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Unfair prices in contracts in English and French law

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ABSTRACT

When and why can parties escape from a contract on the ground that the price is unfair? This question is considered in a comparative and historical perspective in English and French law. The general rule in both systems is that the parties are free to determine the price and they are then bound by their contract. One well known exception in French law, which derives from Roman law, is Article 1674 of the *Code civil* which allows a vendor to rescind a contract for the sale of land if the price agreed in the contract is less than five-twelfths of the fair price. It is generally thought that there are no analogous rules in English law. However, the law on this subject is in fact considerably more complex and more colourful than this simple contrast would suggest.

Numerous rules on unfair prices in contracts were created in French law by the legislature and the courts since the promulgation of the *Code civil* in 1804. In English law, courts intervened in contracts on the ground of an unfair price in a few instances in the nineteenth century. However, only the rule on unfair prices in salvage contracts has survived until today. In both systems, the policies of preserving family wealth, protecting weak parties and giving special treatment to certain parties for economic, political, social or cultural reasons underpin these rules.

There are two principal conclusions. First, freedom of contract is much less extensive in French law than in English law. This is evident in the numerous rules on unfair prices in contracts in French law and in the primacy of the remedy of altering the price rather than rescission. Secondly, while in theory, French courts play a much less significant role than English courts in the development of law, the creation and abolition of certain rules on unfair prices in contracts by French courts shows that judicial creativity in French law can be much less constrained in practice than in English law.

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CHAPTER 1

INTRODUCTION

In 1804, during a divisive debate on the law of contract in the *Conseil d'Etat*, Napoleon¹ made the following statement:

Let's suppose that a vendor had not intended to make a gift, but that he had actually wanted to be paid 10,000 francs for land which was worth 100,000: who would not cry out against the injustice of such a contract?²

The rules on 'such a contract' in English and French law, both in the past and in the present, are the subject of this thesis.

Given that freedom of contract is the foundational principle of both English and French contract law, it is striking to find that there are any rules which allow intervention in contracts on the ground of an unfair price in either system. The freedom to determine the price in contracts is the core element in the principle of freedom of contract. While numerous rules regulate the terms of certain contracts in both systems, the price agreed by the parties to the contract is generally considered to be sacrosanct. Therefore, rules which allow intervention in contracts on the ground of an unfair price undermine the principle of freedom of contract in a particularly flagrant way.

One well-known exception to the principle of freedom of contract in French law is Article 1674 of the *Code civil*³ which allows courts to intervene in contracts for the sale of land at too low a price. It is generally thought that there are no analogous rules in English law but this thesis shows that the story of unfair prices in contracts in English and

¹ In this thesis, 'Napoleon' refers to Napoleon Bonaparte (1769-1821).

² PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, tome XIV (Marchand du Breuil 1827) 58.

³ Hereafter, 'Article 1674' throughout this thesis.

French law is in fact considerably more complex and more colourful than such a simple contrast suggests.

In French law, the question of unfair prices in contracts plunges us into the tumultuous politics of the Revolution of 1789, the Napoleonic period and the Restoration of Louis XVIII. As we will see, Napoleon played a crucial role in the decision to adopt the current rule on unfair prices in contracts for the sale of land and he also shaped some of its key provisions. Later, in the twentieth century, the question of unfair prices in contracts was connected to the sale of public functions and intertwined with several political, social and economic crises during the Third Republic.

In English law, the question of unfair prices in contracts first brings us back to an era of strict settlements and dissolute heirs. We will see how, in the nineteenth century, the courts created and rigorously applied a rule which was intimately connected with the wider social, economic and political policy of preserving wealth, particularly land, within the family. The story of unfair prices in contracts in English law involves naive sailors, grasping captains and the dominant position of the British merchant navy in the nineteenth century. We will see the remarkable influence of a rule developed by a single judge in the English Court of Admiralty in the nineteenth century on both English and French law today.

The thesis addresses six principal questions. It will examine the situations in which English and French contract law have intervened in contracts on the ground of an unfair price; the reasons which led each system to deviate from the principle of freedom of contract in these areas; the significance of whether the contracts were rescinded or whether the price was altered; whether the fair price is determined by judges, *experts* or arbitrators; the significance of the role played by courts in the creation and abolition of

the rules on unfair prices; and the extent to which English law was influenced by the rules on unfair prices which were applied in French law and vice versa.⁴

It is important to clarify three aspects of the meaning of the term ‘unfair price’. First, in this thesis, the term ‘unfair price’ denotes a price which is higher or lower than the market price. Some rules on unfair prices in contracts in French law apply only if the price in the contract is below or above a certain threshold. When these rules are being discussed, the term ‘unfair price’ will refer to a price which falls above or below the threshold that is set out in each rule.

Secondly, the term ‘unfair price’ describes a price which is higher or lower than the market price at the time of the conclusion of the contract. While the price agreed in a contract might become unfair as a result of events which occur subsequent to the conclusion of the contract, such as a depreciation or appreciation in the value of a currency, this question is generally outside the scope of this thesis.⁵

Finally, the direct regulation of prices by the State is outside the scope of this thesis.⁶ Where the State regulates prices, the prices which are set usually deviate from the

⁴ These six questions, which are considered in more detail in the text below from n7 to n11, correspond to the headings and sub-headings in chapter 6.

⁵ It is important to distinguish between *lésion* and *imprévision* in French law. *Lésion* has two meanings. First, as discussed later in section (i) in chapter 2, *lésion* (as a concept) denotes the difference between the price stipulated in the contract and the fair price (or the market price) at the time of the conclusion of the contract. Secondly, *lésion* (as a doctrine) describes a rule which allows one party to escape from a contract on the ground of an unfair price (through rescission of the contract or alteration of the price). *Lésion*, in both senses, is the focus of the discussion on French law throughout this thesis.

On the other hand, the doctrine of *imprévision* is relevant in situations where a difference between the price stipulated in the contract and the fair price (or the market price) has been caused by unforeseen changes in circumstances subsequent to the conclusion of the contract. While the doctrine of *imprévision*, which allows a court to modify the terms of the contract in these circumstances, has been adopted in public law, in general, it has been rejected in private law: F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (10^e éd., Dalloz 2009) 481-490.

Despite the clear distinction between *lésion* and *imprévision*, and the focus on the former in this thesis, it will be necessary to consider the interaction between rules based on *imprévision* and *lésion* in sections (iv) and (v) in chapter 5.

⁶ The regulation of certain prices by the State was an important feature of French law and the French economy until the *ordonnance* of 1 December 1986 which provided that the general rule is that prices are set by the market and not by the State: Terré, Simler et Lequette (n5) 396-397.

market price as it is the perceived inadequacy⁷ of the market price which is the very reason for intervention by the State. Therefore, the term ‘unfair price’ will not be used to denote a price which is higher or lower than a price which is fixed by the State.

The central elements of the six principal questions which will be examined in this thesis are considered in more detail here. First, in which situations have English and French law intervened in contracts solely on the ground of an unfair price? In the nineteenth century, there were similarities between the rules in English and French law on unfair prices in contracts for the sale of land and in both systems today, there are similar rules on unfair prices in salvage contracts. However, beyond the common ground of contracts for the sale of land and salvage contracts, there are rules on unfair prices in French law for which there are no equivalents in English law. So, in contrast to English law, French law has intervened on the ground of an unfair price in contracts for the provision of certain services, for the sale of public functions (*offices ministériels* or *offices ministériels et publics*),⁸ for the sale of agricultural commodities, for the sale of businesses in the Great Depression and for the assignment of copyright.

Secondly, why have rules which allow intervention on the ground of an unfair price in these particular situations been created in English and French law? As will be seen, in both systems, the rules on unfair prices are based on three policies: preserving family wealth, protecting weak parties and giving special treatment to certain parties for

However, since the accession of François Hollande to the presidency and the election of a socialist majority in both the *Assemblée nationale* and the *Sénat* in 2012, it appears that the direct regulation of prices is in vogue once again. The *décret* n° 2012-915 of 26 July 2012 provides that the salaries of certain managers (those who are *mandataires sociaux*) of companies owned by State cannot exceed €450,000 (which equates to twenty times the salary of the lowest paid employees in these companies). In practice, this *décret* applies to around fifty public companies and ten subsidiaries of these companies. See <www.gouvernement.fr/gouvernement/les-remunerations-des-dirigeants-d-entreprises-publiques> accessed 3 October 2012.

⁷ Of course, the price might be considered to be ‘unfair’ in a different sense to the way in which that term is used in this thesis.

⁸ These terms are explained in section (iii) in chapter 5.

economic, political, social or cultural reasons. Each rule on unfair prices in English and French law can be explained by one or sometimes, two of these policies, but no rule can be explained by all three policies.

Thirdly, in what ways have courts intervened in contracts on the ground of an unfair price and what are the consequences of the particular type of intervention for the scope of freedom of contract in both systems? For the purposes of this thesis, the term 'intervention' includes the refusal to award specific performance of a contract, the rescission of a contract and the alteration of the price.

The remedy of refusing to award specific performance of a contract is the least significant of the three as it is an equitable remedy which is peculiar to English law and there is no exact analogy in French law. At first glance, the remedy of refusing to award specific performance might seem to be the very opposite of intervention in a contract. However, it is appropriate to classify this remedy as 'intervention' given that it operated only where specific performance would otherwise have been granted by a court as a matter of course.

The remedies of rescinding the contract and altering the price agreed in a contract clearly constitute intervention but the latter infringes freedom of contract to a much more significant extent than the former. Freedom of contract includes the freedom to determine the price at which one is willing to enter into a contract in addition to the freedom to choose whether to conclude a contract at all. Where a court rescinds the contract, the parties are placed in the position in which they would have been had they not entered into any contract. In contrast, where the court alters the price, the parties are effectively compelled to perform a contract which differs from the one which they actually made. If the contract is rescinded, the parties are free to decide whether they want to enter into another contract at a different price (the fair price). However, the parties are deprived of

this choice if the court alters the price in the contract. Therefore, there is a significant difference between the remedies of rescission and alteration of the price in the context of freedom of contract.

Fourthly, who determines the fair price in lieu of the parties to the contract? In France, this role is performed by judges, *experts* and arbitrators. In English law, the picture is quite different. As the particular role of *experts* is unique to French civil procedure, there are no equivalent legal actors in English law. For most of the nineteenth century, the fair price was determined by judges when the rules on unfair prices in contracts were invoked in English law. The parties often presented the evidence of various valuers but the fair price was ultimately determined by the judge. Since the last decade of the nineteenth century arbitrators have largely replaced judges in this role in the context of the one rule on unfair prices which is still in force in English law today. In practice, the parties to a salvage contract no longer stipulate a price in their contract and the fair price is determined by arbitrators after the performance of the contract. In chapter 6, we will consider why this particular method appears to be the most appropriate way of dealing with rules on unfair prices in contracts in other contexts too.

Fifthly, the role of French courts in the creation and abolition of certain rules on unfair prices will be compared to that of English courts. In the common law, judges have the power to create rules and abolish rules which they have created in certain circumstances. In contrast, in theory, French courts do not have similar powers.⁹ Therefore, the creation of two of the rules on unfair prices in contracts and the recent abolition of one of these rules by French courts is particularly striking.

Furthermore, the comparative analysis of the creation and abolition of certain rules by courts in both French and English law will provide an illustration of the extent to

⁹ The theoretically restricted role of French judges today is a legacy of the controversial political role of the *Parlements* during the *ancien régime* and the reaction to that during the Revolution of 1789: JP Dawson, *The oracles of the law* (University of Michigan Law School 1968) 262-431.

which, notwithstanding the position in theory, judicial creativity in French law is in fact less constrained than in English law.¹⁰ We will see that in one instance, a rule which had been created by English courts had to be abolished by legislation when it was considered to be no longer desirable as the doctrine of precedent impeded the judicial abrogation of the rule. In contrast, when, in 2004, the *Cour de cassation* thought that a rule which it had created in 1910 was no longer appropriate, it was able swiftly and peremptorily to expunge that rule from French law.

Finally, this thesis will examine the circulation of legal ideas on unfair prices in contracts between English and French law. In this regard, the beginning of the twentieth century is a turning point. Before this point, English judges and jurists sometimes discussed or mentioned the rule on unfair prices in contracts for the sale of land in French law even though the analogous rule in English law was not based on the rule in French law. Similarly, French jurists were aware of many aspects of English maritime law, including the English rule on unfair prices in salvage contracts and in fact, the French rule is a transplant from English law. However, the flow of legal ideas on unfair prices in contracts between English and French law came to an end at the beginning of the twentieth century. After this period, there is no discussion in English law of the various rules in French law (which are examined in chapter 5) for which there are no equivalents in English law. It is significant that all but one of these rules were created in the twentieth century. The absence of any discussion of the rules in French law on unfair prices in contracts in English law in the twentieth and twenty-first centuries is consistent with the more general disengagement of English contract law from reflection on civil law systems since the beginning of twentieth century.¹¹

¹⁰ This point will be examined in light of one of the general observations in Dawson (n9). See section (ii)(b) in chapter 6.

¹¹ AWB Simpson, 'Innovation in nineteenth century contract law' (1975) 91 *LQR* 247, 256-257.

This thesis is an exercise in comparative law and legal history.¹² Of course, it would have been possible and worthwhile to analyse the question of intervention in contracts on the ground of an unfair price in English law only or in French law only. However, it is the comparative context which gives particular significance to the aspects of the question of unfair prices in contracts in both systems which are analysed in this thesis. For example, the importance of the existence or absence of particular rules on unfair prices in each system, the similar and different rationales and remedies for these rules and the awareness or ignorance of each system of the position on unfair prices in contracts in the other system is apparent only in this comparative perspective.

Furthermore, a comparative perspective facilitates the formulation of general observations about English and French law which would not be feasible in a study which focused on English law only or on French law only. Two examples are given here. One general observation on English and French law which is made in this thesis concerns the fifth question discussed above,¹³ on judicial freedom and constraints in English and French law. Another observation, which this time relates specifically to English and French contract law, is that the general picture of the rules on unfair prices in contracts shows that freedom of contract is much less extensive in French law than in English law. This is evident in two ways. First, there are many more rules on unfair prices in contracts in French law than in English law. Secondly, the remedy of altering the price is much more prevalent in the rules on unfair prices in contracts in French law than in English law.

An explanation of the comparative law method which is used in this thesis is necessary. Comparative law methodology has been the subject of a significant amount of

¹² Each method complements the other: J Gordley, 'Comparative law and legal history' in M Reimann and R Zimmermann (eds), *The Oxford handbook of comparative law* (OUP 2008) 753.

¹³ See the two paragraphs on the fifth of the six questions outlined above.

analysis and debate.¹⁴ While comparative law methods are various and numerous, functionalism¹⁵ and prescription¹⁶ are particularly common features of comparative law studies. Therefore, the particular comparative law method which is used in this thesis deviates from common comparative law methods in two ways.

First, in general, the rules on unfair prices and particularly the origin and operation of these rules in practice, constitute the starting point in this thesis. In contrast, the functional method often starts with factual situations rather than rules or concepts. The latter method can lead to illuminating comparative insights and it is in fact used in a subsidiary way at certain points in this thesis. However, as the focus of this thesis is a legal idea, which has been embodied in various rules in English and French law at different times, it is appropriate to prioritise rules rather than factual situations as the starting point. Moreover, as this thesis focuses on rules rather than factual situations, it is essential to examine the legal, political, economic, social or cultural context in which the rule was created and applied.¹⁷ Such an analysis leads to significant comparative insights which would not emerge in a purely functionalist study.

Secondly, in general, the comparative law method in this thesis is descriptive (or interpretative) rather than prescriptive. Many comparative law studies focus on what the law in each system ought to be. We consider this method to be ‘prescriptive’. On the

¹⁴ See for example, the essays in Reimann and Zimmermann (n12) 305-865.

¹⁵ K Zweigert and H Kötz, *Introduction to comparative law* (T Weir tr, 3rd edn, OUP 1998) 34; R Michaels, ‘The functionalist method of comparative law’ in Reimann and Zimmermann (n12) 339.

¹⁶ Prescription is a feature of many collaborative comparative law projects. See for example the Principles of International Commercial Contracts (the UNIDROIT principles), the Principles of European Contract Law (the PECL) and the Draft Common Frame of Reference (the DCFR). However, the prescriptive method is not used in all collaborative comparative law projects. The Common Core of European Private Law, for example, eschews this method.

