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ROMAN AND FRANKISH ORIGINS

OF THE JUST PRICE

OF MEDIEVAL ROMAN AND CANON LAW

by

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Submitted in partial fulfillment
of the requirements for the degree of
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INTRODUCTION

The comprehensive and systematic presentations of medieval Roman and canon law of the thirteenth century contain entire sections on price law. The price regulations in these collections, and the important influence they would have on future centuries have been well studied, but their origins and early development have received relatively brief attention. The major problem, then, of this dissertation is to discover some of the origins of the medieval just price.

It is not possible to comprehend all possible origins of these twelfth and thirteenth century laws in a single study. Therefore, this study shall be limited to those roots that can be found in the bodies of law which preceded the Decretals and the thirteenth century commentaries on Justinian's Corpus Civilis. They will include the Theodosian Code, the Justinian Code, certain bodies of early medieval law such as the Lex Visigothorum and the Bavarian law, the Carolingian law, and the twelfth and thirteenth century Roman and canon law. In addition, mention shall be made of the great monastic collections of both church and secular laws.

It will be seen that the same phrases which appear in Roman and Carolingian legislation appear prominently in the twelfth and thirteenth century bodies of law. Yet, an often-repeated principle of the Roman law allowed the seller to charge as much as he could and the buyer to purchase as cheaply as he was able. The medieval works, on the other hand, declare that the buyer might not purchase as cheaply as possible;

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neither might the vendor sell as dearly as he could. Price discrimination was forbidden. Goods sold outside of the marketplace were to be sold at the price then prevailing in the marketplace. The just price in any given transaction then was not be be determined simply by an agreement between buyer and seller, and certainly not by the overweening power of either of them. It was to be set by "the law of supply and demand" at a general gathering of buyers and sellers.[1] In the centuries that passed between the late Roman Empire and the High Middle Ages a major revision in price law had clearly occurred. The Roman phrases had been preserved; their meaning altered.

Neither the medieval nor the Roman price law has lost its significance to the present time. The Roman system of [illegible]ing the buyer and seller setting the price is currently used in retail and in many wholesale transactions. The just price, on the other hand, has been traced up to and beyond Adam Smith and it has been concluded that "the conspiracy idea of the anti-trust laws goes back to scholastic precedents and is rooted in the medieval concept of just price."[2] Current anti-trust law still forbids certain types of price discrimination.

To provide compensation for those injured by unjust transactions, a principle called laesio enormis was often employed in ancillary connection with the just price. It allowed for a certain amount of deviation from the just price but it set both upper and lower limits to which the deviation might extend. It also prescribed the ways in which the injured party was to be compensated.

The laesio enormis, like the just price, influenced not only the era from which it emerged but also played a considerable part in modern

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legislation, and its connection with the modern era has been demonstrated in some cases with more, and in some with less, precision. B. Eliachevitch, for example, claims that the medieval principle of laesio enormis was revived in the Soviet Union in the 1930's. In the same decade, legislation was being passed in the United States, Great Britain, and Germany, which "restrict(ed) freedom of contract in order to avoid lesion or exploitation of the entire mass of the population,"[3] according to J. B. Thayer. He also suggests that there is a connection between the medieval laesio enormis and those court decisions in Great Britain and the United States by which contracts have been overturned on the grounds that they "shocked the conscience of the court," but the author concedes that the connection is difficult to demonstrate.[4]

The laesio enormis appeared in Dutch law too, according to R. W. M. Dias, and as late as 1950 was still operative in South Africa and Ceylon. Here, the connection between the medieval and the modern law has been demonstrated, Grotius and others carrying the law forward in time. Dias makes an additional point, maintaining that laesio enormis is found not only in Gregory's issue of 1234, but in some relatively obscure and atypical passages in the Justinian Code, and opens the question of which of the two is the real source of the modern legislation.[5]

Although it is the case that most studies declare that the true origin of the laesio enormis was the Justinian law, this dissertation maintains that these sixth century passages were not concerned with the amount of price. It seems more likely that the two passages involved dealt with sales made by minors or unpaid obligations or both of them. Centuries passed before a new meaning was given to the passages of the

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Codex that created the concept of the laesio enormis.[6]

The primary task of this study, however, is to discover the legal origins and early versions of the just price itself. The rule of 1234, mentioned above, was not the first law that sought justice in the marketplace. Earlier canonists had made the same judgment. Moreover, a comparison of the texts makes it clear that the decretal of 1234 is derived from a Carolingian capitulary of 884 and that both the law of 884 and the law of 1234 contain key words which appear in the Justinian Code.

It is an oversimplification, however, to conclude that the concept went from the Justinian, to the Carolingian, to the canon law. Carolingian legislation issued before 884 seems to carry the same idea and it does not use phrases from Justinian.

It is, in fact, our contention that the ancient Roman law was not originally concerned with price despite the fact that it was used for that purpose in Carolingian and medieval law. It is our aim to show that the Carolingian law was the first body of law to forbid price discrimination. Stated differently, the presentation of the just price of medieval law and its origins is the aim of this investigation. We are then, measuring in one area the impact of Roman and Carolingian civilization on the medieval and ultimately the modern law. Fortunately, the relevant sources are sufficient to permit the subject to be examined, for the matter is not a minor one. That a price is just (or unjust) is one of the most fundamental judgments that can be made upon the most common of all commercial transactions.

The concept of just price which modern historians most frequently associate with the medieval period describes a price that would cover the producer's costs and allow him a profit adequate to maintain his status. It first seems to have been presented by a theologian, Henry of Langenstein,

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in the latter part of the fourteenth century and it was held by few in his time. Most medieval thinkers including Albertus Magnus, Thomas Aquinas, Bernardino of Siena and Cardinal Cajetan followed the canon law. Nevertheless, most modern studies, both general and economic, concerned with the medieval era present Langenstein's just price as typical of the era. It was apparently first presented to the modern reader by W. Roscher and was made popular by, and is usually associated with, Max Weber.[7]

The price that would cover costs and provide a wage adequate for one's status is not the only modern description of the medieval just price. Some of the versions are similar, but by no means identical, to the Weber thesis. According to one version, the just price proceeds from a specific medieval notion of the purpose of industry and trade. The tradesman's goal was "not to make money, but to provide goods and services to the community."[8] The just price, therefore, is the lowest price that allows them "a sufficient profit to continue in business."[9] According to another version a just price was to yield to the manufacturer "only enough to recompense him for the cost of the raw material and provide a decent wage for his time and labor."[10] Status is not mentioned.

J. M. Clark presents the Langenstein price rule but maintains that it did not apply to farmers and importers. Indeed, the author's presentation corresponds neither with Langenstein, medieval law or the facts, for according to Clark, farmers must sell at whatever price they can get. In fact, agricultural produce was at times sold at market price and at other times placed under government price ceilings.[11] At no time did the law allow the farmer to charge whatever he was able to obtain. Merchants importing from distant countries were also excepted from the Langenstein status rule. No reason is given.[12]

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J. and R. Lacour-Gayet also present the Langenstein price rule with additions of their own. The price must cover the cost of material and wages and it must allow the seller to maintain his status. So much is Langenstein, and if not medieval law, it is medieval. The rest is more imaginative. The price should not only maintain the seller's status, it must also preserve the buyer's status. Otherwise, "un prix . . . se sera rendu coupable de lèse-harmonie et sera soumis à revision."[13] Moreover, the quality of the merchandise must be reflected in the price. These various and varying conditions make it necessary to work out a just price for each transaction. The two parties to the transaction are the ones who decide the price, but if they cannot agree, then the community will act as the arbitrator.[14]

No one, of course, ever suggested that the buyer's status be considered. Consequently there was no need to arrive at a just price for every transaction. The buyer and seller in a particular transaction did not decide on the just price and although the community (or its representative) decided on generally applicable prices[15] and came to just price decisions on real estate transactions (previously made but later contested),[16] it is difficult to find an example of the community acting as arbitrator before the fact for a particular transaction. To be sure, the quality of the merchandise was reflected in the price.[17]

According to William Temple the price should cover the cost of material and labor and yield a "reasonable profit." By the fifteenth century, the author declares, St. Antonius had adopted the market price as the just price and had even allowed a "certain elasticity" in the application of the market price. Nevertheless, Temple continues,

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neither in the earlier nor the later period might the seller "ask the utmost the purchaser would pay" nor might he "charge more because the buyer's need is great."[18]

The principle of a "certain elasticity" is, of course, the laesio enormis and it was correctly described. The laesio, however, has been seen in another fashion. Rather than moving up or down with the just price which itself moved up and down with price fluctuations, the laesio is considered permanent upper and lower limits within which the market price might fluctuate. The just price too was rigid but "oscillations round the 'just price' according to some market fluctuations" might take place; in particular (Aquinas) had justified the taking of a higher price where the seller would otherwise incur a loss. The prevention of loss was not the only reason for which one might fairly depart from the just price. Transportation costs, miscalculation, and "differences in the status of the participants in exchange, became valid reasons for departing from the just price. In time, even variations of supply and demand were allowed to affect the market prices." By the fifteenth century "Saint Antonio...introduced so many qualifications into the doctrine that the force of the objective 'just price' was greatly diminished."[19]

Several errors can be found, but most of them stem from the single misconception that for "valid reasons" one might depart from the just price but that those "valid reasons" never altered the just price itself. Aquinas, following canon law, had allowed certain limited deviations from the just price. "Market fluctuations," however, were a different matter. They were not "oscillations round the just price."

They themselves were alterations of the just price. Similarly for some later scholastics, altered costs and status were not "valid reasons for departing from the 'just' price" which remained unaltered. Rather, the altered cost or status altered the just price itself.[20]

Canon law itself has been used to prove the inalterability of the just price. The expression "common estimation" to be discussed later, seems to mean "market price" and consequently the just price. An alternative definition given to "common estimation,"--specifically "customary price"--does not seem to be consistent with the law.[21] But one who does take the "common estimate" to refer to a "customary price" may thus conclude: "In sum, the just price is largely a customary price--a custom natural in a customary age."[22]

Moreover, if one takes the just price to be determined by custom --that is to say rarely changing--then it would also be the case that the laesio remains constant. In fact, the laesio is considered more inflexible than the just price. Aquinas--who is quite consistent with canon law--was cited thus by A. Gray: The just price itself "cannot be fixed with complete accuracy"; rather it must be estimated; "therefore within limits a slight variation up or down" is permitted.

Thus is the laesio enormis not only considered maximum deviation from the just price (which it is), it is also apparently presented as the maximum alteration allowed to the just price itself. Thus the laesio is not only inviolable but inflexible.[23]

Other versions of the medieval just price go further afield. According to one,[24] the medieval belief was that everything had a proper price which corresponded to "an abstract value fixed by natural law and

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consisting of such components of the true value of the material, the labour, and the time that went to the making of the product." This just price, it is claimed, is the same at all times and in all places with a single exception. If a shortage of any of the materials occurred, its value would increase and therefore the price of the finished product would also climb. The value of money represented the intrinsic value of the metal. All these considered, the author concludes, prices were expected to be stable.

There are a good number of assertions here, virtually all incorrect. Taking the last point first, one may immediately state that prices were not expected to be stable. Both in the Carolingian era and in the High Middle Ages, the highest authorities had declared that prices do fluctuate and that such fluctuation is lawful.[25] Even those prices which were fixed by the lawmakers were frequently altered. That the value of money represented the intrinsic value of the metal is also misleading. Obviously it is true that a heavy solid gold piece was worth more than a light silver alloy coin. Nevertheless, metal was worth more in coin than it was in bars. Such must have been the case. Otherwise no one would have brought their metal to the mint for coining for no one came out of the mint with as much gold in coin as he had brought in for coining. Deductions were always made for seigniorage and mint fees. Again, it is declared that the just price was the same at all times and all places only excepting those times during which the component materials of the item were scarce. No instance has been found in which a just price is declared valid for all times. There is one

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Carolingian law which may have sought to establish a permanently valid set of price ceilings but they were soon altered and then abolished altogether.[26] And not even Charlemagne tried to publish one set of prices which was valid for all his domains.[27] When reliance was placed on markets the variety of prices, of course, multiplied enormously. Instances, some probable[28] and some provable have been found in imperial, as well as royal and local legislation in which a shortage, by increasing the value of the material, brought about an increase in the value of the total product.[29] In most cases, material is not distinguished from total product and both might fall under price ceilings or neither of them.[30]

It is difficult to discover which medieval legislation or theory the author attempted to describe. Langenstein, to be sure, would allow the price to rise with the material costs. But material cost is not the sole determinant for Langenstein and if the price of a necessity--say grain--were to rise sharply, that too, would seem to justify the craftsman's raising his price. For he allows the price to include a wage adequate to maintain the craftsman.

Lipson too speaks of a "recompense suitable to his station," but he refers to "the labourer." (Apparently the businessman draws a quasi-wage.) "Prices," he states, are fixed according to the cost of production."[31] And he takes the question further. Who, specifically, is the one who has the authority to set those prices? In one case he speaks of "officials 'discreet and honest'," again, a mayor, and yet again "by authority." He mentions a municipal ordinance aiming to "ensure the sales of 'good and wholesome victual at reasonable prices'."

Int-11 He also speaks of market regulations "framed to facilitate by fair competition both adequate supplies and low prices."[32]

While it is true that markets do not necessarily provide "adequate supplies and low prices," the author gives examples of town authorities occasionally allowing "foreign" merchandise into the market to bring prices down,[33] as well as other times when "foreign" merchandise is kept out and hence prices pushed up. (Such practise was quite common and indeed supplemented by allowing domestic merchandise out or keeping it home depending on whether the prices were desired up or down.)[34] Again, a township might schedule certain buyers, (e.g., bakers) at one time and others (e.g., housewives) at another time thus preventing a large crowd which would tend to bid grain very high.[35] To be sure, wages suitable to one's station, or prices in accordance with the cost of production or "low prices" or "reasonable" prices were never declared "just" by the law. Nevertheless, prices set in the manner described by Lipson would be called just prices in medieval law. By medieval criteria a price would be judged just if established by a lawful authority or, a fortiori, if influenced by that same authority in the market and that precisely is what Lipson described.

On the other hand, the market price, in fact, was a just price. But it does not guarantee, or even attempt to obtain a low price nor to cover production costs. Consequently it is not included in Lipson's discussion on the just price. But his work is too thorough to overlook the fact that many prices were in fact simply market prices. Thus is the market price excluded from the "just" prices, but included in his

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treatise nevertheless, and discussed simply as an extant and lawful phenomenon.[36]

L. S. Schumacher was certain that the market was neither just nor lawful. "The point we wish to highlight," he states, "is that the price was not determined by the haggling on the market." Neither the "blind chance" which caused prices to "fluctuate crazily" nor the secret planning of a few for their own profit were allowed to operate. Rather did "sound judgment striving to be fair to both buyer and seller" set the prices. The "sound judgment" was provided by "municipal authorities, or by the members of the community, especially the most influential ones," and the gilds.[37]

The imperial and canon law must be counted as declaring against the justness or even legality of prices set by gilds. Those bodies of law name many legitimate price setters[38] but they do not include the gilds among them. Nor is it surprising: in no case does the law allow either buyers or sellers the authority to set prices.[39]

Other rulers or legislators or customs or laws do not seem to have gone beyond imperial or ecclesiastical law on this point, although the contrary is often declared. Pirenne, and of course Weber, and others declared that gilds do lawfully settle prices.[40] Lipson too declares that they set prices and in his usually detailed and well-corroborated history, he states "craft gilds . . . regulated the prices of their commodities." But he continues, "Evidence of this is necessarily scanty because the gilds would not openly claim the right to do so in their ordinance for fear of awakening the jealousy of the authorities."[41]

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On the other hand he describes cases in which gilds that had fixed prices were prosecuted and punished. But the author continues, "We naturally hear most about control of prices by the craft gilds when the privilege was abused." And indeed he does give many examples of gilds prosecuted on charges concerning prices but it is not altogether clear whether they were prosecuted for abusing a right or simply for--so to speak--taking a privilege. Thus of a gild amerced for fixing a minimum price he states "apparently their prices were extortionate."[42] And his general conclusion is "'a fair price' would naturally be determined by a gild." Equally detailed works addressed to the same topic and the same location denied that the gilds had the lawful role of price sellers.[43] This conclusion seems to be valid throughout Europe. For Sylvia Thrupp, who first inquired about the matter over a quarter of a century ago[44] concluded quite recently that gilds "exercised little or no influence on selling prices."[45]

This entire gild controversy could be recapitulated in relation to all producers and merchants. It has been mentioned that Langenstein had declared that if the government set no price, the merchant could fix a price that would cover his labor and expenses and would enable him to maintain his status; that Sombart and others before and many after him declared that the Langenstein statement was the characteristic medieval doctrine of just price; and that neither the canon nor the imperial law described a price thus formulated as a just price. Moreover, it may be observed here regarding "producers" or "merchants" as it has already been noted in connection with prices set by gilds that the law never named a party to the transaction--in this case the seller--as the lawful determiner and judge of the just price.

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G. G. Coulton's discussion of the just price is in one sense familiar and in another unique. He defines the just price as "a price which enables the seller just to keep up that household which his state of life, whatever it may be, does on the average require," and again, "a man has the right of selling things dear enough to keep himself and his family in what may be looked upon as reasonable comfort, or in the dignity required by his position in life." So much is familiar. A unique aspect is that he attributes it to Thomas Aquinas. He cites the Summa Theologica II, II, LXXVII, 4. To be brief, the passage in question does not mention status. Neither does it consider prices but rather speaks of the trader's intention for his profits. Profit, St. Thomas states, can be directed to necessary or virtuous ends. "One may intend the moderate gain that he seeks to acquire by trading for the support of his family or for the poor or for some public advantage, etc."[46]

The "'decent' profit" system is not the only pricing system Coulton describes as operative. He portrays one commodity going through several steps. First it went to the market where it might be purchased by any buyer. After a number of days the market was closed and the commodity could be sold "wholesale" to retailers providing always that only an "'honest profit'" was made. The retailer too was "allowed to raise a 'decent' profit only."[47] The entire procedure and the prices, except for the merchandise that was sold in the market, were supposedly governed by the gild.

A "just price" is assumed to include a "decent profit,"[48] and the gild is taken to have established them.[49] Whether he considers any price set by a gild ipso facto just is not clear. It would seem not.

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He also quotes a Bishop who speaks of a just price which was set by the King and Council.[50] It is not clear whether the author considers it a just price because it was set by the King and Council or because the price that was set by the King and Council was itself just. A similar situation is found in connection with the market price. One may surmise that he does consider market prices as lawful.[51] But does he consider them just? On the one hand, it would seem so, for he says, "within its own limitations the Gild system aimed at absolute fairness. It ruled that everything should go to the market and be offered to all buyers."[52] Yet again he defines the Just Price as "a price which enables the seller to keep up that household which his state of life . . . does on the average require."[53] That the market price may not "keep up" the household's needs is obvious. The author's own conclusion is that one could hardly "expect a successful practical definition of the word just with all its elusive implications. Therefore, medieval practice fell far short of St. Thomas's ideal."[54]

Modern studies of the early medieval price laws present no such gap between the ideal and the practiced; neither do they introduce such a variety of versions of the just price. The few scholars that give attention to Carolingian price rules state that price is just if it is declared by the government, or if it is found in the public market. But these studies do not attempt to comprehend all the price laws of the period.[55]

Thus a recent study declares that modern scholars believe that "The just price was tacitly assumed to be the current price." We propose that a previously unconsidered Carolingian capitulary does graphically

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describe the prices that were considered just: that law expressly prohibited price discrimination. Similarly, it is declared, "How this current price was used as the just price is not quite clear. Often it seems to have been equated with the customary practices. . . ." The "customary practices," it is maintained, might extend to "many diverse areas," to a "single region," or a single market.[56] This thesis will attempt to show that the "single market" price is the only one that can be accurately derived from the capitularies.

The manner in which the market price itself was calculated has also been argued. Historians have denied that the medieval market price was derived from the "higgling" of the buyers and sellers as is the case in the modern era. Rather was the medieval market price derived from the "ethical judgment of the most influential members of the community."[57]

Such a description certainly cannot be given to the Carolingian market. Although it has not been included in modern studies, there does exist a Carolingian law which describes the market procedures, and it seems to leave no doubt that the market price is derived from the bids and offers made at a general concourse. Moreover, for those specified occasions when prices are to be fixed in advance, the capitularies reserve that right to the Carolingian rulers and deny it to all others.

Roman price law and Carolingian law, it has been maintained, expressed the same fundamental principle of the just price. In both, " . . . price discrimination was not legal."[58]

In flat contradiction to that statement another declared "Le droit romain est un vaste recueil des textes législatifs et juridiques qui ne contiennent, même en germe, aucune doctrine économique."[59] It

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has no rule governing price.

It is our contention that the latter statement is correct and that no principle determines price in Roman law. Both the Theodosian and the Justinian codes repeatedly assert their own irrelevancy in the matter of price and both bodies of law state that to be lawful, a price need only to conform to the wills of the buyer and seller.

Although it is the case that most studies declare that the true origin of the rule called laesio enormis was the Justinian law, this dissertation maintains that these sixth century passages were not concerned with the amount of price. It seems more likely that the laws in question dealt with sales made by minors or with unpaid obligations or both of them. Later generations gave a new meaning to the passages of the Codex and in so doing, created the concept of the laesio enormis.

FOOTNOTES TO INTRODUCTION

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1. See J. W. Baldwin, "The Medieval Theories of the Just Price," Transactions of the American Philosophical Society, n. s., XLIX (1959), passim. This work is primarily concerned with establishing this to be the case during the twelfth and thirteenth centuries. As will be seen, the sections on these two centuries in this thesis use his work considerably.

2. R. de Roover, "The Concept of Just Price: Theory and Economic Policy," The Journal of Economic History, XVIII (1958), p. 427; "Monopoly Theory prior to Adam Smith: A Revision," Quarterly Journal of Economics, LXV (1951), 501-502, 507.

3. J. B. Thayer, "Laesio Enormis," Kentucky Law Journal, XXV (1936-37), 331. The author shows no tangible connection, but merely similarity. B. Eliachevitch (Traité de droit civil et commercial des Soviets, 2 vols. [Paris: Librairie générale de droit et de jurisprudence, 1930], II, 87) declares that the Soviet code does not contain any special provision concerning recision of sales in cases of lesion, but that the Soviet courts were overturning sales on those grounds, one reason being that such sales were apt to mask usurious transactions.

4. Thayer, "Laesio Enormis," pp. 330-332.

5. R. W. M. Dias, "Laesio Enormis: The Roman Dutch Story," in Studies in the Roman Law of Sale: dedicated to the Memory of Francis de Zulueta (Oxford: Clarendon Press, 1959), passim, esp. p. 48. The author's judgment is that the church law is the true source, not because it was first to promulgate the laesio enormis but because it was first to state it in a forceful manner and to give it important status.

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6. James Mackintosh, The Roman Law of Sale, Edinburgh: T. and T. Clark, 1907, pp. 267-269, Contracts of Sale in the Civil Law, Oxford: The Clarendon Press, 1892, pp. 180-188.

7. R. de Roover, "The Concept of Just Price," pp. 418-419. The author names eleven historians who present the "maintenance of status price" as typical of the middle ages and points out that "the list is by no means exhaustive." Another such list can be found in J. W. Baldwin, "Medieval Theories," p. 7.

8. In Thomas Aquinas this is one of the several honorable goals to which a man's trading activity may be turned. It is not involved at all in the question of price. See Thomas Aquinas, II, II, 77, 4.

9. P. M. Kendall, The Yorkist Age (Garden City, New York: Anchor Books, Doubleday and Company, 1965), p. 58.

10. L. Thorndike, The History of Medieval Europe (Boston: Houghton Mifflin Company, 1928), pp. 332-333.

11. See below, pp. 84-86; 98-99; 106-107; 125-128.

12. J. M. Clark, "Adam Smith and the Currents of History," Adam Smith 1776-1926 (Chicago: University of Chicago Press, 1928), p. 60. Social Control of Business (2d ed., New York: Whittlesey House, McGraw-Hill Book Company, 1939), pp. 23-24.

13. Jacques Lacour Gayet and Robert Lacour Gayet, De Platon à la Terreur (Paris: SPID, 1948), p. 101.

14. Ibid., p. 102.

15. See below, pp. 127-128.

16. See below, pp. 50-51.

17. E.g., see below, p. 42.

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18. William Temple, Christianity and Social Order (New York: Penguin Books, 1942), p. 31.

19. Eric Roll, A History of Economic Thought (New York: Prentice Hall, 1942), p. 41.

20. One assumes the author refers to John Duns Scotus and Langenstein. In fact Langenstein does not say anything about alteration of status and the common sense inference seems to be that he would allow a change in price if there was a change in the cost maintenance of a certain status. See R. de Roover, "The Concept of Just Price," p. 424.

21. See p. 152. See also R. de Roover, "Joseph A. Schumpeter and Scholastic Economics," Kyklos, X (1957), 133-134.

22. Alexander Gray, The Development of Economic Doctrine. An Introductory Survey (London: Longmans, Green and Company, 1937), p. 52. This conclusion is drawn despite the fact that the author sees price as reflecting "need and use."

23. Ibid., pp. 52-53.

24. G. R. Elton, England Under the Tudors (London: Methuen and Company, Ltd., 1955), p. 225.

25. See below, pp. 86-87; 124-126.

26. See below, p. 108, n. 4; 109, n. 6; p. 111, n. 12.

27. See below, p. 108, n. 3.

28. See below, p. 108, n. 2.

29. Mary Dermer Harris (ed.), The Coventry Leet Book (London: Early English Text Society, 1907), Part III, pp. 632, 643, 648, 663, 665, 682, 685.

30. London, for example, often set prices for capons, roast capons and capons cooked as pastries, but not apparently on beef. See Henry

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Thomas Riley (ed.), Memorials of London and London Life (London: Longmans, Green, Longmans and Roberts, 1868), pp. 253-256, 317), or see below, pp. 83-84, 87.

31. E. Lipson, The Economic History of England (London: Adam and Charles Black, 1949), Vol. I, p. 438.

32. Ibid., p. 299.

33. Ibid., p. 439.

34. See for example, Liber Albus (ed. H. T. Riley, in Rerum Britannicarum Medii, Aevi Scriptores (Rolls Series) Sec. 12, Munimenta Gildhallae Londoniensis, London: Longman, Brown, Green, Longmans, and Roberts, 1859), III, 466; Liber Custumarum (ed. H. T. Riley, in Rerum Britannicarum Medii Aevi Scriptores (Rolls Series), Sec. 12, Munimenta Gildhallae Londoniensis, London: Longman, Green, Longman, and Roberts, 1860), II, 82.

35. Harris, op. cit., p. 25.

36. Lipson, op. cit., p. 226.

37. Leo S. Schumacher, The Philosophy of the Equitable Distribution of Wealth (Washington, D. C.: Catholic University of America Press, 1949), p. 44.

38. See below, pp. 125-126.

39. A quasi-exception would occur, of course, if the ruler explicitly named a particular gild as the price setter. The gild in that case would be expressing not its own authority but the authority of the ruler. This did occur but very rarely. The barbers in Durham are an example. See C. E. Whiting, "The Durham Trade Guilds," Transactions of the Architectural and Archeological Society of Durham and Northumberland, IX (1941), 158.

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40. H. Pirenne, Economic and Social History of Medieval History (New York: Harvest Books, Harcourt,Brace and Company, 1937), p. 183; Max Weber, General Economic History, trans. by F. H. Knight (London: Allen and Unwin, n.d.), pp. 138-143; A. R. Myers, England in the Late Middle Ages (Baltimore: Penguin Books, 1952); W. Sombart, Der Moderne Kapitalismus (Munich: Dunker and Humbolt, 1916), Vol. I, pp. 292-293.

41. Lipson, op. cit., pp. 337-338.

42. Ibid., pp. 338-339.

43. S. Krammer, "The English Craft Guilds and Government," Studies in History, Economics and Public Law, XXIII (1905), No. 4, 73, 99-100; G. Unwin, The Guilds and Companies of London (London: Methuen and Company, 1908), pp. 168-169.

44. S. L. Thrupp, "Medieval Gilds Reconsidered," The Journal of Economic History, II (1942), 164-173.

45. S. L. Thrupp, "The Gilds," The Cambridge Economic History of Europe, ed. J. H. Clapham and Eileen Power (Cambridge: The University Press, 1941-1965), Vol. III, pp. 263-265, and esp. 246.