¹⁷ As a result, the sources used in this thesis are more eclectic than those found in studies based primarily on the functional method. In addition to primary and secondary legal materials, this thesis mainly uses secondary historical sources. In a more subsidiary way, it also draws on articles in newspapers, novels and a treatise on political economy.

other hand, that which we will label as the ‘descriptive’ comparative law method seeks to explain what the law is and what it once was in each system and to reveal and analyse the reasons for the similarities and differences. The descriptive method is always necessary in a comparative study, as it is a preliminary step to any prescriptive analysis. Therefore, the choice is not whether to use the descriptive method instead of the prescriptive method but whether to use the prescriptive method in addition to the descriptive method.

The use of the descriptive method only in this thesis is justifiable as it leads to the formation of sufficiently significant insights into the scope and nature of freedom of contract in English and French law, judicial freedom and constraints in the creation and abolition of rules and the circulation of legal ideas in both systems which merit extensive analysis.¹⁸ It is therefore unnecessary to embark also on the very different exercise of a prescriptive study.

In addition to comparative law, legal history is a principal method in this thesis. An historical perspective adds the dimension of time to a legal analysis and this is particularly important in the study of an area of law where, at first glance, the current position in both English and French law seems to defy any easy and coherent explanation. Indeed, it is difficult to see any rational pattern in the medley of rules which allow courts to intervene in contracts on the ground of an unfair price in French law today. Similarly, the reason why courts can intervene in salvage contracts where the price is too high or too low in English law today and not in any other situation is not at all obvious.

An historical analysis allows us to discern the ways in which and the reasons why various rules and ideas on unfair prices in contracts were adopted, abandoned or debated in different fora (courts, legislatures and legal writing) at different times. There are two significant outcomes from such an approach. First, what seems at first to be a puzzling

¹⁸ Nonetheless, exceptionally, in section (i)(d) in chapter 6, we will offer a prescriptive view on the methods of determining the fair price in English and French law.

motley of exceptions to the principle of freedom of contract in the present law can be neatly arranged within the comprehensive and coherent vision of the development of English and French contract law which emerges from an historical analysis.

Secondly, the dimension of time allows one to gain a deep understanding of legal development in English and French law. In this thesis, we will see how and why a rule on unfair prices in contracts was transplanted from English law to French law. We will also consider the significant role of French courts in the creation and abolition of rules on unfair prices, which is particularly remarkable given that, in theory, French courts, unlike English courts have no such powers. Such observations would not be possible without combining the perspective of legal history with that of comparative law.

Finally, a note on the use of translations in this thesis is also necessary. In general, citations from French sources are translated into English in this thesis in order to minimise obstacles to the flow of the text. However, the original text in French is preserved where it has a particular resonance which would be significantly diminished or lost in a translation. French legal terms are explained rather than translated where there is no equivalent concept or institution in English law.

CHAPTER 2

THE GENERAL PICTURE AND THE LIMITS OF THIS STUDY

This chapter considers the general position of English and French law on unfair prices in contracts. We will also outline here the limits of this study and justify the exclusion of certain topics from the scope of this thesis.

(i) French law

Intervention in certain contracts on the ground of an unfair price is an ordinary, though not very common, feature of French law today. The extent to which the concept of intervening in contracts on the ground of an unfair price is such an entrenched and an integral part of French law is apparent in the existence of the specific term '*lésion*', which describes this concept, in legal French. During the debates on the *Code civil* in the *Conseil d'Etat* in 1804, Portalis defined '*lésion*' as 'the difference between the common price or the just price and the price stipulated in the contract'.¹ The term '*lésion*', which is derived from the Latin term '*laesio enormis*' transparently evokes the very ancient roots of the concept of intervening in contracts on the ground of an unfair price. Chapters 2, 3 and 4 will show that this concept has been a significant element of French law since the twelfth century.

(a) The general position on unfair prices in contracts

The rules which allow intervention in contracts on the ground of an unfair price certainly constitute the exception rather than the general rule in French law. The general rule in

¹ PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, tome XIV (Marchand du Breuil 1827) 136.

French law is that the parties are free to determine the price in their contract. As Portalis observed, in his *discours préliminaire* on the *Code civil* in 1800,

a man who deals with another man should be careful and shrewd; he should look after his own interests, seek out appropriate information, and not neglect that which is useful. The law... is not there to relieve us of the burden of having to use our own reason.²

The principle of freedom of contract is also evident in Article 1134 of the *Code civil* which provides that ‘contracts which are lawfully concluded take the place of legislation for those who have made them’.

The exceptional nature of the rules which allow intervention in contracts on the ground of an unfair price in French law is apparent in the prevalence of negative particles (‘*ne... que*’) in Articles 1118 and 1313 of the *Code civil*. Article 1118 of the *Code civil* stipulates that ‘*la lésion ne vicie les conventions que dans certain contrats ou à l’égard de certaines personnes...*’. Similarly, Article 1313 of the *Code civil* provides that those who are not under some contractual incapacity can obtain restitution on the ground of *lésion* only in certain situations.

The general prohibition on intervention in contracts on the ground of an unfair price in Articles 1118 and 1313 of the *Code civil* influences the shape of the doctrines of *erreur* and *dol* in Articles 1110 and 1116 of the *Code civil* respectively.

First, this is apparent in the sharp distinction between mistake as to the substance and mistake as to the value in the doctrine of *erreur*.³ A contract will not be annulled on

² Fenet, tome I (n1) 514.

³ Mistake as to value was defined by Ghestin as ‘an erroneous economic assessment based on facts which are correct’ in his influential doctoral thesis on mistake: J Ghestin, *La notion d’erreur dans le droit positif actuel* (LGDJ 1962) 83. Ghestin’s definition has been widely used by courts and legal writers: G Goubeaux, ‘A propos de l’erreur sur la valeur’ in *Etudes offertes à J Ghestin* (LGDJ 2001) 389, 389-390.

the basis of *erreur* where one of the parties made a mistake which was merely a mistake as to the value.⁴ However, in practice, the line between mistake as to the value and mistake as to the substance of the contract is not very clear. In certain cases, the courts have annulled contracts on the ground of *erreur*, even though the claimant clearly made a mistake as to the value.⁵ In fact, it has been observed that the courts have interpreted the concept of mistake as to the substance so broadly that there have been hardly any cases in which a mistake as to the value was not held to constitute a mistake as to the substance.⁶ Nonetheless, the maintenance of the distinction between mistake as to the substance and mistake as to the value highlights the importance of the general rule that courts will not intervene in contracts simply on the ground of an unfair price.

Secondly, Articles 1118 and 1313 of the *Code civil* also cast a shadow over the doctrine of *dol* (in Article 1116 of the *Code civil*). The influence of the general rule that courts will not intervene in contracts simply on the ground of an unfair price is evident in the distinction between the disclosure of information relating to the value and the disclosure of other kinds of relevant information. The intentional failure to disclose relevant information to the other party to the contract often constitutes *dol par réticence* and may lead to annulment of the contract under Article 1116 of the *Code civil*.⁷

⁴ F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (10^e éd., Dalloz 2009) 233; English law on mistake is much more restrictive than French law. Even if both parties were mistaken as to the value, the contract would not be void in English law. As Lord Thankerton observed in *Bell v Lever Brothers Ltd* ‘it is not enough that a grossly excessive price has been paid for a bad article’: [1932] AC 161, 235.

⁵ See for example, Cass com, 12 February 2008. As Y-M Laithier observes, ‘the only mistake’ in this case was a mistake as to value of the shares which the claimant sold the defendant: *RDC* (2008) 730, 732.

⁶ Goubeaux (n3) 395, 397.

⁷ Terré, Simler and Lequette (n4) 243-245. For example, in Cass civ 3, 15 November 2000: Bull civ III n°171, the *Cour de cassation* annulled a contract for the sale of land on the basis of Article 1116 of the *Code civil* as the purchaser had intentionally omitted to inform the vendor that there were valuable minerals under the ground. In contrast, in English law, the general rule is that there is no duty on a party to a contract to disclose any relevant information to the other party. In *Smith v Hughes*, Cockburn CJ stated that ‘the question is whether... the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract’ and he concluded that ‘it will not’: (1871) LR 6 QB 597, 603. In fact, Cockburn

However, the *Cour de cassation* has held that there is no *dol par réticence* where one party intentionally fails to disclose information relating only to the value.⁸ Thus, there is a distinct boundary between the doctrine of *dol* and intervention on the ground of an unfair price.

(b) The limits of this study

Chapters 2, 3 and 4 examine several rules in French law which allow intervention in certain contracts on the ground of an unfair price. There are also four other rules in French law which allow intervention in certain contracts on the ground of an unfair price. These four rules, which will not be analysed in this thesis, are briefly described here. The reasons for excluding these four rules from the scope of the thesis will then be outlined.

First, Article 1305 of the *Code civil* provides that a minor can rescind ‘all types of contracts’ which would bind him on the basis of an unfair price.⁹ Secondly, adults who have been placed under one of the special legal regimes of *la sauvegarde de justice*, *la*

CJ specifically discussed what would happen in a case where the facts were similar to those in Cass civ 3, 15 November 2000 (n7). He stated that the

case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding: *Smith* (n7) 604.

⁸ Terré, Simler and Lequette (n4) 248. See in particular, Cass civ 1, 3 May 2000: Bull civ I n°131 and Cass civ 3, 17 January 2007: Bull civ III n°5. Thus Cockburn CJ’s observation in *Smith* (n7) that English law and civil law systems did not diverge on this point at that time is still valid today in English and French law. He noted that

even the civil law, and the foreign law founded upon it, which require that the seller shall answer for latent defects, have never gone the length of saying that, so long as the thing sold answers to the description under which it is sold, the seller is bound to disabuse the buyer as to any exaggerated estimate of its value: *Smith* (n7) 606.

⁹ However, certain contracts are not binding on minors. Article 1124 of the *Code civil* states that minors are not bound by their contracts. The relationship between Articles 1124 and 1305 of the *Code civil* was settled by the *Cour de cassation* in two seminal cases in the middle of the nineteenth century, Cass civ, 18 June 1844 (*Rovel c Simon*): D.1844.1.123 and Cass civ, 25 March 1861 (*Marchais c Marchais*): D.1861.1.202: H Capitant, F Terré and Y Lequette, *Les grands arrêts de la jurisprudence civile* tome 1 (12^e éd., Dalloz 2007) 393-398.

curatelle or *la tutelle* due to a lack of mental capacity, can also rescind contracts which would otherwise be binding on them on the ground of an unfair price.¹⁰ Thirdly, French courts intervene in certain loan contracts on the basis that the rate of the interest is unfairly high.¹¹

Fourthly, the doctrine of *prix dérisoire* (which is based on the concept of *la cause* in Articles 1131 and 1591 of the *Code civil*)¹² also allows intervention in contracts on the ground that the price is unfair.¹³ A contract can be annulled on the ground of *prix dérisoire* if the price is too low.¹⁴ There is no specific point at which the price stipulated in the contract becomes a *prix dérisoire* as this question is decided by the *juge du fond* on a case by case basis.¹⁵ Nonetheless, it seems that the threshold is usually quite high. For example, in 2004, the *Cour de cassation* held that the doctrine of *prix dérisoire* did not apply to a contract for the sale of a ring at a quarter of the fair price.¹⁶ However, the threshold is not so high that the doctrine can be invoked only where the price is nominal.

¹⁰ Article 435 *al 2* and 465 of the *Code civil*. The general rule which is set out in Articles 414-1 and 1123 of the *Code civil*, is that a person who lacks mental capacity can also rescind a contract simply on the ground of his incapacity. Unlike English law (see the text below from n61 to n66), it is not also necessary to establish that the other party knew of the incapacity in French law. However, it is often preferable for a claimant who has been placed under either *la sauvegarde de justice*, *la curatelle* or *la tutelle* to invoke the specific rules of his particular regime (which include the rule that certain contracts can be rescinded on the ground of an unfair price) as then it is not necessary to establish that the claimant lacked mental capacity at the particular time when the contract was concluded: P Malaurie, *Les personnes: la protection des mineurs et des majeurs* (Defrénois 2010) 302, 321-322.

¹¹ Articles L313-1 to L313-6 of the *Code de la consommation*.

¹² J Ghestin, *Cause de l'engagement et validité du contrat* (LGDJ 2006) 229-233.

¹³ The concept of '*la cause*' has also been used to protect parties from contracts which are unfair in different ways. See R Sefton-Green, '*La cause* or the length of the French judiciary's foot' in J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French law of obligations: comparative reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Hart 2009) 101.

¹⁴ It is unclear whether the application of the doctrine of *prix dérisoire* leads to '*nullité absolue*' or '*nullité relative*'. This point is considered in chapter 3 in the text from n169 to n173.

¹⁵ This question falls within the 'sovereign' power of assessment of the *juges du fonds*: Terré, Simler and Lequette (n4) 311.

¹⁶ Cass civ 1, 4 July 1995: Bull civ I n°303.

For example, in 2011, the *Cour d'appel* of Reims annulled the sale of a plot of land for a price which was one tenth of the fair price on the ground that the price stipulated in the contract constituted a *prix dérisoire*.¹⁷ While the doctrine of *prix dérisoire* is not restricted to any particular type of contract, it has always played a significant role in contracts for the sale of land in return for an annuity. This particular point will be examined below in section (i)(c) in chapter 3.

The rules on unfair prices in contracts concluded by minors and persons who lack mental capacity are particular threads in a wider web of rules which seek to protect such persons. These rules are excluded from this thesis as it would be necessary to deviate significantly from the topic of unfair prices in contracts in order to properly explain the specific function of these rules in the context of the more general law on minors and persons who lack mental capacity.¹⁸ The rules on usury are outside the scope of this thesis as much of the history of these rules relates to the direct regulation of prices by the State rather than intervention in contracts on the ground of an unfair price.¹⁹ Finally, a comprehensive general discussion of the doctrine of *prix dérisoire* has been excluded from the scope of this thesis as the application of that doctrine is often intertwined with the particular issues of insolvency and planning laws which are not the focus of this thesis.²⁰ Nonetheless, in section (i)(c) in chapter 3, we will examine the application of the

¹⁷ *Cour d'appel* of Reims, 18 October 2011. Similarly, Ghestin cites a case (Cass civ 1, 13 January 1998) in which the *Cour de cassation* refused to hold that a price which was 37.5% of the fair price was not a *prix dérisoire*: Ghestin (n12) 233-234.

¹⁸ In section (i)(c) in chapter 3, we discuss certain aspects of the rules in French law on prodigals. While prodigals could be deprived of full contractual capacity in French law until these rules were abolished in 2007, it is not really true to say that prodigals lacked mental capacity. As we will discuss in section (i)(c) in chapter 3, the preservation of family wealth was the primary purpose of the rules on prodigals.

¹⁹ The distinction between the direct regulation of prices by the State and intervention in contracts on the ground of an unfair price is explained in chapter 1.

²⁰ P Malaurie, L Aynès and P-Y Gautier, *Les contrats spéciaux* (4^e éd, Defrénois 2009) 144-145.

doctrine of *prix dérisoire* to contracts for the sale of land in return for an annuity, which is the most important instance in which that doctrine is applied.

(ii) English law

In contrast to French law, intervention in contracts on the ground of an unfair price is certainly not an integral feature of English law. This is particularly evident in the fact that there is no equivalent in English law for the term '*lésion*' in French law. Nonetheless, English courts have, and in one important area still can, intervene in certain contracts on the ground of an unfair price. In chapter 3 we will see that in the nineteenth century, contracts for the sale of reversions could be rescinded on the ground of an unfair price and that there was some uncertainty as to whether specific performance could be refused on the ground of an unfair price. In chapter 4, we will examine the rule which allows courts to increase or decrease the price agreed in a salvage contract on the ground that the price stipulated by the parties is unfair.

(a) The general position on unfair prices in contracts

The general rule in English law is that courts cannot intervene in contracts merely on the ground of an unfair price. This rule is manifest in four aspects of English contract law.

First, while consideration is a necessary element in a contract, as Bowen LJ observed in *Carlill v Carbolic Smoke Ball Company*, 'the law does not require us to measure the adequacy of the consideration'.²¹ Therefore, a contract is binding even if the consideration is inadequate. In *Carlill*, it was held that there was 'ample consideration'

²¹ [1893] 1 QB 256, 271.

for the advertiser's promise to pay £100 as the claimant had used a smokeball 'three times daily for two weeks according to the directions at the request of the advertiser'.²²

The rule that the adequacy of the consideration is irrelevant is often traced back to the decision of the Court of King's Bench in *Sturlyn v Albany* in 1587.²³ In this case, it was held that showing the sub-lessee the original lease between the claimant and the lessee, at the sub-lessee's request, was sufficient consideration for the sub-lessee's promise to pay the rent which was due. However, as Simpson observes, the question in *Sturlyn*²⁴ was whether there was 'any consideration at all' rather than whether it was adequate.²⁵ Furthermore he notes that, in the sixteenth and seventeenth centuries, 'there do not seem to be any cases... where it is argued that a promise is not binding because the consideration (viewed as the price) was inadequate'.²⁶ Nonetheless, even though *Sturlyn*²⁷ is not a direct authority for the rule that the inadequacy of the consideration is irrelevant, Simpson states that the law on this point 'was in principle the same in the sixteenth and seventeenth centuries' as it is now.²⁸

²² *Carlill* (n21) 265 (Lindley LJ). Lindley LJ explained that this action constituted consideration as 'there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball'. Similarly, Bowen LJ exclaimed that 'it is consideration enough that the plaintiff took the trouble of using the smoke ball': *Carlill* (n21) 265, 271.

²³ (1587) Cro Eliz 67: G Treitel, *The law of contract* (13th edn, by WE Peel, Sweet & Maxwell 2011) 87. Pollock also cites this case as authority for the proposition that the adequacy of the consideration is irrelevant. In addition, Pollock refers to *Westlake v Adams*, where Byles J stated that it 'is an elementary principle, that the law will not enter into an inquiry as to the adequacy of the consideration...': (1858) 5 CB 248, 265: F Pollock, *Principles of contract* (Stevens and Sons 1876) 154.

²⁴ *Sturlyn* (n23).

²⁵ AWB Simpson, *A history of the common law of contract: the rise and fall of the action of assumpsit* (Clarendon 1975) 446.

²⁶ Simpson (n25) 446. The focus of this book is limited to the sixteenth and seventeenth centuries.

²⁷ *Sturlyn* (n23).

²⁸ Simpson (n25) 446.

At first glance, it is surprising not to find a discussion of the issue of whether consideration must be adequate in the cases from this period. First, as Simpson observes, ‘everyone in the sixteenth century must have known about the doctrine of the just price’.²⁹ Moreover, it was in the sixteenth century that the doctrine of consideration was developed along with the rise of the action of *assumpsit*.³⁰ *Assumpsit* significantly expanded the kinds of promises which could be binding³¹ and the role of consideration was to delimit the promises which were actually enforceable in *assumpsit*.³²

However, as Simpson explains, the absence of any discussion of the question whether consideration must be adequate can be attributed to the fact that consideration was considered to be ‘a reason for a promise’ rather than ‘a price for a promise’.³³ This explanation is particularly plausible in light of the debates in the eighteenth century on whether writing can constitute a substitute for consideration³⁴ and in the nineteenth century on whether a moral obligation is good consideration.³⁵ These debates could not

²⁹ Simpson (n25) 446. See the text from n13 to n18 in chapter 3 on the doctrine of the ‘just price’.

³⁰ Simpson (n25) 316-319.

³¹ *Ibid* 316.

³² Consideration was one of the ‘boundary markers’ which was established to perform this function: Simpson (n25) 316.

³³ Simpson (n25) 446. He also states that the absence of any discussion of the question whether consideration must be adequate at this time can be explained by the fact that ‘no such defence had ever been recognised at common law in medieval times’: Simpson (n25) 446.

³⁴ In *Pillans v Van Mierop* (1765) 3 Burr 1663, in the Court of King’s Bench, Wilmot J and Lord Mansfield stated that consideration was unnecessary if there was evidence of the contract in writing. However, the House of Lords rejected this view in *Rann v Hughes* (1778) 4 Bro PC 27: G McMeel, ‘*Pillans v Van Mierop* (1765)’ in C Mitchell and P Mitchell (eds), *Landmark cases in the law of contract* (Hart 2008) 23; Simpson (n25) 617-619; W Swain, ‘The changing nature of the doctrine of consideration: 1750-1850’ 26 *JLH* (2006) 55, 60-62.

³⁵ Swain states that while the ‘precise moment in time when the courts began to accept moral consideration is not completely clear’, in *Lee v Muggeridge* (1813) 5 Taunt 36, the Court of King’s Bench (of which Lord Mansfield was then Chief Justice) clearly affirmed that moral obligations constituted good consideration. This rule was ultimately rejected by the Court of Queen’s Bench in *Eastwood v Kenyon* (1840) 11 Ad & E 438: Swain (n34) 67-69.

have arisen unless, to use Simpson's terms, consideration was conceived, by at least some judges, as 'a reason for a promise' rather than 'a price for a promise'.

Even though the rule that the adequacy of the consideration is irrelevant cannot be traced back to *Sturlyn*,³⁶ it is now a well established rule. Furthermore, while 'the judges who developed the rule were not confronting the problem of equality in exchange', this rule is consistent with the general principle in English law that one cannot escape from a contract simply on the basis that the price is unfair.³⁷

Secondly, the requirements of the doctrines of undue influence and unconscionable bargains demonstrate that in English law, a party cannot escape from his contract simply on the ground of an unfair price. An unfair price is a necessary, but not a sufficient element of the doctrine of unconscionable bargains and an unfair price is not even a necessary element of the doctrine of undue influence.

As Kay J stated in *Fry v Lane*, a claimant must show 'a purchase... at a considerable undervalue' in addition to 'poverty and ignorance... and absence of independent advice' in order to place the burden of proving that 'the purchase was fair, just and reasonable' on the defendant.³⁸ Furthermore, as Ward LJ affirmed in *Portman Building Society v Dusangh*, in addition to the elements in *Fry v Lane*,³⁹ the claimant

³⁶*Sturlyn* (n23).

³⁷ Naturally, as Gordley observes, 'the enforcement of hard bargains was the occasional consequence of the rule against examining the adequacy of consideration': J Gordley, *The philosophical origins of modern contract doctrine* (Clarendon Press 1991) 148.

³⁸ (1888) 40 Ch D 312, 322. As Nourse LJ notes in *Credit Lyonnais Bank Nederland NV v Burch*, 'Equity's jurisdiction to relieve against' unconscionable bargains is 'more rarely exercised in modern times': [1997] 1 All ER 144, 151.

³⁹ *Fry* (n38).

must show ‘morally reprehensible conduct’ on the part of the defendant.⁴⁰ Thus, while an unfair price is a necessary element in a claim that a contract should be set aside on the basis that it is an unconscionable bargain, it is only one of many necessary elements and on its own, it is not sufficient.

Similarly, it is unnecessary for a claimant to show an unfair price in order to successfully invoke the doctrine of undue influence. This is evident in *Royal Bank of Scotland plc v Etridge (No 2)* where the House of Lords restated the doctrine of undue influence.⁴¹ In this case, Lord Nicholls held that it is sufficient for a claimant to show ‘a transaction which calls for explanation’ in addition to ‘a relationship of trust and confidence’ in order to place the burden of proof on the defendant who must then show that he did not ‘abuse the influence he acquired in the parties’ relationship’.⁴² Therefore, it is not necessary for a claimant to show an unfair price.

Thirdly, the rule on penalties in English law illustrates the general principle that a party cannot escape from his contract simply on the ground of an unfair price. Unfair prices play a significant role in the rule on penalties. As Lord Dunedin observed in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*, a clause will constitute a penalty ‘if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach’.⁴³

⁴⁰ [2000] 2 All ER 221, 235-236. Similarly, Simon Brown LJ states that the claimant must establish that the defendant acted ‘in a morally reprehensible manner’: [2000] 2 All ER 221, 229. Both Ward LJ and Simon Brown LJ cite *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84 and *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1983] 1 WLR 87 as authorities for the requirement of ‘morally reprehensible conduct’.

⁴¹ [2002] AC 773.

⁴² *Etridge* (n41) [14]. Of course, a claimant might be able to establish that undue influence was exercised by proving ‘overt acts of improper pressure or coercion such as unlawful threats’ and then there may also be a claim at common law on basis of duress: *Etridge* (n41) [8] (Lord Nicholls).

⁴³ [1915] AC 79, 87.

However, an important restriction on the scope of the rule on penalties is the requirement that the obligation to pay a certain sum must arise on breach of contract in order to come within the rule on penalties.⁴⁴ It is this requirement which serves to distinguish the rule on penalties from intervention in contracts simply on the basis that the price is unfair.

Agreed damages clauses are enforced by actions for the agreed sum.⁴⁵ This action is usually available in a wide range of common contracts such as contracts for the provision of services for a certain price.⁴⁶ If it were no longer necessary to show that the obligation to pay a certain sum arose on a breach of the contract between the parties in order to bring the obligation within the rule on penalties, it would be impossible to prevent primary obligations to pay particular sums (such as the price due for goods or services) from falling into the clutches of the rule on penalties. The courts would then face the appalling spectre of assessing

the fairness of the price in all actions for the agreed sum, a jurisdiction which they have systematically declined, no doubt because they believe that it would interfere too greatly with freedom of contract and weaken the utility of the quick remedy for debt.⁴⁷

⁴⁴ This point was affirmed by the House of Lords in *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 WLR 399. In *Office of Fair Trading v Abbey National Plc and others*, Andrew Smith J rejected the claimant's argument that various clauses in certain standard form contracts produced by six banks were penalties on the ground that the obligation to pay certain sums did not arise on a breach of contract on the part of the customer: [2008] EWHC 875, [295]-[323]. As this conclusion was not appealed, there is no discussion of this point in the Court of Appeal and the Supreme Court: [2010] 1 AC 696.

⁴⁵ H Collins, *The law of contract* (4th edn, LexisNexis 2003) 373.

⁴⁶ See for example, *White and Carter (Councils) Ltd v McGregor* [1962] AC 413.

⁴⁷ Collins (n45) 374.

As Lord Roskill observes in *Export Credits Guarantee Department*, ‘it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain’.⁴⁸

Fourthly, Regulation 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999⁴⁹ also illustrates the general rule that English law does not intervene in contracts on the ground that the price is unfair. Regulation 6(2)(b) provides that

in so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate... to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.⁵⁰

Regulation 6(2)(b) recognises that the freedom to determine the price is a sacrosanct aspect of the principle of freedom of contract and that it should not be infringed by the judicial power to assess the fairness of certain terms under the 1999 Regulations. In an article which influenced the text of the Directive on which Regulation 6(2)(b) of the 1999 Regulations is based, Brandner and Ulmer observe that the

relationship between the price and the goods or services provided is determined...
by the mechanisms of the market... any control by the courts or administrative

⁴⁸*Export Credits Guarantee Department* (n44) 403.

⁴⁹ The Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083 (hereafter, ‘the 1999 Regulations’) replaced the Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159 which gave effect to Council Directive 93/13/EC on Unfair Terms in Consumer Contracts [1993] OJ L95/29 (hereafter, ‘the 1993 Directive’).

⁵⁰ Regulation 8(1) provides that an unfair term ‘shall not be binding on the consumer’. Regulation 6(2)(b) of the 1999 Regulations is based on Article 4(2) of the 1993 Directive. As Lord Walker noted in the Supreme Court in *Office of Fair Trading v Abbey National Plc and others* [2010] 1 AC 696

not all the member states have precisely transposed the Directive into their national laws, since article 8 provides that they may adopt or retain more stringent provisions for consumer protection, so long as they are compatible with the Treaty: (n44) [9].

Nevertheless, France, like the United Kingdom has ‘precisely transposed the Directive’: *Abbey National* (n50) [9]. In French law, Article L132-1 *al* 7 of the *Code de la consommation* provides that where a term is written in a clear and comprehensible way, it will not be held to be unfair on the basis of ‘the adequacy of the price or remuneration for the thing sold or the service provided’.

authorities of the reasonableness or equivalence of this relationship is anathema to the fundamental tenets of a free market economy.⁵¹

Therefore, under Regulation 6(2)(b), ‘the fairness of the transaction in the sense of the price paid for the goods or services should not be subjected to review or control’.⁵²

(b) The limits of this study

As discussed in chapters 3 and 4, in English law today and in the past, parties have been able to escape from contracts simply on the ground of an unfair price in certain circumstances. There are four rules in English law today which allow intervention in a contract on the ground of an unfair price which will not be discussed in this thesis. These four rules are briefly described here. In addition, two aspects of the question of the role of unfair prices in contracts in English law in the past which will not be considered in this thesis will be briefly outlined. The decision to exclude these rules and issues will then be justified.

First, while a minor is bound by a contract for necessities, he is liable to pay only a fair price.⁵³ Secondly, a person who lacks mental capacity is liable to pay only a fair

⁵¹ HE Brandner and P Ulmer, ‘The Community Directive on unfair terms in consumer contracts: some critical remarks on the proposal submitted by the EC Commission’ (1991) 28 *CML Rev.* 649, 656. The significance of this article was recognised in the Supreme Court in *Abbey National* (n50) [6] (Lord Walker JSC), [109] (Lord Mance JSC).

⁵² H Collins, ‘Good faith in European contract law’ (1994) 14 *OJLS* 229, 238. Lord Walker JSC cites this passage from Collins’ article in the Supreme Court in *Abbey National* (n50) [44].

As Lord Mance JSC observed in *Abbey National*, ‘not every provision for payment contained in a contract for the supply of goods or services is rendered immune from scrutiny under regulation 6(2)’: (n50) [101]. The extent to which Regulation 6(2)(b) of the 1999 Regulations insulates unfair prices in consumer contracts from the review of unfair terms which is permitted under the 1999 Regulations has been addressed by the Supreme Court in *Director General of Fair Trading v First National Bank plc* [2002] 1 AC 481 and *Abbey National* (n50). Regulation 6(2)(b) was interpreted less restrictively in the latter than in the former. Naturally, the less restrictively one interprets Regulation 6(2)(b) the wider the scope of the principle of freedom of contract.

The ‘interpretation and application’ of Article 4(2) of the 1993 Directive ‘give rise to considerable difficulty’: S Whittaker, ‘Unfair contract terms, unfair prices and bank charges’ 74 *MLR* (2011) 106, 122.

price for the supply of necessary goods and the provision of necessary services.⁵⁴ Thirdly, English courts will intervene in certain loan contracts on the basis that the rate of interest is unfairly high.⁵⁵ Fourthly, under the fair-dealing rule, a fiduciary who purchases property from his principal must not pay less than the ‘full value’ and a fiduciary who sells his property to his principal must not receive more than the ‘full value’.⁵⁶ The contract between the principal and the fiduciary will be set aside unless the fiduciary can establish that he did not pay less or receive more than the fair price of the property.⁵⁷

At one time in English law, a fair price was a necessary element in valid contracts in restraint of trade. This rule was created by Parker CJ in 1711⁵⁸ but it was abolished by Tindal CJ in the Court of Exchequer Chamber in 1837.⁵⁹ As Lord Macnaghten observed in 1894 in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd*,⁶⁰ a seminal case

⁵³ The term more commonly used is a ‘reasonable price’. Section 3 of the Sale of Goods Act 1979 provides that a minor is liable to pay a ‘reasonable price’ for necessary goods supplied to him. A minor is also liable to pay a fair price where the other party to the contract has provided necessary services. See *Walter v Everard* [1891] 2 QB 369. While a minor is liable to pay a fair price where necessary goods and services have been supplied to him, the decision of the Court of Appeal in *Roberts v Gray* [1913] 1 KB 520 suggests that a minor is also bound by an executory contract for necessary services. The reasoning in *Roberts* (n53) is equally applicable to an executory contract for necessary goods.

⁵⁴ Mental Capacity Act 2005, s 7. The term used in section 7 of the Mental Capacity Act 2005 is ‘a reasonable price’. In practice, a person who lacks mental capacity will often be liable to pay the price stipulated in the contract rather than the ‘reasonable price’ because, on the basis of *Hart v O’Connor* [1985] 1 AC 1000, he will be bound by his contract unless the other party knew of his incapacity. The significance of *Hart* (n54) is discussed below in the text from n61 to n66.

⁵⁵ Consumer Credit Act 1974, ss140A-C (which were inserted by the Consumer Credit Act 2006, ss 19-21).

⁵⁶ *Tito v Waddell* (No 2) [1977] Ch 106, 225 (Megarry V-C). Conaglen has recently argued that contracts which fall within the fair-dealing rule cannot be set aside simply on the ground that the principal either received less than or paid more than the ‘full value’: M Conaglen, ‘A re-appraisal of the fiduciary self-dealing and fair-dealing rules’ 65 *CLJ* (2006) 366.

⁵⁷ The burden of proof is on the fiduciary: *Tito* (n56) 225 (Megarry V-C).