46. G. G. Coulton, Medieval Panorama (New York: Meridian Books, 1955), p. 332.

47. Ibid., p. 291.

48. Ibid., pp. 291, 332-333.

49. Ibid., pp. 290-291 and 610-611.

50. Ibid., p. 611.

51. Ibid., p. 317 seq.; p. 291.

52. Ibid., p. 291.

53. Ibid., p. 332.

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54. Ibid., pp. 291, 333.

55. See, for example, A. Dopsch, Die Wirtschaftsentwicklung der Karolingerzeit, 2 vols., (Weimar: Bohlaus 1921-1922).

56. Baldwin, "Medieval Theories," pp. 33-34.

57. See above, p. 21, n. 37.

58. Baldwin, "Medieval Theories," pp. 21, 33.

59. R. de Roover, La Pensée Économique Des Scolastiques Doctrines Et Methodes, (Sainte-Catherine, Montreal: Institut D'Études Médiévales, 1971), pp. 52-53. To corroborate this point R. de Roover makes reference to an article which I published previously and which contains several sections used in this thesis. See "The Roman and Frankish Roots of the Just Price of Medieval Canon Law," Studies in Medieval and Renaissance History, VI, pp. 1-52.

CHAPTER I

THE THEODOSIAN LINE

In the Theodosian Code it is stated that in each instance the buyer and the seller by mutual agreement fix the price for which property is sold. Set close together under the title of De contrahenda emptione, three rules in the Code have roughly the same force:[1] sales cannot be set aside on the grounds that the price was inadequate. Each of the three rules limits, or rather describes, the scope of this general law. The first excludes from its coverage cases in which the purchaser has brought to bear upon the seller fraud or violence.[2] The second specifies that the rule is to apply only to those who have attained their majority. It declares further that the claim of ignorance of the value of property asserted by an adult is not valid grounds for recision even if the property is located at a great distance from him.[3] The third restricts the operation of the law to persona legitima[4] which has the definition at law (according to Harper's Latin Dictionary) of a "having legal rights and obligations including free men and the state, but not including slaves."

In 506, less than three-quarters of a century after the promulgation of the Theodosian Code, these three laws appeared complete and verbatim in the Breviarum Alaraci[5]--the Lex Romana Visigothorum. In the following century in a consolidated, condensed and simplified form they appeared in the collection of King Receswinth, which is known as the Lex Visigothorum.[6] A single rule of law flatly states that no one should attack the validity of a sale on the grounds that he sold at a

low price whether that sale be of lands, slaves, any type of animal or anything else (res aliquas).[6] (In a separate rule the validity of sales induced by violence or fear is absolutely denied, price not being mentioned.)[7]

Receswinth's brief rule appears verbatim in the Bavarian law, promulgated in the second quarter of the eighth century. In the Bavarian law, however, a clause is added according to which not only the seller, but also the buyer, is expressly denied the right to escape from the sale.[8] Once the transaction is made, reads the law, it is not to be set aside unless it is determined that the seller has concealed some defect and sold, for example, a slave, which, unknown to the buyer, is blind or leprous or epileptic. (Sed postquam factum est negotium non sit mutatum, nisi forte vitium invenit quod ille venditor celavit, etc.) The writer of the law seems particularly concerned with making the sale of faulty livestock voidable (In animalibus autem sunt vitia que aliquotiens celare potest venditor); nevertheless, they are merely given as examples; the coverage of the law is general (aut in cavallo aut in qualicumque peculio). In order to avoid action on grounds of defect, the seller need only inform the buyer of its existence and the sale will stand. The law, then, by stating that hidden defects are the only grounds for rescinding a sale, eliminates high price as grounds for voiding or altering the transaction. Thus, the law was extended in such a manner that, whereas previously the buyer was expressly given the right to do as well for himself as he could, now the seller was named as having the right to sell as dearly as he was able. It should, perhaps, be emphasized that this particular alteration of the law was not

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due to misunderstanding or even to a somewhat more general interpretation of the Theodosian rule. The section extending the law so as to cause it to protect sellers from actions on the grounds of high prices was a deliberate and novel addition to the original legislation.[9]

In the ninth century the rule covering now both buyer and seller appeared in the collection of Capitularies of Benedictus diaconus.[10] The examples were omitted. At the end of the eleventh century the entire regulation appeared verbatim in the very important collection of Ivo of Chartres.[11]

The three Theodosian regulations on the disallowance of sales are also found in several epitomes. Here they stayed much closer to their original form and meaning. Generally speaking, they remain three separate laws, usually present the same qualifications to the force of the law, and are arranged in the same order as they had in their original setting. The only difference between the later and the original versions is in the vocabulary.

The Epitoma Aegidius composed at the beginning of the eighth century lacks two of the interpretationes found in the Theodosian Code. The one it does contain, however, is very similar to the original.[12]

The code which is entitled the Scintilla[13] is a little later than that of Aegidius. It was composed at the end of the eighth or early in the ninth century.[14] Its renditions of the Interpretationes are somewhat briefer and syntactically simpler than the original. The original code states that the sale will stand if no fraud or violence was exerted by the buyer. (Si nihil fraudis vel violentiae eget ille); The Scintilla says that the seller must have acted according to his own

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free will (propria voluntate vendiderit).[15] The second regulation is likewise abbreviated in the later collection but the condition is the same and the same phrase is used to express it; the seller must have attained his majority (perfecta aetate).[16] The third is stated in terms similar to the original,[17] but it seems that the special meaning of persona at Roman law has been lost.

The Epitome Codicis Guelpherbytani which was done in the latter part of the eighth century is remarkable throughout for the brevity of its formulations. For the first qualification of Theodosius (the absence of fraud or violence), it substitutes the presence of good faith,[18] which term probably comprehended the Theodosian qualifications and more. The qualification concerning age is present (aetas perfecta) and ignorance of value is disqualified as grounds on which an adult may rescind a sale,[19] as is the case in the original code. That the special Roman meaning of persona has been lost seems quite clear and the entry in this epitome is nothing more than a terse statement of the general principle that sales cannot be rescinded on the grounds that the price was too low (res vindita. p[ropter] vilitatem p[re]cii rescindi non posse).[20]

The Monk's Epitome, or as he called it Breviarium was also done in the eighth century. It simplifies the vocabulary and syntax and holds rather closely to the original meaning. Like the original text it specifies that the presence of fraud provides an exception to the general non-rescindability of sales, but unlike the original it does not mention violence.[21] The second rule carries the same meaning as the original and many of the words are identical.[22] The third regulation is presented simply as a general rule that sales cannot be rescinded

on the grounds of low price.[23]

The Epitome of Saint Gaul as a whole contains far more adaptations, indeed alterations, than any of the other epitomes.[24] The regulations on price, however, are not very much changed. The sale will stand, the first rule says, if the price has been agreed upon in mutual harmony by the buyer and seller. This would seem to mean that the buyer must not have forced the seller to accede to his terms. Concerning fraud, nothing is said.[25] The second rule, unlike its original model, states that the law refers to adult males (homo iam in plena etate).[26] The third emerges, as it does in other instances, as a general statement of the law, persona again being rendered homo.[27]

It may be said, then, that the meaning of the Theodosian rules on price are altered to some small degree in the epitomes here considered. The qualifications in the Roman law to the general proposition that low price is no grounds for rescinding a sale are sometimes lost in the later versions. Gone is the Theodosian Code's distinction expressed by the word persona which made free adults and the state subject to the law but exempted slaves from it. The other conditions in the presence of which the law would not apply, such as fraud or violence, are not always specifically stated but even here the epitomes provide that the improper behavior of the buyer may invalidate a sale. The protection of minors from the consequences of their actions as vendors is always present. Most important, the general force of the law and its coverage remain unchanged. The right to rescind sales on the grounds of low price is denied. It is, of course, to the seller that denial is made.

I-6 It is not true in all cases that the Theodosian rules were modified. The first of the three Theodosian price regulations appears verbatim in Ivo of Chartres' Decretum. If there is no fraud or violence, says the Decretum, the seller has no grounds for rescision for a sale cannot be rescinded on the grounds of low price.[28] Thus Ivo of Chartres has two price regulations deriving from the Theodosian Code. The first, which seems to come directly from the Code, refers only to the seller and cases of low prices. The second, which originated in the Code, appears in a simpler form in King Receswinth's Law, greatly expanded in scope in the Bavarian Law, polished up, as it were, in the Collection of Benedict Levita and in this version it is found in the Decretum of Ivo. In its altered form it not only denies the seller the right to have a sale rescinded on the grounds of low price, it also denies to the buyer any recourse on the grounds of high price.

The Theodosian law, then, had been essentially maintained. Its original form declared that low price is no grounds to invalidate a sale. In the centuries following, this principle was maintained. The great addition made to it was completely consistent with the original rule. High price, declared later bodies of law, is not ground for rescinding a sale. The price was to be set by the buyer and the seller.

FOOTNOTES TO CHAPTER I

1. Theodosiani Libri XVI, ed. T. Mommsen and P. Meyer (Berlin: Weidmann, 1905), 3, 1, 1; 3, 1, 4; 3, 1, 7, pp. 126-129.

2. Ibid., 3, 1. 1, p. 126: "Imp Constantinus A ad Profuturum Pf. Annonae. Venditionis atque emptionis fidem nulla circumscriptionis violentia facta, rumpi minime decet, Nec enim sola pretii vilioris querella contractus sine ulla culpa celebratus litigioso strepitu turbandus est. P.P. Id Aug. Constantino AV et Licinio Caes. Coss.

Interpretatio. Cum inter ementem atque vendentem fuerit res definito pretio comparata, quamvis plus valeat, quam ad praesens venditur, hoc tantummodo requirendum est, si nihil fraudis vel violentiae egit ille, qui comparasse probatur et si voluerit revocare qui vendidit, nullatenus permittatur."

3. Ibid., 3, 1, 4, pp. 127-128. This rule, not much altered, is found in Justinian C. 4, 44, 16. "Imppp Grat[ianus] Valentin[ianus] et Theod[osius] AAA ad Hypatium Pf. P. Quisquis maior aetate atque administrandis familiarum suarum curis idoneus comprobatus praedia etiam procul posita distraxerit, etiamsi praedii forte totius quolibet casu minime facta distractio est, repetitionis in reliquum pretii nomine vilioris copiam minime consequatur. Neque inanibus immorari sinatur objectis, ut vires sibimet locorum causetur incognitas, qui familiaris rei scire vires vel merita atque emolumenta debuerit Dat VI non mai Mediolano, Merobaude II et Saturnino Coss.

"Interpretatio. Quaecumque persona iam perfecta aetate domum suam regere potest, si villam, domum vel quodlibet aliud, habita pretii definitione vendiderit et forsitan postea opponere velit, quod minus pretii acceperit, quam res valebat, quia forte agrum, quem vendidit, longe positus ignorasse se dicat, non ideo venditio poterit revocari, quia aetas perfecta potuit scire, quid venderet, aut quo pretio res vendenda valere potuisset." It seems quite unlikely that this rule is anything less than general in scope. If ignorance cannot invalidate a sale of property located at a great distance from the seller, surely it will not be valid grounds if the property is close by.

4. Ibid., p. 129, 3, 1, 7. "Iidem AAA Remigio pf. Augustali Semel inter personas legitimas initus empti contractus et venditi ob minorem adnumeratum pretii quantitatem nequeat infirmari. Dat III Kal April Constantinopoli, Arcadio A-IV et Honorio A. III Coss.

"Interpretatio. Quum inter duas quascunque personas de pretio cuiuscunque rei convenerit, quamvis vilius, quam valebat, res fuerit comparata, nullatenus revocetur."

5. Lex Romana Visigothorum, ed. G. Haenel (Leipzig: B. G. Teubner, 1849). See also Brevarium Alarici, ed. and trans. Max Conrat (Cohn) (Leipzig: Hinrich, 1903).

6. K. Zeumer (ed.), Lex Visigothorum edita ab Recesvindo Rege, Monumenta Germaniae Historica (cited hereafter as M. G. H.), Legum, Sec. I (Leipzig and Hanover: Impensis Bibliopolæ Hahniani, 1902), Vol. I, 219-220 [V, 4, 7]), "Si dicat quis rem suam vili pretio vindidisse. Vinditionis hec forma servetur ut seu res aliquas vel terras seu mancipia vel quodlibet animalium genus venditur, nemo propterea firmitaten vinditionis inrumpat eo quod dicat rem suam vili pretio vindidisse."

7. Loc. cit., III: "Venditio vero, fuerit violenter, et per metum extorta, nulla valeat ratione."

8. E. Schwind (ed.), Lex Baiwariorum, M. G. H., Legum, Sec. I (Hanover: Impensis Bibliopolii Hahniani, 1926), Vol. V. pt. 2, p. 437, XVI, 9: "(De venditionis forma) Venditionis haec forma servetur ut seu res seu mancipium vel quodlibet genus animalium venditur, nemo propterea firmitatem venditionis inrumpit, quod dicat se vili pretio vendidisse. Sed postquam factum est negotium non sit mutatum; nisi forte vitium invenerit, quod ille venditor celavit, hoc est in mancipio aut in cavallo aut in qualicumque peculio; id est aut cecum aut herniosum aut cadivum aut leprosum. In animalibus autem sunt vitia que aliquotiens celare potest venditor. Si autem venditor dixerit vitium, stet emptio, non potest mutare. Si autem non dixerit, mutare potest in illa die et in alia et in tertia die. Et si plus de tribus noctibus habuerit post se, non potest mutare, nisi forte eum invenire non poterit infra tres dies. Tunc quando invenerit, recipiat qui vitiatum vendidit, aut si non vult recipere, iuret cum sacramentale uno: 'quia vitium ibi nullum sciebam in illa die, quando negotium fecimus' et stet factum."

9. It does not seem accurate then, to describe the Bavarian Code merely as preserving the Theodosian price rules.

10. Benedictus, Capitularium Collectio, Lib. I, chap. 362, in J. P. Migne, Patrologiae cursus completus. Series Latina (Paris: Granier Fratres, 1844-1880) (cited hereafter as P.L.), XCVII, Col. 749: De venditionibus vili pretio detractis vel vitiosis. Placuit in venditione hanc formam servari, ut seu res seu mancipia vel quodlibet genus animalium venundetur nemo propter hoc venditionis firmitatem inrumpat, quod

dicat se vili praetio vendidisse, sed postquam factum est negotium, non sit mutatum nisi forte vitium sibi a venditore celatum invenerit. Si autem venditor dixerit vitium, stet emptio et non sit immutata. Si autem non dixerit mutari potest in illa die et in alia sive in tertio die. Et si amplius de tribus noctibus illud habuerit, postea non potest mutare, nisi forte eum invenire infra tres dies non poterit. Tunc quando invenit, recipiat qui vitium vendidit. Et si noluerit recipere, iuret cum suis sacramentalibus, quod vitium ibi nullum sciebat in illa die, quando negotium fecit; et stet factum."

11. Ivo of Chartres, Decretum, Part XVI, chap. 285, in P. L., CLXI, cols. 956-957. See above, pp. 1-3. Ivo's version is virtually identical to Benedict's. See n. 10 above.

12. Lex Romana Visigothorum, p. 72: "Quum inter ementem atque vendentem fuerit res definito pretio comparata, quamvis plus valeat, non liceat revocari. Hoc tantummodo requirendum est, si nihil fraudis vel violentiae ibidem emtor egerit." The underlined words are those matching the original Codex verbatim. "Non liceat revocari" in the original is "Et si voluerit revocari qui vendidit, nullatenus permittatur."

13. The Scintilla is also referred to as the Epitome Codicis Regii Parisiensis Suppl. Lat. 215. (See Lex Romana Visigothorum, pp. xxvi et passim.

14. For the dating of these compilations, see Lex Romana Visigothorum, p. xxiii ff. The dating is by G. Haenel.

15. Ibid., p. 73: "Si quis rem suam etiam minus quam valeat propria voluntate vendiderit, se voluerit revocare quae vendidit, nullatenus permittatur."

16. Ibid., p. 75: "Quicumque perfecta aetate quamlibet dicat, quod rem a se longe positam vendiderit, stabit." (See Codex Theodosianus, 3, 1, 4, cited above, p. 30, n. 3.

17. I. e., "Si inter duas personas conveniat, ut res minus, quam valuerit, comparetur, nullatenus refragetur." Lex Romana Visigothorum, p. 75.

18. Ibid., p. 73: "Vendicionem bona fide perfectam rescindi non posse." This is the entire entry for Codex Theodosianus, 3, 1, 1, Cf. above, p.30 , no. 2.

19. Lex Romana Visigothorum, p. 75: "Qui p[ro]pt[er] rem. sibi incognita[m] vindiccion[em] causatur. non poterit rescindere. qu[id] fecit quia aetas. perfecta. scire potuit. quid vinderit." Cf. Codex Theodosianus, 3, 1, 4. above, p. 30, no. 3.

20. Lex Romana Visigothorum, p. 75.

21. Ibid., p. 73: "Si quis aliquid vendiderit et fraus ibi nulla intervenerit, mullo modo potest re repetere, quod vendidit."

22. Ibid., p. 75: "Quaecunque persona iam perfecta aetate aliquid de possessione sua vendiderit et forte repetiit, quod minus pretii acceperit, non eam poterit revocare, quia aetas perfecta poterat scire quod venderet." The underlined words and phrases are found in the original. (See Codex Theodosianus, 3, 1, 4, above, p. 31 ,n. 3

23. Lex Romana Visigothorum, p. 75: "Semel res vendita, quamvis vilius quam valeat, nullatenus revocetur."

24. Haenel reads (Lex Romana Visigothorum), p. xxxi: "Etenim totam rem in alium quasi sermonem convertit, ad regionis, ubi visit, mores et instituta accomodavit, multas leges mutavit, auxit sive amplificavit complures, quae ei videbantur inutiles et a consilio suo alienae esse,

omisit, et tantum abest, Breviarum ut interpretatus sit, ut novum quasi librum iuris composuerit ex Breviario et ex iis, quae addidit, vel omnino mutavit."

25. Ibid., p. 73: "Impe Const Dat Id ag Inter. Cum inter emente[m] et vindentem de qualecunq[ue]: rem fuerit inter eos orta causation. Ille qui ipsa[m] rem vindiderit si exinde minus p[re]ciu[m] p[en]serit qua[m] ipsa[m] re[m] valebit si addifinitu[m] de ipsa[m] rem conveniencie p[re]cium sic[ut] int[er] eos convenit post ea in p[re]-ciu[m] ipse qui conparat nulla[m] re[m] vinditori addire debit nisi solu[m] q[uo]d conveniencia habuer[it] det in ipsa p[er]maneant."

26. Ibid., p. 75: "It. ali Intp. Quicu[n]q[ue]: homo iam in plena etate e[st] qui sua[m] causam agere pote[st] si forsitam; aut agru[m] aut villa[m] aut quale[m]cu[m]que causa[m] vindiderit et postea dixerit q[uod] p[re]ciu[m] minus recipisset qua[m] ipsa[m] rem valebat et forsitam dic[at] illa[m] re[m] aut illu[m] agru[m] longe habui da me n nescieba[m] quantu[m] valerat p[er] tales occasiones nec vindicio cadit nec ipsa[m] rem tollere n pote[st]."

27. Ibid., p. 75: "Ite[m] alia Intp. Omnem re[m] q[uo]d homo ad alteram vindiderit qua[m]vis vilius fuerit conparata si postea dic[at] ille q[ui] ipsa[m] re[m] vindidit q[uo]d minus preciu[m] pr[end]isset qua[m] ipsa res valebat p[er] hoc ipsa[m] re[m] nullaten[us] retollere pote[st]."

28. Ivo of Chartres, Decretum, Part XVI, chap. 244, P.L. CLXI, col. 950: "De rebus venalibus. Cum inter ementem atque vendentem fuerit res definito pretio comparata, quamvis plus valeat quam ad praesens venditur, hoc tantummodo requirendum est, si nihil fraudis vel violentiae egit ille qui comparasse probatur; et si voluerit revocare qui vendidit, nullatenus permittatur."

CHAPTER II

THE JUSTINIAN LINES

1. Laesio Enormis

Justinian law appears to be consistent with, and indeed to expand, the principles expressed in the Theodosian Code. Not only is low price denied as grounds for the rescission of a sale, but the Corpus seems to allow both the buyer and the seller to obtain the terms most favorable to themselves. It was lawful (and even natural) the law declared, for the seller to charge as much as he could and for the buyer to pay as little as possible and consequently for each party to try to get the better of the other. Fraud might serve as grounds for an adult to have a sale rescinded, but fraud, said the Corpus, was judged by the nature of the deed and not by the quantity of the price.[1] Indeed, the principle may have been stated even more firmly. One passage can be translated thus: "In sales and purchases it is naturally allowed to buy a thing of greater value for a smaller price; and to sell a thing of lesser value for a greater price."[2]

In apparent contradiction to these pronouncements are statements found elsewhere in the Justinian Corpus. Two passages seem to deny that price is a matter which is to be settled

between the buyer and the seller. Instead, they apparently insist, first, that in sales of real estate (fundus) there is a certain "just price" (iustum pretium) and, second, that the seller, if he sells for less than half that amount, has suffered what was later called a "great injury" (laesio enormis). In such a case he would be entitled to receive from the buyer the difference between the selling price and the just price, or if the buyer chose, he might return the property to its seller and have the amount he paid for it returned to him.[3]

In neither of the two passages is the term "just price" defined, and one of the tasks the medieval jurists set before themselves was to discover (or invent) its meaning. Nor was it altogether clear how the "one half" was to be calculated, and this too was the subject of investigation and speculation during the period that followed. These matters will be discussed in more appropriate context. The present concern must be the meaning which the laws in question had when they were set into the Corpus.

It is, as has been said, possible to interpret this passage as covering anyone who sells a piece of property at too low a price. Yet, one may suspect that its intended coverage was somewhat more limited. The passage in the law seems to have been written in response to a specific question or questions regarding a particular case. Thus the author of the passage may

assume a certain amount of information on the part of the inquirer which may not be obvious to one reading the response only. Any interpretation, therefore, must be to some degree tentative. The fact that those who made the sale are named as "you or your father" (tu vel pater tuus) suggests that the sale in question might involve property belonging to a minor. If a rule valid for all sales of property were being stated, it would seem that "si quis distraxerit" would have been used.[4] The judgment, then, may have been concerned with protecting a minor from his youth or from his father's errors or even personal interests.[5]

The other case of laesio enormis in Justinian's Code also appears to involve the sale of real estate by a minor. In this instance, the father has given the son permission to sell a piece of his (the father's) property. If he sold the property for less than half its worth, the buyer, as in the first case, has a choice of returning the property and getting his money back or paying the balance of the just price. One might guess that the parallel seen by the Roman jurists between this and the first case is that in both a minor is alienating in a foolishly conceived transaction a piece of property which will one day be his--a property, moreover, which might provide his life's income. That the law was particularly concerned with inherited properties that provided the necessities of life, there can be

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little doubt. Even an adult could not alienate a legacy of sustenance (fundus ad alimenta relictus testamento sive ab intestato) unless the terms were approved by the praetor.

Several passages can be cited which seem to support such an interpretation. They can be found in the section from which laesio enormis is taken, (De rescindenda venditione, C. 4, 44) and in the section on minority (De minoribus viginti quinque annis, D. 4, XLIV), in which it is declared that one less than twenty-five years of age is entitled to restitution if his property is diminished.[6] That the Theodosian Code also protected minors against foolish sales has already been mentioned.[7]

There is still another interpretation of these passages which does not appear to have been considered and which would give the whole matter an entirely different meaning at Roman law. "Minus solvere" is generally translated "to pay less" and taken to mean "to purchase for less." (One might say, for example, "He paid less than 200," or "He purchased the goods for less than 200.") This would give "minus" a standard classical definition. However, there are definitions given in the Digest itself of minus used with solvere. In these definitions solvere minus does not seem to imply to pay less in the sense of purchase for less, but rather in the more mechanical sense of paying less than the price agreed upon, that is "paying" in the sense of handing over money. (One may say, "The item was sold for 200. The purchaser paid 100 at the time of the purchase and he will pay another 100 at a future date.") Thus "pay" in English, too, is somewhat ambiguous, meaning both "purchase for" (as, he paid 200 for it, or purchased it for 200) and to make payment (as, he only paid half of his obligation).

II-4 It can carry a third signification closely related to the second and that is "paid in full." (One might say "The bill has been paid" and that would imply that payment in full of a certain obligation has been made.)

It is in the last sense that the Digest, in the section entitled "The Meaning of Words," seems to define "solvere." The Digest says, "We say that he has paid who has done what he has promised to do." ("Solvere" dicimus eum qui fecit quod facere promisit.)[8] Holding to this definition would mean that "minus solutum" would imply that one has paid (handed to the seller) less than or none of that which he had promised to pay and there are, in fact, three definitions of minus solutum in the Digest which indicate that this is an accurate translation. (The following definitions, like the one of solvere above, are not extractions which might be misleading taken out of their original context. They are definitions, presented as such, under the title "De verborum significatione" [D. 50, 16]).

> Verbum "amplius" ad eum quoque pertinet, cui nihil debetur; sicut ex contrario "minus" solutum videtur etiam, si nihil esset exactum.[9]
> The word "amplius" pertains to him to whom nothing is owed; just as, on the other hand, "minus" seems to have been paid even if nothing has been collected.
>
> "Minus solutum" intellegatur etiam, si nihil esset solutum.
> Scott: Less is understood to have been paid than is due even when nothing at all has been paid.[10]
>
> Minus solvit, qui tardius solvit: nam et tempore minus solvitur.
> Black: He does not pay who pays too late.
> Scott: He who is in default pays less than he owes, for less is paid when the time of settlement is deferred."[11]

It should be added that if this interpretation stand, pretium in C.4.44,2 and 8, very likely means "the amount of payment which was agreed

II-5

upon by the buyer and seller" and that it keeps this meaning whether modified by iustum or verum. It has been pointed out in any case that the appearance of the latter two words in the manuscripts is often of doubtful origin. On the other hand, noted below are other definitions of key words in the passage which support this interpretation. The definitions given in the standard dictionaries for solvere are many, but when solvere is used with money, its meaning seems quite limited and quite similar to the Digest's definitions. (Lewis: "of money or property, pay, pay over, hand over"); (Harper: "of obligations, to fulfill"); (Black: "to pay, comply with one's obligation to do what one has undertaken to do, to release oneself from obligation, as by the payment of the debt.") It should also be noted that in C. 4, 44, 8 datum seems to hold the same place and meaning as solutum in 4, 44, 2. (Lewis's first definition of dare is "hand over," which is followed by "deliver, give up, render, furnish, pay.")

Translations of the two passages are here offered, not as a positive assertion that they are correct, but because the special definitions of solvere and minus solvere presented in the Digest warrant consideration of them.

8 Idem AA. et CC. Aureliae Euodiae. Si voluntate tua fundum tuum filius tuus venumdebit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. hoc enim solum, quod paulo minori pretio fundum venumdatum significas, ad rescindendam emptionem	If with your consent your son sold your estate, fraud from cunning or treachery should be argued, or fear of death or the threat of bodily injury should be disclosed in order that the sale should not be considered valid. But merely that which you indicate, namely that the estate was sold for a price a little low is invalid for the

II-6

invalidum est. quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres. neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda. D.K. Dec. AA. conss.

purpose of rescinding a sale. For if indeed you consider the essence of a contract of buying and selling, that the buyer wishing to buy cheaper and the seller to sell dearer approach this contract, and only after much contention, the seller subtracting from what he was asking and the buyer adding to what he was offering, they both consent to a certain price, you will see immediately that neither good faith, which protects contracts of purchase and sale will suffer, nor any other reason allow, a contract concluded by mutual agreement to be rescinded either immediately or afterwards on account of a dispute about the quantity of the price: unless less than half the price which was agreed upon at the time of the sale has (actually) been handed over (datum; paid). The choice of the manner of discharging the obligation is to be retained by the buyer.[12]

2 Impp. Diocletianus et Maximianus AA. Aurelio Lupo. Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit. PP. v k. Nov. Diocletiano A II et Aristobulo conss.

If you or your father sold something of a greater value for a lesser price, it is humane that, with the authority of the judge intervening, having refunded the price to the buyer, you receive the farm that you sold, or, if the buyer chooses, you receive what is lacking of the price. The price, however, seems to be defaulted if half the price has not been paid. (I.e., "handed over, paid over"--Lewis.)[13]

II-7 In this case "price" appears to signify simply the amount agreed upon.