⁵⁸ *Mitchel v Reynolds* (1711) 1 PW 181. Parker CJ uses the term ‘a good and adequate consideration’: *Mitchel* (n58) 186.

⁵⁹ *Hitchcock v Coker* (1837) 6 A & E 438, 457.

⁶⁰ [1894] AC 535. In *Nordenfelt*, the House of Lords restated the doctrine of restraint of trade for the ‘altered circumstances’ of the late nineteenth century ‘when it may be said that science and invention have almost annihilated both time and space’: (n59) 548 (Lord Herschell LC), 575 (Lord Morris).

on contracts in restraint of trade, the rule that a fair price is necessary in contracts in restraint of trade was eventually discarded as ‘in time it was found that the parties themselves were better judges of that matter than the Court’.⁶¹

Finally, the uncertain position in English law until the decision of the Privy Council in *Hart*,⁶² on the role of unfair prices in contracts concluded by persons lacking mental capacity will not be discussed in this thesis. While *Molton v Camroux*⁶³ and *Imperial Loan Co Ltd v Stone*⁶⁴ established that a person who lacked mental capacity could rescind a contract if the other party knew of the lack of capacity, for almost a century after *Imperial Loan Co Ltd*,⁶⁵ it was unclear whether a contract concluded by a person who lacked mental capacity could also be set aside on the ground of an unfair price. In *Hart*, the Privy Council dispelled all uncertainty on this point by firmly rejecting the idea that a person who lacked mental capacity could rescind a contract simply on the ground that the price was unfair.⁶⁶

The rules on unfair prices in contracts concluded by minors and persons who lack mental capacity and the rules on usury in English law are excluded from this thesis for the same reasons outlined above in relation to French law on these questions.⁶⁷ The fair-dealing rule is also not examined in this thesis as the requirement of finding the existence

⁶¹ *Nordenfelt* (n59) 565. For a short discussion of the rise and fall of this rule see JD Heydon, *The restraint of trade doctrine* (Butterworths 1971) 20-21, 164-171 and PS Atiyah, *The rise and fall of freedom of contract* (Clarendon Press 1979) 451.

⁶² *Hart* (n54).

⁶³ (1848) 2 Exch 487; (1849) 4 Exch 17.

⁶⁴ [1892] 1 QB 599.

⁶⁵ *Imperial Loan Co* (n64).

⁶⁶ *Hart* (n54).

⁶⁷ However, the indirect impact of the usury laws on the rule on the sale of reversions is examined in the text from n369 to n379 in chapter 3.

of a fiduciary relationship between the parties means that intervention in contracts in this instance is often not merely on the ground of an unfair price. Finally, the rule on unfair prices in contracts in restraint of trade, which was a part of English law for just over a hundred years, is outside the scope of the thesis as it was only one element of a larger body of rules on the validity of such contracts. As a result, it would be necessary to analyse the rule in this wider context and that would involve a significant deviation from the topic of unfair prices which is the focus of this thesis.

CHAPTER 3

UNFAIR PRICES AND LAND

Contracts for the sale of land have played a central role in the history of the law on unfair prices in contracts in both England and France. The specific question of unfair prices in contracts for the sale of land is closely intertwined with the wider question of unfair prices in contracts in general. As a result, it is appropriate to consider land and unfair prices in general together in this chapter.

In French law, the rule on unfair prices in contracts for the sale of land has been an integral part of French law since the twelfth century. Today, this rule is the *pièce maîtresse* of the body of rules in French law which allow intervention in contracts on the ground of an unfair price.¹ There was an analogous rule in English law for over fifty years in the nineteenth century and, as we will see, to a certain extent, this rule was more extreme than the equivalent rule in French law. While the English rule was not influenced by the French rule, we will see that a similar policy of preserving family wealth underpins both rules.

(i) French law

(a) Unfair prices from Roman law to the end of the *ancien régime* in France

The roots of *lésion* and particularly of Article 1674 are ancient. The progenitors of *lésion* in modern French law are C.4.44.2 and C.4.44.8 of Justinian's Codex. The most important provision is C.4.44.2 which states that

¹ The other principal rules on unfair prices in contracts in French law are examined in chapters 4 and 5.

If you or your father sold a thing of a higher price for a lower price it is equitable that you either recover the farm you have sold, after restoring the price to the buyers... or, if the buyer so chooses, you recover what is lacking from the just price. The price is considered too little if one half part of its true price was not paid.²

Similarly, C.4.44.8 provides that

If your son sold your farm on your instructions... The mere fact that you show the farm was sold for a slightly too low price has no force for setting aside the sale. Clearly, if you had considered the substance of the contract of buying and selling, and that the buyer comes to the contract hoping to buy more cheaply, and the seller to sell more dearly... then you would truly see that neither good faith which protects the agreement of buying and selling nor any reason allows a contract definitely agreed on whether at once or after much haggling over the price to be set aside: unless less was given than half of the price that was just at the time of the sale, when the choice previously given to the buyer must be observed.³

The precise origin of these rescripts has been the subject of a significant debate since the late nineteenth century.⁴ As Watson observes, a ‘very great deal of intellectual energy has

² A Watson, ‘The hidden origins of enorm lesion’ 2 *JLH* (1981) 186, 187.

³ Watson (n2) 187.

⁴ A rescript is a type of constitution: HF Jolowicz and B Nicholas, *Historical introduction to the study of Roman law* (3rd edn, CUP 1972) 368-370.

Sirks states that while it was Christian Thomasius who first raised doubts about the authenticity of these rescripts in a thesis which was published in Halle in 1706, this debate really began when O Gradenwitz published an article in 1889 in which he argued that the two rescripts were interpolations: AJB Sirks, ‘La laesio enormis en droit romain et byzantin’ 53 *Tijdschrift voor Rechtsgeschiedenis* (1985) 291, 291.

The chronology of the debate on the authenticity of C.4.44.2 and C.4.44.8 is consistent with more general trends in the study of Roman law. ‘The search for interpolations was... carried on by the humanists of the sixteenth and seventeenth centuries, but it was then given up and not seriously resumed until the end of the nineteenth century.’: Jolowicz and Nicholas (n4) 486.

Thomasius’ thesis was discussed at length in the *Conseil d’Etat* on the debates on the *Code civil* in 1803. Berlier cited the doubts about the authenticity of the rescripts as one reason why *lésion* should not be adopted in the *Code civil*. This argument was rejected by Portalis who thought that Thomasius had ‘lost

gone into the search for the origins... of *laesio enormis* in Roman law, but no generally acceptable account has yet emerged'.⁵ In general, two divergent views have been advanced.⁶ On the one hand, some scholars believe that Diocletian created the rescripts in C.4.44.2 and C.4.44.8 in 285 AD and 293 AD respectively. On the other hand, other scholars consider C.4.44.2 and C.4.44.8 to be the products of subsequent interpolations⁷ of Diocletian's rescripts. Amongst the proponents of the latter view, there is no unanimity as to whether the rescripts were interpolated at some point before the compilation of the Codex or at the time of the compilation of the Codex so as to be attributed to Justinian.⁸ Whether the rescripts in C.4.44.2 and C.4.44.8 can ultimately be traced back to the third century or the sixth century, they lay dormant for almost six centuries until the revival of Roman law in the West, particularly in Bologna, at the end of the eleventh century and at the beginning of the twelfth century.⁹

'Like the great generality of rescripts addressed to private individuals', C.4.44.2 and C.4.44.8 provide a specific answer to the problem posed by the claimant rather than

himself in purely speculative theories'. Subsequently, in his presentation of the *Code civil* to the *Corps législatif* in 1804, Portalis indirectly disparaged Thomasius' thesis when he dismissed the significance of 'obscure theses, which focus only on the date' of C.4.44.2 and C.4.44.8: PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, tome XIV (Marchand du Breuil 1827) 35-37, 37-41, 129.

⁵ Watson (n2) 186.

⁶ Sirks (n4) 291-293 and AJB Sirks, 'Laesio enormis again', 54 *Revue Internationale des Droits de l'Antiquité* (2008) 3^e, 461, 461-462.

⁷ 'Interpolation' rather than 'alteration' is the term which is generally used in this field: Jolowicz and Nicholas (n4) 486.

⁸ Sirks, for example, considers that C.4.44.2 and C.4.44.8 were interpolated before the compilation of the Codex: Sirks (n4) 307.

⁹ JW Baldwin, 'The medieval theories of the just price: romanists, canonists and theologians in the twelfth and thirteenth centuries', *Transactions of the American philosophical society* vol 49 no 4 (1959) 1, 21-22. The Roman Empire in the West was no longer in existence at the end of the fifth century. While 'no simple answer can be given to the question, 'when did it end?'' the division between the eastern and western parts of the empire 'became final in AD 395... and the last Roman emperor of the West, Romulus Augustulus, was deposed in AD 476': Jolowicz and Nicholas (n4) 4.

set out the contours of a particular rule.¹⁰ Speculation as to whether the rule should be applied to analogous situations was therefore inevitable. As Watson observes, we ‘might ask, as have thousands of others, whether the rule applies to the sale of moveables? To a sale for too high a price?’¹¹ A variety of answers were given to these questions by legal scholars and practitioners in the centuries after Roman law was rediscovered in the West at the end of the eleventh century and at the beginning of the twelfth century.

After C.4.44.2 and C.4.44.8 were rediscovered in the West, the rule set out in these rescripts became known as *laesio enormis*.¹² This new label was appropriate given the radical transformation of the rule in the *ius commune* in the twelfth century. While C.4.44.2 and C.4.44.8 applied only to a vendor who sold land at too low a price, in the twelfth century, legal writers extended *laesio enormis* from the sale of land at too low a price to the sale of all things at too high or too low a price.¹³

¹⁰ Watson (n2) 189.

¹¹ Ibid 190. Thomasius had a profoundly negative view of *laesio enormis*. The principal argument in his thesis, is that *laesio enormis* is not based on ‘equity’ and that *laesio enormis* is ‘one of papalism’s preferred instruments’ in its battle to gain influence ‘in secular jurisdictions’. Thomasius’ contention (which is mentioned in n4 above) that C.4.44.2 and C.4.44.8 were the products of interpolations at the time of the compilation of Justinian’s Codex is essential to his wider argument that *laesio enormis* is an instrument of papalism as unlike the period when Diocletian was emperor, at the time of Justinian’s reign, ‘the false opinions which sustained the hold of the clergy on the laity’s mind had established themselves’: T Ahnert, ‘Roman law in early enlightenment Germany: the case of Christian Thomasius’ *De aequitate cerebrina legis secundae codicis de rescindenda venditione* (1706) XXIV *Ius Commune Zeitschrift für europäische Rechtsgeschichte* 154, 161-162, 164.

As noted above in n4, Thomasius’ thesis was discussed during the debates on the *Code civil* in 1803 and 1804. Berlier noticed the political argument about papalism as well as the more technical argument about the origin of C.4.44.2 and C.4.44.8 in Thomasius’ thesis. This is apparent in Berlier’s comment that the prevalence of *laesio enormis* in meridional States can be attributed to ‘theologians’ and in his dismissive remark about ‘confessors’ who advocate the restitution of excessive profits: Fenet, tome XIV (n4) 37.

¹² The term *laesio enormis* was created by the Glossators: Ahnert (n11) 154, 154. The Glossators were a school of Roman law scholars which lasted from Irnerius at the beginning of the twelfth century to Azo at the beginning of the thirteenth century: J Gordley, *The philosophical origins of modern contract doctrine* (Clarendon Press 1991) 33.

¹³ Baldwin (n9) 22-23.

In the thirteenth century, Thomas Aquinas added the lustre of scholastic philosophy to *laesio enormis*. One aspect of Aristotle's conception of justice in *The Nicomachean Ethics*, is that an exchange is just only if each party received the value of that which he had given to the other.¹⁴ Aquinas described this type of justice as commutative justice.¹⁵ Aquinas used Aristotle's concept of commutative justice as a philosophical justification for *laesio enormis*.¹⁶ This was a significant step in the development of the doctrine of the just price which was influential in many different disciplines until the sixteenth century.¹⁷ During this period, the just price 'became a legal device, a moral imperative, and an economic doctrine'.¹⁸

The practicalities of applying *laesio enormis* in favour of a purchaser who had paid too high a price was a contested point in legal writing in the centuries following the extension of *laesio enormis* to the purchaser. This debate began in the thirteenth century¹⁹ and 'it was never conclusively resolved'.²⁰ The principal issue was whether the deviation from the fair price should be calculated arithmetically or geometrically when a purchaser was invoking *laesio enormis*. The problem arose as C.4.44.2 and C.4.44.8 had been

¹⁴ Aristotle, *The nicomachean ethics* (OUP 1998) 106-136. As Baldwin observes, while Aristotle 'probably divided justice into three basic parts', his analysis is 'not free from ambiguities'. The three categories of justice are distributive justice, corrective justice and reciprocation: Baldwin (n9) 62, 11.

¹⁵ Aquinas (in addition to his teacher, Albert the Great) divided justice into the two categories of distributive justice and commutative justice: Baldwin (n9) 62.

¹⁶ J Gordley, 'Equality in Exchange', (1981) 69 *Calif L Rev* 1587, 1638.

¹⁷ Baldwin (n9) 8. For an analysis of the discussion on the doctrine of the just price before Aquinas, see Baldwin (n9) 68-71.

¹⁸ Ibid 8. For example, during the Reformation in the sixteenth century, the doctrine of the just price was discussed by Martin Luther and Jean Calvin. Even though Luther and Calvin were divided on the question of usury, they were both in favour of the doctrine of the just price: RE Backhouse, *The penguin history of economics* (Penguin 2002) 54-55.

¹⁹ Ibid 23.

²⁰ R Zimmermann, *The law of obligations: roman foundations of the civilian tradition* (2nd edn, Clarendon Press 1996) 263.

‘designed originally with the seller in mind’.²¹ Before the sixteenth century, the arithmetical calculation was favoured.²² Thus, a purchaser could invoke *laesio enormis* where he had bought something at one and half times its value.²³ In contrast, from the sixteenth century, the geometrical calculation was the preferred method. Thus, a purchaser could invoke *laesio enormis* only if the purchase price was double the value of the thing which he had bought.²⁴

In contrast to the inexorable expansion of the boundaries of *laesio enormis* in the *ius commune*, the fortunes of *lésion* (as *laesio enormis* was, and still is, known in French) in legal practice in France were less spectacular. At first, *lésion* seems to have been assigned a very restricted role in French law. As soon as *lésion* arrived in France in the twelfth century, notaries began to insert clauses into contracts which purported to exclude the application of this rule.²⁵ Moreover, in 1204, the *coutume* of Montpellier expressly provided that while *lésion* could be invoked in contracts for the sale of moveables, it could not be invoked in contracts for the sale of land.²⁶ As the *coutume* of Montpellier

²¹ Baldwin (n9) 23.

²² Zimmermann (n20) 263.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Three types of clauses were used. First, the vendor expressly renounced his right to invoke Roman law in general or *lésion* in particular. This clause appears in Lower Languedoc in the middle of the twelfth century and in Provence in the thirteenth century. Secondly, the vendor stated that any deviation from the fair price was a gift to the other party. This clause began to be used instead of the former clause in Lower Languedoc at the end of the twelfth century. Thirdly, the first two clauses would be reinforced by a general oath: E Meynial, ‘Des conditions requises au Moyen-âge pour l’application de la rescision de la vente pour lésion d’outre-moitié’ in *Mélanges PF Girard* tome II (A Rousseau 1912) 208-209.

²⁶ F Garrisson, ‘Lésion et vente de meubles’ in *Etudes historiques á la mémoire de N Didier* (Monchrestien 1960) 135, 135.

influenced those of other jurisdictions in the South of France, this rule was also found in other *coutumes* such as that of Albigeois and Lower Auvergne during the same period.²⁷

However, from this period until the fourteenth century, the scope of *lésion* was continuously expanded in French law. While legal writers initially accepted that the clauses which excluded the application of *lésion* were valid, these clauses were interpreted much more restrictively from the thirteenth century to the fifteenth century.²⁸ Moreover, *lésion* was considered to apply to a wide range of contracts such as contracts of hire, contracts of exchange and contracts to compromise disputes.²⁹ By the fourteenth century, *lésion* had penetrated ‘every aspect of law’ and it was then at its ‘apogee’.³⁰

It is difficult to determine precisely how far *lésion* had fallen from this apogee in French law before the Revolution of 1789 as there was no uniform body of law which applied throughout France at this time. The significant differences between the laws in different parts of France were only partly due to the division of the country into *pays de droit écrit* and *pays de coutumes*.³¹ Voltaire captured the chaotic diversity of French law before the Revolution of 1789 in characteristically colourful language:

On s’attache aux lois romaines dans les pays de droit écrit, et dans les provinces régies par la coutume, lorsque cette coutume n’a rien décidé. Mais ces lois

²⁷ This rule is set out in Article 39 of the *coutume* of Montpellier of 1204. The rule could be invoked by both vendors and purchasers: Garrisson (n26) 135, 135, 139-142.

²⁸ Meynial (n26) 209-220.

²⁹ E Meynial, ‘Quelques notes sur l’histoire de la rescision pour lésion des contrats entre majeurs au moyen-âge: la glose, les glossateurs et les bartolistes’ in *Studi di diritto romano, di diritto moderno e di storia del diritto: pubblicati in onore di Vittorio Scialoja nel XXV anniversario del sua insegnamento* vol 2 (Ulrico Hoepli 1905) 341, 346-348.

³⁰ Meynial (n29) 351.

³¹ Until the *Code civil* of 1804, the French legal landscape could be divided into *pays de coutumes* and *pays de droit écrit*. The law in the former was based mainly on customs and the law in the latter was based primarily on Roman law. The *pays de droit écrit* were essentially located south of the line which links the island of Oléron and the north of Geneva, and the *pays de coutumes* were located north of this line: J-L Halpérin, *L’impossible Code civil* (PUF 1992) 20-24.

*romaines sont au nombre de quarante mille, et sur ces quarante mille lois, il y a mille gros commentaires qui se contredisent. Outre ces quarante mille lois, dont on cite toujours quelque'une au hasard, nous avons cinq cents quarante coutumes différentes, en comptant les petites villes et mêmes quelques bourgs, qui dérogent aux usages de la juridiction principale; de sorte qu'un homme qui court la poste en France, change de lois plus souvent qu'il ne change de chevaux...*³²

Similarly, in his *discours préliminaire* to the *Conseil d'Etat* on the *Code civil*, Portalis referred to the striking lack of uniformity in French law before the Revolution of 1789, when he stated that '*la France n'était qu'une société de sociétés*'.³³

As a result of this very significant legal diversity, *lésion* appears in various forms in different parts of France in the two centuries preceding the Revolution of 1789. Three aspects of the application of *lésion* in French law during this period will be considered here in order to demonstrate both the extent to which this rule was curtailed after its apogee in the fourteenth century and the very wide range of forms in which it appeared in different parts of France.³⁴

³² Voltaire, *Précis du siècle de Louis XV* in *Œuvres complètes de Voltaire* tome XXII (La société littéraire-typographique 1785) 394. Voltaire studied law in Paris at the beginning of the eighteenth century: R Pearson, *Voltaire almighty: a life in pursuit of freedom* (Bloomsbury 2006) 34. During the debates on the *Code civil* in 1803, Portalis noted that Voltaire had been one of many philosophers and political figures who had praised *lésion*: Fenet, tome XIII (n4) 100.

³³ Fenet, tome I (n4) 464. See also Portalis' speech in the *Corps législatif*: Fenet, tome I (n4) xcijj.

³⁴ In 1560, an edict of either Charles IX or François II provided that *lésion* did not apply in contracts of compromise: J Domat, *Les loix civiles dans leur ordre naturel* vol I (Rollin 1745) 45 (who states that this edict was introduced by Charles IX); Pothier RJ, *Traité des obligations* in *Œuvres de Pothier* vol I (Pichon-Béchet 1827) 22 (who states that this edict was introduced by François II). As mentioned above in the text from n28 to n29, *lésion* had been extended to contracts of compromise in the fourteenth century. The abolition of *lésion* in contracts of compromise in French law in 1560 shows that *lésion* was less extensive after the fourteenth century. However, unlike the other three points discussed below, there was no diversity in French law on this point as this edict applied throughout France.

First, it is clear that *lésion* applied to contracts for the sale of land in most parts of France in the two centuries before the Revolution of 1789.³⁵ In 1804, in his presentation of the *Code civil* to the *Corps législatif*, Portalis mentioned C.4.44.2 and stated that this rule (which applied only to land)³⁶ had been adopted in France in the *pays de coutume* as well as in the *pays de droit écrit*.³⁷ Several *coutumes*, such as that of Sens in 1555 expressly provided that *lésion* applied to contracts for the sale of land.³⁸ Similarly, Domat in the seventeenth century,³⁹ and Pothier in the eighteenth century state that *lésion* applies to contracts for the sale of land.⁴⁰

However, the extent to which *lésion* applied to contracts for the sale of moveables at this time is uncertain. In 1804, Portalis stated that in the *ancien régime*, *lésion* could be invoked in contracts for the sale of ‘precious’ moveables but this assertion is clearly too sweeping.⁴¹ It is clear that *lésion* did not apply to contracts for the sale of moveables in many parts of France. The *coutume* of Orleans in 1509 and that of Sens in 1555 expressly state that *lésion* cannot be invoked in contracts for the sale of moveables.⁴² On the other hand, it is equally clear that *lésion* was applied to contracts for the sale of certain moveables in particular parts of France. The *coutume* of Berry provided that *lésion* could be invoked in contracts for the sale of ‘precious moveables of great value’ and the

³⁵ The *coutume* of Lorraine in 1594 and that of Metz in 1601 expressly rejected *lésion*: M Mémin, *Les vices du consentement dans les contrats de notre ancien droit et en particulier dans les provinces d’Anjou et du Maine: La lésion suivie de notions générales sur l’usure et l’erreur* (L Chaudourne 1926) 125.

³⁶ See the text above from n2 to n3.

³⁷ Fenet, tome XIV (n4) 127.

³⁸ Mémin (n35) 125.

³⁹ Domat (n34) 44-45.

⁴⁰ RJ Pothier, *Traité du contrat de vente* in *Œuvres de Pothier* vol II (Pichon-Béchet 1827) 155-178.

⁴¹ Fenet, tome XIV (n4) 141.

⁴² Mémin (n35) 125.

coutume of Brittany stated that *lésion* applied to contracts for the sale of moveables over ‘100 pounds’.⁴³

The uncertain status of *lésion* in contracts for the sale of moveables is evident in the discussion of this issue by Pothier.⁴⁴ While Pothier states that *lésion* does not apply to contracts for the sale of moveables, he notes that there are discordant views.⁴⁵ He observes that in the sixteenth century, Charles Dumoulin⁴⁶ stated that *lésion* applied to contracts for the sale of valuable moveables such as ‘precious stones, works of plate, or other work of art by an excellent artist’ and ‘wood choppings as they contain the fruit of many years’.⁴⁷ However, Pothier states that it is difficult to maintain these exceptions when certain *coutumes*, including that of Orléans,⁴⁸ expressly reject the application of *lésion* to contracts for the sale of moveables.⁴⁹

⁴³ Ibid 125. Mémin does not provide the years in which these *coutumes* were introduced. However, he notes that the rule that *lésion* applied to contracts for the sale of moveables over ‘100 pounds’ appeared in both the old and the new *coutumes* of Brittany: Ibid 125.

Similarly, Jouary states that *lésion* was available in contracts for the sale of moveables in certain *coutumes* such as that of Brittany in 1580, of Bourbonnais in 1521 and of Berry (no year is mentioned for this *coutume*). Jouary also notes that in four *coutumes*, *lésion* was applied to leases of a certain length: P Jouary, ‘La lésion dans le Code civil de 1804: étude sur l’influence du libéralisme économique sur le Code civil’ 41 *Droits* (2005) 103, 118.

⁴⁴ Pothier (n40) 159. Domat does not address the question of moveables directly but he views *lésion* as applicable only in contracts for the sale of land: Domat (n34) 44-45.

⁴⁵ Pothier (n40) 159.

⁴⁶ Charles Dumoulin (1500-1566), who studied law at the University of Orléans, made a significant contribution to French law. Thireau states that ‘many of his ideas, which are discussed by Pothier in the eighteenth century, appear in the *Code civil* in 1804: J-L Thireau ‘Charles Dumoulin’ in P Arabeyre, J-L Halpérin and J Krynen (eds), *Dictionnaire historique des juristes français: XII^e- XX^e siècle* (PUF 2007) 276, 276-277.

⁴⁷ Pothier (n40) 159.

⁴⁸ Pothier (1699-1772) was very familiar with the *coutume* of Orléans. Pothier was born in Orléans and studied law at the University of Orléans. From 1749, Pothier held the position of Royal Professor of French law at the University of Orléans: J-L Thireau, ‘Robert Joseph Pothier’ in Arabeyre, Halpérin and Krynen (n46) 636, 636-637. Pothier also wrote a treatise on the *coutume* of Orléans. See RJ Pothier, *Les coutumes d’Orléans* in *Œuvres de Pothier* vol X (Pichon-Béchet 1827).

⁴⁹ Pothier (n34) 159.

Secondly, while *lésion* could certainly be invoked by sellers,⁵⁰ the extent to which it could be invoked by purchasers in all parts of France in the two centuries before the Revolution of 1789 is unclear. During the debates on the *Code civil* in the *Conseil d'Etat* in 1803, Tronchet stated that there was no consistency in the *jurisprudence* on this point.⁵¹ Portalis also observed that the *jurisprudence* had not always been uniform on this point.⁵² However, he stated that since a decision of the *Parlement of Paris* in 1676, it was clear that the purchaser could invoke *lésion* where land was sold at too high a price.⁵³

Domat and Pothier were also divided on this point. Domat stated that only the vendor could invoke *lésion*.⁵⁴ In contrast, Pothier states that the purchaser can invoke *lésion*.⁵⁵ While Pothier concedes that the seventeenth century legal writer, Bernard Automne⁵⁶ disagreed with this view⁵⁷, he notes that almost all legal writers, including Dumoulin, state that both the purchaser and the vendor can invoke *lésion*.⁵⁸

⁵⁰ Domat (n34) 44-45; Pothier (n40) 155-174.

⁵¹ Fenet, tome XIV (n4) 75.

⁵² Fenet, tome XIV (n4) 76.

⁵³ Fenet, tome XIV (n4) 76. In an earlier debate on *lésion*, Portalis confirmed that he 'was in a position to prove that on this point the *jurisprudence* of all the old courts in France was the same' as he had collected these decisions when he had been asked to give a legal opinion (presumably, in his capacity as an *avocat*) in the past: Fenet, tome XIII (n4) 99.

Portalis also noted that Pothier and d'Aguesseau supported this view. Fenet, tome XIV (n4) 76. See the text from n54 to n61 below on Pothier's arguments on this point. Henri-François d'Aguesseau (1668-1751) was an illustrious French jurist. As the Chancellor of Louis XV, d'Aguesseau succeeded in unifying certain aspects of private law in his famous *ordonnances* on gifts in 1731, wills in 1735 and *substitutions* in 1747: M-F Renoux-Zagamé, 'Henri-François d'Aguesseau' in Arabeyre, Halpérin and Krynen (n46) 7, 7-8; J-L Halpérin, *Histoire du droit privé français depuis 1804* (PUF 1996) 16.

⁵⁴ Domat (n34) 45.

⁵⁵ Pothier (n40) 174.

⁵⁶ Bernard Automne (1574-1666) was an *avocat* in the *Parlement* of Bordeaux and his most well known work was a commentary on the *coutumes* of Bordeaux and the *pays bordelais*: GD Guyon, 'Bernard Automne' in Arabeyre, Halpérin and Krynen (n46) 26, 26-27.

⁵⁷ Pothier (n40) 174.

⁵⁸ *Ibid.*

A further uncertainty was the method of calculating how far the purchase price could deviate from the fair price when the purchaser sought to invoke *lésion*. As mentioned earlier, this had been a controversial point in legal writing since the thirteenth century.⁵⁹ Pothier states that ‘the value of the thing that the purchaser receives must be less than half of the price’ which he pays to the vendor.⁶⁰ Thus, Pothier clearly favoured the geometrical method which was less favourable to the purchaser than the arithmetical method.⁶¹

Therefore, while the vendor could invoke *lésion* in the two centuries preceding the Revolution of 1789, the position of the purchaser was much less clear.

Thirdly, the effect of clauses which sought to exclude the application of *lésion* was unclear at this time.⁶² Pothier’s analysis of the effect of these clauses illustrates the diversity of views on this point. On the one hand, Pothier notes that the legal writer Andreas Fachin was in favour of the ‘common view’ that these clauses were valid.⁶³ As Fachin died in 1607,⁶⁴ it is likely that the ‘common view’ at the end of the sixteenth century and at the beginning of the seventeenth century was that clauses which excluded the application of *lésion* were valid.⁶⁵ However, in Pothier’s opinion, these clauses were invalid. He notes that if these clauses were valid, *lésion* would be merely ‘*une loi*

⁵⁹ See the text above from n19 to n24.

⁶⁰ Pothier (n40) 176.

⁶¹ Pothier observes that Dumoulin was of the same opinion: Ibid 176.

⁶² The law on this point in preceding centuries is considered above in the text from n27 to n28.

⁶³ Pothier (n40) 166.

⁶⁴ GW Leibniz, *Des cas perplexes en droit (De casibus perplexis in jure)* (P Boucher tr, Vrin 2009) 125.

⁶⁵ Furthermore, in the seventeenth century, Domat stated that such clauses were valid: Domat (n34). However, Pothier does not refer to Domat.

illusoire' and he also observes such clauses were held to be invalid in a case in 1563.⁶⁶ For similar reasons, Pothier stated that clauses in which the vendor states that the difference between the purchase price and the fair price is a gift to the purchaser were invalid.⁶⁷ He notes that a case from 1557 and another case in the *Parlement* of Toulouse held that such clauses were invalid.⁶⁸

Therefore, while the precise contours of *lésion* were unclear in the last two centuries of the *ancien régime*, it is certain that the scope of *lésion* was much less extensive during this period than it had been during its apogee in the fourteenth century.

(b) From the Revolution of 1789 to the *Code civil* of 1804: *lésion* in the political cauldron

While *lésion* had led a relatively serene existence in French law from the twelfth century to the end of the eighteenth, its fortunes fluctuated wildly between the Revolution of 1789 and the promulgation of the *Code civil* in 1804. *Lésion* was the subject of significant scrutiny in numerous laws, draft civil codes, and litigation during the revolutionary period⁶⁹ and it was abolished in 1795 and then reinstated in 1804. Furthermore, *lésion* was the most controversial issue during the debates on the law of sale in the *Code civil* in the *Conseil d'Etat* where it was keenly debated in five sessions in 1803 and 1804. In contrast to the fervent and extensive debates on *lésion*, the other provisions on the law of sale were passed without any significant discussion.

⁶⁶ Pothier (n40) 166.

⁶⁷ *Ibid* 167.

⁶⁸ *Ibid* 167.

⁶⁹ In this thesis, the 'revolutionary period' refers to the period from 1789 to the establishment of the *Consulat* in 1799.

The vacillating fortunes of *lésion* and the significant debate on this rule from 1789 to 1804 illustrate two points. First, during the Revolutionary period, *lésion* was the victim of the primacy of the principles of freedom of contract and transactional certainty. Secondly, the inclusion of *lésion* in Article 1674 in the *Code civil* was explicitly based on the policy of preserving family wealth.

While *lésion* had been a feature of French law since the twelfth century, it was significantly undermined by the principles of freedom of contract and transactional certainty during the revolutionary period. This is evident in the exclusion of *lésion* from the three draft civil codes which were proposed by J-J-R Cambacérès in 1793, 1794 and 1796,⁷⁰ in the debates which preceded the promulgation of the *loi* of 14 fructidor an III (31 August 1795)⁷¹ which abolished *lésion* and in the observations of the *Tribunaux d'appel* of Rouen and Grenoble in 1800 on the proposal to incorporate *lésion* in the *Code civil*.

Lésion was expressly excluded from the first, second and third draft civil codes in 1793, 1794 and 1796 respectively. The rationale of transactional certainty is particularly evident in Cambacérès' *discours préliminaire* to the third draft civil code in the *Conseil des Cinq-Cents* during the *Directoire*. He observed that *lésion* was 'une source intarissable de procès' and that the uncertainty caused by *lésion* impeded the

⁷⁰ None of the draft civil codes of 1793, 1794 and 1796 satisfied the legislators. Halpérin observes that the three draft civil codes were never adopted as they were all presented at unfavourable moments in the revolutionary period. The failure of the first draft civil code can be explained by the acceleration of the Terror and the rise of Robespierre's revolutionary government in the autumn of 1793 rather than by political opposition to its content. In contrast, the second and third draft civil codes, which generally preserved the content of the civil laws passed during the revolutionary period, were rejected as they were presented to the legislators at a time when there was significant opposition to the revolutionary laws. The second draft civil code was presented during the *Convention* after the fall of Robespierre on 9 thermidor an II (27 July 1794), and the third civil code was presented during the *Directoire* in 1796: Halpérin (n31) 140, 205, 214, 240, 250.