Again it is stressed that the above interpretations are merely suggestions. It is possible (though not likely) that the meanings given are correct in one case and incorrect in the other. It can be shown, for example, that the word "pretium" is ambiguous and that its meaning changes even in the same paragraph. Most important is the degree of precision with which the work was actually used by the authors of the Corpus. Pretium has been precisely defined but the dictionary (Harper) also warns that this particular word was often used imprecisely even by the greatest of the Latin writers. In addition to the foregoing, questions of syntax might be raised.[14] But if the word "solutum" is used in the Corpus as it is defined in the Corpus, none of these difficulties can imply a significant alteration of the interpretation here suggested for the two passages.

The concept of laesio enormis does not seem to have entered into the Western European legal systems of the early Middle Ages. It appears to have been first cited in the twelfth century in a study of the Roman law known as the Corpus Legum or Brachylogus.[15] If the rule in Justinian's time was concerned with the collection of unpaid obligations, the medieval jurist altered it completely. It is quite clear that the Brachylogus was interested in the amount for which goods were sold. For Justinian's "nisi minus dimidia pretii . . . datum est" and "si nec dimidia veri pretii soluta sit," the author of the Brachylogus substitut "si quis rem dimidio iusti pretii vendiderit." The case is similar with the other early Romanists. Where the original version used "soluta," these

II-8 medieval renditions employ vendidi or distraxit. This was the meaning accepted by those who followed, and even when they used the term soluta, the contexts make it clear that they understood the law as the Brachylogus presented it.

If Justinian's rules applied only to minors, their scope was expanded to such a degree that that which was the exception became the rule. There is no doubt that in the Brachylogus version all sellers are covered (si quis . . . vendiderit). Moreover, if res is to be understood in its most general sense, the law covers not only the sale of real estate, as seems to have been the case at Roman law, but rather all sales. It is reported that Bulgarus raised the question of whether restitution was to be made in a sale where the selling price was less than the just price but more than half of it. (The source in which Bulgarus is cited was composed in the latter part of the twelfth century.)[16] That question does not seem to have been raised again in the later writings of the legists. With one possible exception, there is no call for adjustment on a low price unless the price was less than one-half of the just price.[17]

In the mid-twelfth century, the Summa Trecensis presented the laesio enormis in the same manner as the Brachylogus. If anyone sells for less than one half the just price, he is entitled to receive the difference between the selling price and the just price or, having returned the sale price to the buyer, he can recover his property. The choice remains with the buyer.[18] At about that time the law was understood in that fashion by Rogerius[19] and by the author of the Abbreviatio Codicis.[20]

II-9 At that time Vacarius also presented the law in the same fashion.[21] But Vacarius appears to have sensed that the terminology of the Roman price laws needed clarification and he provided a set of definitions which foreshadowed, as it were, several lines along which these rules would change and develop.

> One price is the true (verum) price, another the common (commune) price and yet another the special (singulare) price. The true price is the price for which the item is sold. The common price is the price for which it can be sold to anyone. The special price is found when something is worth more to one than to others. Consider the slave who is an excellent craftsman and who was sold to one who is a craftsman. The slave is worth more to him than to another who is not a craftsman.[22]

In the middle of the century in a summa written in Provençal, the coverage of the law was extended once again. Not only was the seller to be protected when he sold too cheaply, but the buyer was to be reimbursed when he paid more than twice the true value (si res fuit vendita ultra in duplum quam valeret). In either case the uninjured party was to choose whether there was to be a return of the merchandise and the purchase price or a sum of money handed to the injured party to bring the selling price (up or down) to the just price. The Provençal summa, Lo Codi, containing this version of the laesio enormis, was translated into Latin by Richard Pisanus about a decade after its composition.[23]

The interpretation presented by Lo Codi was supported by "Hugo-Albericus," who wrote at the end of the twelfth century[24] and by the author of the Dissensiones Dominorum in the thirteenth century.[25]

But also presented in the Dissensiones is an interpretation with which its author does not agree, an interpretation, incidentally, which

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must be considered as broadening the scope of the law so as to include still more transactions. According to this latter interpretation, the seller is covered as before but the buyer is considered injured if he overpays by one-half the just price. Thus, if the just price is ten and the buyer has paid sixteen, a case of laesio enormis exists. Now, according to Hugolinus, the price must be twenty-one for a laesio enormis to have occurred. If this is so, the law, according to the new interpretation, is literally more comprehensive for (to use the same figure) the transaction at sixteen would not be included as an offense under a law which declares an offense at twenty-one. If, on the other hand, offense is declared at sixteen, both sales at sixteen and twenty-one would be included. Doubtless, there would be a great number of actual cases added by shifting the formula for determining the maximum lawful price from twice the just price to one and one-half times the just price. Thus the scope of the law has once more been expanded and the margin for divergence from the just price once more contracted.

Placentinus may have been the first to argue that the buyer had sustained a laesio enormis if the selling price was more than half again the just price.[26] Like him, the great Romanists of the thirteenth century, Azo,[27] Accursius,[28] and Odofredus,[29] understood the law to cover both buyer and seller. For both parties the dimidia was used in the calculation. An article worth ten might not be sold for more than fifteen nor less than five. If it were, the uninjured party was given a choice. Either the goods would go back to the seller and the purchase price to the buyer or the injured party would receive a sum of money. If the buyer had suffered the laesio enormis, he received a

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refund, bringing the selling price down to the just price. If the seller were the aggrieved, he received a supplementary payment, bringing the selling price up to the just price.

The argument against Azo's mode of assessing the laesio enormis was probably based on the employment of the ratio of two to one for both buyer and seller. If a seller sold goods worth ten at the price of four, he had been deceived by more than double (ultra duplum) since he should have received ten and he only took four.[30] Thus, it is reasoned, that one who bought that same object for sixteen would not have been deceived by more than double. Such deception would not take place until the price reached twenty-one. Azo, on the other hand, adhered to the word dimidia. The man who purchased at twenty-one had not merely paid beyond half the just price but beyond once over the just price itself (i.e., beyond the whole price, ultra pretium). But deceptio took place beyond half the just price (ultra dimidiam iusti pretii). Since five was half the just price, deception would take place at sixteen. Accursius argued similarly and rejected the view which calculated with duplum. Twenty-one was not half, he said, but double. (Alii dicant emit pro XXI quod non placet, quia tunc non dimidia iusti precii sed duplum egreditur.)[31] Odofredus called upon the reasoning and authority of Azo in arriving at the same conclusion.[32] He also offered a pragmatic justification for his choice. The law will afford wider protection; much trickery will be avoided.

In connection with laesio enormis, another principle of Roman law is often mentioned--a principle which has been called "freedom of bargaining."[33] It is not usually present, at least in this context, in the

II-12 earlier works of the twelfth century such as Bulgarus, Vacarius and Rogerius; nor is it in the Brachylogus, Lo Codi or Summa Trecensis. In the latter half of the century, however, and in the thirteenth century, it received a good deal more attention.

The principle of law, as mentioned above, gave both parties to a sale the right to obtain for themselves the most advantageous terms (e.g., in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire D.4,4,16,4). It should be stated immediately that the introduction of the principle of freedom of bargaining to the considerations of laesio enormis did not cause the jurists to alter the rules of laesio enormis. Although the principle of freedom to bargain may seem in some sense to contradict the restraint imposed by laesio enormis, no one used it for that purpose. It was, moreover, present in the writings of those who set the buyer's protection by dimidia as well as those who set it by duplum.

Although the raising of the question of freedom of bargaining produced no effect on the rules of laesio enormis, it seems that the conjunction of the two principles was viewed somewhat differently in the twelfth century than in the thirteenth. In the twelfth century the laesio enormis seems to have been regarded as a frame within which legal free bargaining existed--a set of limits within which the freedom of bargaining might take place.

Thus the twelfth century Abbreviatio Codicis,[34] like the Corpus itself, described the "fundamental essence" of a sales contract as an agreement made between a vendor who wished to sell high and a purchaser who wished to buy low, the two bargaining till at last they reached an

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agreement.[35] But the writer added, the price was too low if it was not at least half the just price.[36] In the Quaestiones dominorum Bononensium[36] deception (decipere) is also declared legal if it is not intolerable, that is beyond half the just price. The case was the same with Hugo-Albericus in the Distinctiones.[37]

The thirteenth century Romanists did not change the law or its consequences but they did see and articulate some element of contradiction between the conjoined principles of laesio enormis and freedom of bargaining. Thus Azo says the words "humanum est" are included in the law of laesio enormis because the common law (ius commune) offers a different principle, specifically, that the contracting parties may deceive each other. But this law, he says, shall not be allowed to operate as it stands. The doctrine of laesio enormis shall prevent the full implication of it.[38]

Accursius also speaks of contradicting laws but uses other terms. "Can the sale for forty of an article worth 100 be rescinded?" he asks. "According to the rigor of the law," he answers, "No" (quod de rigore iuris, non): "According to equity, yes," (de aequitate, sic.). "According to the rigor of the law," he continues, "the contracting parties may deceive each other, but in cases of great deception, the rigor is mitigated." (de rigore iuris, cum licuit contrahentibus sese decipere . . . sed ille rigor mitigatur, etc., C.4, 44, 4). Odofredus in his Lectura super Codice presented the problem in a fashion quite similar, contrasting the rigor of the law with equity and opting for equity.[39]

To present this matter of the joining of the doctrines of laesio

II-14

and freedom of bargaining as if it were a crucial issue would be quite misleading. The law is unchanged. In one view, however, it is presented as a single principle which includes a set of limits; in the other, as two laws, one of which is, so to speak, imposed upon the other.

The canonists followed the Romanists in the adaptation of laesio enormis. The first expression of the principle was made by Alexander III in the decretal Quum Dilecti issued sometime between 1159 and 1181. It concerned a particular sale transacted between two clerical bodies. A wood had been sold by the canons of Beauvais to the Abbey of Chaalis. Subsequently the canons claimed they had sold the land at too low a price. The case was brought to the Bishop of Thérouvane and to the Dean of Rheims, the latter declaring that the land had been sold for less than half its just price and that the land should be returned to the canons. The Pope in part upheld and in part rejected the judgment of the bishop. He allowed that the sale could not hold as originally made but the bishop's decision, he declared, was incorrect. The wood need not necessarily have been returned. The buyer had a choice. He could return the property and obtain a refund of the purchase price or he might pay what was lacking of the just price.[40] Quum Dilecti was included in Bernard Balbi of Pavia's compilation (Compilatio Prima[41]) in 1191 and in 1234 was incorporated into the Decretals of Gregory IX.[42] This first pronouncement of laesio enormis by the highest church authority was in close conformity with the recently developed Romanist construction of that law. The injured party was the seller; the damages involved, more than half. (The term laesio enormis, incidentally, was not actually employed.)

II-15 In the second pontifical expression of this law, the term laesio enormis was used but the Pope's ruling was rather less standard. The decretal Ad nostram noveritis did not concern a sale but rather an enfoeffment. A monastery had granted an estate in fief to a layman. The layman to whom the fief had been granted was to pay a mortgage on it of eighty pounds. It was discovered, however, that the layman was drawing eighty or more pounds per year from the fief. The Pope declared that the monastery had suffered a laesio enormis (enormiter in hoc laesum). He commanded, therefore, that the revenue received thus far was to be considered ample recompense for the layman's payment of the mortgage and that the fief was to be returned to the monastery free and clear.[43] Peter Beneventanus entered Ad nostram noveritis into the Compilatio Tertia,[44] and Raymond of Penaforte set it into the Decretals which he compiled for Gregory IX.[45]

Unlike Ad nostram noveritis, in which the uninjured party was not granted the opportunity of making a supplementary payment and retaining the property,[46] the third decretal, Quum Causa, offered these standard alternatives. In the case involved, a monastery had sold properties to two laymen. The price was found to be less than half the just price. The decretal[47] ordered that the purchase price was to be refunded and the property returned or a sum was to be paid to the sellers which would bring the price up to the just price at the time of the sale.[48] The decretal Quum cause, like Ad nostram noveretis, was entered in the Compilatio Tertia[49] and like both Ad nostram noveretis and Quum dilecti can be found in the Decretals.[50]

The earliest of these decretals comes well after the medieval

II-16 students of Roman law first put forth their conception of laesio enormis. The Romanists understood the law to allow recision of sales made by responsible agents at extraordinary low prices (which may not have been the case in the Roman era)[51] and it was in the medieval sense that the Popes understood it. It seems quite accurate, therefore, to point to the twelfth-century Romanists as the source from which the Church drew in promulgating these decretals.

The three decretals were concerned with protecting the vendor only. Church law was slow in extending the laesio principle to the buyer. The first very tentative suggestion of such a possibility was made by Bernard of Pavia nearly a half-century after it was first put forth in medieval Roman law. "Perhaps," he said, after a positive explication of the protection which laesio enormis offers to the seller, "Perhaps the same may be said for a buyer deceived by more than half."[52] (forte idem dici poterit e contrario de emtore ultra dimidiam decepto). Shortly afterward, Vincentius Hispanus, commenting on Quum Causa, also suggested this possibility.[53]

The canonists do not seem at any time to have supported the interpretation which maintains that the buyer must have paid more than double the just price before he has recourse to the law. Bernard Botone shows how the seller is covered and then, citing Azo in a full and clear statement, maintains that a laesio enormis had been suffered when the buyer paid more than one and one-half times the just price.[54] Hostiensis, citing Azo, supported this interpretation twice[55] and it has been maintained,[56] probably correctly, that it was put forth in these terms by Innocent IV.[57]

II-17 It is difficult to state with certainty that Innocent was concerned with protecting the buyer. The wording of what seems to be the key passage is a bit unusual: "Est autem decept[us] ultra dimidiam + qui rem valentem + X + dedit p[ro] quattor + Alii + dicunt q[uod] eciam qui rem valentem septem dedit p[ro] quator."(But see the entire quote, p. 78, n. 57.

To consider this passage as concerned with the protection of the buyer, it would have to be translated: "He is deceived beyond half who pays (dedit) ten for a thing instead of (pro) four; others say, it is who pays seven for a thing instead of (pro) four." This rendition corresponds with the usual interpretations of laesio enormis but it does not match the text too well. For example, "Pro" can indeed be translated "instead of" but in price laws it generally means "for." And what would "valentem" mean? There are other difficulties with a "buyer's interpretation." It seems rather better to translate it: "He is deceived beyond half who gives (sells, dedit) a thing worth ten for four; others say it is he who gives (sells) a thing worth seven for four." With the latter translation, concern would be for the seller. If this is the case, he is speaking of an unusual mode of calculation. The dimidia, instead of being one-half the just price, is one-half the selling price. Thus if the sum of the selling price plus one-half the selling price falls short of the just price, a laesio enormis exists. The selling price was four. One-half of four is two and two plus four equals six, but the just price was seven and so a laesio enormis has been inflicted. By the older method (the first of the two cited by Innocent) the dimidia is applied to the just price and with a just price of ten, the legal minimum would be five. By the second method

II-18 described by Innocent, a just price of ten would render a legal minimum of 6.67. Thus what seems to be a tendency to narrow the divergence allowed from the just price, apparently continues. The first medieval expressions of the laesio enormis were concerned only with minimum prices but soon both maxima and minima were provided. For goods valued at ten the maximum of sixteen generally prevailed over the maximum of twenty-one. Here Innocent may have substituted for a minimum of five a minimum of 6.67.

Of the legists of the twelfth and thirteenth century about a dozen Romanists, including the most prominent of them, and an equal number of canonists, including five popes, have been cited, all of whom declared the principle that a fifty percent divergence from the just price is to be allowed. It certainly seems incorrect, therefore, to maintain that the principle of laesio enormis originated in the fifteenth century or that it introduced a "new elasticity" or that it stems from a set of ideas "expounded as early as the middle of the fourteenth century" which were the "natural outcome of the intense economic activity of the later Middle Ages."[58]

2. Value

After Accursius raised and answered the question of how to calculate half the just price, he posed a question more fundamental: "How should one calculate the just price?" As part of his answer, he cited a passage which appears twice in Justinian's Digest, once in Ad legem Aquiliam and once in Ad legem Falcidiam.[59]

II-19

> The prices (values) of things are not to be calculated from the sentiment or interests of individuals, but by the general view (commonly).
>
> pretia rerum non ex affectione nec utilitate singulorum, sed communiter fungi . . .
>
> Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur (finguntur).

In a recent study this principle was held to forbid price discrimination and so it could be concluded that the medieval law was consistent with or even based upon the Roman law.[60] The present concern is with the meaning which the laws in question had at the time they were set into the Digest. It is possible that they were given a different meaning during the Middle Ages, in which case the identification of the real source of the law in the latter period might be different than it would be were the meaning identical in both periods. A close reading of the laws both independently and vis-a-vis each other and comparison of the two passages with other regulations in the Corpus seem in order.

The variant readings of the verb in D. 35,2, 63 are of no great concern. Finguntur and funguntur can be translated, in effect, identically. Finguntur may be rendered "formed," "made," "supposed," and "funguntur," given the meaning "done," "executed," "administered" as well as a definition for the word as it appears in one of the passages in question (D. 9,2,33): "are taken."

Pretia, on the other hand, will receive more than one meaning. It has been shown that the word has been used in the Corpus of Justinian to mean several things.[61] In the present context it seems to carry two meanings, the first being "selling price" and the second "value"--in the sense of assessed value (such as, to use modern examples, are made for purposes of taxation or to assess damages and which assessments might

II-20 or might not match the current selling price). A single sentence in the same capitula in which the formula "pretia rerum etc." appears, provides an example.

> Nonnullam tamen pretio varietatem loca temporaque adferunt: nec enim tantidem Romae et in Hispania oleum aestimabitur nec continuis sterilitatibus tantidem, quanti secundus fructibus, dum hic quoque non ex momentis temporum nec ex ea quae raro accidat caritate pretia constituantur.[62]

Translating pretia as selling price throughout renders this passage either meaningless or causes it to forbid market fluctuations. (The examples having neither legal nor logical force are omitted so as to bring the two usages into sharp contrast.) "Sometimes places and times will bring a change in selling price . . . selling prices should not be determined from moments of time or from a rare dearness." If pretio is translated as selling price and pretia as (assessed) values, with no other alteration, the passage becomes quite meaningful. "Sometimes places and times will bring a change in price . . . (assessed) values should not be determined from moments of time nor from rare dearness." In other words, assessments, or rather estimations of value, should not be based on unusual fluctuations of the market.

The estimations are made for specific purposes. Both titles in their entirety (D. 35, 2 and 9, 2) are regulations for the administration of a certain pair of laws. For the cases with which these laws are concerned, assessments of property values for the purposes of a court settlement are necessary or even central. One of them Ad Legem Falcidiam (35, 2) deals with the division of inheritance; the other, Ad Legem Aquiliam (9, 2) is concerned with the reparation of unlawful damages.

II-21 This fact is clearly indicated by the names of the title-sections--Ad Legem Falcidiam (35, 2) Ad Legem Aquiliam (9, 2). They are not collections of laws on certain general topics as are most of the sections--e.g., de servitutibus, de adulteriis, de poenis militum. The title-heading De servitutibus would mean, in effect, "the following is a group of laws concerned with the general topic of slavery," or literally "concerning slavery." Ad Legem Falcidiam means, in effect, the following regulations were devised for the purposes of the Lex Falcidia. The rules apply not to cases but to a particular law. The use of "ad" is not without meaning. It shows that the rules have been structured for a special purpose as "ad hoc," i.e., "for this special purpose" (Black's definition). In this case the hoc is the Legem Falcidiam and the contents of such a title cannot be laws which are generally valid. If the Lex Falcidia is not being invoked, the regulations found under the heading Ad Legem Falcidiam are without force.

The areas to which the Lex Falcidia can be applied seem quite narrow and certainly do not appear to include the regulation of prices. The law, as it is quoted in the Digest, forthrightly declares its purpose: "After the passage of this law, any Roman citizen who draws up a will shall have the power and the right in accordance with the public law to bequeath as large a sum as he wishes to any other Roman citizen if the will is made in such a manner that his heirs will receive not less than one-fourth of the estate by that testament."[63]

Though such a law would not be concerned with regulating the prices for which property would be sold, it might well be concerned with the evaluation of property. Part of an inheritance might be made up of certain properties not easily divisible, as would be the case if three men inherited an estate which consisted of a single slave. It would

II-22 then be necessary to set a value on such property so that a cash settlement might be made among the interested parties.

The estimation of values is an important concern of this title and other parts of the title provide a context quite consistent with interpreting the passage in question as being concerned with evaluation. The section contains a set of items which are to be deducted from or added to the total value of the estate.[64] Criteria for evaluation are presented in addition to the ones included in the section here being discussed. Thus is found, "Properties which are in the goods of the deceased are to be evaluated according to the truth of the matter, that is, according to the present price. Fixed or formulated prices are not to be used."[65] It is, in fact, this statement which is directly followed by the regulation in question: "The values of things are not to be calculated from the affection or utility of individuals but, rather, commonly. For a man who possesses his natural son is none the richer simply on the grounds that if someone else possessed his son, he would redeem him at a higher price than anyone else."

Nor do the regulations on calculation end here. Immediately following the statement in question, it is declared that not all market prices may be used for these calculations. The law recognizes that the market may fluctuate sharply at certain times and in certain places,[66] and these unusual extremes of prices may not be employed either.

It seems reasonable to conclude, therefore, both from its use of particular words and from the context into which they are set, that the statement in question does not tell how the proper and legal selling price of an item is to be determined, but rather is concerned with the manner in which its value is to be determined for the settling of

II-23 a certain type of litigation.[67]

Indeed, one might even say in this particular case, it is not a matter in which the courts will determine selling prices or the law determine the mode of setting them, but rather that the market price is used to determine the decision of the court. In itself the statement in question does not demand the operation of a free and open market at all. It does, however, recognize the open market as extant (and apparently legal) and within certain limits[68] allows it to set a value on items for the purpose of the courts.

To show that the Lex Aquilia is concerned not with price discrimination but rather with the assessment of damages, it is necessary only to set the extracted passage back into context.

> If you kill my slave, I am of the opinion that my sentiments are not to be taken into account (as for example, if one kills your natural son for whom you would be willing to pay a high price), but only what he is worth to all. Sextus Pedius also agrees that the value of property is to be reckoned not by the sentiment or interest of individuals, but by the common view (pretia rerum non ex affectione nec utilitate singulorum sed communiter fungi); hence he who possesses his natural son is none the richer because he would buy him for a large price if another possessed him, nor does he who possesses another's son own as much as he could sell him for to his father. In short under Lex Aquilia we recover our damages (in lege enim Aquilia damnum consequimur); and we are held to have lost what we could have gained or what we are forced to expend.

That the law will employ the market price as it sees fit is shown by comparing the Aquilia and Falcidia. The formula which is found in the Lex Falcidia is practically identical to the form in the Lex Aquilia (pretia rerum, etc.). Yet in the case of the Lex Aquilia the amount decided upon by the court may be different than it would have been were the same property being evaluated for the purposes of the Lex Falcidia.

II-24 Falcidia uses the present market price (secundum praesens pretium); Aquilia uses the highest market price of the year (quanti id in eo anno plurimi fuit). The latter law says, "If anyone kills a male or female servant or a quadruped (a herd animal) by an unjust injury, he must pay damages equal to the highest amount that the creature was worth during the year."[69] Another passage states, "The law says 'the largest amount that the man was worth during the year': this clause refers to the assessment of damages which were inflicted." The rule then is quite clear. A market price is assumed to exist and is applied in a manner that suits the court. But the law does not seem to have any concern about regulating the price involved in the transfer of goods by sale.

That the law is determined to use the market price and none other is also evident. By "the highest amount the creature was worth during the year" is not meant some unusually high price that an individual in desperate circumstances may have paid for a badly needed object to one either not anxious to sell or determined to take advantage. On this point the law insists (see above, p. 59).

Thus, for the Lex Aquilia as for the Lex Falcidia a (fluctuating) market price is taken as extant, but the law does not seek to establish its legitimacy or to make it mandatory. The texts seem to show that the courts were to use it to settle wills and award damages, in the one case using the present and the other the year's highest market price. It seems reasonable to conclude that the purpose of the formulation (pretia rerum, etc.) was not to end price discrimination or to establish a legal selling price.

Evaluation of property in the Roman law is not peculiar to the

II-25 Lex Aquilia and Lex Falcidia. Scattered throughout Justinian's Corpus Iuris are many regulations describing the proper mode of ascertaining the value of property.[70] In addition to the evaluations made for damages and the division of estates, are those made for the purpose of dividing property commonly held,[71] estimating the value of jettisoned cargo and other purposes as well. There are a number of formulae stating the criteria for these values and the manner in which they are to be obtained.

One of these formulae is "quanti venire possunt." (How much [the articles] can be sold for.) It appears three times in portions of the Lex Falcidia not considered above.[72] It is also used to evaluate the liability of the master for certain types of purchases made for him by his slaves. It is employed too for certain of the assessments made for proportional distribution of the losses incurred when cargo must be jettisoned at sea in order to save the ship.[73]

This formula, then, like the one discussed above (pretia rerum, etc.), is used to assess a value for certain types of settlements. In this sense, all these rules concerning value assessments may be called consistent in that they govern awards made by the courts and in that none of them regulate the prices at which real estate or merchandise must be sold.

It may be said that Roman law was not informed by an economic doctrine in the usual sense. No independent principle set, or even guided, a sale price. If the wishes of the buyer and the seller were in free agreement, any price they struck was lawful. Neither of them had later recourse if the price seemed extraordinarily high or unusually low. The laesio enormis did not provide an exception to this principle. In Roman times, the laesio, either was not primarily concerned with price or it sought to protect minors.

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FOOTNOTES TO CHAPTER II

1. Corpus Iuris Civilis, ed. T. Mommsen, P. Krueger, et al., (Berlin: Weidmann, 1880-1922), Digest (cited hereafter as D.), 4, 4, 16, 4. One might also cite the Code (cited hereafter as C.) 4, 44, 10: "Dolus emptoris qualitate facti, non quantitate pretii aestimatur"; or C. 4, 44, 5: "Quod si iure perfecta venditio est a maiore viginti quinque annis, intellegere debes consensu mutuo perfectam venditionem resolvi non posse."

2. D. 19, 2, 22, 3: "Quemadmodum in emendo et vendendo naturaliter concessum est, quod pluris sit, minus emere: quod minoris sit, pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est." The punctuation of the latter paragraph, added for clarity, is taken from Les Cinquante Livres du Digeste, ed. M. Hulot (Paris: Fondonnery, 1804). Cf. the translation of B. Schilling and F. Sintenis: "Gleichwie es nach dem Naturrecht beim Kauf und Verkauf erlaubt ist, dasjenige, was mehr werth is, für einem geringer Preise zu kaufen, und was weniger werth ist, theurer zu verkaufen, und sich dergestalt gegenseitig zu übervortheilen, so ist es auch Rechtens beim Verpacht und Pacht," (Leipzig: Verlag von Carl Focke, 1832).

3. C. 4, 44, 2. C. 4, 44, 8 (See below, p.p. 41-42.

4. Several of the passages in this set seem to be answers to inquiries made by interested individuals with particular cases in mind; for example: C. 4, 44, 6: "Idem AA. et CC.: Novisio Gaiano veterano Non est probabilis causa, propter quam rescindi consensu factam venditionem desideras. quamvis enim duplum offeras pretium-emptori, tamen

invitus ad rescindendam venditionem urgueri non debet."

5. For example, the father, as guardian of the youth, might sell the property in collusion with a "buyer" for a token price.

6. D. 4, 4, 4, (For legacies of sustenance see D. 2, 15, 8 and D. 2, 15, 8, 15.)

7. See above, pp. 53-54.

8. D. 50, 16, 176.

9. D. 50, 16, 82.

10. D. 50, 16, 32. The Civil Law, trans. S. P. Scott (Cincinnati: Central Trust Company, 1952).

11. D. 50, 16, 12, 1. Henry C. Black, Black's Law Dictionary (St. Paul, Minnesota: West Publishing Company, 1933); Scott (trans.), The Civil Law.

12. C. 4, 44, 8.

13. C. 4, 44, 2.

14. See below, pp. 55-56 for pretium. On the question of syntax: the "nisi . . . datum est" clause is generally taken as modifying the force of the passages preceding it (specifically "neque . . . rescindi"). But the rules of grammar would allow it to be taken as directly modifying the force of the passages following it (i.e., "electione . . . servanda"). However, the word order that would render such an interpretation would be unusual and therefore the lengthy discussion required to indicate its implications will be foregone.