⁷¹ Hereafter, 'the *loi* of 1795'.

development of agriculture and '*l'embellissement des cités*'.⁷² He also declared that '*notre législation doit... imprimer le sceau de la stabilité aux actes faits sous ses auspices*'.⁷³

The extent to which the consistent opposition to *lésion* during the revolutionary period was based on a deliberate political choice in favour of freedom of contract and transactional certainty is also evident in the debates in the *Convention* which preceded the promulgation of the *loi* of August 1795. While the *loi* of 1795 suspended the application of *lésion* to contracts of sale which had been concluded before 31 August 1795, it also abolished *lésion* for contracts of sale which would be concluded after this date. In the *Convention* on 31 August 1795, Laurence proposed the abolition of *lésion*. He argued that *lésion* was '*un droit qu'on peut qualifier d'odieux, puisqu'il est une exception au droit commun, à la liberté des contrats*' and '*un agiotage qui révolte, inquiète les citoyens et compromet les propriétés*'.⁷⁴

Furthermore, the significance of the principle of freedom of contract in the introduction of the *loi* of 1795 is consistent with the more general atmosphere of economic liberalism at this time.⁷⁵ After the fall of Robespierre on 9 *thermidor* (28 July 1794), the 'economic Terror' dissipated along with the political Terror.⁷⁶ In the following months, the State relinquished its control of several businesses such as foundries in

⁷² Fenet, tome I (n4) 170.

⁷³ Fenet, tome I (n4) 170. See also Cambacérès' *discours préliminaire* to the first draft civil code in Fenet, tome I (n4) 9. Cambacérès does not mention *lésion* in his *discours préliminaire* to the second draft civil code.

⁷⁴ *Réimpression de l'ancien moniteur* tome XXV (Plon 1854) 644.

⁷⁵ D Woronoff, *La république bourgeoise: de thermidor à brumaire, 1794-1799* (Seuil 2004) 18.

⁷⁶ Woronoff (n75) 18. Robespierre was executed on 28 July 1794: R Dupuy, *La république jacobine: terreur, guerre et gouvernement révolutionnaire, 1792-1794* (Seuil 2005) 7, 275-281. The fall of Robespierre is generally known as '9 *thermidor*'.

Toulouse and Maubeuge and armament workshops in Paris.⁷⁷ In addition, the regulation of the prices of a vast number of goods,⁷⁸ which had prevailed under Robespierre, was abandoned on 24 December 1794.⁷⁹

Finally the observations of the *Tribunaux d'appel* of Rouen and Grenoble on the *Code civil* demonstrate that the opposition to *lésion* was primarily based on the principles of freedom of contract and transactional certainty.⁸⁰ The *Tribunal d'appel* of Rouen argued that *lésion* should not be included in the *Code civil*. It stated that it was not the task of the law to '*s'interposer dans le prix et les conditions qui ont été licitement et volontairement consentis entre majeurs*'.⁸¹ It also observed that the inclusion of *lésion* would spread '*le trouble et l'inquiétude chez tous*' as no purchaser would feel safe.⁸² Similarly, the *Tribunal d'appel* of Grenoble stated that *lésion* should be rejected or at least subject to restrictions on the grounds that '*le sort des propriétés... ne doit pas rester incertain*'.⁸³

During the debates on the *Code civil* in the *Conseil d'Etat* in 1803 and 1804, the Second Consul Cambacérès, Bigot de Préameneu and Portalis, all of whom advocated the incorporation of *lésion* in the *Code civil*, argued that the abolition of *lésion* in the *loi* of

⁷⁷ Woronoff (n75) 18.

⁷⁸ Wages were also subject to a cap at this time: Dupuy (n76) 209-214. The regulation of prices was known as '*le maximum*'. Woronoff states that '*le maximum*' was the 'keystone' of this dirigisme: Woronoff (n75) 19.

⁷⁹ Woronoff (n75) 19.

⁸⁰ Napoleon appointed a committee composed of Portalis, Tronchet, Bigot de Préameneu and Maleville to draft the *Code civil* on 12 August 1800. They completed the *Code civil* on 21 January 1801. The *Tribunal de cassation* and the *Tribunaux d'appels* were then asked to comment on the *Code civil* before it was examined, debated and altered in the *Conseil d'Etat*: Halpérin (n31) 272.

⁸¹ Fenet, tome V (n4) 542.

⁸² Ibid 543.

⁸³ Fenet, tome III (n4) 586.

1795 could be explained by the monetary difficulties caused by the depreciation of the paper currency during the revolutionary period.⁸⁴ Their principal argument, as Bigot de Préameneu asserted, was that *lésion* could not be applied ‘*sous l’empire du papier-monnaie*’ as it was impossible to determine the value of things.⁸⁵ However, this rationalisation was simply an attempt to minimise the significance of the opposition to *lésion* during the revolutionary period which was principally based on the principles of freedom of contract and transactional certainty.

The inadequacy of this rationalisation was forcefully exposed in the *Conseil d’Etat* by Berlier who rejected the view that the abolition of *lésion* was simply ‘*une loi de circonstance*’.⁸⁶ First, he observed that since 1793, the three draft civil codes had not proposed the adoption of *lésion*.⁸⁷ Furthermore, he noted that the third draft civil code, which was presented to the *Conseil des Cinq-cents* under the *Directoire* in 1796 after the reintroduction of metallic currency, proposed to confirm the *loi* of 1795 under which *lésion* had been abolished.⁸⁸ Thirdly, Berlier stated that the *discours préliminaire* given by Cambacérès when the third draft civil code was presented to the *Conseil des Cinq-*

⁸⁴ Fenet, tome XIII (n4) 48, 104, 96; Ibid, tome XIV (n4) 46. During the revolutionary period, there were two types of paper money. The *assignat*, which was created by the *Assemblée Constituante* in December 1789, depreciated rapidly in value against metallic currency, particularly when the economy was deregulated following the fall of Robespierre on 28 July 1794. See the text from n74 to n79 above on this point. The *assignat* was worth 31% of its nominal value in August 1794 and it fell to only 8 % of its nominal value at the beginning of April 1795. The *assignat* was abolished in February 1796 when it was worth less than what it cost to produce it.

The *mandat territorial* was created by the *Directoire* in March 1796 to replace the *assignat*. However, the *mandat territorial* also fell swiftly in value against metallic currency. The *mandat territorial* was demonetised in February 1797 in order to return fully to metallic currency: M Vovelle, *La chute de la monarchie: 1787-1792* (Seuil 1999) 163-165; Woronoff (n75) 19, 110-112.

⁸⁵ Fenet, tome XIII (n4) 13, 96.

⁸⁶ Ibid 91.

⁸⁷ Ibid.

⁸⁸ Ibid.

cents, demonstrated that the abolition of *lésion* was ‘*une innovation sage et réfléchie, bonne pour tous les temps*’ rather than ‘*une mesure révolutionnaire et de circonstance*’.⁸⁹

Nevertheless, the monetary difficulties caused by the depreciation of the paper currency did influence certain aspects of *lésion* during the revolutionary period. First, the monetary difficulties can explain the decision to suspend the application of *lésion* in the *loi* of 1795.⁹⁰ In addition to abolishing *lésion*, the *loi* of 1795 suspended cases in which *lésion* had been invoked which were then pending. In the *Convention* on 31 August 1795, Lanjuinais, referred to the ‘multitude of cases’ which had been initiated by vendors due to the depreciation of the paper currency and proposed the suspension of *lésion*.⁹¹ Similarly, Laurence, who proposed the abolition of *lésion*, deplored the dramatic rise in the number of cases on *lésion* due to the depreciation of the paper currency.⁹² He described these cases as ‘*le scandale le plus affreux, le brigandage le plus infâme*’.⁹³

⁸⁹ Ibid. Berlier thus highlighted the fact that Cambacérès had argued against *lésion* in the *discours préliminaire* to the third draft civil code in 1796. In addition to the point mentioned by Berlier, Cambacérès’ opposition to *lésion* is also evident in his *discours préliminaire* on the first draft civil code in 1793: Fenet tome I (n4) 9.

In the *Conseil d’Etat*, Cambacérès responded to Berlier by saying that his previous statements did not reflect his ‘personal opinion’ which was that the *Code civil* would be ‘*un Code révoltant*’ if it did not include *lésion*: Fenet, tome XIII (n4) 102; Fenet, tome XIV (n4) 43.

The vacillation of Cambacérès on this point supports the assessment of Halpérin that Cambacérès was ‘fundamentally opportunistic’: Halpérin (n31) 137. The shifting views of Cambacérès on the merits and demerits of *lésion* contrast with the consistent opposition of Berlier to *lésion* throughout the revolutionary period and in the debates on the *Code civil* in the *Conseil d’Etat*. Berlier was involved in the preparation of the first, second and third draft civil codes. Therefore, Berlier signed the three draft civil codes in which *lésion* was either expressly excluded or omitted: Fenet, tome I (n4) 98, 139, 326.

⁹⁰ Similarly, the depreciation of the paper currency led only to the suspension and not the abandonment of the sale of *biens nationaux* by the State. On 21 November 1795, less than two months after the *loi* of 1795, the sale of *biens nationaux* by the State was suspended until 21 May 1796. The term ‘*biens nationaux*’ refers to the land which was confiscated by the State during the revolutionary period from the Catholic Church and the *émigrés*. The State then sold the *biens nationaux*: B Bodinier and E Teyssier, *L’événement le plus important de la Révolution: la vente des biens nationaux (1789-1867) en France et dans les territoires annexés* (CTHS 2000) 30. See also the discussion of *biens nationaux* in the text below from n98 to n109.

⁹¹ *Réimpression de l’ancien moniteur* (n74) 644.

⁹² Ibid.

⁹³ Ibid.

Moreover, the monetary difficulties caused by the depreciation of the paper currency can explain the introduction of several laws on *lésion* during the *Directoire*.⁹⁴ For example, the introductory paragraph of the *loi* of 3 *germinal an V* (23 March 1797), which removed the suspension of the application of *lésion* which had been imposed by the *loi* of 1795, expressly stated that as paper currency was no longer the only legal currency, the reasons which underpinned the suspension of the application of *lésion* in the *loi* 1795 were no longer valid.⁹⁵

There was a significant increase in cases on *lésion* during the revolutionary period. During the debate in the *Convention* on the *loi* of 1795 which abolished *lésion*, Laurence stated that in Normandy at that time, there were up to a hundred cases on *lésion* in the courts, whereas in the past, there had usually been only two or three cases on *lésion* each year.⁹⁶ Similarly, an economic historian has drawn on archives to demonstrate that during the revolutionary period, *lésion* was invoked in numerous cases by vendors from a wide range of socio-economic backgrounds, from the divorced wife of Grimaldi, the prince of Monaco, to tradesmen such as tanners, butchers and locksmiths.⁹⁷

The depreciation of the paper currency can partly explain the significant increase in cases on *lésion* during the revolutionary period. During the debate in the *Convention*

⁹⁴ Rép civ Dalloz, 'Vente' (1858) 38-39.

⁹⁵ After the removal of the suspension in 1797, four other laws had to be introduced to provide specific guidance to courts on how *lésion* should be applied to contracts of sale which had been concluded before the *loi* of 1795. See Rép civ Dalloz, 'Vente' (1858) 38-39.

⁹⁶ Laurent's observation might explain the reason why the *Tribunal d'appel* of Rouen was the only *Tribunal* which opposed the inclusion of *lésion* in the *Code civil* of 1804. See the text from n80 to n82 above.

⁹⁷ JA Miller, 'The aftermath of the assignat: plaintiffs in the age of property, 1794-1804', in HG Brown and JA Miller (eds), *Taking liberties* (Manchester University Press 2002) 70, 80.

on the *loi* of 1795 which abolished *lésion*, Laurence attributes the rise in cases on *lésion* to the depreciation of the paper currency.⁹⁸

However, it is likely that the significant increase in litigation on *lésion* during the revolutionary period can also be attributed to the vibrancy of the market in land at this time. During the revolutionary period, land was bought and sold much more frequently than in the past due to the emergence of *biens nationaux*.⁹⁹ About ten per cent of land in France was confiscated and sold by the State as *biens nationaux*.¹⁰⁰ Those who had purchased *biens nationaux* from the State frequently sold them to third parties who then sold them to others. Georges Duval, the clerk of a Parisian *notaire*, described the proliferation of contracts for the sale of land around 1795 in his diary.¹⁰¹ He observed that ‘at no other time... has land ever been exchanged so rapidly’, that the land which was sold was generally ‘only *biens nationaux*’ and that some properties were ‘sold and resold four or five times in the same day’.¹⁰²

Vendors of *biens nationaux* often had many reasons to sell the land which they had bought from the State or from others. Many vendors were speculators who divided up the land which they had bought into small plots and very swiftly sold them to peasants at high prices.¹⁰³ Other vendors sought to escape from the social opprobrium of owning *biens nationaux*. The owners of *biens nationaux* were viewed as supporters of the Revolution.

⁹⁸ *Réimpression de l'ancien moniteur* (n74) 644.

⁹⁹ Bodinier and Teyssier (n90) 9, 378.

¹⁰⁰ Two thirds of the land that was confiscated and sold had belonged to the clergy and most of the other third had belonged to *émigrés*. The majority of *biens nationaux* were sold between 1790 and 1797 but the State was still selling *biens nationaux* until 1867: Bodinier and Teyssier (n90) 439, 12.

¹⁰¹ *Ibid* 363-364.

¹⁰² *Ibid* 363.

¹⁰³ *Ibid* 443. Some speculators were members of groups known as ‘black gangs’ who used violence to intimidate other bidders at auctions at which the State sold *biens nationaux*: A Moulin, *Les paysans dans la société française: De la révolution à nos jours* (Seuil 1992) 45.

As a result, some priests refused to marry purchasers of *biens nationaux*, give them the last rites or baptise their children.¹⁰⁴

Moreover, the owners of *biens nationaux* feared the consequences of a counter-revolution.¹⁰⁵ The prevalence of this fear is evident in the fact that it was addressed by Napoleon during the debates on *lésion* in the *Conseil d'Etat* in 1804. He stated that '*il n'y aurait qu'une contre-révolution qui pourrait opérer l'expulsion des acquéreurs de domaines nationaux, et rappeler les anciens propriétaires...*'.¹⁰⁶

Finally, many owners of *biens nationaux* had a specific fear of *lésion*. Georges Duval, noted that many owners of *biens nationaux* sought to sell their *biens nationaux* as quickly as possible as they feared that the State, as vendor, would successfully invoke *lésion*.¹⁰⁷

The market in land was particularly vibrant at this time as many purchasers sought to acquire *biens nationaux* which the owners were keen to sell. All sections of society including peasants, clergy, bourgeois and nobles purchased *biens nationaux* from the vendors who were willing to sell them.¹⁰⁸ Nobles who had emigrated and whose land the State had confiscated and sold, had a particular reason to purchase *biens nationaux*. Many *émigrés* nobles attempted to put their ancestral estates back together by purchasing the

¹⁰⁴ Bodinier and Teyssier (n90) 13.

¹⁰⁵ Ibid 364.

¹⁰⁶ Fenet, tome XIV (n4) 57. In fact, the sales of *biens nationaux* were not reversed when the monarchy was restored in 1814 and again in 1815: Bodinier and Teyssier (n90) 12. The First Restoration of Louis XVIII (1814-1815) ended when Napoleon escaped from Elba and took power during the Hundred Days in 1815. The Second Restoration (1815-1830) began when Napoleon fell from power after the Battle of Waterloo.

In Article 13 of *Concordat* of 1801, the Pope declared that he would 'not trouble the purchasers of *biens nationaux*'. Therefore, after 1801, it was always unlikely that the sales of land which had originally belonged to the clergy (the *biens nationaux de première origine*) would be reversed. The purchasers of land which had originally belonged to *émigrés* (the *biens nationaux de seconde origine*) could feel more secure after the *émigrés* received financial compensation for the loss of their land under the *loi* of 27 April 1825 which was known as the '*milliard des émigrés*': Bodinier and Teyssier (n90) 42.