15. Corpus Legum sive Brachylogus . . . , ed. E. Böcking (Berlin: Ferd. Dummler, 1829), Lib. III, Tit. 13 (10), pp. 98-99: "Illud etiam considerandum, quod, si quis rem minus dimidio iusti pretii vendiderit,

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emptorem vel ad rem reddendam vel ad iustum pretium exsolvendum convenire poterit."

16. Questiones dominorum Bononiensium, LXIX, edited in A. Gaudenzi, Bibliotheca Iuridica Medii Aevi (Bologna: Ex Aedibus Angeli Gandolphi, Typis Societatis, Azzoguidianae, 1914), I, 248: "Persuasione et dolo Titii alias non venditurus fundum vendidi Seio, bona fide ementi, minus tamen iusti pretio habui, sed plus dimidio vendidi. Queritur si contra eum aliquam actionem habere possim Bulgarus: Reus obtinet."

17. See below, pp. 53-54.

18. Summa Trecensis, ed. H. Fitting (Berlin: J. Guttentag, 1894), Lib. IV, Tit. 4, 41, 4 pp. 116-117: "Propter intollerabilem deceptionem res[c]inditur: veluti si minum dimidia iusti pretii distracta sit: tunc enim offitio iudicis res[c]inditur vel quod deest iusto pretio restituitur electione videlicet emptori concessa." H. Fitting, the editor, attributed this work to Irnerius but the attribution is now doubted.

19. Rogerius, Summa Codicis, C. 4, 45, edited in Gaudenzi, Bibliotheca, I, 126: "Propter rei iniquitatem rescinditur venditio, ut puta: minus dimidia iusti pretii vendidit. nam per officium iudicis rescinditur venditio, data electione emptori utrum velit iustum pretium adimplere et rem retinere, an restituto pretio rem restituere."

20. Abbreviatio Codicis (IV, 44), edited in Gaudenzi, Bibliotheca, I, 533, "De rescindenda venditione (IV, 44). Minus pretium esse videtur, si nec dimidia pars iusti pretii fuerit soluta, . . . (1.2). Substantia contractus emptionis et venditionis est quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant, . . . (1.8)."

21. Vacarius, The Liber Pauperum of Vacarius, ed. F. de Zulueta (London: Quaritch, 1927), Lib. IV, Tit, 46, p. 153: "'iudicio' Quia si minoris dimidio iusti pretii distracta sit res, venditi iudicio rescinditur emptio, nisi adimpleatur quod iusto deest pretio." Ibid., Lib. IV, Tit. 42, p. 147: "minus pretium videri si nec dimidia pars fuerit soluta."

22. Ibid., Lib. IV, Tit. 46, p. 150.

23. Lo Codi, In der Lateinische Übersetzung Ricardus Pisanus' ed. H. Fitting (Halle: M. Niemeyer, 1906), Lib. IV, Tit. 61, 5, p. 127: "Aliquando contingit quod vendicio destruitur, quamvis non sit facta fraus; ut si res vendita est minus medietate quam valerat eo tempore quando fuit vendita. Similiter si res fuit vendita ultra in duplum quam valeret, potest destrui vendicio si emptor hoc vult, eadem racione qua dictum est de vendicione." I have not been able to find a full edition of the Provençal version. It would seem that it was supposed to have been published in connection with the Latin edition here being used, but that the project was never completed. Some parts of the Provençal version have been published, but not the section with which this paper is concerned.

24. Distinctiones, Collectio Senensis, XXVIII, edited in Gaudenzi, Bibliotheca, II, 152: "Si dolus inest re ipsa, distinguendum est utrum equitate pacti possit tolerari annon, ut siquidem equitate pacti tolerari possit, non agatur, quia licet contrahentibus se naturaliter circumvenire. Si autem talis est deceptio que non possit tolerari equitate pacti, puta si emit plus duplo vel vendidit minus dimidio iusti pretii quod inequaliter factum est, in melius est reformandum; et ideo proposita actione, ex contractu agetur ut sit in potestate emptoris, vel iustum pretium dare,

vel quod dedit recuperare, restituta re empta ut C. de rescindenda venditione l. rem maioris et l. si voluntate (C. 4, 2. et 8), . . ." A statement of the principle of the law can also be found in Quaestiones Dominorum Bononiensium, in Gaudenzi, op. cit., I, 260, in relation to a specific case.

25. Dissensiones Dominorum . . . , ed. G. Haenel, (Leipzig: Hinrichs, 1834), No. 253, pp. 426-427: "De Rescindenda venditione (C. 4, 44.) L.2. Quando emtor enormiter laesus dicatur? Dissentiunt in C. de Rescind vend, (C. 4, 44.) L.1 et L.2 ubi dicitur, quod potest rescindere venditionem, si deceptus sit, etsi minus pretium habeat. 'Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit.' Unde dominus Azo dicit, quod idem sit in emtore, ut si quis rem, quae X valebat, emeret pro XVI, quod emtor, si voluerit, potest rescindere venditionem, quia deceptus est ultra dimidiam iusti pretii; et hoc ita probat: verum et iustum pretium erat in X et deceptus est in VI, ergo ultra dimidiam iusti pretii, id est, ultra dimidiam X; nec Lex dicit, quod debeat esse deceptus in duplum, sed tantum in dimidiam iusti pretii, ut C. de Rescind. vend. (4,44.) L.2. et L. Si voluntate tua (8.). Sed Pla. (Placentinus), Al. (Albericus) et M. (Martinus) et Alii Sapientes dicunt contrarium et dicunt, quod non potest agere, nisi sit deceptus in duplum, et hoc ita probatur. Lex dicit, quod tunc potest rescindere venditionem, si non habet dimidiam iusti pretii. Hoc ita intelligi, si sit deceptus in duplum. Nam deceptus est in duplum, quia ipse venditor debuisset accepisse X et non accepit nisi quattuor. Unde deceptus est ultra duplum, quod debuisset accepisse. Per simili-

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tudinem et iste emtor, qui emit rem, quae valebat X, pro XVI, non est deceptus in duplum, nisi XX dedisset; unde non ei subvenitur et ita per consuetudinem adprobatur et ita probo sententiam Alb. (Alberici) et Aliorum."

26. Petrus Placentinus, Summa Codicis (Turin: Bottega d'Erasmo, 1962), IV, 44, p. 176: "De Rescindenda Venditione . . . Iudicis officio venditio rescinditur, puta si venditor ultra dimidiam iusti pretii deceptus fuerit. Iusti inquam, tempore venditionis: deceptus inquam, non per emptoris dolositate(m), sed re ipsa, rescinditur autem iniquitas ista electione emptori praebita, velit ne iustum pretium supplere, et rem retinere: veluti rem restituere, et pretium iniustum a se praestitum recuperare, ut C eo l ii (C. 4, 44, 2) fit et econtrario, id est, si emptor ultra dimidiam iusti pretii numeravit, ut C eo. l. Solu. mat. si circumscripta (C. 5, 18, 6)." Some difficulty has arisen concerning the proper interpretation of Placentinus's judgment. According to the Dissensiones he said that laesio enormis occurred when the buyer paid more than double the just price. (See above, p. 66, n. 25) Baldwin ("Medieval Theories," pp. 22-23) says that Placentinus did not believe that the buyer was to be covered at all. Placentinus also names Martinus and Albericus as favoring the duplum, and Azo favoring the dimidia, in regard to the buyer. Contrario can be misleading.

27. Azo, Summa Azonis (Venice: Franciscus Bindonus, 1566), col. 417: "Ubi autem decipitur quis re ipsa, non alterius proposito, tenet venditio: sed deceptus ultra dimidia[m] iusti precii, quod erat tempore venditionis, agit ut non decipiatur . . . [C. 4, 44, 2 and 8]."

Azo, Commentarius Azonis (Lyons: Iacobus Stoer & Franc. Faber, 1596, 4, 44, 2, pp. 508-509: "Rem maioris, Humanum est etc. Ideo dicit, quia aliud est de iure communi, cum liceat contrahentibus naturaliter (se circumuenire): ut D[igestum] de minoribus in causae penult. [D, 4, 4, 16, 4] vel dic, quod contrahentibus licitum est se decipere, non tamen tantum quantum hic dicit. Si ultra dimidia iusti pretii. . . . Vel si emptor elegerit. Habet ergo emptor qui non deceptus est, electionem, suppleat pretium, vel rem restituat. . . . Et ita est cum res valebat XI et ego vendidi V. quia non accepi dimidiam iusti pretii, sed pone e co[n]-verso, quod emptor fuit deceptus, et voluerunt quidam ita ponere exemplum, quia si res valebat X et ego vendidi pro XX non decipior ultra dimidiam iusti pretii. secus si pro XXI. nos non ita. nec enim hic decipitur ultra pretium, sed ultra dimidiam iusti pretii. Si ergo iustum pretium rei erat X et tu dedisti XV non es deceptus ultra dimidiam iusti pretii: secus si XVI quia V erat dimidia iusti pretii, et tu dedisti V ultra quam valeret, et plus." See below p.64, n. 20.

Azo may have altered another rule contained in this section (C. 4, 44) in order to maintain consistency in the use of laesio enormis. On the other hand, the employment of the word paulo in the Roman test may show that he has caught its real intent. C. 4, 44, 15: "Quisquis maior aetate praedia etiam procul posita distraxerit, paulo vilioris pretii nomine repetitionis rei venditae copiam minime consequator." Azo says of this passage (Commentarius C. 4, 44, 14 [sic.], Quisquis maior): "Paulo vilioris pretii. Secus enim si deceptus esset ultra dimidiam."

28. Accursius, Corpus iuris civilis Iustiniani: cum Commentariis Accursii . . . (Paris: Sebastianus Niuellius, 1576), C. 4, 44, 2, Vol. IV, cols. 919-920: "Rem. Si rem quae c. valebat, pro xl vendidisti: an rescindere possis venditionem, quaeritur? Respond[es] quod de rigore iuris, non: de aequitate, sic, refuso precio quod accepisti: ita tamen ut emptor eligat velit solvere iustum precium, et habere rem: vel rem restituere refuso sibi precio quod dedit. quod quando sit minus preciu[m] in si. dicit: illud scilicet quod est minus dimidia iusti precii. h. Humanum est Secus de rigore iuris, cum licuit contrahentibus sese decipere: D[igestum] de mino. l. in causa ii penul. [D. 4, 4, 16, 4] Sed ille rigor mitigatur, cum est immensa deceptio: sicut & quando inest dolus.

"Sed quae est haec dimidia? Dic in emptore decepto: si res valet dece[m], emit pro xvi. licet alii dicant, emit pro xxi, quod non placet: quia tu[n]c non dimidia[m] iusti precii, sed duplu[m] egreditur. In ve[n]ditore: sicut res valet dece[m], ve[n]didit pro quatuor. Et probantur haec fi. huius. l. [C. 4, 44, 2] infra ea. l. si voluntate, [C. 4, 44, 8] infra si ma. [C. 4, 44, 13]. . . ." C. 4, 44, 8, Vol. IV, cols. 922-923: "Si Voluntate. . . . quia non est rescindenda venditio propter parvum precium: quia hoc consueverunt facere emptores, cum venditores primo offerunt vendere magno precio: & emptores offerunt parvam quantitate[m] & postea maiorem, et vendentes detrahunt de eo quod petierant, & ita contendunt invicem,&postea consentiunt: & sic propter exiguitatem precii non poterit rescindi venditio, nisi probes filiu[m]."

29. Odofredus, Lectura Super Codice. (Bologna: Formi, 1968-1969), fol. 246, col. 2: Sed si laesio est immoderata, l[icet] rigor iuris no[n] patiat[ur] rescindi ha[n]c venditionem, q[uia] licetu[m] est unicuique ab

initio co[n]trahere vel no[n] co[n]trahere . . . et quia licitu[m] est co[n]trahe[n]tibus invice[m] se p[re]cio decipere: equitas t[ame]n suadet, ut si deceptio est ultra dimidiam iusti precii, quod venditio rescindat[ur] vel suppleat[ur] iustu[m] p[re]ciu[m]. . . . Re[m] valente[m] X. emptor emit p[ro], XVI. q[uia] iste emptor est deceptus ultra dimidia[m] iusti p[re]cii, poterit agere. . . ."

30. See above, p. 66, n. 25.

31. See above, p. 69, n. 28.

32. Odofredus, Lectura Super Codice, C. 4, 44, 2, fol. 242, col. 2: "Sed si vultis exe[m]plificare in emptore decepto ultra dimidia[m] iusti p[re]cii exe[m]plificabitis ita s[ecundu]m Azo. Re[m] valente[m] X. emptor emit p[ro] XVI. q[uia] iste emptor est deceptus ultra dimidia[m] iusti p[re]cii, poterit agere ut res empta recipiat[ur]. Alii aut[em] volunt exe[m]plificare in emptore decepto ultra dimidiam iusti precii, sic. Si rem valentem X emptor emit p[ro] XXI sol. Q[uo]d non placet: q[uia] in tali exe[m]plo dicit[ur] decipi emptor in duplum, no[n] in dimidia[m] iusti precii. Ex quo colligetis istud not. quod nimis capito evitatur."

33. By Baldwin, "Medieval Theories," p. 21.

34. See above, p. 64, n. 20.

35. This translation of substantia may be found in Sir William Smith, A Latin-English Dictionary (London: Barnes and Noble, Inc., 1926).

36. Quaestiones Dominorum Bononiensium, CXXXVIII, edited in Gaudenzi, Bibliotheca, I, 260: "permissum esse contrahentibus inter se decipere non ex proposito, si tamen deceptio intolerabilis non sit, idest ultra dimidiam iusti pretii."

37. See above, p. 65, n. 24.

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38. Azo, Commentarius, C. 4, 44, 2, p. 508: "Rem maioris. Humanum est. etc. Ideo dicit, quia aliud est de iure communi, cum liceat contrahentibus naturaliter: ut D[igestum], de minoribus in causae penult [D. 4, 4, 16, 4] vel dic, quod contrahentibus licitum est se decipere, non tamen hic tantum quantum hic dicit, si ultra dimidia[m] iusti pretii." "Ius commune": the general law common to all, the law which is binding on all peoples or all Roman citizens. See A. Berger, Encyclopedic Dictionary of Roman Law (Transactions of the American Philosophical Society), N. S. XLIII, Part 2 (Philadelphia: The American Philosophical Society, 1953).

39. Accursius, Commentariis, C, 4, 44, 2, Vol. IV, col. 919. Odofredus, Lectura super Codice, fol. 246, col. 2; see above, p. 69. n. s. 28 and 29.

40. Gregory IX, Decretals, III, 17, c. 3, Corpus Iuris Canonici, ed. A. Friedberg (Graz: Akademische Druck- Und Verlagsanstalt, 1959, cited as C.I.C.), II, cols. 518-519: "Alexander III. Attrebatensi Episcopo. Quum dilecti filii nostri Belvacenses canonici contra religiosos viros abbatem et fratres Cariloci proponerent querimoniam, quod silvam, quae Nigra valiis dicitur, a quibusdam eorum ignorante capitulo pro X. libris, XL. marchas tunc valentem, comparassent, post multas commissiones tandem causam ipsam venerabili fratri nostro Morinensi episcopo et dilecto filio decano Remensi sub certa forma commisimus terminandam, adiicientes in literis, quod, si uterque eiusdem causae cognitioni interesse nequiret, alter adhibitis sibi viris prudentibus et honestis in eodem negotio procede non differret. Quum itaque decanus partes ad suam propter hoc praesentiam convocasset, abbas et monachi non ad agendum vel respondendum, sed ad quaerendum dilationes nuncios destinarunt, asserentes, quod ad nos miserant

et ad audientiam nostram appellaverant. Verum quia in literis appellatio remota fuerat, Tandem decanus in illius causae cognitione processit. Et quum ei per testes canonicorum Belvacensium constitisset, quod praedicti fratres silvam minus dimidia iusti pretii comparassent, pronunciavit, venditionem non tenere, et silvam ipsam Belvacensi ecclesiae adiudicans, canonicos in possessionem induxit. Nunciis igitur utriusque partis in nostra propter hoc praesentia constitutis, dum ex parte canonicorum instanter et sollicite sententia peteretur auctoritate apostolica confirmari, habita deliberatione cum fratribus nostris et aliis sapientibus, qui legibus iurati iudicant, eandem sententiam iuri contrariam intelleximus. Quia vero in arbitrio emptoris est, si velit supplere iustum pretium, aut venditionem rescindere, quum res minus dimidia iusti pretii comparatur: sententiam ipsam tanquam iuri contrariam irritantes, possessionem monachis iudicavimus esse reddendam, salva omni quaestione canonicis super deceptione pretii, vel consensu capituli in venditione non habito, et alia causa rationabili, quam canonici contra monachos duxerint proponendam. "

41. Quinque Compilationes Antiquae, ed. A. Friedburg (Graz: Akademische Druck-U. Verlagsanstalt, 1956), Compilatio I, III, 15, C. 4, p. 31.

42. Gregory IX, Decretals, loc. cit.

43. Innocent III, Regesta, Lib. IX, C. 56, in P. L., CCXV, 868-869: Episcopo Maurianensi, et Praeposito Ulciensi, et Decano Heltonensi, Taurinensis et Maurianensis Dioeceseon. Quod dimittant feudum Javen Monasterio Clusin. (Laterani, iv Kal. Aprilis.) Ad nostram noveritis audientiam pervenisse quod, cum Clusin. monasterium depressum esset onere maximo debitorum, dilecti filii . . . abbas et conventus, ejusdem villam, quae Javen vulgariter appellatur, necessitate coacti, Bonevardo laico

concesserunt in feudum, tali conditione apposita, quod idem laicus octoginta libras persolveret, pro quibus eadem villa exstiterat obligata, quod idem non distulit effectui mancipare. Verum, quia praedictum monasterium est, sicut dicunt, enormiter in hoc laesum eo, quod de redditibus villae praedictae conventus diebus singulis unum ferculum, et in festis duodecim lectionum, pisces, vel aliud aequivalens percipere consuevit, nobis humiliter supplicarunt, ut feudum praedictum faceremus ad utilitatem monasterii revocari, praesertim, cum idem laicus primo anno de ipsius fructibus ultra summam receperit praetaxatam, et per multos postmodum annos sumpserit ejus fructus. Nos igitur, sic volentes gravaminibus praedicti monasterii providere, quod alii non videamur injuriam irrogare, discretioni vestrae per apostolica scripta mandamus, quatenus, inquisita plenius veritate, si praedictum monasterium propter hoc inveneritis enorme dispendium incurrisse, saepedictum laicum, ut, pecunia, quam pro exoneratione praedicti feudi, seu etiam pro utilitate ipsius monasterii, noscitur expendisse, ab eisdem abbate ac conventu recepta, cum sibi fructus percepti hactenus sufficere debeant pro labore, praedictum feudum eidem monasterio dimittat liberum et quietum, monitione praemissa, per censuram ecclesiasticam, appellatione postposita compellatis. Nullis litteris veritati, etc. Quod si non omnes . . . tu, ea frater, etc. Datum Laterani, iv Kal. Aprilis, anno nono."

44. Compilatio, III, III, 13, C. 2, p. 122.

45. Gregory IX, Decretals, III, 13, C. 11, C.I.C., II, 212. (In A. Potthast, Regesta Pontificum Romanorum (Berlin: Rudolphus de Decker, 1874-1875), Vol. I, 2729.

46. It should be stressed, however, that Ad nostram noveritis was not concerned with a regular sale.

47. There were, in fact, two letters. The first (Ne causa) acknowledged the receipt of the complaint and described the rule of law which would be applied, this being the standard principle of laesio enormis See Innocent III, Regesta, Lib. X, c. 145, in P. L., CCXV, cols. 1243-1244. Ne causa does not appear in later compilations. The final judgment of the case appeared in the second letter, Quum Causa, which repeated the rule of law stated in the first and mentioned also the nature of the testimony which was to be used for the final assessment needed to calculate the supplementary payment.

48. Innocent III, Regesta, Lib. X, c. 162, in P. L., CCXV, cols. 1255-1256. This is the final statement on the matter and one that appears in the great collections: "Episcopo et Archdiacono Urbevetano. Committitur eis causa quaedam Viterbiensis. (Apud S. Petrum, v. Kal. Decembris.) (42) Cum causa, quae inter oeconomum monasterii Sancti Martini de Monte Viterbiensis ex parte una, F. et R. cives Viterbienses ex altera, super accasamentis quondam Tornampartis et terris de Rasiare ac Salicis, et molendino ubi facta est galcheria, vertebatur, coram nobis fuisset aliquandiu ventilata, nos, intellectis rationibus utriusque partis et attestationibus diligenter inspectis, cum constitisset nobis monasterium ipsum in praedictarum rerum venditione ultra dimidiam justi pretii fuisse deceptum, sententiando decrevimus ut praefati cives aut recepto pretio possessiones restituerent memoratas, aut supplerent quantum constaret legitime venditionis tempore justo pretio defuisse. Cum igitur . . . abbas et fratres ejusdem loci probare per testes intendant quanti pretii venditionis tempore possessiones fuere praedictae, praesentium vobis auctoritate mandamus quatenus infra trium mensium spatium recipientes,

appellatione remota, testes quos alterutra partium duxerit producendos, audiatis causam, et eamdem remittentes ad non sufficienter instructam, praefigatis partibus terminum competentem in quo nostro se conspectui repraesentent sententiam recepturae. Si vero pars monasterii ad hunc probandum articulum eosdem testes produxerit quos ad alium probandum produxit, vos nihilominus eos recipere procuretis, quoniam aliud est probasse deceptionis excessum, et aliud probare quantitatem valoris. Datum Romae apud Sanctum Petrum, v Kal. Decembris, anno decimo."

Ibid., CLXV, cols. 1243-1244. This is the first letter: "Abbati et Conventui S. Martini de Monte. De revocandis alienationibus monasterii. Ne causa sententiali calculo diffinita in recidivae contentionis scrupulum relabatur, judicialis diffinitio atramentali debet calamo exarari. Praesentibus ergo litteris innotescat quod nos auditis et intellectis attestationibus, instrumentis, et allegationibus universis propositis coram nobis in causa quae vertebatur inter oeconomum vestrum ex parte una et Fortiguerram ac Raynucium filium Poli Guiddoti cives Vitterbienses ex altera super accasamentis quondam Tornampart. et terris de Risiare ac Salicis cum molendino ubi facta est qualkeria, sententiam Jacobi et Matthaei judicum Vitterbien. contra monasterium inique prolatam omnino cassamus, et sententiam a ven. f. n. R. civitatis Castellanensis episcopo et P. Ismaelis tunc abbate Sancti Andreae contra praefatos cives minus provide promulgata corrigimus in hunc modum, videlicet quod, cum constet monasterium vestrum in venditione praedictarum rerum ultra dimidiam justi pretii fuisse deceptum, praefati cives aut recepto pretio possessiones restituant memoratas, aut suppleant quantum legitime ostendetur tempore venditionis justo pretio defuisse. Nulli ergo . . . nostrae diffinitionis, etc. . . .

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Si quis autem, etc. Datum. ut in alia."

49. Compilatio, III, III, 14, c. 2, p. 122.

50. It is split into two parts in the Decretals, III, 17, c. 6 and II, 20, c. 42, C.I.C., Vol. II, col. 520, col. 333.

51. See above, pp. 37-43.

52. Bernardus Papiensis, Summa Decretalium, ed. E.A.T. Laspeyres (Ratisbon: G. Iosephus Manz, 1860), Liber III, Tit. XV, No. 6, p. 82. "Illud in summa notandum, quod si venditor deceptus sit ultra dimidiam iusti pretii et de ipsa deceptione queratur, in potestate emtoris est, vel iustum pretium supplere vel rescindere venditionem, ut infra eod c ult. (Gr. c. 3 III, 12 et Cod de rescind vend L ult); forte idem dici poterit e contrario de emtore ultra dimidiam decepto."

53. Vincentius Hispanus, Apparatus to Compilatio III, Paris Bibl. Nat. Lat. 14611, fol. 93^{rb}, III, 14, c 2. "Quum causa. deceptum Quid si cives [i.e., the buyers] sint decepti ultra dimidiam in pretia agant. ut refundatur eis de pretio. ut solvatur contractus." Cited by Baldwin, "Medieval Theories," p. 44, n. 14.

54. Bernardus Botone, Glossa Ordinaria to the Decretals (Lyons: P. Landry, 1606), III, 17, c. 6, col. 1126. Cum causa: "Dimidiam. Istud sic est intelligendum: ecce, res valet decem, vendidisti illam pro quattuor: patet quod tu es deceptus in sex: sed sunt plus quam dimidia iusti pretii, quod est quinque, & ita est deceptus in dimidia, quae est quinque & plus, scilicit uno; sufficit si illud plus valet unum bologninum tantum & hoc intellige in venditore qui decipit in pretio, et sic etiam in emptore decepto pone quod res valeat decem & emptor soluit.

sexdecim, pot[est] agere ad pretium recipiendum q[uo]d plus dedit, vel in totu[m] recedere a contractu: q[uod] sic patet, q[ui] est deceptus ultra dimidiam iusti pretii. soluit em[ptor] sex ultra dimidia[m] iusti pretii quod fuit decem. Si enim deciperetur in quinque tantum non ageretur; quia quinque sunt dimidia decem. & ita non est deceptus emptor in aliquo ultra dimidia[m] iusti pretii, sed quia sex dedit, ultra dimidiam deceptus est, ideo aget. Azo. intelligit ista verba ita. Alii dicunt quod necessarium est ut duplum iusti pretii & ultra dederit emptor: ut ecce, res valet decem, et ego emi pro viginti unum, quod nulla lex dicit: & nihil est quod dicu[nt]: quia hic decipitur emptor in plus quam sit totu[m] iustum pretium, sed primu[m] verius est."

55. Henricus de Segusio, Cardinalis Hostiensis, Summa (Aalen: Scientia, 1962), III, 17, c. 7, fol. 149: "Si in pretio quis deceptus sit non ex proposito contrahentis: si quide[m] ultra dimidia[m] iusti pretii agit deceptus ut restituatur scilicet q[uod] rescindat[ur] co[n]tractus: ut suppleat[ur] iustu[m] pretium data elec[tione] decipienti. C. de rescin. vendi. [C. 4, 44, 2] s[ecundu]m Azo. Sed certe l[ex] illa dicit q[uod] electio est emptoris q[ua]n[do] minus dimidia iusti pretii co[m]parat[ur]. j eo cū causam [See above p. 71, n. 40 and p. 74, n. 48.] ergo a contrario si ultra dimidia[m] iusti pretii ut si emptor deceptus sit dabitur electio venditori sicut intelligit Azo. Emit[ur] aut[em] res minus dimidia iusti pretii si res valet .X. ve[n]dit[ur] p[ro] .V minus uno denario. Sic decipitur ve[n]ditor sed si valet .X. emat[ur] p[ro] XV denario deceptio

est ultra dimidia[m] iusti p[re]tii. Sic decipit[ur] emptor s[ecundu]m Azo. Alii dicu[n]t q[uod] tu[n]c sit deceptio ultra dimidiam iusti p[re]tii q[ua]n[do] res q[uae] valet .X. emit[ur] .XXI. sed s[e]n[tent]ia Azo verior est. . . ."

56. See Baldwin, "Medieval Theories," p. 45 n. 18. He also cites Hostiensis' four-volume Decretalium Librum Commentaria (Venice, 1581), III, 17, c. 6, Vol. III, fol. 58^{vb}. Quum Causa. dimidiam, a work very difficult to locate.

57. Innocent IV, Apparatus super Quinque Libris Decretalium (Strassburg, 1478), III, 17, c. 6, p. e33. "Qum causa [see above p. 74, n. 48] recipio C de rei ven l ii [C. 4, 44, 2] Restituerent cum quis decipitur ultra dimidiam iusti precii agi potest ut vel rescindatur contractus v[el] ut suppleatur p[re]cium actione ex contractu. . . . Est autem decept[us] ultra dimidiam qui rem valentem x dedit p[ro] quattuor. dicunt q[uo]d eciam qui rem valentem septem dedit p[ro] quattuor." Cf. above p. 64, and n. 16.