¹⁰⁷ Bodinier and Teyssier (n90) 364.

¹⁰⁸ Ibid (n90) 363-379.

numerous plots into which the estates had been divided from the owners of *biens nationaux*.¹⁰⁹

In summary, *lésion* was abolished in the *loi* of 1795 as this rule was considered to be incompatible with the principle of freedom of contract which, along with economic freedom more generally, was especially lauded at that time and the principle of transactional certainty. The abolition of *lésion* in the *loi* of 1795 cannot be ascribed to the monetary difficulties caused by the depreciation of the paper currency. Therefore, the removal of *lésion* from French law was the result of a deliberate political choice rather than ‘*née des circonstances*’, the logical outcome of the impersonal forces of events, as Portalis contended in the *Conseil d’Etat* in 1804.¹¹⁰

On the other hand, the plethora of legislation on the suspension of *lésion*, the removal of this suspension and the application of *lésion* to cases which had been suspended can certainly be ascribed to the depreciation of the paper currency. Moreover, the depreciation of the paper currency is also a partial explanation for the proliferation of cases on *lésion* during the revolutionary period. Nonetheless, the vibrancy of the market in land at this time due to the sale of *biens nationaux* was an equally important causative factor in this situation.

Given the prominence of *lésion* in the legislature and in the courts during the revolutionary period, this rule was, perhaps inevitably, the subject of extensive and fervent discussion during the debates on the *Code civil* in 1803 and 1804. *Lésion* was reinstated in French law in Articles 1674 to 1685 of the *Code civil* in 1804, just under a

¹⁰⁹ During the revolutionary period, many *émigrés* nobles had to use ‘*prête-noms*’ (nominees) to purchase *biens nationaux*: Moulin (n103) 51. See part (c) below for a discussion of the purchase of plots from the owners of *biens nationaux* by nobles after the Second Restoration in 1815.

¹¹⁰ Fenet, tome XIV (n4) 46.

decade after it had been abolished in the *loi* of 1795. The shape in which *lésion* emerged in the *Code civil* and the very decision to include it in the *Code civil* can be attributed to the significance of the policy of preserving family wealth.

The principal features of *lésion* in the *Code civil* are evident in Articles 1674, 1681 and 1683.¹¹¹ First, *lésion* applies to the sale of land only and not to moveables.¹¹² Article 1674 provides that a contract for the sale of land can be rescinded if the purchase price is less than five-twelfths of the fair price of the land.¹¹³ Secondly, clauses in the contract of sale which purport to exclude Article 1674 are not valid.¹¹⁴ Thirdly, Article 1683 expressly precludes the purchaser from invoking Article 1674. Finally, Article 1681 provides that the purchaser can choose whether to return the land to the vendor and recover the purchase price or keep the land and pay a sum which equals the difference between the purchase price and the fair price minus ten per cent.

¹¹¹ Other important features are discussed below in section (iii) where Article 1674 is compared to the analogous rule in English law on the sale of reversions which was abolished in 1867.

¹¹² *Lésion* is excluded in two situations. Article 1706 of the *Code civil* provides that *lésion* cannot be invoked in contracts of exchange. It is certain that *lésion* was applied to contracts of exchange until the fourteenth century. See the text above from n28 to n29. It was also possible to invoke *lésion* in certain contracts of exchange before the Revolution of 1789. Pothier states that a person who exchanges land in return for something (immoveable or moveable property) which is worth less than half the value of the land can invoke *lésion*: Pothier (n40) 276. Domat expresses a similar view: Domat (n34) 45. Article 2052 of the *Code civil* states that *lésion* cannot be invoked in contracts of compromise. This provision affirms the rule created by the edict of 1560. See n34 above.

¹¹³ Tronchet states that the fraction of five-twelfths was chosen instead of the traditional threshold of one half of the fair price as the latter was too uncertain: Fenet, tome XIV (n4) 63-64. At first glance, the fraction of five-twelfths appears to be a peculiar choice. However, the fraction of five-twelfths is not uncommon in other disciplines such as botany, horticulture and astrology. In fact, there are specific nouns in English (*quincunx*) and French (*quinconce*) which describe this fraction.

¹¹⁴ The final two clauses of Article 1674 provide that the vendor can rescind the contract 'even if, in the contract, he has expressly excluded the possibility of asking for rescission and has declared that the surplus price is a gift'. There is merely a brief reference to this point in the debates on *lésion* in the *Code civil* in 1803 and 1804. In a speech before the *Corps législatif* in 1804, Portalis stated that if these clauses were valid, every purchaser would insist on including them in the contract and Article 1674 would be an 'impotent and illusory' rule: Fenet tome XIV (n4) 146. It is also likely that the prevalence of clauses which excluded the application of *lésion* in the two centuries preceding the Revolution of 1789 and the uncertainty on the validity of these clauses can explain the inclusion of the final two clauses in Article 1674. See the discussion of the use of these clauses before the Revolution of 1789 in the text above from n61 to n68.

Due to the constitutional structure of the *Consulat*, the most significant debates on the *Code civil* took place in the *Conseil d'Etat*.¹¹⁵ *Lésion* was debated during five of the hundred and two debates on the *Code civil* in the *Conseil d'Etat*.¹¹⁶ Almost as many *conseillers* were in favour of *lésion* as those who were against the adoption of this rule. The *conseillers* Berlier, Regnaud de Saint-Jean-d'Angély, Defermon, Berenger and Treilhard opposed the introduction of *lésion* in the *Code civil*. On the other hand, Muraire, Cambacérès, who was then the Second Consul and the four members of the committee which had drafted the *Code civil*, Portalis, Tronchet, Bigot de Préameneu and Maleville, advocated the introduction of *lésion* in the *Code civil*.

In this apparent stalemate, the presence and the active participation of Napoleon were decisive factors in the ultimate adoption of *lésion* and in the determination of certain aspects of this rule in the *Code civil*.¹¹⁷ The key role played by Napoleon is evident in two episodes which are relevant here.¹¹⁸

¹¹⁵ Under the Constitution of 22 *frimaire an VIII* (13 December 1799), only the executive could propose legislation and the *Conseil d'Etat* prepared the legislation on behalf of the executive. The Constitution of 22 *frimaire an VIII* (13 December 1799) also provided that legislation had to be submitted to the *Tribunat* and the *Corps législatif*, which were the two legislative bodies. The *Tribunat* could discuss the legislation before voting either against or in favour of the legislation. However, the *Corps législatif* could merely vote against or in favour of the legislation as no discussion of the legislation was permitted. The subordinate role of the *Tribunat* and the *Corps législatif* in the debates on the *Code civil* was exacerbated by the '*coup d'éclat à la limite du coup d'Etat*' of 20 March 1802 when Napoleon took advantage of the first renewal of the legislators in the *Tribunat* and the *Corps législatif* by removing 'his most eloquent opponents'. Napoleon had been angered by the obstructive attitude of the legislators in the *Tribunat* and the *Corps législatif* in the initial debates on the *Code civil*. Halpérin notes that this attitude can be explained by political opposition to Napoleon rather than by a negative view of the content of the legislation. Thereafter, the 'docile' *Tribunat* and *Corps législatif* voted in favour of all the provisions which were subsequently incorporated into the *Code civil*: J-L Halpérin, *Le Code civil* (2^e éd., Dalloz 2003) 19-23; Halpérin (n31) 273-275.

¹¹⁶ *Lésion* was debated in the five sessions which took place on 3 November 1803, 17 November 1803, 22 December 1803, 12 January 1804 and 28 January 1804.

¹¹⁷ Napoleon played a central role in the debates on the *Code civil* in the *Conseil d'Etat*. He presided over fifty-two of the sessions during which the *Code civil* was debated and he spoke two hundred and fifty seven times during the debates: J-L Souriaux, 'Le rôle du premier consul dans les travaux préparatoires du Code civil', in *1804-2004, Le Code civil: un passé, un présent, un avenir* (Dalloz 2004) 107, 109. However, Halpérin states that Napoleon presided over fifty-five of the hundred and seven sessions in the *Conseil d'Etat*: Halpérin (n31) 21.

¹¹⁸ Napoleon also played an essential role in the adoption of Articles 1676 and 1681 of the *Code civil*. Article 1676 of the *Code civil* provides that a claim under Article 1674 must be initiated within two years of

First, the crucial decision to include *lésion* in the *Code civil* can be attributed to Napoleon. The divisions amongst the *conseillers* on *lésion* had been evident from the beginning of the debates on this point in 1803. The final decision to adopt *lésion* was made only in 1804 after Napoleon made his first contribution on this point in the *Conseil d'Etat*.¹¹⁹ After Napoleon had argued ardently in favour of *lésion*, he stated that it was necessary to decide in principle whether or not *lésion* should be incorporated into the *Code civil*.¹²⁰ It was at that point, that the *Conseil d'Etat* finally voted in favour of adopting the *lésion* in the *Code civil*.¹²¹

Secondly, the intervention of Napoleon was decisive in the adoption of Article 1683 of the *Code civil* which precludes the purchaser from invoking *lésion* where land is sold at too high a price. Until Napoleon's intervention, no-one had argued against allowing the purchaser to invoke *lésion*. In fact, Berlier, Portalis, Tronchet, Jollivet and Ségur had spoken in favour of allowing purchasers of land to invoke *lésion*.

Napoleon's speech was the longest and most significant contribution to the discussion on Article 1683 of the *Code civil*.¹²² He presented several arguments against allowing the purchaser of land to invoke *lésion*. There was then no further debate on Article 1683 of the *Code civil*. Napoleon's view prevailed and the proposal to extend *lésion* to the purchaser was rejected in the *Conseil d'Etat*.¹²³

the conclusion of the contract of sale. This point and Napoleon's role in the adoption of this provision are discussed below in section (iii). Article 1681 of the *Code civil* and Napoleon's role in the adoption of the provision which gives the purchaser a reduction of ten per cent if he chooses to keep the land and pay the fair price are discussed in section (i)(b) in chapter 6.

¹¹⁹ Fenet, tome XIV (n4) 57-59.

¹²⁰ Ibid 62.

¹²¹ Ibid.

¹²² Ibid 77.

¹²³ Ibid 78.

The significance of the policy of preserving family wealth is as apparent in the arguments of those who opposed Article 1674 as it is in the arguments of those who were in favour of including this rule.

In a litany of melodramatic images of reckless sons and destitute families, those who were in favour of Article 1674 depict vendors of land as members of a family and portray land as belonging to the family rather than to the individual. Cambacérès referred to a '*père de famille*' who trembled at the thought that a son, who was prepared to sacrifice everything for a fleeting moment of pleasure, could irrevocably dispose of his fortune by an injudicious signature.¹²⁴ Similarly, Tronchet evoked the image of a young man who, influenced by his fiery emotions, sacrifices '*son héritage*'.¹²⁵

The conception of vendors as members of a family and of land as belonging to the family is particularly evident in Napoleon's arguments in the *Conseil d'Etat*. Napoleon stated that '*le droit de propriété ne donne à personne la disposition indéfinie de ses biens*'¹²⁶ and that the *Code civil* should not condone '*un acte par lequel un individu sacrifie dans un moment de folie l'héritage de ses pères et le patrimoine de ses enfants*'.¹²⁷ He also observed that a purchaser who acquires land at less than the fair price enriches his family and impoverishes another.¹²⁸ This point is emphasised in Napoleon's subsequent statement that when a vendor from '*les petites familles*' and '*les petites*

¹²⁴ Ibid 43.

¹²⁵ Ibid 68.

¹²⁶ Ibid 58. This observation contrasts sharply with Article 554 of the *Code civil* which provides that '*la propriété est le droit de jouir et de disposer des choses de la manière la plus absolue...*'.

¹²⁷ Ibid.

¹²⁸ Ibid 71.

fortunes’ sells land at too low a price, he disinherits ‘*sa postérité toute entière*’ and reduces his family to destitution.¹²⁹

The importance of the policy of preserving family wealth in the decision to include Article 1674 is equally evident in the arguments of those who opposed the adoption of this rule. For example, Defermon stated that *lésion* was a part of French law before the Revolution as at that time ‘*le système de toute la législation tendait à maintenir les biens dans les familles, et principalement dans les mains des seigneurs*’.¹³⁰ He reinforced this point by drawing an analogy between *lésion* and the *retrait lignager*.¹³¹ As he observed, the common ‘*esprit*’ of preserving family wealth underpins both rules.¹³²

The preservation of family wealth was very clearly the rationale of the *retrait lignager* which allowed the vendor’s relatives to recover the land from the purchaser by giving him a sum which included the purchase price and the costs of the sale. The *retrait lignager* was available in all *pays de coutume* and in some *pays de droit écrit*.¹³³ Naturally, given the significant legal diversity in France at this time,¹³⁴ the class of relatives who could invoke the rule and the period during which it could be invoked differed from place to place within France. The *retrait lignager* could be invoked by relatives up to the ninth degree in Brittany and up to the tenth degree in Franche-

¹²⁹ Ibid 72.

¹³⁰ Fenet, tome XIII (n4) 97. Regnaud de Saint-Jean-d’Angely made a similar point: *ibid* 100.

¹³¹ Ibid 97 (Defermon), 100 (Regnaud de Saint-Jean-d’Angely). Similarly, Cambacérès considered *lésion* and the *retrait lignager* together in his speech in the *Convention nationale* on the first draft civil code in 1793: Fenet, tome I (n4) 9.

¹³² Fenet, tome XIII (n4) 97.

¹³³ RE Mousnier, *Les institutions de la France sous la monarchie absolue 1598-1789, volume 1: société et état* (PUF 1980) 61. Bloch states that the *retrait lignager* can be traced back to the thirteenth century in French law. He also states that in medieval times, the *retrait lignager* was applied everywhere in Europe apart from England where however, it was a part of the customs of certain towns: MLB Bloch, *La société féodale: la formation des liens de dépendance* (Michel 1949) 207.

¹³⁴ See the discussion above in the text from n30 to n33.

Comté.¹³⁵ In Briançonnais, relatives had to invoke the *retrait lignager* within ten days of the contract of sale.¹³⁶ In contrast, in Paris, Orléans and Normandy, relatives had one year and a day from the conclusion of the contract of sale to invoke the *retrait lignager*.¹³⁷ The *retrait lignager* was abolished in the *loi* of 19 of July 1790¹³⁸ and this rule was not reinstated in French law in the *Code civil*.

The importance of the policy of preserving family wealth also explains the decision of the *Conseil d'Etat* not to extend Article 1674 to the sale of moveables. Napoleon makes this point particularly vividly.

*Ne voit-on pas que la loi de la rescision est une loi de mœurs qui a pour objet le territoire? Peu importe comment un individu dispose de quelques diamants, de quelques tableaux ; mais la manière dont il dispose de sa propriété territoriale n'est pas indifférente à la société.*¹³⁹

Similarly, in a speech before the *Corps législatif* in 1804, Portalis emphasised the significance of the policy of preserving family wealth in the decision to exclude moveables from Article 1674. He stated that unlike moveables,

des immeubles appartiennent longtemps au même propriétaire; ils ne sortent guère des mains de celui qui les possède que par l'ordre des successions.

¹³⁵ Mousnier (n133) 62.

¹³⁶ *Ibid* 63.

¹³⁷ *Ibid* 62.

¹³⁸ J-P Lévy, 'La Révolution française et le droit civil' in *1804-2004, Le Code civil: un passé, un présent, un avenir* (Daloz 2004) 87, 93.

¹³⁹ Fenet, tome XIV (n4) 57.

*Combien de familles dans lesquelles les diverses générations se partagent pendant longtemps le même patrimoine?*¹⁴⁰

Thus, the policy of preserving family wealth clearly took precedence over the principle of freedom of contract in Article 1674. In addition, the policy of preserving family wealth influenced the decision to confine this rule to the sale of land.

(c) Article 1674 of the *Code civil* since 1804

Since the promulgation of the *Code civil* in 1804, Article 1674 has generally led a much quieter life. Three aspects of the application of Article 1674 since 1804 will be discussed here. First, we will examine two particularly notable cases in the history of Article 1674 since 1804. Secondly, we will consider how the courts have been willing to intervene in contracts for the sale of land at too low a price even where the facts do not come within the scope of Article 1674. This demonstrates that notwithstanding the divisive and tumultuous history of *lésion* during the revolutionary period, the idea of intervening in contracts for the sale of land at too low a price is firmly entrenched in French law. Nonetheless, as we will discuss in the third point, the policy of preserving family wealth is in decline in French law and in this context it is possible that Article 1674 would not be retained in French law if it were reconsidered by legislators.