58. R. Tawney, Religion and the Rise of Capitalism (New York: Mentor Books, 1954), pp. 42-43.

59. Accursius, Commentariis, C. 4, 44, 2, Vol. IV, col. 920: "Sed qualiter sciam quando excedit? Respon[deo] non per hoc q[uod] duo vel tres volunt tantu[m] dare. quoniam precia rerum non co[n]stituuntur ex adfectione singuloru[m]: ut D[igestum] ad legem Falc[idiam] .l. precia et D[igestum] ad legem Falc[idiam] .l. precia et D[igestum] ad legem Aquil[iam] si servum meum." The passages in question are D. 9, 2, 33 and D. 35, 2, 63:

D. 9, 2, 33: "Paulus libro secundo ad Plautium. Si servum meum occidisti, non affectiones aestimandas esse puto, veluti si

filium tuum naturalem quis occiderit quem tu magno emptum velles, sed quanti omnibus valeret, Sextus quoque Pedius ait pretia rerum non ex affectione nec utilitate singulorum, sed communiter fungi: itaque eum, qui filium naturalem possidet, non eo locupletiorem esse, quod eum plurimo, si alius possideret, redempturus fuit, nec illum, qui filium alienum possideat, tantum habere, quanti eum patri vendere posset. in lege enim Aquilia damnum consequimur: et amisisse dicemur quod aut consequi potuimus aut erogare cogimur."

D. 35, 2, 63: "Paulus libro secundo ad legem Iuliam et Papiam. Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur. nec enim qui filium naturalem possidet tanto locupletior est, quod eum, si alius possideret, plurimo redempturus fuisset, sed nec ille, qui filium alienum possidet, tantum habet, quanti eum patri vendere potest, nec exspectandum est, dum vendat, sed in praesentia, non qua filius alicuius, sed qua homo aestimatur, eadem causa est eius servi, qui noxam nocuit; nec enim delinquendo quisque pretiosior fit, sed nec heredem post mortem testatoris institutum servum tanto pluris esse, quo pluris venire potest, Pedius scribit: est enim absurdum ipsum me heredem institutum non esse locupletiorem, antequam adeam, si autem servus heres institutus sit, statim me locupletiorem effectum, cum multis causis accidere possit, ne iussu nostro adeat: adquirit nobis certe cum adierit, esse autem praeposterum ante nos locupletes dici, quam adquisierimus, Cuius debitor solvendo non est, tantum habet in bonis, quantum exigere potest. Nonnullam tamen pretio varietatem loca temporaque adferunt: nec enim tantidem Romae et in Hispania oleum aestimabitur nec continuis sterilitatibus tantidem,

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quanti secundis fructibus, dum hic quoque non ex momentis temporum nec ex ea quae raro accidat caritate pretia constituantur."

60. Baldwin, "Medieval Theories," p. 21.

61. P. Oertman, Die Volkwirtschaftslehre des Corpus Juris Civilis (Berlin, 1891), pp. 39ff. and Baldwin, "Medieval Theories," p. 20. Satisfactory definitions are in Thayer, Laesio Enormis, p. 322 and especially p. 332, n. 5.

62. D. 35, 2, 63 (2).

63. D. 35, 2, 1: Ad legem Falcidiam. "Paulus libro singulari ad legem Falcidiam. Lex Falcidia lata est, quae primo capite liberam legandi facultatem dedit usque ad dodrantem his verbis; 'qui cives Romani sunt, qui eorum post hanc legem rogatam testamentum facere volet, ut eam pecuniam easque res quibusque dare legare volet, ius potestasque esto, ut hac lege sequenti licebit.' secundo capite modum legatorum constituit his verbis: 'quicumque cives Romanus post hanc legem rogatam testamentum faciet, is quantam cuique civi Romano pecuniam iure publico dare legare volet, ius potestasque esto, dum ita detur legatum, ne minus quam partem quartam hereditatis eo testamento heres, capiant, eis, quibus quid ita datum legatumve erit, eam pecuniam sine fraude sua capere liceto isque heres qui eam pecuniam dare iussus damnatus erit, eam pecuniam debeto dare, quam damnatus est.'" It should be noted that "pecunia," means more than money. The Digest itself provides a precise definition: (D. 50, 16, 5) "pecuniae significatio ad ea referatur, quae in patrimonio sunt."

64. D. 35, 2, 37 (1): E. g., "Sed et si heres servum alienum rogatus est manumittere, placuit ut etiam huius pretium ex aestimatione hereditatis deduci debeat." See also

D. 35, 2, 43; 62; and 69.

65. D. 35, 2, 62 (1): "Corpora si qua in bonis defuncti, secundum rei veritatem aestimanda erunt, hoc est secundum praesens pretium: nec quicquam eorum formali pretio aestimandum esse sciendum est."

66. See quotes above, pp.55-59.

67. This conclusion seems to be borne out by many studies in a sort of negative fashion. A number of works on Roman laws of sale have been examined and none of them mention the Lex Falcidia (or the Lex Aquilia) as part of that law. See G. Hanausek, Die Haftung des Verkaufers (Berlin: Hertz, 1883), James Mackintosh, The Roman Law of Sale (Edinburgh: T. and T. Clark, 1907), J. B. Moyle, Contracts of Sale in the Civil Law (Oxford: The Clarendon Press, 1892), V. Scialoja, Compra, Vendita (Esegesi Tit. I, Lib. XVIII del Digesto) Lezioni Stenografate e Compilate dal Dott. G. Pulvirent. Anno Accademico 1906-1907 (Rome, 1907); F. de Zulueta, The Roman Law of Sale (Oxford: The Clarendon Press, 1945).

68. Reference is made to D. 35, 2, 63, (2). See above, 56.

69. D. 9, 2, 2. "Lege Aquilia capite primo cavetur: 'ut qui servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit, quanti id in eo anno plurimi fuit, tantum aes dare domino damnas esto: et infra deinde cavetur, ut adversus infitiantem in duplum actio esset." See also D. 9, 2, 21.

70. The most adequate treatment of the subject, perhaps, is that of N. Mathews, "The Valuation of Property in the Roman Law," Harvard Law Review, Vol. XXXIV, no. 3 (January, 1921), pp. 227-259.

71. D. 10, 3.

72. D. 35, 2, 55. "Idem libro vicesimo digestorum. Cum Titio in annos singulos dena legata sunt et iudex legis Falcidiae rationem inter heredem et alios legatarios habeat, vivo quidem Titio tanti litem aestimare debeat, quanti venire id legatum potest, in incerto posito, quamdiu victurus sit Titius: mortuo autem Titio non aliud spectari debet, quam quid heres ex ea causa debuerit." See also D. 35, 2, 45, 1 and D. 35, 2, 73, 1.

73. E.g., D. 14, 2, 2 (4).

CHAPTER III

THE FRANKISH LINE

1. Fixed Prices

The earliest Frankish pronouncement which may perhaps be classified as a price regulation was issued during the reign of Pippin. On March 2, 744 a capitulary declared that the market of each city was to fashion its measures according to the abundance of the time. (Et per omnes civitatis legitimus forus et mensuras faciat secundum habundantia temporis.)[1] This brief notice may imply that a standard price was set that was not to be changed. The necessary adjustment to low or high yields would be made by altering the quantity received rather than the amount paid; for example, times of shortage, rather than increasing the price would decrease the size of a loaf of bread.

In 794 a law promulgated by Charlemagne and reissued by the Council of Frankfurt, declared that all the types of breads mentioned--wheat, rye, barley, and oat--were to be baked into loaves weighing two pounds each. Moreover, one denarius was the only selling price given. It was the number of loaves which varied and it varied according to the type of flour used. Thus one denarius was to purchase twelve wheat breads or fifteen rye breads or twenty loaves of barley or twenty-five of oats.[2]

This mode of expressing price was used again three years later.

An assembly of Frankish churchmen and noblemen together with Saxons from several regions had gathered in Aachen and, by the authority of Charlemagne, drew up the most elaborate set of prices in Carolingian law. It not only included the greatest variety of products, but set different prices in different regions. Yet all were expressed in a single amount--one solidus. In Westphalia one solidus was to purchase forty bushels of oats or twenty bushels of rye or of barley. Grain prices "in the North" were somewhat higher; a solidus bought only thirty bushels of oats or fifteen of rye or barley. On the other hand, northern prices for honey were the lower ones. There a denarius was to purchase two siclos of honey while in Westphalia the same amount of money bought only 1-1/2 siclos. In all areas the solidus was to purchase a calf in its first year and as its size increased, so would its price. The solidus itself was expressly declared to be the equivalent to twelve silver denarii.[3]

The 794 edict also set prices for grain but it stated them in the manner that would become more typical. The varying figure is the amount of money to be paid; the fixed figure is expressed by "the measure"[4]--a standard quantity recently established (modium publicum noviter statutum). Oats are set at one denarius per modium, barley at two denarii, rye at three, wheat at four. No penalty is threatened against violators, yet an imperial action is described that might well be effective in both preventing overcharging or ending it in areas where it might exist. The edict seems to warn that in places where prices are too high, grain from the imperial stores would be sold. In such sales the prices would be from twenty-five to fifty per cent lower than those declared

as the lawful ceilings. Two measures of oats would be sold for one denarius, a measure of barley for one, of rye for two, of wheat for three.

A decade later, it was flatly stated that imperial dumping would be used to lower prices. Having called upon everyone to pray in all times of difficulty, the law declares that the year of 805-806 being one of famine, each man should give to his people to the best of his ability. Furthermore, his grain should not be sold too dearly. No price is set and no penalty mentioned. Nevertheless, an imperial recourse is threatened that might prevent overcharging or terminate it in those areas where it exists. The edict warns that grain from imperial stores will be sold wherever prices are too high. Doubtless such a threat would be meaningless in the face of general scarcity, but in scattered cases in which local shortages caused high prices, local sellers might moderate their prices rather than face the sudden entrance into their markets of large amounts of grain from the imperial stores which might break or at least sharply reduce their prices.[5]

A few weeks later a second capitulary was issued which, like the first, stated that the year of 805-806 was one of famine; that the capitulary was valid in that year only; and that each churchman and nobleman was to care for his own. But the second capitulary declared precisely what was meant by "sold too dearly." One might not sell a measure of oats for more than two denarii, of barley (and spelta) for more than three, rye flour, and wheat six.[6]

That the price list of 806 was related to the above mentioned capitulary of 805 is clear enough. More problematic is whether there exists any connection between the price lists of 794 and 806. Stated

more specifically: Did the 794 price ceilings still have force in law between 794 and 805? There is some evidence that they did but it is not overwhelming.[7] The law of 794 declares its prices permanent (ut nullus . . . nunquam carius vendat annonam sive tempore abundantiae sive tempore caritatis). On the other hand the 806 measure declared itself in force only for that year of famine (praesente anno, quia per plurima loca fames valida esse videtur . . . non carius vendat nisi. . . .). Again, the prices for 806 seem to be based on those of 794. The prices in the 806 emergency measure have in most cases raised the 794 prices precisely one denarius per measure. Oats have been raised from one denarius to two denarii, barley from two denarii to three, rye from three to four.[8]

Food was not the only article upon which specific prices were set. Price ceilings were published for articles of clothing. A double cape was to be sold for twenty solidi, a single for ten. Marten and otter capes might bring thirty solidi, sable on the other hand only ten. A fine of forty solidi was to be levied on violators--both buyers and sellers. Anyone discovering and denouncing an offender would receive a reward of twenty solidi.[9]

By 813 Charlemagne had not only legislated prices, but had apparently legislated on the right to legislate prices. He named himself as the sole regulator of purchase and sale and declared that no one might act contrary to his command.[10]

In a similar manner, Louis the Pious, at the Council of Paris (in 829), denied the great ones the right to set prices and, in effect, reserved that right to the Emperor. Certain church prelates and nobles,

it was declared, were promulgating edicts which forbade the poor who were subject to them to sell their surplus grain and wine at a price higher than those set forth in those edicts. These poor, the Council disclosed, were being forced to sell their wheat for four denarii. They might sell for much higher prices if their proper liberty was allowed them and they were not prohibited by their seniores from bargaining with others for the sale of their surpluses. Indeed, those who were not denied this lawful right, were currently selling grain for as much as twelve denarii.[11] Henceforth, declared the Emperor in Council, the pauper shall render to his senior only that part of the crop which is due; the rest belongs to the pauper, who, without any hindrance from the seniores, may sell it on such terms as are pleasing to the buyer and seller (and are lawful to all others).[12]

It is difficult, however, to state with precision certain aspects of the price decrees. The 805 and 806 capitularies on grain prices were placed in the collection of Abbot Ansegius in c.827. The wording was altered to some extent and in its later form it seems less like a special measure and more like a piece of permanent legislation.[13] The clause praesente anno, for example, is not found. Nevertheless, it was still described as a famine measure and the prices are the same, wheat being set at six. The decree of 794, on the other hand, clearly states that the rule is to hold for years of good harvest and bad and it puts the wheat price at four. It is that very price that Louis the Pious decries in 829: and he forbids the great nobles and churchmen from insisting on it or on any price. Again, the decree of 829 expressly grants a free market only to the poor. However, it certainly does not

seem likely that they were being granted an exclusive privilege. Finally, it should be stressed that the legislation of 829 insists neither that sales should be made in the open market nor that the market price is mandatory; it does assume that a market price exists and that the poor would sell at that price. But the law only states that the buyer and seller, uninhibited by the powerful, may set a price that is pleasing to themselves.

It seems to be the case then, that the Emperors have expressly demanded that all purchases and sales conform to imperial law and have denied to all others the right to legislate on price. Yet, a generation would pass before an Emperor would set a specific price again--at least insofar as the extant records show--and that would be the last time the Carolingians set price. In 864, Charles II, King of West Francia, declared maximum prices for gold. If the gold were the purest, a pound of it was to sell for no more than 2,880 new and pure silver denarii (duodecim libris argenti de novis et maris denariis). Gold which was imperfectly refined might be sold for 2,400 perfect pennies. Any free man violating the regulation was to be fined 720 denarii (sexaginta solidi); a slave or colonus to be whipped naked.[14]

The gold edict seems to complete the account of Carolingian price ceilings for which evidence is extant. It has been argued, however, that the price of slaves also was regulated. It was supposedly allowed to vary between fifteen and twenty-five solidi. But it is doubtful whether this was the case. The text given to corroborate the point appears in a set of rules on stealing. Of the six rules on stealing slaves (De servis vel mancipiis furatis), the one in question states that if

anyone steals (and sells) a slave worth fifteen to twenty-five solidi (valentem solidos quindecim aut viginti quinque), such as a carpenter, hunter, vine dresser or other skilled craftsman, he must pay seventy solidi.[15] Without an assertion in the law so stating, one must assume a great deal in order to equate "value" with a lawful selling price. The entire set from which this particular rule is drawn does not usually assign a specific value. On the other hand, a relative value is recognized. Thus, for a slave not characterized by any special skill, no value at all is declared and the fine is considerably lower--specifically, thirty-five solidi. The same may be said of other stolen items. No monetary values are set on pigs,[16] yet some are recognized as more valuable than others and so the fines vary. If one steals a one-year old, he will pay a penalty of three solidi. If he steals a two-year old, he will pay a penalty of fifteen solidi. Other types of livestock are similarly expected to have varying values. One may go further. The law seems certain that virtually any item can be evaluated and that its value may be expressed in money. The fines, though related to the value of the items, are not necessarily equal or even proportionate to them. Thus one breaking into a house and taking any item worth two denarii (quod valet duos denarios furaverit), will pay a fine of 1,200 denarii. Should he take an item worth five or more denarii (quod valet quinque aut supra, etc.), his fine will be 1,400 denarii.[17] In short, the law recognizes that some items are more valuable than others, that in some cases the relative value was expressed by the age (really the size) of the item; and in other cases the value was expressed in money as was the case with one type of slave. But there is no reason to

believe that those values were the only prices at which the items might be sold.

Penalties for selling merchandise are imposed only if the merchandise has been stolen. Though the value of the stolen item will, to some extent, govern the fine, the price for which it is in fact sold never enters the case. To the law, it is irrelevant whether the thief sells, frees or kills the slave (occiderit aut vendiderit vel ingenuum dimiserit). And a sale made by a lawful owner is never discussed.[18]

In addition to the prices set, or supposedly set, by the law, for which the evidence is found in the law, Loisel maintains he finds evidence for yet other lawfully set prices. A spear was to sell for two sous; so also a buckler. The price for a helmet was to be six sous; for a dagger or a sword, seven; and for plate armor, twelve. The evidence is found in the Ripuarian law. One might say that these laws express lawful or official values. It is even likely that at the time the law was drawn they were usual prices. But it is doubtful that they were the lawful prices. They are, in fact, the amounts for which one was credited if he used certain items in paying the wergild. Thus, for example, in paying a wergild, one might give a cow in partial payment. The cow could be counted as two solidi. If one gave a helmet, six solidi would be subtracted from the total amount owed. Other items, including all those specified by Loisel, were valued at specified prices. But the law seems to address itself to the problem of paying wergild and says nothing about the prices for which the items listed must be sold.[19]

To be sure, the Frankish government may not have set some of the prices listed by Loisel. But even if the doubtful items be omitted, his collection of prices set by the Carolingians remains more complete than any other. He further maintains that a price established by that government is a just price (juste prix).[20]

None of the particular capitularies presenting the price lists discuss the justness of their prices. Unless one maintains that a judgment on the justness (or unjustness) of a price is not meaningful, a price must be judged just or not just. There is no other alternative. It is not very bold to suggest that the government would not concede that it had itself set unjust prices. Stated differently: If the Carolingians were wont to judge prices as just or unjust, it seems likely that Loisel was correct and that the Carolingians considered the prices they set to be just. And the Carolingians had long since spoken of the just price (iusto pretio), to which we now turn.

2. Real Estate

The term "just price" was used by the Carolingians as early as 776 or 781. A capitulary was issued concerning property sold for a price which was not just (quod res venundasset et non iusto pretio). Where this was the case the buyer and the seller were to come together along with the estimators (estimatores) and the worth of the property was to be judged. If the price was ruled just, the sale was to stand; if not, the money was to be refunded and the property returned to its former owner. (Improvements made by the buyer might be removed by him or a settlement made between him and the seller.)

The law apparently did not have general force. It seems to refer to Italy and to that place only at a certain time, that is, immediately after the Frankish invasion. For the value which is to be set upon the lands is that which they were worth, in good condition, before the Frankish invasion (sicut tunc valebant quando res ipsae bene restauratae fuerunt, antequam nos hic cum exercitu introissemus). Moreover, the seller had to show, not only that he did not obtain a just price (iusto pretio), but that the sale was the alternative to starvation (strictus necessitate famis venditionem fecisset).[21] This particular piece of legislation is, in fact, one of a set of four capitula which refer rather pointedly to an emergency situation.[22] Contracts by which men sold themselves or their wives or children into slavery are declared invalid. Other types of transactions are suspended pending further judgment.[23]

The rule of 776 or 781 not only distinguishes between the just and the unjust price, it also makes a clear distinction between the just price and the lawful price. To be sure, as long as the rule was in force, the actual price for which the property was sold had to be just in order to be judged lawful. If the price was not just (and therefore, under the rule, unlawful), it would be overturned by the courts. This is the entire aim of the law. But the rule itself declares that it only covers sales made during the days of the Carolingian invasion and that sales made after February 20 (776 or 781), will not come under that rule. Consequently, it would seem that for sales made prior to the invasion and those made after February 20, it was not required that selling prices must be just in order to be lawful.

In the late eighth century one spoke of churchmen being tricked into selling property; in the early ninth poor freemen were the victims. The powerful were using "evil tricks" so shrewdly (per aliquod malum ingenium), that the poor had no choice but to sell their land or give it away. The apparent indifference as to whether the property was taken or purchased indicates perhaps that the rule intended to forestall attempts to avoid earlier law by literal interpretation. That is, one might force the owner to relinquish his property, pay him a trivial price and, should complaint be made, claim that one had purchased the property. This seems to be the purpose of the law, for the capitulary itself declares that the Emperor wishes to prevent the poor from being driven by poverty to begging and stealing. The law, of course, would also prevent forced sale even at a fair price. Indeed, as it stands, the law of 805 would allow the seller the right to refuse for any reason including whim.[24]

In 813, the Council of Mainz issued a similar declaration but added other prohibitions and requirements. No one is to use hard times (or shrewd tricks) to cause the poor to sell their property. Neither shall it be taken by force. Therefore, all purchases must be made publicly and before suitable witnesses.[25]

Both Charlemagne's capitulary of 805 and the decree of the Council of Mainz of 813, found their way in numerous collections, official and unofficial. The 805 capitulary was reissued in 832[26] and again in 847.[27] It was also placed into the collection of Ansegius.[28]

The Mainz issue was not in fact the earliest version of the 813 legislation. A few weeks before it came out in Mainz, it had been

published in Arles.[29] In the same year it was issued as an imperial capitulary[30] and two highly abbreviated forms were also issued.[31] Somewhat later a full edition was published in Pavia.[32] Its status there is not clear. The Mainz version was reissued in about 826.[33] Like the capitulary of 805, it was reissued in 847[34] and put in the collection of Ansegius.[35]

Sales were declared unlawful if the prices had been influenced by trickery, by force, or by hunger but these did not exhaust the methods. Military service, too, was used to expedite sales. One who did not wish to sell his property to a high ranking churchman or layman might find himself sent to the Army again and again. This would continue until he was reduced to poverty and "willy-nilly" sold the property or surrendered it. The property having been transferred, service was no longer required.[36]

Not only the poor, it would seem, found that they lost real estate they had intended to keep. In 823, it was declared, or rather conceded, by Lothar, King of Italy and the co-emperor, that royal "curtes" which came into the hands of certain of his subjects would be their property, given three conditions. They must be noble, they must be loyal, and they must have purchased the property for an "appropriate price" or had obtained it in some other "just" fashion.[37]

3. Commodities

Laws governing the pricing of movables were apparently drawn up rather earlier than those covering real estate. The first of them is dated 768. In a single sentence it declares that one traveling to the

Army or to the royal presence was entitled to take grass, water and wood at no cost to himself; that he might take no more of these commodities than was adequate for his own use and that in inclement weather he was entitled to shelter. For whatever else he might need or desire, he must either beg or purchase.[38] A second sentence describes the penalty: a violator of the capitulary will pay triple the composition called for in his law.[39]

Two decades later a similar rule was pronounced in Italy.[40] The complementary items of hospitality and the penalties for violations of it may or may not have differed, but the parties addressed and the essential force of the law were certainly the same. Ecclesiastical and military potentates or anyone else traveling to or from the palace were ordered to refrain from carrying off produce which had not been given to, or purchased by, them.

Sales to the sovereign's agents were, perhaps, not the most typical sort; neither did they fall under the same rules. Most buyers and sellers were not expected to make their transactions in obscure places. In about 820 the law expressly declared that such transactions were to be made in specially designated places--specifically in markets[41] where general commercial intercourse should take place[42] (in mercatibus ubi communia commertia, etc.). But some items, more appropriate to a country house, such as grass or wood, must by their very nature be purchased outside the marketplace. For these items the user will negotiate with his supplier. They will estimate the quantity used and the seller receive the just amount for these items. No question is raised regarding the price of the merchandise sold in the market.

At Pavia, Louis II raised questions concerning transactions between the great and the obscure. When the powerful are at home, they feed their livestock on the pasture or on the hay of the poor. When they travel at the royal command, they demand hospitality in such a fashion that they aggravate the unfortunate condition of the poor. When they journey on their own business they do the same. "How can these matters be rectified?" asked Louis II in 850.[43]

He presented the answers the same year. At home the powerful must cease using the property of the poor; rather must they feed their livestock on their own fields. When they travel on their own business they must maintain the peace and not burden others.[44] But when they journey to the imperial presence, they might rightly expect lodging in the homes they find en route. Such had been the case in a Pavian issue of 787. The decrees of 787 and 850 were similar in other respects. Their wording, to be sure, is quite different. The substance of them, however, is virtually the same. As in the earlier capitulary, those traveling to the royal presence are instructed not to take by force from those with whom they lodge. There is, however, an added refinement. The earlier decree declared that they must not take items they have not purchased (non praesumant . . . tollere . . . si non comparaverint). In the later capitulary they are told that they may take only that which they have purchased for a just price (nihil . . . tollat . . . nisi . . . precio iusto comparet).[45]

A pair of capitula declare penalties for despoiling lands. They seem to correspond to the capitula of 850: one setting the penalty for despoiling lands near his own home; the other for doing it at home. The

penalties are not identical. The precise year in which they were written is not known, but it seems certain that they were drawn at Pavia in the middle of the ninth century. It seems likely that they were drawn for the 850 capitularies mentioned above.[46] One despoiling lands near his own home will make composition and abstain from meat and wine for forty days; one committing the same offence while coming to the palace will make composition and abstain from meat and wine for thirty days.[47]

In 865, Louis II, now Emperor, issued another set of capitula, again concerning the problem of rapine. One of them ordered that those coming to and going from the Emperor's seat should not molest the inhabitants nor take anything from them unless they have paid for it. The inhabitants, for their part, are told not to deny these travelers "roof, fire, water and straw." Then a new aspect is introduced. "Nor," says the decree, are the inhabitants to charge the travelers higher prices than they can charge their neighbors.[48] The regulation is the first law, Roman or medieval, that indubitably prohibits price discrimination.

For almost a century--ceilings aside--price law had been primarily concerned with the seller. The earliest extant regulation protecting the buyer is dated 865 and the wording of that law rather indicates that protection for the buyer was a novel addition to the law. Yet, a capitulary issued one year later clearly expresses the idea that for a given transaction a price can be found and if that price is asked and paid, justice will have been observed by both parties to the transaction.[49] (Et hoc constituimus ut ex utraque parte iustitia servetur.) For a hundred years the capitularies had complained that the Emperors'

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men had not paid, or only partially paid, for the items they had taken. Thus the rule of 866 declared the Emperors' men shall pay what the neighbors pay. The capitularies had complained that the travelers had paid more than the inhabitants. The rule of 866 declared that the inhabitants shall not charge these travelers more than the neighbors pay. It concludes that if the traveler pays the seller not less than the neighbors do, and the traveler is not charged more than the neighbors, "justice will be maintained." Neither the purchaser nor the seller decide that particular price which will properly serve both of them. The "neighbors" collectively, by the prices at which they buy and sell, set the correct price. Pillage, token payment and price discrimination are simultaneously declared unlawful.

"And each will drink the blood of his own arm." "This means," it is explained, "that each will plunder the substance of his brother; this is the prophecy of Isaiah, (9:20) and in our time it is fulfilled." This and similar phrases preface a series of fourteen capitula issued by Carloman in 884 for the purpose of alleviating the various forms of depredation from which France then suffered.[50] So that every reason for rapine may be removed, declared the thirteenth of these capitula, "Parish priests should admonish their flocks not to charge wayfarers more than the price obtainable in the local market." Otherwise, the wayfarers can complain to the priest and by his order the prices will be set "with humanity." "This text clearly equates just price with market price and does not lend itself to a different interpretation."[51] The usual plea for hospitality is present both here and elsewhere in the set.[52]

> Placuit nobis et nostris fidelibus, ut presbyteri suos parrochianos admoneant,ut et ipsi hospitales existant et nulli, iter facienti mansionem denegent; et ut omnis

> occasio rapinae tollatur, nihil carius vendant transeuntibus, nisi quanto in mercato vendere possunt. Quodsi carius vendere voluerint, ad presbyterum transeuntes hoc referant, et illius iussu cum humanitate eis vendant.

It seems likely that the Pavian issue of 865 and 866 had the same price-finding device as this West Frankish capitulary of 884. The earliest one says that the local inhabitants shall not charge travelers higher prices than they charge their neighbors (neque . . . sua carius quam vicinis audeant vendere).[53] The version of 866 carries the same rule (nullatenus carius quam vicinis vendere).[54] The version of 884 says that the prices for the travelers shall be no higher than those obtained in the market (quanto in mercato vendere possunt). In it, as in the 865 and 866 capitularies, is implicit the notion that the local people know and are paying a price which is the same for all of them; that is, they have perfect knowledge of an extant market. In an era characterized by small, comparatively isolated communities, such an assumption would not be unwarranted.

The condition of the traveler-buyer may be quite the opposite. The transaction referred to takes place outside of the market, that is, when the market is not in session. The stranger may not know the current price in that village. The resident, taking advantage of that fact, may charge him a higher price. Or, it may be the case that the traveler knows the price, but the market being closed, he might not have access to any other seller and, therefore, has no choice but to pay for his necessities at the seller's will.

These capitularies seem to address themselves to limited sets of people. The capitulary of 865 spoke of prices for men traveling to

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the sovereign. The 884 issue seems to broaden its scope to cover all travelers. Yet, even the latter specification can be misleading by apparently limiting the implications of the just price only to a specified group of people that is limited in number, e.g., travelers. For if it is the case that when the traveler pays the market or residents' price he is paying the just price, it follows that the "neighbors" are assumed to be paying the just price, and the capitularies, addressing themselves to the special matter of travelers' prices have revealed the universally applicable just price of that period. For one is either traveling or resident.

The similarity between the West Frankish and the Pavian capitularies may not be coincidental. Eight years before the issuance of the West Frankish version, Carloman's grandfather, Charles the Bald, King of West Francia, had been crowned again at Pavia. Thus the two governments were joined for a time under one ruler.

More regulations of the same or similar type were issued. Two came from Pavia. The first, promulgated in 889 soon after the town had been seized by Guy of Spoleto, was designed (as so often had been the case) to protect resident sellers from those who were passing through the town in order to attend an assembly. It was declared that the price must be "suitable" (digno pretio), for such was the ancient custom.[55] Two years later, a set of travelers previously unconsidered (or not expressly specified) were put into the law. These were foreigners, people from another land. Some are dangerous, the law declared, they should be met at the border and escorted through the land. Those items that are necessary to them should be sold to them "not more dearly but according to the practice and custom of the land." If they insist upon

III-19 looting, the local churchman or counts may place them under imperial ban and force them to make the appropriate emendations. If they remain recalcitrant, the local bishop shall excommunicate them immediately.[56]

The comparative and precise comprehension of the last three mentioned laws has been questioned. Stated differently, Baldwin and Schaub have suggested that the 884, the 889 and the 891 capitularies each use a different base to calculate their respective lawful or just price. In each of the three cases, to be sure, the current price is used as the just price. But, states Baldwin, "How this current price was used as the just price is not clear. Often it seems to be equated with the customary practices of the market. The geographical extent of these customary practices varied considerably." Thus the "customary price" in the capitulary of 884 "reproduced the experience of a single market price" (nihil carius vendant transeuntibus, nisi quanto in mercato vendere). The "customary practices" referred to in the 891 capitulary "included the custom of a single region." (Vendere autem eis quae necessaria sunt faciant (episcopi et comites) non plus carum, sed secundum usum et consuetudinem terrae.) The "customary practices" to which reference is made in the 889 capitulary included the practice of many diverse areas (sibi necessaria antiqua consuetudine digno pretio ementes). Schaub expresses a similar idea but describes it in more general terms. These three capitularies, he says, express a "graduating of custom which ranges from the broadest to the narrowest sense."[57]

The meaning of the 884 capitulary is not here debated. Like prior capitularies it declared that the just price was the current price

which "reproduced the experience of a single market." It is not altogether certain, however, that the capitularies of 889 and 891 insist that the just or current price be derived from the practices of an entire region, or from the practices of many diverse areas.

There are in fact several reasons to doubt that the current (or just) price was derived either from an entire region (891) or from many areas (889). First, to be sure not conclusive, the 889 and 891 capitularies thus understood, would not be consistent with the prior, nor the subsequent price legislation.[58] Moreover, the two capitularies in question are not consistent with each other. Pragmatically both would mean that for virtually any item the traveler will pay a different price than the inhabitants. For it goes without saying, inhabitants do pay the local price. Again, a difference amongst several lawful prices at one particular marketplace may itself create a problem. If prices throughout a "region" are running low because there is a bumper crop, the traveler would pay a low price even in a local and remote market area of that region in which prices are high. That remote market area might be suffering a local food shortage due, for example, to a crop-burning during a siege. If the farmer has no price compensation for a sharply reduced crop, his catastrophe has been multiplied.

More important are the very words of the two capitularies. It has been maintained that the proper price of the 889 capitulary is derived from many "diverse areas." Indeed, the capitulary does use the expression "diverse area." But the phrase is not used in reference to a variety of prices or areas in which the prices are charged. It refers to the domiciles of those who are traveling to see the King. Yet,

despite the variety of their places of origin, the rules set down for all who are going to see the ruler are identical: They shall not exercise rapine; rather shall they buy their necessities according to the ancient custom for a suitable price. It may be stressed that throughout the greater part of the capitulary the writing is in the plural (e.g.: pertranseuntes, exerceant, conveniunt, et al.). The "suitable price" and "ancient custom," however, are in the singular. It would not seem that the price or the custom relevant to it varies from man to man wherever his place of origin. Similarly, the regulation of 891 speaks of many people and many places (eorum terminos, noluerint, exteros, et al.). Yet when it speaks of the price it speaks only of one (non plus carum, sed secundum usum et consuetudinem).

Finally, it seems to have gone unnoticed that the two supposed geographical detriments of the lawful prices (consuetudinem terrae 891; diversis ex partibus 891) not only "varied considerably" in "geographical extent," they refer to the opposite parties of the transactions. The single region (terra) refers to the general location of the sellers. But the "diverse areas" of the 889 capitulary refer to the homes of the buyers and only the buyers (a most unlikely legal source of prices one might add).

There is, then, no reason to assert that according to the capitularies of 889 and 891 there are different proper prices for a given item at one time in the same place. Rather does it seem to be the case that whatever the base from which prices are calculated, it is a single standard. Moreover, according to the text of the two laws in question, the standard was not new. Rather it is called a "usage," a "custom"

or even an "ancient custom."[59] But the older Carolingian capitularies express only one formula to calculate a proper price for a traveler to pay or for a seller to charge and that was the price current in the local market.

The issues of 889 and 891 were new in respect to penalties. In 889 excommunication was added to the penalties of non-payers. In 891, it was declared that no composition had to be paid by one who killed an offender. Severe penalties were declared for counts who did not enforce the law.[60]

The term "market" has been understood in a specific modern sense: a formal organized gathering of buyers and sellers of goods, a gathering where the buyers are legally free to bid and the sellers free to ask whatever price they choose, but where at any given time only one (or no) price will have been struck at which buyers and sellers are willing to do business. That there were, in the ninth century, designated places where goods were bought and sold and that there was a particular price at any given time at which transfers of property occurred has already been shown. The rest indeed would be drawn by common sense inference, but such inference is not necessary. A capitulary describing the admission to, and activity at, a particular market reveals that a Carolingian market in 903-906 had all the essentials of a modern market, or rather, that the modern market has preserved the essentials of the Carolingian market: the area designated for the market seems usually to have been the same and its meetings quite regular. Within the area of the market, the seller has license to ask whatever price is pleasing to him and the buyer to offer whatever amount pleases himself. A lawful sale will occur when

a price is struck which is pleasing to both of them (quantocumque meliori precio venditor et emptor inter se dare voluerint res suas). But the transactors will have full view of all transactions taking place at that time and so will know if they are paying too much or selling too cheaply. For the law clearly states that all transactions in the entire area must take place within this specified marketplace.[61]

The description of the market procedure is quite brief, but brief as it is (thirty-six words) it has, as it were, a theme which it repeats a number of times. The marketers may "exchange . . . freely, buy and sell freely and safely," "without any decrees of the count (bannum)," "without any hindrance of anyone." In a very certain sense, the rule is a "positive" statement of many of the laws written over the prior century. For "free" must be taken at least in its simplest sense: uncoerced. Both the buyer and the seller shall be uncoerced and much of the price law is the prohibition of the use of coercion by one of the parties to the transaction to influence the price. But it is not only the use of coercion that may invalidate a sale. All of the rules invalidate sales in which one of the parties to the transaction has been placed at a disadvantage either by his general condition or by the other party. Thus, under the Carolingian eye, come sales made by starving sellers or by peasants whipped or sent to the army too often or even by an unwilling or unaware king. Nor may the seller take advantage of the ignorance or hunger of the buyer. The price, in short, should not reflect the fact that one of the parties has or obtains an advantage over the other and can, therefore, dictate the price. This rule holds even if the disadvantaged party is for the time willing to yield to his

difficult situation. The price should not reflect the simple will of one or even both of them.

Of all the price laws of the ninth century, the West Frankish capitulary of 884 was surely the most articulate. Its purpose was merely to protect travelers, but in so doing, it expressed the just price of the era in its clearest formula: "quanto in mercato vendere possunt." And, indeed, this capitulary holds a unique place in the history of medieval commercial law. In one sense, it was the culmination of a series promulgated by the Carolingians which begins, perhaps, in the middle of the eighth century. In the intervening years, laws both of a more general and more special nature were issued both for the protection of the buyer and the seller. By 865, price discrimination had been expressly forbidden. It was in 884 that the market price was explicitly declared the just price although other of the medieval empire's laws had either expressed, or apparently tried to express, that principle with such expressions as dignum pretium, iustitia, and iustum pretium.

In another sense, the capitulary of 884 has some relation to the more remote past: its fundamental formula "quanto in mercato vendere possunt," is quite similar to those phrases often found in Justinian, "quantum vendere possunt" and "quanti veniri possunt."[62] It is fairly certain that the Carolingian law has put the formula to new use. No longer was it used, as in Justinian's time, to assess property for the courts to use in certain types of settlement. In the Carolingian law it was declared the just price.

Not only did the capitulary of 884 have connections real and apparent with the past, it had an unquestionable connection with the future.

III-25 In about 900 A. D., it appeared practically unaltered in the Libellus de Ecclesiasticis Disciplinis of Regino of Prum.[63] In the next century Burchard of Worms[64] included it in his collection of laws. Ivo of Chartres' Decretum[65] contained it also. Before the twelfth century ended, it had been placed in the First Compilation.[66] In 1234, in a form close to the original, it was entered into the Decretals.[67]

FOOTNOTES TO CHAPTER III

1. A. Boretius and V. Kraus (eds.), Capitularia Regum Francorum (cited hereafter as Capitularia), M.H.G., Legum, Sec. II (Hanover: Impensis Bibliopolii Hahniani, 1883), Vol. I, p. 30, No. 12, chap. 6.

2. Capitularia, Vol. I, p. 74, No. 28, chap. 4: "Si vero in pane vendere voluerit, duodecim panes de frumento, habentes singuli libras duas, pro denario dare debeat, sigalatius quindecim aequo pondere pro denario, ordeaceos viginti similiter pensantes, avenatios viginti quinque similiter pensantes."

3. Ibid., Vol. I, p. 72, No. 27, chap. 11: "Illud notandum est quales debent solidi esse Saxonum: id est bovem annoticum utriusque sexus autumnali tempore, sicut (in stabulum) mittitur, pro uno solido; similiter et vernum tempus, quando (de stabulo) exiit, et deinceps, quantum aetatem auxerit, tantum in pretio crescat. De avena vero Bortrinis pro solido uno scapilos quadraginta donant, et de sigale viginti; septemtrionales autem pro solidum scapilos triginta de avena et sigale quindecim. Mel vero pro solido Bortrensi sigla una et medio donant; septemtrionales autem duos siclos de melle pro uno solido donent. Item ordeum mundum sicut et sigale pro uno solido donent. In argento duodecim denarios solidum faciant. Et in aliis speciebus ad istum pretium omnem aestimationem (conpositionis sunt)."

4. Ibid., Vol. I, p. 74, No. 28, chap. 4: "Statuit piissimus domnus noster rex, consentienti sancta synodo, ut nullus homo, sive ecclesiasticus sive laicus sit, ut nunquam carius vendat annonam, sive tempore abundantiae sive tempore caritatis, quam modium publicum et

noviter statutum de modio de avena denario uno, modio ordii denarius duo, modio sigalo denarii tres, modio frumenti denarii quattuor. . . . De vero anona publica domni regis, si venundata fuerit, de avena modius II pro denario, ordeo den. I, sigalo den. II, frumento modius denar. III. Et qui nostrum habet beneficium, diligentissime praevideat, quantum potest Deo donante, ut nullus ex mancipiis ad illum pertinentes beneficium famen moriatur; et quod superest illius familiae necessitatem, hoc libere vendat iure praescripto." See also A. Werminghoff (ed.), Concilia Aevi Karolini cited hereafter as Concilia, M.H.G., Legum, Sec. III (Hannover and Leipzig: Impensis Bibliopolii Hahniani, 1908), Vol. II, p. 166.

5. Ibid., Vol. I, pp. 122-123, No. 44, chap. 4: "De hoc si evenerit fames, clades, pestilentia, inaequalitas aeris vel alia qualiscumque tribulatio, ut non expectetur edictum nostrum, sed statim depraecetur Dei misericordia. Et in praesenti anno de famis inopia, ut suos quisque adiuvet prout potest et suam annonam non nimis care vendat; et ne foris imperium nostrum vendatur aliquid alimoniae."

6. Ibid., Sec. II, Vol. I, p. 132, No. 46, chap. 18: "Consideravimus itaque, ut praesente anno, quia per plurima loca fames valida esse videtur, ut omnes episcopi, abbates, abbatissae, obtimates et comites seu domestici et cuncti fideles qui beneficia regalia tam de rebus ecclesiae quamque et de reliquis habere videntur, unusquisque de suo beneficio suam familiam nutricare faciat, et de sua proprietate propriam familiam nutriat; et si Deo donante super se et super familiam suam, aut in beneficio aut in alode, annonam habuerit et venundare voluerit, non carius vendat nisi modium de avena dinarios duos, modium unum de

ordeo contra dinarios tres, modium unum de spelta contra denarios tres si disparata fuerit, modium unum de sigale contra denarios quattuor, modium unum de frumento parato contra denarios sex. Et ipsum modium sit quod omnibus habere constitutum est, ut unusquisque habeat aequam mensuram et aequalia modia."

7. For the question of continuation beyond 805-806, see above.

8. The exception is wheat which goes up from four to six. Even this change, in its fashion, is quite consistent with the others. If the amount of increase (i.e., one denarius) stays absolutely constant, then the higher the original prices of the various grains, the smaller the increase. Thus oats have gone up 100 per cent, barley 50, and rye only 33-1/3 per cent. An increase of one would have brought a 25 per cent increase to the wheat. Instead, an increase of two is granted wheat thus bringing the price up 50 per cent.

9. Ibid., Vol. I, p. 140, No. 52, chap. 5: "De emptionibus et venditionibus, ut nullus praesumat aliter vendere et emere sagellum meliorem duplum viginti solidis et simplum cum decem solidis; reliquos vero minus; roccum martrinum et lutrinum meliorem triginta solidis, sismusinum meliorem decem solidis. Et si aliquis amplius vendiderit aut empserit, cogatur exsolvere in bannum solidos quadraginta, et ad illum qui hoc invenerit et eum exinde convicerit solidos viginti." Ibid., Vol. I, p. 139, No. 51, chap. 7: "De roccis et sagis."

10. Ibid., Vol. I, p. 146, No. 59, chap. 10: "Nullus homo praesumat aliter vendere aut emere vel mensurare nisi sicut domnus imperator mandatum habet."

11. It has been tentatively suggested that the nobility was using the 794 edict to their own advantage. The wheat price they enforced

was precisely that which set in 794--four denarii per measure of wheat. Moreover, the capitulary says that these nobles soleant edictum inponere. If this suggestion is correct the edictum in question is the capitulary of 794 now being used by the great to force down prices to their own advantage.

12. M.G.H. Leges, Sec. III, Concilia, Vol. II, p. 645, No. 50, chap. 52: "De interdictu quodam, quo apud plerasque provintias pauperes adgravantur, ab imperiali clementia prohibendo. Non solum rumore, sed etiam venerabilium virorum relatu comperimus, quod in quibusdam occidentalibus provinciis suadente avaritia episcopi et comites et ceteri praelati pauperibus sibi subiectis soleant edictum inponere, ut nullus illorum tempore messis modium frumenti nec tempore vindemiae modium vini maiori praetio, nisi quod ab eis constituitur, vendere praesumat. Quod si quispiam illorum facere praesumpserit, et paupertati suae magnam iacturam patitur, insuper etiam acribus verberibus flagellatur. Unde fit, ut, cum aliis modius frumenti duodecim denariis et modius vini viginti denariis venumdari possit, huiuscemodi seniores modium frumenti ad quattuor et modium vini ad sex sibi extorqueant denarios. Quae res, quia impietatis iniustitiaeque plena est, necesse est ut piissimi principis auctoritate inhibeatur, quoniam verendum est, ne, dum his et his similibus gravaminibus pauperes adteruntur, ira aeterni iudicis non solum facientibus, sed etiam consentientibus et corriegere nolentibus accumuletur, quatenus pauperibus libertas tribuatur, ut redditis senioribus suis quae iuste reddenda sunt, reliqua, quae sibi supersunt, liceat aliis, prout pactio vendentis et ementis grata fuerit, absque prohibitione seniorum suorum distrahere."

13. Ansegius, Caroli Magni Ludovici et Lotharii Imperatorum

Capitularia, Lib. I, chap. 126, P. L. XCVII, col. 530; Capitularia, Ansegii Abbatis Capitularia Collectio, M.H.G., Legum, Sec. II, Vol. I, p. 411.

14. Capitularia, M.G.H., Legum, Sec. II, Vol. II, p. 320, No. 273, chap. 24: "Ut in omni regno nostro non amplius vendatur libra auri purissime cocti, nisi duodecim libris argenti de novis et meris denariis. Illud vero aurum, quod coctum quidem fuerit, sed non tantum, ut ex eo deauratura fieri possit, libra una de auro vendatur decem libris argenti de novis et meris denariis. Et omnimodis provideant tam comites, quam ceteri omnes ministri rei publicae, ne aliqua adiectione vel fraude per occasionem aliquid amplius vendatur, sicut de suis honoribus volunt gaudere. Et quicumque hanc commendationem nostram aliquo ingenio infirmare vel fraudare seu aliter immutare inventus fuerit, si liber homo fuerit, bannum nostrum, id est sexaginta solidos, componat; colonus seu servus nudus cum virgis flagelletur."

15. G. H. Pertz, Pactus Legis Salica, Capitularia, M.G.H. Legum, Sec. I, Leges Nationum Germanicarum (Hanover: Impensis Bibliopolii Haniani, 1835), Vol. I, p. 290, Tit. 11, Cap. 5: "Si quis servum aut ancillam valentem solidos quindecim aut viginti quinque furaverit aut vendiderit, seu porcarium aut fabrum, sive vinitorem vel molinarium, aut carpentarium sive venatorem, aut quemcunque artificem, bis mille octingentis denariis, qui faciunt solidos septuaginta, culpabilis judicetur, excepto capitale & delatura."

16. Ibid., Vol. I, p. 284, Tit. 2, chaps. 8-9: "Si quis porcellum anniculum furaverit, centum viginti denariis, qui faciunt solidos tres, culpabilis judicetur, excepto capitala & delatura."

"Si quis porcum bimum furaverit, sexcentis denarios, qui faciunt solidos quindecim, culpabilis judicetur, excepto capitale & delatura."

17. Ibid., Vol. I, p. 291, Tit. 12, chaps. 3-4: "Si quis ingenuus casam effregerit, & quod valet duos denarios furaverit, mille & ducentis denariis, qui faciunt solidos triginta, culpabilis judicetur, excepto capitale & delatura."

"Si vero quinque aut supra quinque denarios furaverit, mille & quadringentis denariis, qui faciunt solidos triginta quinque, culpabilis judicetur, excepto capitale & delatura."

The fines may differ only because of value but also because of the status of the thief or of the owner."

18. Ibid., Vol. I, p. 290, Tit. 11, chap. 3: "Si quis servum alienum occiderit aut vendiderit, vel ingenuum dimiserit, mille & quadringentis denariis, qui faciunt solidos triginta quinque, culpabilis judicetur, excepto capitale & delatura."

19. G. H. Pertz (ed.), Lex Ribuaria, M. G. H. Legum, Sec. I, Leges Nationum Germanicarum (Hanover: Impensis Bibliopolii Hahniani, 1835), Vol. I, pp. 231-232: "Si quis weregeldum solvere coeperit, bovem cornutum videntem et sanum pro 2 solidis tribuat. Vaccam cornutam videntem et sanam per tres solidos tribuat. Equum videntem et sanum per duodecim solidos tribuat. Equam videntem et sanam pro 3 solidis tribuat. Spatam cum scoglio pro septim solidis tribuat. Spata absque scoglio per tres solidos tribuat. Bruina bona pro 12 solidis tribuat. Helmo conderecto pro sex solidis tribuat. Bagnbergas bonas pro sex solidis tribuat. Scuto cum lantia pro 2 solidis tribuat. Aucceptorem non domito per 3 solidos tribuat. Cummorsum gruarium pro sex solidis tribuat. Aucceptorem mutatum pro 12 solidis tribuat."

20. S. Loisel, Essai sur la législation économique des Carolingiens d'après les Capitulaires (Caen: 1904), pp. 140-141: "Les

Carolingiens ont, à diverses époques, fixé le prix des métaux précieux, des armes, des fourrures, des tissus, du bétail, des esclaves, des instruments de travail, et des denrées." See also, p. 142.

21. Phrases like, "strictus necessitate famis" are used four times. In the case of church property it mentions famine and a "clever trick" as grounds for setting aside a transaction.

22. Capitularia, M.G.H., Legum, Sec. II, Vol. I, pp. 187-188, No. 88, chap. 2: "Qui pulsat, quod res venundasset et non iusto pretio, accedant ambe partes super res quas venundavit, et existimatores cum ipsis, et rememorent et adpretient res ipsas, sicut tunc valebant quando res ipsae bene restauratae fuerunt, antequam nos hic cum exercitu introissemus. Et si res adpretiata fuerint iusto pretio, sicut in ipsa cartula legitur quod res ipsas legitimo pretio venundasset, sicut tunc valuerunt ut dictum est, venditio ipsa firma permaneat. Nam si res ipsius amplius estimaverint quod tunc valuissent quam pretio ipso quod accepit, et ipse qui venundaverit ostendere potuerit, ut strictus necessitate famis venditionem ipsam fecisset, aut forte cartula ipsa manifestaverit tempore necessitatis famis, cartula ipsa frangatur, et pretio iuxta quod in ipsa cartula legitur reddat, et recipiat res suas sicut modo invenerit eas, anteposito aedificia aut labores, qui postea ibi facti sunt, ipse qui fecit tollat, aut sicut inter eos convenerit. Et de ista venditione ipsa persona agat qui venundavit aut filius eius nam non alter propinquus."

23. See Appendix II, 2-4.

24. Capitularia, M.G.H., Legum, Sec. II, Vol. I, p. 125, No. 44, chap. 16: "De oppressione pauperum liberorum hominum, ut non fiant a potentioribus per aliquod malum ingenium contra iustitiam oppressi, ita

ut coacti res eorum vendant aut tradant. Ideo haec et supra et hic de liberis hominibus diximus, ne forte parentes contra iustitiam fiant exhereditati et regale obsequium minuatur et ipsi heredes propter indigentiam mendici vel latrones seu malefactores efficiantur. Et ut saepius non fiant manniti ad placita, nisi sicut in alio capitulare praecepimus ita servetur."

25. Concilia, M.G.H., Legum, Sec. III, Vol. II, p. 262, No. 36, chap. 7: "Ut res pauperum vel minus potentum mala occasione non emantur. Propter provisiones pauperum, pro quibus curam habere debemus, placuit nobis, ut nec episcopi nec abbates nec comites nec vicarii nec iudices nullusque omnino sub mala occasione vel malo ingenio res pauperum vel minus potentum nec emere nec vi tollere audeat. Sed quisquis ex eis aliquid comparare voluerit in publico placito coram idoneis testibus et cum ratione hoc faciat. Ubicumque autem aliter inventum fuerit factum, hoc omnino emendetur per iussionem vestram."

26. See Appendix II, No. 5.

27. See Appendix II, No. 6.

28. See Appendix II, No. 7.

29. See Appendix II, No. 8.

30. See Appendix II, No. 9.

31. See Appendix II, Nos. 10-12.

32. See Appendix II, No. 13.

33. See Appendix II, No. 14.

34. See Appendix II, No. 15.

35. See Appendix II, No. 16.

36. Capitularia, M.G.H., Legum, Sec. 2, Vol. I, p. 165, No. 73, chap. 3: "Dicunt etiam, quod quicumque proprium suum episcopo, abbati

vel comiti aut iudici vel centenario dare noluerit, occasiones quaerunt super illum pauperem, quomodo eum condempnare possint et illum semper in hostem faciant ire, usque dum pauper factus volens nolens suum proprium tradat aut vendat; alii vero qui traditum habent absque ullius inquietudine domi resideant."

37. Ibid., Vol. I, p. 321, No. 159, chap. 4: "Concedimus etiam gastaldiis nostris curtes nostras providentibus, ut si proprio suo pretio res emerint aut quolibet iusto adtractu acquisierint, sicut lex easdem res ad nostram partem concedit, ita nos eas illis concedimus, si in servitio nostro fideles inventi fuerint."

38. Capitularia, M.G.H., Legum, Sec. II, Vol. I, p. 43, No. 18, chap. 6: "Quicumque in itinere pergit aut hostiliter vel ad placitum, nulla super suum pare praendat, nisi emere aut praecare potuerit, excepto herba, aqua et ligna; si vero talis tempus fuerit, mansionem nullus vetet."

39. Ibid., Vol. I, p. 43, No. 18, chap. 7: "Quicumque homo super suum parem, dum ad nos fuerit, aliquid abstraxerit aut exfortiaverit, secundum suam legem triplititer conponat."

40. Ibid., Vol. I, pp. 198-199, No. 94, chap. 4: "De episcopis, abbatibus, comitibus seu vassis dominicis vel reliquis hominibus qui ad palatium veniunt aut inde vadunt vel ubicumque per regnum nostrum pergunt, ut non praesument ipsi nec homines eorum alicui homini suam causam tollere nec suum laboratum, in tantum si non comparaverint aut ipse homo eis per suam spontaneam voluntatem non dederit. Et quando

hibernum tempus fuerit, nullus debeat mansionem vetare ad ipsos iterantes, in tantum quod ipsi iniuste nullam causam tollant. Et si aliquis hoc facere praesumpserit, tam seniores quam et vassalli, et ipse homo ibidem ad eos proclamaverit, tunc volumus, ut presentaliter ille homo qui hoc malum fecit hoc quod ad ipsum hominem tulit ei secundum suam legem emendet. Et si hoc evenit, quod ipsa causa ibidem secundum legem presentaliter emendata non fuerit, et ad palatium exinde proclamatio devenerit, tunc volumus, ut ipse qui hoc malum fecit contra ipsum hominem qui proclamavit suam legem emendet et ad palatium nostrum bannum componat, pro eo quod super nostrum bannum hoc facere ausus fuit."

41. One was expected to pay a toll to gain admission. Anyone selling outside the market and avoiding the toll was to pay the toll and sixty solidi besides.

42. Ibid., Vol. I, p. 294, No. 143, chap. 1: "Ubi telonea exigi et ubi exigi debeant. Volumus firmiter omnibus in imperio nostro nobis a Deo commisso notum fieri, ut nullus teloneum exigat nisi in mercatibus ubi communia commertia emuntur ac venundantur, neque in pontibus nisi ubi antiquitus telonea exigebantur, neque in ripis aquarum, ubi tantum naves solent aliquibus noctibus manere, neque in silvis neque in stratis neque in campis neque subter pontem transeuntibus nec alicubi, nisi tantum ubi aliquid emitur aut venditur qualibet causa ad communem usum pertinens. Et ubi emptor cuiuslibet utitur herba aut lignis aut aliis villaticis commodis, cum eo cuius sunt quibus utitur agat iuxta aestimationem usus, et quod iustum est de tali re illi persolvat. Quod si aliquis constituta mercata fugiens, ne teloneum solvere cogatur, et extra praedicta loca aliquid emere voluerit et huiusmodi inventus fuerit,

constringatur et debitum telonei persolvere cogatur. Et quisquis huiusmodi iusta telonea solvere declinantem susciperit sive celaverit, id secundum suam legem emendare conpellatur: is tamen quem celavit debitum teloneum persolvat. Ceterum, sicut superius dictum est, nisi in memoratis locis nemo a quolibet exigat telonea; et si fecerit contra haec praecepta nostra, sciat se esse damnandum LX summa solidorum."

43. Ibid., Vol. II, p. 85, No. 212, chaps. 2, 3: "(2) Potentes autem, ne circa domos, in quibus habitant, oppressiones exerceant, quibus pauperes afliguntur, quia solent cum suis caballis ac reliquis animalibus inter reliquas violentias aliorum prata decerpere, nihilhominus autem et hiemis tempore occasione nutriendorum equorum illos affligunt: per eos etiam scire volumus, qualiter hoc emendandum sit. (3) Quando ad palatium vel ad alia loca potentes properant et in exposcendis hospitiis pauperes adgravant, inquirere placet, qualiter haec oppressio fieri desinat."

44. Ibid., Vol. II, p. 87, No. 213, chap. 5: "Hoc etiam multorum querellis ad nos delatum est, quod potentes et honorati viri in locis, quibus conversantur, minorem populum depopulentur et opprimant et eorum prata depascant, mansiones etiam contra voluntatem privatorum hominum sive pauperum in eorum domibus suis hominibus disperciant eisque per vim quaelibet tollant. Unde precipimus, ut hoc ulterius non fiat, sed unusquisque honoratus noster se suosque ex suo pascat. Et si de loco ad locum migrat, cum summa pace transeat et neque in manendo neque in iter agendo onerosus et damnosus aliis existat. Et hoc sciant omnes, quia, quicumque deinceps hoc transgredi presumpserit, nostrae indignationis motum sustinebit et proprio honore carebit."

45. Ibid., Vol. II, p. 87, No. 213, chap. 4: "Sed et hoc pervenit ad notitiam nostram, quod, quando potentes et honorati, sive ecclesiastici ordinis sive secularis, ad nos veniunt, a populo, in quorum domibus mansiones accipiunt,suis usibus suorumque equorum necessaria per vim tollant et hac occasione populus noster affligatur. Idcirco precipimus, ut omnis fidelis noster, quicumque ad nostram presentiam properat, nihil in veniendo aut revertendo ab aliquo violenter tollat, set suis hominibus et equis, nisi forte ab amicis stipendia acciperit, ab hospitibus suis precio iusto comparet. Nam quicumque huius mali famam habuerit, cum ad nos venerit, veracem hominem volumus ut det, qui pro suis omnibus iuret nihil eos in itinere tulisse. Et si forte in aliquo se suosque obnoxios recognoscit, donet idoneum hominem, qui iuret et cuncta restituat his, quibus abstulisse visus est."

46. See Boretius and Krause, Ibid., Vol. II, p. 97. If they were not issued for the 850 capitularies, then they were certainly issued for law with the same force. One may have noticed the similarities and differences between them and the capitulary of 787. See p. 116, n. 40.

47. Ibid., Vol. II, p. 97, No. 219, chaps. 3, 4: "(3) Si quislibet episcopus vel comes in propia sede vel domos aut villa residet, homines ipsius depraedationes fecerint, messes vel prata defensionis tempore devastaverint et hoc cognitum absque iniusta dilatatione non emendaverit et factori condigna castigatione non inposuerit, ipsum malum, ut lex est, emendare cogatur et insuper quadraginta dies et noctes a vino et carne abstineat. (4) Per viam quoque ad palatium veniens aut

rediens cuicumque homines rapinam fecerint et cognito statim non emendaverit et factori condignam castigationem non inposuerit, omnia, que rapta sunt, ut lex est, emendare cogatur, et insuper triginta dies et (noctes) carne et a vino abstineat."

48. Ibid., pp. 91-92, No. 216, chap. 5: "Porro cum ad nostrum quislibet nostrorum fidelium properat obsequium, tam eundo, quam redeundo gradiatur pacifice; et ni generalis exigat utilitas, (ut) cum scaritis veniat, in statutis iuxta domibus maneat. Episcopus et comes, per quorum transeunt terminum, diligenter provideant, ne molestentur incolae aut eorum domos per vim paciantur invadere vel propria diripere absque conlato praecio; sed neque indigenae per solita loca tectum, focum, aquam et paleam hospitibus denegare aut sua carius quam vicinis audeant vendere."

49. Ibid., Vol. II, p. 96, No. 218, chap. 10: "Et hoc constituimus ut ex utraque parte iustitia servetur: videlicet nostri sicut circavicini quae necessaria sunt emant, vicini autem nullatenus carius quam suis circavicinis vendere praesumant."

50. Ibid., Vol. II, pp. 371-375, No. 287, chaps. 1-14.

51. R. de Roover, "The Concept of the Just Price," p. 421. Vercauteren follows de Roover's interpretations of the capitularies of 774, 850, 865, and 889 as evidence that the idea of the just price was known during the Carolingian era. See F. Vercauteren, "Monnaie et circulation monétaire en Belgique et dans le Nord de la France du VIe au XIe siècle," Settimane di studio del Centro Italiano di studi sull' alto medioevo, VII, Moneta e scambi nell' alto medioevo (Spoleto, 1960), 294-295.

52. Capitularia, M.H.G., Legum, Sec. II, Vol. II, p. 375, No. 287, chaps. 12-13.

53. See above, p. 120, n. 48.

54. See above, p. 120, n. 49.

55. Ibid., Vol. II, p. 105, No. 222, chap. 7: "Hi vero,qui tempore placiti diversis ex partibus conveniunt, nullam pertranseuntes in villis seu civitatibus rapinam exerceant sibi necessaria antiqua consuetudine digno pretio ementes."

56. Ibid., Vol. II, p. 107, No. 224, chap. 1: "Placuit nobis eciam summopere statuere, ut episcopi et comites uniti sint in suis paroechiis et comitatibus pro pace et salvatione in omnibus operibus suis habitantibus, ita ut nullum praedonem, raptorem vel incestum permittant morari in suis sedibus vel concessis honoribus. Et si intellexerint ex aliqua parte per eorum terminos velle aut debere transire exteros ad istius regni vastationem, obviam eis missos communitorios dirigant, ut pacifice et sine praeda per eorum transeant terram. Vendere autem eis quae necessaria sunt faciant non plus carum, sed secundum usum et consuetudinem terrae. Si vero noluerint adquiescere, sed praedas et rapinas exercuerint, quicquid alteri rapuerint, legaliter cum banno nostro ab episcopo vel comite eiusdem loci emendare coganţur. Quodsi exequi noluerint, statim a loci episcopo excommunicentur. Postea vero si contigerit, ut comes loci populusque terrae super ipsos praedones venerint et eos impedierint et mortui fuerint, neque faida inde crescat, neque compositio aliquando requiratur pro his, qui ibidem occubuerint. Et si comes eiusdem loci hoc adimplere neglexerit, proprio honore privetur. Et si oportuerit et necesse fuerit, ut in suo auxilio vicinum suum advocet

comitem, et ille se subtraxerit, similiter proprio privetur honore, et insuper LX solidos ad rege conponat."

57. Baldwin, "Medieval Theories," pp. 33-34. F. Schaube, Der Kampf gegen Zinswucher, ungerechten Preis und unlautern Handel im Mittelalter . . . (Freiburg im Breisgau: Herder, 1905), pp. 99-100. "Eine bezügliche dreisache Abstufung des Herkommens lassen folgende zeitliche einander nahestehenden Kapitularien wahrnehmen. Im weitesten Sinne erscheint es Widonis capit. elect. 889 c7 Bor. II 105 . . . im engeren Widonis cap. Pap. 891 c1 ebd. II 107 . . . in engsten Karlomani cap. Vern 884 c13 ebd. II 375. . . ."

58. See above, pp. 97-99, 104-106.

59. "Ancient" in early medieval usage seems to have neither the modern or classical meaning. It may mean perhaps a generation or so in Italy.

60. See above, p. 121, n. 56.

61. Capitularia, M.G.H., Legum, Sec. II, Vol. II, pp. 251-252, No. 253, chap. 7: "Item de navibus salinariis, postquam silvam (Boemicam) transierint, in nullo loco licentiam habeant emendi vel vendendi vel sedendi, antequam ad Eperaespurch perveniant. Ibi de unaqueque navi legittima, id est quam tres homines navigant, exsolvant de sale scafil III, nichilque amplius ex eis exigatur, sed pergant ad Mutarun vel ubicunque tunc temporis salinarium mercatum fuerit constitutum; et ibi similiter persolvant, id est III scafil de sale, nichilque plus; et postea liberam ac securam licentiam vendendi et emendi habeant sine ullo banno comitis vel constrictione alicuius persone; sed quantocunque meliori precio venditor et emptor inter se dare voluerint res suas, liberam in omnibus habeant licentiam."

62. See above pp. 35-36. Mathews ("Valuation of Property," p. 238) maintains that it exists in the form quanti vendere possunt. Quanti venire possunt and quanti veniri possunt seem to be the most common.

63. See Appendix II, No. 17.

64. See Appendix II, No. 18.

65. See Appendix II, No. 19.

66. See Appendix II, No. 20.

67. See Appendix II, No. 21.

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CHAPTER IV

THE CROSSING OF THE LINES

The formula quantum vendi potest was used not only to judge prices for which goods were exchanged but also to detect the presence of usury. It seems first to have been employed for this purpose by the canonist Simon of Bisignano somewhat before 1180.[1] For that same purpose, Tancredus, no later than 1215, used the same formula together with another which was definitely from Justinian's Corpus:

> Res tantum valet quantum vendi potest . . . preciam enim rerum non ex affectu singulorum, sed communiter extimatur.[2]
>
> A thing is worth as much as it can be sold for . . . but the value is to be established not by the affection of individuals, but by the community at large.

Bernard Botone used the same words as Tancredus. The phrase "Res tantum valet quantum vendi potest" as well as "pretia enim rerum non ex affectu singulorum sed communiter extimatur" are found in his Gloss on the Decretals and Botone names Justinian's Ad Legem Falcidiam.[3] To explain the same bit of text, Innocent IV, a few years later, simply used the phrase "communis estimacione."[4] Other thirteenth-century canonists, Vincentius Hispanus, Hostiensis, and Monaldus, have been cited as expressing the same judgment.[5]

Simon of Bisignano had used the phrase "res tantum valet etc." in connection with Si quis clericus, which is concerned with clerical usury.[6] Tancredus, Botone, Vincentius Hispanus, Innocent IV, and

Hostiensis used similar phrases in connection with In civitate which was concerned with the giving of higher prices in contracts in which payment was deferred, a contract which might well involve usury as well as speculation.[7] Monaldus employed the phrase under the heading De usuris. In each case, calculation was needed to discover whether usury or speculation was present in the transaction in question. The phrase was being used as an evaluating device to ascertain the presence or absence of the condemned practice; it was not being employed as a true price regulation.

In the Apparatus: Ius Naturale (1210-1215) was contained a regulation concerning price itself. Clerics were allowed to sell at a profit providing their motivation and behavior were correct and providing they sold for a just price.[8] No declaration as to what constituted the just price seems to be included. Nevertheless, in the realm of clerical sales before 1215, a judgment made upon a price is found. In the earlier discussions of sales and purchases made by the clergy, the judgment seems to be rendered upon behavior and motivation only. Not long after the composition of the Apparatus: Ius Naturale, Raymond of Pensforte also permitted clerics to sell at a profit if they sold on the open market (communiter venditur in foro).[9]

For the purpose of establishing a just price the law might call for witnesses, "good men" or a judge. In the bulls with which laesio enormis was brought into the law of the church, the just price was established by witnesses (per testes).[10] The author of the Apparatus: Ius Naturale called for a good man.[11]

Johannes Teutonicus and Tancredus[12] and the Decretals[13] called for witnesses to establish a price from which the extent of a laesio could be calculated. Only a little while before Teutonicus had suggested "a judge or someone else."[14] This apparent indifference may be revealing, and indeed, it has been suggested that the naming of an authority or consultant is not in fact a true mode for establishing prices.[15] For the question of the basis upon which the witnesses or judge are to arrive at their price remains unanswered. In the Decretals this was in some sense recognized. The section of Quum Causa concerned with the laesio enormis had been separated from the section concerning the witnesses and the two halves were entered appropriately.[16]

In addition to the market price (communis aestimatio) there seem to be other modes of evaluation. In all but one of these devices for arriving at a just price (the exception, of course, being the use of the market price), the Romanists of the middle ages anticipated the canonists. Bulgarus and others of the twelfth century had called for judges and good men to reveal the price.[17] It was Azo who, among the Romanists, first provided a formula by which those assessors might calculate that elusive and perhaps fluctuating figure.[18] In the first decade of the thirteenth century, he suggested that the price paid for a nearby piece of property be examined. But it might be argued, he warns, that the purchaser of the property used for comparison had bought foolishly or that the property used for assessment did not border the property being assessed and therefore was not suitable for purposes of comparison. "Both these rebuttals," says

Azo, "may be refuted."

Nevertheless, he gives an alternative method, clearly useful only for assessments of income-producing property. Drawing upon a Justinian rule concerning public sales of property made for the purpose of paying debts owed to the community,[19] he suggests that the value of property can be established from the quantity of its returns.[20] A price thus established is just (iustum).[21] Other legists, almost immediately, added a degree of precision. Value, they said, was to be assessed from the income derived from the property over a twenty- or fifty-year period--presumably they meant by capitalizing income at a certain rate. This procedure was drawn from the Novellae of Justinian[22] and was suggested in the early part of the thirteenth century by Laurentius Hispanus, Johannes Teutonicus, Tancredus, and Vincentius Hispanus. In the latter part it was described by Hostiensis, but Hostiensis, it is said, preferred the communis aestimatio.[23]

Accursius, like Azo, addressed his attention to the problem of discovering the just price when he discussed the laesio enormis. After defining the dimidia he directly asked the question, "How do I know when it has been exceeded?" (sed qualiter sciam quando excedit?).[24] "Not," he says, "by the price that two or three individuals are willing to pay." For, he continues, "the value of things is not constituted from the affections of individuals." He cites for his authority the Lex Aquilia and the Lex Falcidia (precia rerum non constituuntur ex adfectione singulorum: ut D[igestum] ad leg. Falc. l. precia. et D[igestum] ad l. Aquil. l. si servum meum).[25]

The price then is to be revealed by a device found in the

Lex Falcidia. There can be no doubt about the meaning Accursius gives to the passage he cites from that Roman law. In his gloss on the passage "pretia rerum . . . communiter funguntur" of the Lex Falcidia, he uses the well-traveled passage "quantum vendi potest" (what it can be sold for). "A thing is to be estimated by the common price; thus it is said that a thing is worth as much as it can be sold for to the community at large." (. . . funguntur, id est communi pretio aestimatur res quod ergo dicitur, res tantum valet quantum vendi potest scilicet communiter.)[26]

Thus did Accursius, the great Romanist of the thirteenth century, accept the just price as it had been defined in church law for three centuries--as it had originally been defined by the Frankish legislator in 884. Stated differently, "quantum vendi potest," a device used for court assessments in the Justinian Corpus and converted into a formula for the just price in the Carolingian law, reappears in a thirteenth-century gloss on the Justinian Corpus where it performs its Carolingian function.

It is probable that Accursius considered a price established by the legal authorities quite as just and fundamentally of the same type as the market price. He gives several definitions of communiter funguntur, the first of which describes the pretium communis as the market price and the second describes it as a price established by the community acting as lawmakers rather than as buyers and sellers.[27]

His gloss to the passage in the Lex Aquilia is briefer. "Res tantum valet, quantum vendi potest: intellige communiter,"[28] is the whole of it; no further considerations are presented. Accursius uses

this phrase to explain many other passages in Justinian. He directly cites only the Lex Falcidia and the Lex Aquilia, however, to provide a formula for the calculation of lawful prices.[29]

It would seem to be incorrect to say that Accursius was, in this regard, following Azo. Azo, it will be recalled, said that land might be evaluated by examining the price for which a neighboring piece of land has been sold. Accursius, too, has called for the examination of prices for which similar parcels had been sold. The resemblance, however, is deceptive. Azo speaks in the singular (probo enim quod res quae non est melior hac vendita est ultra duplum). To stress this use of the singular is not to focus upon a literary or syntactical bit of change. Azo literally means one other sale. He himself recognizes the limited value of this procedure for he provides alternative procedures should the defendant claim that the buyer of that particular piece had bought foolishly (si opponatur ille stulte emit). "Prove," he says, "that it was not foolish. Prove (or show) the price of the thing from the quantity of the returns."

Accursius, on the other hand, speaks in the plural (dic ergo inspici venditiones factas locorum existentium iuxta illum), and he specifically denies the validity of one or even two or three offers (non per hoc q[uod] duo vel tres volunt tantu[m] dare quoniam pretia rerum, etc.). Accursius' solution to the problem of the possibility of a foolish purchase and a therefore misleading price must have been the result of examination of prices obtained in many sales.

In a very real sense then, Accursius' mode is a correction or even a contradiction of one of Azo's methods. (At logic, it is a

contradiction.) It flatly denies the validity of employing Azo's guide--a single sale. To argue that Accursius followed Azo in the sense that both were examining sales which had actually been made, would be misleading. Even if Accursius was inspired, so to speak, to his position by reflections on Azo's statement, it would be incorrect to conclude that he is following Azo. To do so would be to fail to distinguish between psychological and legal derivation. Accursius is not broadening the scope of a rule found in Azo; he is denying the validity of a method and substituting an alternative. Needless to say, one can only have a true market price for fungibles. Nevertheless, the more sales that are examined the more closely one approximates it.

Accursius offers another criteria for evaluation which is found verbatim in Azo. "Examine," he says, "the quantity of the returns" (redituum quantitatis), and adds, "and the quality of the property" (qualitatem rei).

Rei qualitatem and redituum quantitatem, he suggests, need only be employed in the evaluation of real property (immobiles). With other types of goods such as grain, the price is certain (in mobilis autem rebus, ut frumento est precium certum). This would seem to mean that the first method, that is, the market price (and perhaps the price established by lawful authority) is the proper price.[30] A summary of the modes of assessment is found in Odofredus. He lists the market price,[31] the value of nearby property,[32] the value of the produce,[33] and the opinion of the men of the neighborhood.[34]

IV-8 Odofredus' list includes all the medieval modes of lawfully calculating the just price. The price doctrine found in Langenstein--that the producer should charge only the amount necessary to cover his labor and expenses and allow him to maintain his status--would not appear for another century.[35] It never became part of the medieval law nor does it seem to have been adopted by many other medieval writers. Nevertheless, during the late nineteenth and twentieth centuries modern historians presented it as the typical price ethic of the middle ages.

FOOTNOTES TO CHAPTER IV

1. Simon of Bisignano, Summa, Paris Bibl. Nat. Lat. 3934A fol. 78va, Causa XIV, q. 4, c. 5. "Si quis clericus. Hic queritur si mutaui tibi aureum puta usque ad festum nativitatis et tunc non habes aureum. hoc vis mihi pro eo frumentum vel huiusmodi dare. an possint tantum de frumento exigere quantum poterat tempore quo mutuaui haberi vel tantum quantum contra communi estimacione haberi potest. cum aureus redditur et placet quibusdam tantum me debere accipere. quantum tunc communiter vendi poterit cum aureus debit reddi. . . ." Quoted in Baldwin, "Medieval Theories," p. 54, n. 98.

2. Tancredus, Apparatus to Compilatio I, Paris Bibl. Nat. Lat. 3931A, fol. 71va, V, 15, c. 8. "In civitate. valent. From Baldwin, "Medieval Theories," p. 54, n. 100. The work apparently exists only in manuscript.

3. Bernard Botone, Glossa Ordinaria to the Decretales. . . , V, 19, c. 6. col. 1736: "In civitate. Non valent. Immo v[idetu]r q[uod] tantu[m] valeat: res enim tantum valet quantum vendi potest . . . pretia enim rerum no[n] ex affectu singuloru[m] sed co[mmun]iter estima[n]tur. D[igestum] ad l[egem] fal[cidiam], [D. 35, 2, 63]."

4. Innocent IV, Apparatus super Quinque Libris Decretalium (Strassburg: 1478), V, 19, c. 6, p. C-25. "In civitate, non valent. communi estimacione." For a fuller discussion of the term communis estimatio, see Appendix III.

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5. Baldwin, "Medieval Theories," p. 54, n. 102, cites Vincentius Hispanus (Apparatus to Decretales Gregorii IX, Paris Bibl. Nat. Lat. 3967, fol. 189, V, 19, c. 6. In civitate. valent.) as expressing a similar judgment. The work exists only in manuscript and he does not quote. The same judgment is found in Hostiensis, In Decretalium Librum Commentaria, V, 19, c. 6, Vol. IV, fol. 57ra. In civitate. non valent, a four-volume work difficult to obtain, and Monaldus, Summa Perutilis (Lyon, before 1516), v^{o} fol. 290 de usura, similarly unobtainable. See Baldwin, "Medieval Theories," p. 54, n. 102.

6. Gratian, Decretum, Causa XIV, q. 4, c. 5., C.I.C., Vol. I, cols. 736-737. The phrase iusto pretio is used but not defined.

7. Gregory IX, Decretals, V, 19, c. 6, C.I.C., Vol. II, col. 813.

8. Apparatus: Ius Naturale, Paris Bibl. Nat. Lat. 15393, fol. 150^{vb}, Causa XIV, q. 4, c. 3, "Canonum. Si enim rem emisset clericus pro utilitate sua, et eam postea vendere et expediret, si carius venderet quam emit non peccaret, dummodo iusto pretio et sine fraude." Quoted in Baldwin, "Medieval Theories," p. 47, n. 36.

9. Raymond of Penaforte, Summa de casibus (Rome, 1603), II, 7, part. 9, p. 236; cited by Baldwin, "Medieval Theories," p. 47, n. 35.

10. See above, pp. 71, n; 40, 74, n. 48.

11. Apparatus: Ius Naturale, Paris Bibl. Nat. Lat. 15393, fol. 151ra, Causa XIV, q. 4, c. 5. "Si quis clericus, mercandi. Quantum vir bonus arbitratur debitos nummos valere tempore solutionis faciende." Quoted in Baldwin, "Medieval Theories," p. 53, n. 88.

12. Johannes Teutonicus, Apparatus to Compilatio III, Paris Bibl. Nat. Lat. 3930, fol. 164^{vb}, III, 14, c. 2. "Quum causa. quantitatem. videtur quod non potuerunt (probare) excessum deceptionis quanto probaverunt quantitatem valentie rei. Respondeo hoc modo potuit esse. quia cum res essent vendite decem testes dicerunt quod valebant multo plus quam viginti, sed non taxabant certum pretium rei valentie quod iterum probari debet. vel constitit pape per confessiones partium quod res valebant ultra dimidiam iusti precii: sed non conveniebant de quantitate valoris quem monachi debent probare. unde non producuntur hic testes super eodem casu tamen super eodem possunt induci in tali casu. quia ad aliud agitur modo quam prius." Baldwin understands the decem to go with testes, and says that ten witnesses were being called. The syntax will bear this interpretation. It may be the case, however, that decem refers to price thus: "The thing was sold for ten. Witnesses say that it was worth much more than twenty." ("Pro" is not necessary, the ablative of price not requiring a preposition. "Decem," of course, is not declinable.) Teutonicus is quoted by Baldwin, "Medieval Theories," p. 53, n. 90.

13. Gregory IX, Decretals, II, 20, c. 42, C.I.C., Vol. II, col. 333. "Idem Episcopo et Archdiacono Benventanis. Quum causa, quae inter oeconomum monasterii sancti Martini de Monte (Et infra; cf. c. 6 de empt. III. 17.) Quum igitur abbas et fratres eiusdem loci probare per testes intendant, quanti pretii venditionis tempore possessiones praedictae fuere praesentium vobis auctoritate mandamus, quantenus infra trium mensium spatium recipiatis appellatione remota

testes, quos alterutra partium super hoc duxerit producendos, audiatis causam et, eandem remittentes ad nos sufficienter instructam, praefigatis partibus terminum competentem, in quo nostro se conspectui repraesentent sententiam recepturae. Si vero pars monasterii ad hunc probandum articulum eosdem testes produxerit, quos ad alium probandum produxit, vos nihilominus eos recipere procuretis, quoniam aliud est probasse deceptionis excessum, et aliud probare quantitatem valoris."

14. Johannes Teutonicus, Glossa Ordinaria to the Decretum, Paris Bibl. Nat. Lat. 14317, fol. 156^{rb}, Causa XIV, q. 4, c. 5, Si quis clericus; quoted by Baldwin, "Medieval Theories," p. 53, n. 88. "A iudice vel ab alio hoc vult dicere quod creditor debet frumentum pro tanta pecunia recipere, quantum aliquis decreverit, quod valet tempore solutionis."

15. Baldwin, "Medieval Theories," p. 28.

16. See above, pp. 120. notes 48-50.

17. Baldwin, "Medieval Theories," pp. 27-28, and ns. 63-67. Similarly, they had made note of the importance of the time. Thus, for example, Placentinus, Summa Codicis, 4, 44, p. 176: "Iusti inquam tempore venditionis." Azo, Summa, 4, 44, 2, col. 417: " . . . iusti precii quod erat tempore venditionis."

18. Azo, Commentarius, 4, 44, 8, p. 510: " . . . potest esse quod tempore venditionis fuerit X. post XV." He notes that weight, etc., may be changed to cover alterations in price: "sicut per diversa tempora mutantur quae consistunt in pondere, numero vel mensura."

19. C. 4, 44, 16: "Imppp. Valentinianus Theodosius et Arcadius AAA. ad Magnillum vicarium Africae. Si quos debitorum mole depressos necessitas publicae rationis adstringat proprias distrahere facultates, rei qualitas et redituum quantitas aestimetur nec sub nomine subhastationis publicae locus fraudibus relinquatur et possessionibus viliore distractis plus exactor ex gratia quam debitor ex pretio consequatur."

20. Azo, Commentarius, 4, 44, 8, p. 510. "Si voluntate tua. Finitum. Id est, completum. Mi[nus] dimid[ia] iusti pre[tii] quod fue[rat] temp[ore] vend[itionis]. Ut D[igestum] de iure si. non intelligitur. divi. et ideo dicit, quia potest esse quod tempore venditionis fuerat X. post XV. sicut per diversa tempora mutantur quae consistunt in pondere, numero vel mensura. sed quod hic dicit de iusto pretio, qualiter probabitur? Respon[deo] bene. probabo enim quod res quae non est melior hac, vendita est ultra duplum. si opponatur, Ille stulte emit, vel sibi confinis erat fundus, probabo non fuisse confinem: & probabo illum fuisse talem, quem non est verisimile stulte emisse. Idem & Probatur rei pretium ex quantitate reditum ut j eo. si quos. [C. 4, 44, 16] & in authent. de aliena. & emphy. & hoc autem concedimus [Nov. 120, 9, pr.]& de non alien. reb. eccl. quia vero Leonis. & si vero aliquis [Nov. 7, 3, par. 1] & ut D[igestum] de rebus eorum qui sub tut. l. si fundus sit sterilis [D. 27, 9, 13]. . . ." It is generally agreed that the non (on line 8, above) goes with sibi confinis erat rather than probabo (non) fuisse confinem where it is found.

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21. Azo, Commentarius, 4, 44, 15 (sic), p. 511: "Si quos. et redituum quantitas. Et ita redituum quantitas in iusto pretio aestimatur."

22. Novellae 120, 9, pr.: "Sanctissimis vero ecclesiis civitatum Odessi et Tomeos ad captivorum redemptionem immobiles res alienare permittimus, nisi ea conditione possessiones illis datae sint, ut nullo modo alienentur. Hoc quoque concedimus, ut sanctissima Hierosolymitana ecclesia facultatem habeat domus ad se pertinentes et in ipsa sancta urbe sitas vendendi, non minore tamen pretio, quam quantum ex earum pensionibus quinquaginta annis colligitur, ut ex earum pretio alius melior reditus ematur." This rule might be classified as a price regulation, but it should be noted that it is not general. It applies only to three specified agents.

Novellae 7, 3, par 1: "Si vero in ecclesiastico aliquo praedio suburbano eoque pretioso emphyteusis constituatur (cuiusmodi multa maxime in felici hac urbe esse scimus, quae magni quidem pretii sunt, verum ex quibus minimus vel plane nullus reditus percipitur), non ex reditu emphyteusis metienda, sed suburbanum accurate aestimandum, et reditus computandus est. qui ex pretio viginti annis collecto percipi potest, redituque ita computato emphyteusis non in perpetuum, sed accipienti, et duobus eius successoribus, et viro atque uxori, sicuti ante diximus, concedenda est."

23. Henricus Segusia (Cardinal Hostiensis), In Decretalium Librum Commentaria (Venice: Iuntae, 1581), II, 20, c. 42, fol.

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101ra Quum Causa: "articulum: Sed qualiter probabitur verum preciu[m] rei: R[espo]n[deo] rei qualitate & redituum quantitate inspecta & considerata. . . . Quandoque tamen consideratum posset valere infra .l. an[no.] verbi gratia. Valet quolibet anno .xx. sol[um] precium ergo emptionis . . . Sed verius est q[uo]d dicitur qua[n]tum vendi posset tempore ipsius contractus." It has been said that Hostiensis preferred to common estimate which seems likely. Hostiensis, however, may have rejected the fifty year income capitalization altogether. Azo has been named as the first to call for assessment by means of the property's yield which would place it at about 1210. Perhaps Innocent III should be considered in this regard. Ad nostram noveritis (1206) states that the income produced by the property showed the price to have been so low as to be unjust. Innocent rejects it because a year's income equalled the price of the property. Moreover, Ad nostram noveritis referred to an enfeoffment (See above p. 72.) Cf. Baldwin "Medieval Theories" pp. 29, 53.

24. Accursius, Commentariis, C. 4, 44, 2, Vol. IV, col. 920.

25. Ibid.

26. Ibid., D. 35, 2, 63, Vol. II, col. 1397: "Funguntur. id est communi pretio aestimatur res Quod ergo dicitur, res tantum valet, quantum vendi potest scilicet communiter ut hic et s, eodem l. proxi in fin. et s ad legem Aqui[lia]. l. servum [D. 9, 2, 33]. Vel dic, communiter fungutur, scilicet pretia: id est statuunter, et communiter

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expone ut prius. Vel tertio funguntur communiter, id est, tale pretium imponitur, quod equivaleat rei, ut commune, et quale sit habere rem, vel pretium."

27. See p. 138, n. 26.

28. Accursius, Commentariis, D. 9, 2, 33, Vol. II, col. 1080, redempturus fuit.

29. See Baldwin, "Medieval Theories," pp. 28-29.

30. Accursius, Commentariis, C. 4, 44, 2, Vol. IV col. 920: "Sed qualiter sciam quando excedit? Respon[deo]. non per hoc q[uod] duo vel tres volunt tantu[m] dare. quoniam precia rerum non co[n]stituuntur ex adfectione singuloru[m]: ut D[igestum] ad leg. Falc. l. precia [D. 35, 2, 62] D[igestum] ad l. Aquil. si servum meum [D. 9, 2, 33]. Dic ergo inspici venditiones factas locorum existentium iuxta illum. Item rei qualitatem et redituum quantitatem . . . et hoc in immobilis. In mobilis autem rebus, ut frumento est precium certum."

31. Odofredus, Lectura super codice: "Sed quo[modo] probabit quod res illa tunc valebat. X. R[espo]ndeo hoc modo probabit, quia si co[mmun]iter res illa posita fuisset venalis habuisset X. no[n] aute[m] dicet, ita habeba[m] cara[m] r[at]ione affectionis quia precia rerum et cetera."

32. Ibid: "Vel probabit quod alia predia circumiacentia valebant. X. et ita erat istud prediu[m] bonum ut convicium. . . ."

33. Ibid: "Vel prohabit quod tot fructus co[n]sueverunt p[er]cipi ex illa re que valet. X. quia estimatio rei p[er] reditum fructuu[m] estimat[ur] . . ." It has been said that this is virtually the market price (Baldwin, "Medieval Theories," p. 29). But the convenience or

inconvenience of the location of a farm, for example, might also affect its market value. Perhaps that is among the reasons why bordering lands, which would have a similar location, were listed as a separate criteria. See above, p. 139, n. 32.

34. Ibid: "Ite[m] p[ro]babit quod quando petebat consiliu[m] quantum valeret homines dicebant ei quod valebat dece[m]. na[m] per hoc presumitur ignorare quod valebat. X. quia alias in dubio praesumitur quis scire vires p[a]trimonii sui ubi ignoraverat. . . . Et hec que dicta sunt, locu[m] habet in his que certa sunt: ut fundus vel domus. sed no[n] in his q[ue] dubia sunt: ut nomina et condictionalia. na[m] ibi spectamus qua[n]ti invenit emptor."

35. Heinrich von Langenstein, Tractatus bipartitus de contractibus emptionis et venditionis, Part I, cap. 12, in Johannes Gerson, Opera Omnia, IV (Cologne, 1484), fol. 191.

CHAPTER V

CONCLUSION

A controversy over market price on the one hand, and status price on the other, is essentially an argument between modern history and medieval law. Historical studies usually present the cost plus status-wage price; the medieval law always offers a market price. Moreover, in all of the just price regulations of the Empire and the church concerning "cash and carry" sales, the law considers only the selling price and the manner in which it is calculated; neither the seller's costs nor his profit is considered.

Indeed, the seller, like the buyer, was not to control the price in these transactions. Neither of them, nor both in agreement, nor their gilds were named as lawful authorities on prices. The prices were to be legislated by the government, or calculated by the capitalization of income, or set by "the law of supply and demand" operating in general gathering of buyers and sellers.

A certain irony may be found in the modern view that medieval men, perhaps leading a sheltered life, did not perceive supply and demand or denied its irresistibility. But one may wonder whose view is sheltered. For medieval men, indeed know that price varied with supply, but they also know that "the law of supply and demand" could be overriden, so to speak, with political power, legal sophistication, or by hunger or simple force. It was particularly in the ninth century that

these problems were extant and articulated.

Although Justinian's texts were cited by the great legists of the Middle Ages, it appears that the true origin of the use of the market price as the legal regulator of prices is medieval. The often cited Lex Falcidia and Lex Aquilla do not seem to have been concerned with regulating the selling price of lands or goods. That they should not have been concerned with the regulation of price seems quite consistent with positive statements found in the Corpus and in another great body of Roman law, the Theodosian Code. The latter, indeed, states unequivocally that low price is not grounds for rescinding a sale.

The only Roman regulation which might be construed as a generally applicable price regulation is the one which came to be known as laesio enormis. This rule, however, seems to be interpretable in at least three ways. According to the first, sales can be rescinded if the price is too low. This was the meaning accepted in the Middle Ages. According to the second interpretation, the law protects only minors. Possible also is a third interpretation, according to which, the law was not concerned with prices, but merely allowed rescision of sales in certain cases of unpaid obligations. In either of the latter two cases, it seems correct to say that Roman law provided no recourse for adults who paid more or less than the market price. Probably in the Corpus and definitely in the Theodosian Code, except where certain types of abuse were present, the seller was explicitly denied recourse on grounds of price.

The Roman law ran a different course in the Middle Ages. In the Justinian line, laws not concerned with selling price were converted

into price regulations and their scope broadened so that they protected not only children but adults, and not only sellers, but buyers. The Theodosian line, on the other hand, began as a denial of recourse for sellers on the grounds of low price and this denial was, in the early Middle Ages, extended to buyers complaining of high prices.

The major changes, both in the Theodosian line and in the Justinian line occurred in the early part of the Middle Ages. Of the several bodies of early medieval law which adopted the Theodosian price regulations, it seems to have been the Bavarian code which extended the explicit denial of recourse from sellers to both buyers and sellers. It was a West Frankish capitulary which first employed a Justinian formula as a price regulation declaring that the price on the open market was the just price. The West Frankish regulation, however, was very similar to a number of laws issued earlier at Pavia. The political connection between the West Frankish Kingdom and Pavia at that time was close.

The original and the expanded Theodosian principle on the one hand and the principle of Justinian as altered by the Carolingians on the other, entered the law collections of the Church. Both lines come together in the collection of Ivo of Chartres and there stand, in essence at least, in contradiction. It was the Carolingian line that was picked by the canonists and Romanists of the following centuries. The Theodosian line was neglected.

When Justinian's Corpus was studied again, several rules were interpreted in the Carolingian manner and used as price regulations. But even the ignoring of the Theodosian line did not hide the fundamental Roman position that buyers and sellers might decide on any price and so close a legally valid sale.

Azo and Accursius saw the contradiction within the Roman law itself and said that the words humanum est were in the law because laesio enormis provided an exception which contradicted the Roman law strictly held. Indeed, the laesio enormis passages may have provided an exception to the general Roman laws of sale. In that case, they expressed a principle which was out of harmony with the body of Roman law, but which was picked up in medieval law and made central. More likely, the "exception" had not originally been put into the law to contradict it in cases in which the price was "unjust." It may have been inserted to make the law on the rescission of sales consistent with the law's general principle of protecting minors from the dangers of buying and selling. Most likely, it was intended to provide a recourse for unpaid vendors. As to seeing in the law of supply and demand the source of the just price there is less question. That the market price is the just price and properly the lawful price is a medieval notion to which medieval men made the Roman law conform.

APPENDIX I

THE RECISION OF SALES AND RESTITUTION: PRICE, FRAUD AND MINORITY

It does not seem logically possible to prove absolutely that one interpretation is superior to another by citing the following clauses. Nevertheless, they should be considered.

De rescindenda venditione C.4,44,5. Idem AA. et CC. Claudio Rufo. Si dolo adversarii decepti venditionem praedii te fecisse praeses provinciae aditus animadverterit, sciens contrarium esse dolum bonae fidei, quae in huiusmodi maxime contractibus exigitur, rescindi venditionem iubebit. Quod si iure perfecta venditio est a maiore viginti quinque annis intellegere debes consensu mutuo perfectam venditionem resolvi non posse D xv K Nov Sirmi AA. conss.

C.4,44,10. Idem AA. et CC. Aemilio Severo Dolus emptoris qualitate facti, non quantitante pretio aestimatur. quem si fuerit intercessisse probatum, non adversus eum in quem emptor dominium transtulit, rei vindicatio venditori, sed contra illum quo contraxerat in integrum restitutio competit.

C.4,44,15. Imppp. Gratianus Valentinius et Theodosius AAA ad Hypatium pp. Quisquis maior aetate praedia etiam procul posita distraxerit, paulo vilioris pretio nomine repetitionis rei venditae copiam minime consequatur. neque inanibus immorari sinatur obiectis, ut vires sibimet locorum causetur incognitas, qui familiaris rei scire vires vel merita atque emolumenta debuerat.

(Concerning minors)

D.4,4,1. Ulpianus libro undecimo ad edictum. Hoc edictum

praetor naturalem aequitatem secutus proposuit, quo tutelam minorem suscepit. nam cum inter omnes constet fragile esse et infirmum huiusmodi aetatium consilium et multis captionibus suppositum, multorum insidiis expositum: auxilium eis praetor hoc edicto pollicitus est et adversus captiones opitulationem.

D.4,4,1,1. Praetor edict: "Quod cum minore quam viginti quinque annis natu gestum esse dicetur, uti quaeque res erit animadvertam."

D.4,4,24,(4). Restitutio autem ita facienda est, ut unusquisque integrum ius suum recipiat. itaque si in vendendo fundo circumscriptus restituetur iubeat praetor emptorem fundum cum fructibus reddere et pretium recipere . . . nam et si origo contractus ita constitit, ut infirmanda sit, si tamen necesse fuit pretium solvi, non omnimodo emptor damno adeficiendus est.

D.4,4,6. Idem Libro decimo ad edictum. Minoribus viginti quinque annis subvenitur per in integrum restitutionem non solum cum de bonis eorum aliquid minuitur, sed etiam cum intersit ipsorum litibus et sumptibus non vexari.

APPENDIX II

CAROLINGIAN PRICE LAWS

The laws cited here, together with the rules cited in Chapter III, constitute a complete collection of the Frankish price laws.

1. Ansegisus, Caroli Magni Ludovici et Lotharii Imperatorum Capitularia, Lib. I, chap. 126, P.L., XCVII, col. 530: Capitularia, Ansegisi Abbatis Capitularium Collectio, M.G.H., Legum, Sec. II, Vol. I, p. 411: "De hoc si per plurima loca fames fuerit. Consideravimus itaque, quia per plurima loca fames valida esse videtur, ut omnes episcopi, abbates, abbatissae, optimates et comites seu domestici et cuncti fideles, qui beneficia regalia tam de rebus ecclesiasticis quamque et de reliquis habere videntur, ut unusquisque de suo beneficio suam familiam nutricare faciat et de sua proprietate propriam familiam nutriat; et si Deo donante super se et super familiam suam aut in beneficio aut in alode annonam habuerit et venundare voluerit, non carius vendat nisi modium de avena denarios duos, modium de ordeo contra denarios tres, modium unum de sigile contra denarios quatuor, modium unum de frumento parato contra denarios sex. Et ipse modius sit, quem omnibus habere constitutum est. Et unusquisque habeat aequam mensuram et aequales modios."

2. Capitularia, M.G.H., Legum, Sec. II, Vol. I, pp. 187-188, No. 88, chap. 1: "Primis omnium placuit nobis, ut cartulas obligationis, quae factae sunt de singulis hominibus qui se et uxores, filios vel filias suas in servitio tradiderunt, ubi inventae fuerint, frangantur, et sint liberi sicut primitus fuerunt."

3. Loc. cit., chap. 3: "Cartula illa que legitur de donatione similiter volumus ut adpretietur, si amplius valuerint res ipse quando

bene restaurate fuerint, quam ipso launegild fuisset quando accepit, et ipsam donationem similiter strictus necessitate famis fecisset; et si approbare potuerit, reddat launegild et recipiat res suas; et cartula ipsa frangatur."

4. Loc. cit., chap. 4: "De donatione vel venditione que in loca venerbilia facta sunt suspendi iussimus, usque dum compensaverimus in sinodo cum episcopis et comitibus, quomodo fieri debeant. Et hoc iubemus, ut illis partibus iustum procedat iudicium, ubi nos aut nostra hostis fuerimus, pro illud quod supra scriptum est. Et hoc statuimus, ut cartule ille quae tempore Desiderio factae fuerunt per districtionem famis aut per qualecumque ingenio, ut ista causa non computetur, sed iuxta legem ipsorum exinde procedat iudicium. Et hoc damus in mandatis, ut quicumque homo ab hac presenti die vicesimo mensis Februarii res suas vendere aut alienare voluerit, in omnibus eorum permaneat potestatem: tantum sic faciant, sicut eorum fuerit lex.

"Unde qualiter nobis complacuit, presentem deliberationis notitiam pro amputandas intentiones fieri iussimus et nobis relegi fecimus, et volumus ut sic procedat iudicium. (Facta notitia anno dominorum nostrorum . . .)."

5. Capitularia, Vol. II, p. 61, No. 201, chap. 7: "De oppressione pauperum liberorum hominum, ut non fiant a potentioribus per aliquod malum ingenium contra iustitiam oppressi, ita ut coacti res eorum vendant aut tradant. Ideo haec de liberis hominibus diximus, ne forte parentes contra iustitiam fiant exheredati et regale obsequium minuatur et ipsi heredes propter indigentiam mendici vel latrones seu malefactores efficiantur."

6. Capitularia, Vol. II, p. 180, No. 248, chap. 17: "De pauperibus non opprimendis. Monemus regiam pietatem de oppressione pauperum liberorum, ut non a potentioribus per aliquod malum ingenium contra iustitiam opprimantur vel cogantur, ut res suas vendant sive tradant, ne forte parentes eorum contra iustitiam fiant exeredati et regale obsequium minuatur et ipsi propter indigentiam mendici vel latrones seu malefactores efficiantur. Et ut sepius non fiant manniti ad placita nisi sicut in dominico capitulari olim facto praecipitur."

7. Ansegius, op. cit. Capitularia, M.G.H., Vol. I, p. 410; P.L. XCVII, col. 528, Lib. I, chap. 115: Identical to the capitulary of 805. See above p. 114, n. 24.

8. Concilia, M.G.H., Legum, Sec. III, Vol. II, p. 253, No. 34, chap. 23: "Ne comites vel vicarii seu iudices vel centenarii sub mala occasione vel ingenio res pauperum emant nec per vim tollant aut quolibet argumento subripiant; sed si cui aliquid possessionum emendum aut vendendum est, id in publico coram comite et iudicibus et nobilibus civitatis facere debebit."

9. Capitularia, Vol. I, p. 174, No. 78, chap. 22: "Ut comites vel vicarii seu iudices aut centenarii sub mala occasione vel ingenio res pauperum non emant nec vi tollant; sed quisque hoc conparare voluerit, in publico placito coram episcopo fiat."

10. Concilia, M.G.H., Legum, Sec. III, Vol. II, p. 296, Appendices ad Concilia Anni 813, chap. 22: "Ut comites vel vicarii seu iudices aut centenarii sub mala occasione vel ingenio res pauperum non emant nec vi tollant; sed quisquis hoc conparare voluerit in publico placito coram episcopo faciat.

11. Concilia, M.G.H., Legum, Sec. III, Vol. II, p. 298, Appendices ad Concilia Anni 813, chap. 4: "De rebus pauperum per malam occasionem non emendis hoc omnibus placuit, quod in Mogonciacensi conventu statutum est."

12. Concilia, M.G.H., Legum, Sec. III, Vol. II, p. 302, Appendices ad Concilia Anni 813, chap. 5: "De rebus pauperum per malam occasionem non emendis.

13. Capitularia, M.G.H., Legum, Sec. II, Vol. I, p. 220, No. 105, chap. 21: "Ut nec episcopi nec abbates nec comites nec vicarii nec iudices nullusque omnino sub mali occasione vel malo ingenio res pauperum vel minus potentium nec emere nec vi tollere audeat; sed quisquis ex eis aliquid comparare voluerit, in publico coram idoneis testibus et cum rationibus hoc faciat. Ubicumque autem aliquid inventum fuerit factum, hoc omnino emendetur per iussionem nostram. (In tribus libri Papiensis codicibus quasi Karoli M. capitulum legitur; Leg. IV, 587, c. 11.)"

14. Capitularia, Vol. II, p. 312, No. 154, chap. 2: Identical to the issue at Mainz, 813. See above p. 115, n.25.

15. Capitularia, M.G.H., Legum, Sec. II, Vol. II, p. 180, No. 248, chap. 18: "De rebus pauperum per malam occasionem non emendis. Propter provisiones pauperum, quorum curam habere debemus, placuit nobis, ut nec episcopi nec abbates nec comites nec vicarii nec iudices nullusque omnino sub mala occasione vel malo ingenio res pauperum vel minus potentum emere aut vi tollere audeat. Sed quisquis ex eis aliquid conparare voluerit, in publico placito coram idoneis testibus et cum ratione hoc faciat. Ubicumque autem aliter inventum fuerit factum, hoc omnino emendari per regiam convenit iussionem."

16. Ansegius, op. cit. Capitularia, Vol. I, p. 421; P.L. XCVII, col. 546, Lib. II, chap. 32: Identical to the issue at Mainz, 813. See above p. 115,n.25.

17. Regino of Prum, Libellus de Ecclesiasticus Disciplinus, Lib. II, chap. 421 in P. L., CXXXII, col. 364. Virtually identical to the issue of 884. See above pp. 98-99.

18. Burchard of Worms, Decretorum Libri Viginti, Lib. II, chap. 168 in P. L. CXL, col. 653: "Ut presbyteri plebes suas ut hospitales sint admoneant. Placuit ut presbyteri plebes suas admoneant ut ipsi hospitales sint, et nulli iter facienti mansionem denegent, et ut omnis occasio rapinae tollatur, nihil carius vendant transeuntibus, nisi quanto in mercato vendere possint. Quod si carius vendere voluerint, ad presbyterum transeuntes hoc referant, et illius jussu cum humanitate eis vendant.

19. Ivo of Chartres Decretum, Part VI, chap. 259, col. 500, P. L. CLXI, Identical to the text of Burchard of Worms. See above note 18.

20. Compilatio I, III, 15, C2, p. 31.

21. Decretals, III, 17, C. 1, C.I.C., Vol. II, col. 518: "Cogit episcopus, ne carius vendatur transeuntibus, quam in mercato venderetur. Placuit ut presbyteri plebes suas admoneant, ut et ipsi hospitales sint, et, non carius vendant transeuntibus, quam in mercato vendere possunt, alioquin ad presbyterum transeuntes hoc referant, ut illius iussu cum humanitate sibi vendant.

APPENDIX III

COMMUNIS AESTIMATIO

Bisignano's passage on usury has a particular significance for the history of the terminology of price law.[1] The meaning of the expression communis aestimatio, which it contains has been long argued. It is translated "common estimate," but here the agreement ends. On the one hand, common estimate is taken to mean "the customary price";[2] on the other hand it is taken to mean "the market price."

The Bisignano passage makes it clear that it cannot mean "the customary price." In discussing the question of paying grain to settle a loan which was originally made in cash, Bisignano asks, "Should the lender demand the amount of grain he could have purchased at the time the loan was made or should one receive the amount that could be purchased according to the common estimate (communi estimacione) when the money was to be returned?" Clearly if the "common estimation" was a customary price, then the prices mentioned by Bisignano would probably have been the same at the time of the loan and the time of the payment and the alternatives given would be meaningless, but the author's expectation is clearly fluctuation, not stability, in prices.

The same may be said about the word communiter, for the passage also says "as much as it can be sold for at that time commonly" (quantum tunc communiter vendi poterit). To say "for as much as it can be sold for customarily at that time (tunc communiter) is literally an absurdity. If the price is customary then it is not merely the price at that time. If the price stands only at that time, then it is not customary.

That "common estimate" does not mean customary price seems clear, but it has also been argued as to whether communis aestimatio means market price or an estimate made by experts on the basis of which the government might establish a fixed price. One should state immediately that neither the lawful nor the historical status of either government prices or the market prices depends on the meaning of communis estimatio since both types of prices had appeared in the law in different words.[3]

Nevertheless, the expression "common estimation" appears in the law and its meaning has been argued. "The just price," states W. Cunningham "is known by the common estimation of what the thing is worth." So much of course would go unargued. But, he continues, there are two modes in which the common estimate is obtained--the one marking the modern and the other the medieval view and "whereas we rely on the 'higgling of the market' as the means of bringing out what is the common estimate of any object, medieval economists believed that it was possible to bring common estimation into operation beforehand and by consultation of experts to calculate out what was the right price. If the 'common estimation' was thus organized, either by the authorities or gilds or parliament, it was possible to determine beforehand what the price should be and try to lay down a rule to this effect."[4]

In fact, the author himself either rejects or does not see the implication of describing the just price (or the knowledge thereof) as the common estimation and describing the common estimation as extant and imposed either by town authorities or gilds of parliament before the merchandise came to market. For he states that it was unjust "to speculate on the possibilities of the future in such a way as to be able

to demand an extortionate price." How a dealer can "speculate" in a fashion that allows him to "demand" a high price is difficult to understand. According to Cunningham the dealer does not set the price in any case.[5] "Black market" seems to be the only possibility.

Cunningham's definition of the "common estimation" did not go unargued. T. Slater insisted it was incorrect. A common estimate, he said, was a "social estimation" and by that he meant an estimation not by "'certain members' of the community" but by all the members of the community, or rather, "the people with whom commercial transactions are possible and practicable"--all buyers and sellers (one hesitates to use the phrase but it is so appropriate) who are willing and able to transact.

Moreover, stated Slater, the precise opposite of the common estimate he describes is the value which a commodity may have to any particular individual or would-be buyer: "If one be starving a loaf of bread is worth more to him than all the gold of Midas."

Rather will the value *of exchange* (*or just price*) be determined by the amount the members of the community as a group are prepared to pay for a loaf of bread, maintains Slater; moreover, it is precisely this "collective judgment" which constitutes the "common estimation"[6] and which is expressed as the market price.[7]

But Slater gave virtually no corroboration of his "thesis" and it was expressly rejected. One writer declared that the common estimation was similar, but not identical to the just price. Only lawfully fixed prices were just prices. The common estimation was an ethical judgment on a price--a declaration made by "the most influential members

of the community who anticipate the markets."[8] If that estimate became law or custom the estimate became "the just price." The legal and customary prices were thus an effort to give practical expression to the common estate.[9]

Neither Cunningham nor Kelleher's description of the common estimation can be accepted for they are contrary to medieval law. According to Cunningham[10] the common estimation in itself had no force at law, i.e., the estimation was made by experts; subsequently it might be turned into law by parliament, town authorities or gilds. Similarly, Kelleher says that the just price was a lawfully fixed price but the common estimation was an ethical judgment. It obtained force at law if and only if it was converted into a legal or customary price.[11]

According to Innocent IV, on the other hand, the common estimation itself had force at law.[12]

Reviewing the statements of Cunningham, Slater and Kelleher, and citing additional sources, G. O'Brien divides the just price into two categorical chapters: "The Just Price when Fixed by Law"[13] and "The Just Price when not Fixed by the Law."[14] When the price is fixed by competent authority it was the pretium legitimum and "ipso facto the justum pretium."[15] But in the absence of a legal fixing "the just price . . . was held to be the price that was in accordance with the communis estimatio." He cites a medieval text: "a thing is worth what it can generally be sold for at the time of the contract; this means what it can be sold for generally either in that day or the preceding or following day. One must look to the price at which similar things are generally sold in the open market."[16]

From that very quotation he concludes, "It is quite incorrect to say . . . that the medieval just price was in no way different from the competition of today which is arrived at by the higgling of the market price." For the particular mode in which the common estimation was made, he cites other historians: "this common estimation . . . proceeds from the evaluation of competent men," and again "The common estimation meant an ethical judgment of at least the most influential members of the community anticipating the markets."[17]

There are several points at which the medieval text quoted clashes both with O'Brien and the historians quoted. But perhaps the most striking is the statement by Ryan: "The common estimation was social judgment that fixed price beforehand," as compared with the medieval which cited: "a thing is worth . . . what it can be sold for generally either on that day or the preceding or following day." It is difficult, for example, to see how an item can be sold for a price fixed beforehand when the price might not be determined till the next day.[18]

The expression "common estimate" was used as early as 1180[19] and equated with quantum tunc communiter vendi poterit. Although one cannot speak with certainty "poterit" does not seem appropriate for an estimation made so that a price might be fixed by the government.

Moreover, it is presented not as part of the process of establishment of price by a government, but rather as an alternative to a legislated price. Accursius's gloss on Pretia rerum ex affectu utilitate singulorum sed communiter funguntur, seems to show this quite well. The Romanist gives several interpretations to communiter funguntur and he considers them all lawful. One is legislated price: "id est statuuntur."

Another interpretation seems to be a market price: "communi pretio estimatur res," and he continues, "Quod ergo dicitur, res tantum valet, quantum vendi potest scilicet communiter." Later texts remove all doubt for they equate the phrase secundum communem aestimationem vel cursem with secundum aestimationem fori.[20]

FOOTNOTES TO APPENDIX III

1. See above, p. 132, n. 1.

2. Alexander Gray, The Development of Economic Doctrine, p. 52.

3. E.g.: "Communiter funguntur, scilicet pretia; id est statuuntur; Quantum in mercato vendere posset." See above pp. 98 and 130.

4. W. Cunningham, The Growth of English Industry and Commerce during the Early and Middle Ages (Cambridge: University Press, 1905), Vol. I, p. 253.

5. Ibid., p. 254.

6. T. Slater, "The Just Price," Irish Theological Quarterly, IV (1909), 157. Needless to say, he speaks of supply (or scarcity) as influencing the judgment. See, p. 148.

7. Ibid., pp. 156-157.

8. J. Kelleher, "Father Slater on Just Price and Value," The Irish Theological Quarterly, XI (1916), 133.

9. Ibid., p. 131.

10. See above, note 4.

11. Kelleher, "Father Slater," p. 133.

12. See above, p. 132, n. 4.

13. George O'Brien, An Essay on Medieval Economic Teaching (London: Longmans, Green and Company, 1920), pp. 106-109.

14. Ibid., pp. 109-120.

15. Ibid., p. 108.

16. Ibid., p. 116.

17. He cites a number of historians: Abbé Desbusquois, "La Justice dans l'Échange," Semaine Sociale de France, 1911, pp. 169-170; Kelleher, "Father Slater on Just Price and Value," The Irish Quarterly, XI, 133 (correctly, pp. 132-133), Dr. Ryan, Living Wage, p. 28 and Cunningham, Growth of English Industry and Commerce, Vol. I, 353 (correctly, p. 253). See above, pp.153-4. O'Brien, Essay, pp. 116-117.

18. It may also be the case that the writer considered the price somewhat flexible but that the flexibility was limited by a permanent maximum and minimum price. See above, pp.708. O'Brien, Essay, p. 117. On the other hand, he emphatically denies any notion of any inherent or intrinsic value. Rather does he state, "The value of an object is to be measured by its capacity for man's wants," and cites Buridan. He also cites Antonius of Florence, who says that value is determined by "virtuositas raritas and placibilitas." See ibid., pp. 109-110, and ns. 1 and 2.

19. See above, p.127.

20. R. de Roover, "Joseph A. Schumpeter and Scholastic Economics," Kyklos, X, No. 2 (1957), 133-134.

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