First, vestiges of the politics of the revolutionary and Napoleonic periods emerged in the form of a claim under Article 1674 in *Chaylan et consorts c Boyer d'Eguilles*.¹⁴¹

¹⁴⁰ Ibid 141.

¹⁴¹ Cass civ, 11 April 1820: S.1819-1821.212; M Laporte (ed), *Journal des audiences de la Cour de cassation; ou recueil des arrêts de cette Cour en matière civile et criminelle* (J Smith 1820) 241. In this thesis, we rely primarily on the more comprehensive report of this case in the latter source.

The purchaser was the son of the marquis Boyer-d'Eguilles who had been the owner of a large estate in Provence before the Revolution of 1789. As the marquis had emigrated with his children at the beginning of the Revolution, his land had been confiscated and sold by the State as *biens nationaux*. The estate had been divided into fifty plots and the purchasers had lived 'peacefully' on the land until the Second Restoration of Louis XVIII in July 1815. In August 1815, the son of the marquis purchased all fifty plots which together were worth between 30,000 and 40,000 francs for 7,200 francs from the twenty seven vendors, who had purchased the land from the State as *biens nationaux* in 1792 and 1793. The vendors then sought to rescind the contracts of sale which they had concluded with the son of the marquis.

As discussed earlier,¹⁴² *émigrés* nobles were often very eager to put their estates back together. In October 1800, during the *Consulat*, 52,000 people were removed from the 'list of *émigrés*' and this meant that they were able to recover any *biens nationaux* which the State had confiscated from them but which had not yet been sold.¹⁴³ Furthermore, the Charter of 1814, which was introduced during the First Restoration of Louis XVIII, provided for the restitution of all *biens nationaux* which had not yet been sold by the State.¹⁴⁴ However, as much land had been sold as *biens nationaux*, many former owners or their descendants had to enter into contracts of sale with the current owners in order to recover the land.¹⁴⁵

¹⁴² See the text above from n108 to n109.

¹⁴³ Moulin (n103) 55.

¹⁴⁴ Ibid 78-79.

¹⁴⁵ Many *émigré* nobles had to deal with the problem of multiple vendors. Jones refers to the 'uphill task of treating with two hundred purchasers' which Count Crusy de Marcillac faced in the Aveyron when he returned to France. After the Second Restoration in July 1815, 'the great majority' of the purchasers offered to sell the *biens nationaux* to the Count at the prices which they had paid for them and 'the transaction was completed by 1822'. Jones notes that the Count's story is 'typical of many': P Jones, *The peasantry in the French revolution* (CUP 1988) 255. The facts of *Chaylan* (n141) support Jones' observation.

Moulin notes that certain *émigrés* nobles resorted to ‘persuasion and threats’ in order to convince the current owners of the land to enter into contracts of sale.¹⁴⁶ Persuasion and threats are certainly evident in *Chaylan*.¹⁴⁷ Nonetheless, in the *Cour de cassation* the vendors’ claim was based solely on Article 1674.

The purchaser advanced two principal arguments in the *Cour de cassation*. First, he contended that Article 1674 did not apply to *biens nationaux*. To support this argument, he cited Article 3 of the *loi* of 2 *prairial an VII* (21 May 1799) which had excluded the application of *lésion* to contracts for the sale of *biens nationaux* which had been concluded before the abolition of *lésion* in the *loi* of 1795.¹⁴⁸ The purchaser argued that Article 3 of the *loi* of 2 *prairial an VII* (21 May 1799) was still applicable as it had not been excluded by the *Code civil* of 1804.

Secondly, the purchaser argued that as he was the true owner of the land, the vendor had sought to discharge a ‘natural obligation’ by selling it to him at less than the fair price. Therefore, the purchaser asserted that the contract of sale could not be

¹⁴⁶ Moulin (n103) 79.

¹⁴⁷ *Chaylan* (n141). In this case, some of the vendors were arrested and imprisoned in Aix just a few days after the Second Restoration. The families of the vendors were told that they would not be released until they gave back the *biens nationaux*. These vendors then entered into the contracts of sale with the son of the marquis the day after they were freed. In addition, after the conclusion of these contracts, certain quantities of straw and wheat were requisitioned from *commune* of Eguilles and the burden fell disproportionately on the owners of *biens nationaux*. The owners of *biens nationaux* were told that they would be treated in this way until they gave back the *biens nationaux*. This episode convinced all the other owners of *biens nationaux* to sell their land to the son of the marquis.

The events which preceded the contracts of sale in this case were probably some of the numerous ‘incidents’ which led to the introduction of the *milliard des émigrés* in the *loi* of 27 April 1825: Moulin (n103) 79. See n106 above on the *milliard des émigrés*.

¹⁴⁸ Ironically, the primary purpose of this provision was to protect the patriotic purchasers of *biens nationaux* against unpatriotic vendors who sold their *biens nationaux* at a low price. The legislators viewed the vendors of *biens nationaux* as counter-revolutionaries or fickle citizens who feared the return of the monarchy and the restitution of the *biens nationaux* to the original owners: F Boulanger, ‘Le problème de la lésion dans le droit intermédiaire’ in A Decouflé, F Boulanger and B-A Pierrelle, *Etudes d’histoire économique et social du XVIII^e siècle* (PUF 1966) 53, 83-84.

rescinded under Article 1674 as the difference between the purchase price and the fair price was justified by this ‘natural obligation’.

Both the *Tribunal civil* of Aix in 1816 and then on appeal, the *Cour royale* of Aix in 1817 had held in favour of the purchaser. They concluded that the difference between the purchase price and the fair price could not be recovered as Article 1235 of the *Code civil* precluded the restitution of a sum which the vendor was under a natural obligation to pay to the purchaser. Furthermore, they held that the contract could not be rescinded under Article 1674 as it was a sale to the original owner who had been ‘unjustly despoiled’ rather than an ordinary sale between two individuals.

However, the *Cour de cassation* quashed the decision of the *Cour royale* of Aix. The *Cour de cassation* held that *biens nationaux* were not excluded from Article 1674 and that the vendors had been under no ‘natural obligation’ to sell the land to the purchaser at less than the fair price.

The response of the courts to the question whether the vendors in *Chaylan* could invoke Article 1674 had significant political implications.¹⁴⁹ The tensions between those who supported and those who opposed the monarchy were much more acute during the Second Restoration than during the First Restoration.¹⁵⁰ However, Louis XVIII affirmed that he was eager to avoid becoming ‘*le roi de deux peuples*’.¹⁵¹ Thus, the decision of the

¹⁴⁹ *Chaylan* (n141). The participation of Odilon Barrot (1791-1873) as *avocat* for the purchaser adds a different political dimension to this case. Barrot, who after the Revolution of 1848 became Louis Napoleon Bonaparte’s first prime minister, opposed the restoration of the monarchy in 1814 and 1815. As an *avocat*, he succeeded in convincing the *Cour de cassation* to quash various decisions in which opponents of the restoration of the monarchy had been sentenced to death for various reasons. Therefore, it is peculiar to find that Barrot was the *avocat* of the purchaser rather than the vendor in this case: J-J Clère, ‘Camille-Hyacinthe-Odilon Barrot’ in Arabeyre, Halpérin and Krynen (n46) 40, 40-41.

¹⁵⁰ J-J Chevalier, *Histoire des institutions et des régimes politiques de la France de 1789 à 1958* (9^e éd. Dalloz 2001) 179.

¹⁵¹ Chevalier (n150) 179.

Cour de cassation in *Chaylan*¹⁵² was consistent with the general policy of reconciliation which Louis XVIII sought to implement during the Second Restoration.

Article 9 of the Charter of 1814, which was retained when Louis XVIII came to power for the second time in 1815, provided that ‘*toutes les propriétés sont inviolables, sans aucune exception de celles qu’on appelle nationales, la loi ne mettant aucune différence entre elles*’. In the *Cour de cassation* in *Chaylan*, the vendors expressly contended that this provision would be ‘illusory’ if the *Cour de cassation* did not quash the decision of the *Cour royale* of Aix in 1817.¹⁵³

In *Chaylan*,¹⁵⁴ the *Cour de cassation* expressly held that the *Cour royale* of Aix in 1817 had infringed Article 9 of the Charter of 1814, in addition to Articles 1674 and 1235 of the *Code civil*. However, unsurprisingly, given the brevity and concision of most decisions of the *Cour de cassation* then and now,¹⁵⁵ there is no reference to the wider political context in its decision in this case. Nevertheless, it is clear that Louis XVIII’s policy of reconciliation would have been significantly undermined if the *Cour de cassation* had not quashed the decision of the *Cour royale* of Aix in *Chaylan*.¹⁵⁶

A second notable case since 1804 on Article 1674 is the decision of the *Cour de cassation* in *Société économique de Rennes c Pailleret* in 1932.¹⁵⁷ As the *rapporteur* Dumas observed, this was the first case in which the *Cour de cassation* affirmed that Article 1674 applied to contracts for the sale of land at less than five-twelfths of the fair price even if it could be shown that the vendor had freely consented to enter into the

¹⁵² *Chaylan* (n141).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ JP Dawson, *The oracles of the law* (University of Michigan Law School 1968) 374-431.

¹⁵⁶ *Ibid.*

¹⁵⁷ Cass req, 28 December 1932: D.1933.1.87.

contract. This was a contentious point in the *jurisprudence* and in *doctrine*, even though in most cases it had been held that the application of Article 1674 depended only on whether the price was unfair and not on whether the vendor's consent had been completely free.¹⁵⁸

In this case, the vendor and the purchaser had concluded a contract in 1912 under which the purchaser leased land and buildings from the vendor and the purchaser was also given the option to purchase the land and buildings at a certain price. In 1925, the purchaser exercised the option and the land and buildings were sold to the purchaser. However, the vendor argued that the purchase price was less than the fair price and sought to rescind the contract under Article 1674.

Even though the purchase price was clearly less than the fair price of the land and buildings, the purchaser argued that Article 1674 was not applicable as the vendor had freely consented to the contract and had not been under any pressure due to his particular circumstances. This argument had been rejected in the *Tribunal* of Ille-et-Vilaine and in the *Cour d'appel* of Rennes.

In the *Cour de cassation*, its *rapporteur* Dumas, thought that the purchaser's argument was 'ingenious' and he observed that it '*séduit par la rigueur apparent de sa logique, et même, - pourquoi ne pas le reconnaître? – par son caractère équitable et les garanties qu'elle propose contre la violation trop usuelle de la loi du contrat*'. Furthermore, Dumas conceded that during the debates on *lésion* in 1804, the vendor who was under pressure due to his particular circumstances was the typical case in the minds of the *conseillers*.

¹⁵⁸ This point is made by the anonymous author of the note to the report of this case in the *Gazette du Palais*: Gaz Pal.1933.1.287.

Nevertheless, Dumas stated that beyond the *travaux préparatoires* and the ‘most edifying reasoning’, lies the text of Article 1674 and one cannot distort or add to this text under the pretext of interpretation. He concluded that as Article 1674 clearly requires only a disparity of seven-twelfths between the fair price of the land and the purchase price, it is not necessary for the vendor to show that he was under pressure due to his particular circumstances when he concluded the contract. The *Cour de cassation* agreed with Dumas and affirmed the decision of the *Cour d’appel* of Rennes. Therefore, the vendor could invoke Article 1674 even though he had not been under any pressure due his particular circumstances when he entered into the contract.

During the debates on *lésion* in 1804, Regnaud de Saint-Jean-d’Angély predicted that Article 1674 would only ever benefit ‘*un très-petit nombre de personnes*’ as ‘*il en est peu qui soient assez dépourvues de raison pour vendre leur bien au-dessous de la moitié de sa valeur*’.¹⁵⁹ This prophecy has been disproved by the significant number of cases in which a vendor seeks to rescind a contract for the sale of land on the basis of Article 1674. For example, in 2011, Article 1674 was invoked in two cases in the *Cour de cassation*,¹⁶⁰ and in fifty-four cases in sixteen different *Cours d’appel* in all corners of France.¹⁶¹

The text of Article 1674 and Articles 1676 to 1685 has remained unchanged since the promulgation of the *Code civil* in 1804. The *loi* of 28 November 1949 added a clause

¹⁵⁹ Fenet, tome XIV (n4) 56.

¹⁶⁰ Cass civ 3, 3 November 2011: *RDC* (2012) 389; Cass civ 3, 14 December 2011: *RDC* (2012) 387.

¹⁶¹ Article 1674 was invoked in 2011 in the *Cours d’appel* of Agen, Aix-en-Provence, Angers, Bordeaux, Grenoble, Lyon, Montpellier, Nancy, Nîmes, Orléans, Paris, Pau, Reims, Riom, Rouen and Toulouse. This observation is based on a search of cases on Jurisclasseur. See <www.lexisnexis.fr> accessed 3 October 2012.

to Article 1675 of the *Code civil* but it did not fundamentally alter this provision.¹⁶² Therefore, the rule which was invoked in the *Cour de cassation* in 1820 by vendors who had purchased their land from the State as *biens nationaux* during the Revolution of 1789¹⁶³ was essentially identical to the rule which was invoked in the *Cour de cassation* one hundred and ninety one years later by a man and a woman who had sold their plots of land to a building company.¹⁶⁴

Since the introduction of the *Code civil* in 1804, the courts have often been willing to intervene in contracts for the sale of land at too low a price even where the facts do not come within the scope of Article 1674. This is evident in the way in which the courts have applied the doctrine of *prix dérisoire* to contracts for the sale of land in return for an annuity. Thus, to a certain extent, the idea of intervening in contracts for the sale of land at too low a price transcends Article 1674 and is firmly entrenched in French law.

As mentioned earlier, the doctrine of *prix dérisoire*, which is based on the concept of *la cause*, has played a significant role in contracts for the sale of land in return for an annuity.¹⁶⁵ This type of contract has always been quite common in French law and is used particularly frequently when the vendors are old.¹⁶⁶ The courts have created a specific

¹⁶² The general rule in Article 1675 *al* 1 of the *Code civil* is that the land is valued when the contract of sale is concluded. The additional clause in Article 1675 *al* 2 of the *Code civil* provides that when a vendor promises to sell his land to the purchaser under an option contract, the land is valued at the time when the purchaser agrees to the sale rather than at the time of the conclusion of the option contract. This clause enshrined in the *Code civil* a rule which had been developed by the courts: H Mazeaud, L Mazeaud and J Mazeaud, *Leçons de droit civil* tome III (Montchrestien 1960) 746.

¹⁶³ Chaylan (n141).

¹⁶⁴ Cass civ 3, 14 December 2011: *RDC* (2012) 387.

¹⁶⁵ See section (i)(b) in chapter 2.

¹⁶⁶ Malaurie, Aynès and Gautier label a contract for the sale of land in return for an annuity '*un contrat de vieillards*': P Malaurie, L Aynès and P-Y Gautier, *Les contrats spéciaux* (4^e éd, Defrénois 2009) 583. The ubiquity of contracts in which old vendors (particularly old women) sold their land for an annuity in the nineteenth century is evident in Maupassant's short story, '*Le petit fût*', where an old woman sells her

threshold, which is almost ‘a mathematical criteria’ in this part of the doctrine of *prix dérisoire*.¹⁶⁷ A contract for the sale of land in return for an annuity will usually be annulled on the ground of *prix dérisoire* if the annual sum which the purchaser pays to the vendor is less than either the annual revenue from the land or the annual interest on the capital sum which equals the value of the land.¹⁶⁸

The doctrine of *prix dérisoire* is of particular importance in contracts for the sale of land in return for an annuity as it allows courts to intervene in contracts for the sale of land at too low a price where the facts do not come within Article 1674. Article 1676 of the *Code civil* provides that claims based on Article 1674 must be initiated within two years of the conclusion of the contract of sale.¹⁶⁹ However, as claimants are the descendants of the vendor in almost all the cases in which the doctrine of *prix dérisoire* is invoked in order to annul contracts for the sale of land in return for an annuity, this period has usually expired.

house and surrounding land to her neighbour in return for an annuity: G de Maupassant, *Les sœurs Rondoli* (first published 1884, Livres de poche 1992) 63. See also, for example, *Bocave c Montborne* (Cass req, 7 August 1849: D.1849.1.245) where a woman over 80 years old sold her house to her tenant in return for an annuity and *Lansalot c Martin* (Cass req, 28 October 1895: D.1896.36) where a 76 year old woman sold three houses in return for an annuity.

While contracts for the sale of land in return for an annuity are also common today, there has recently been a noticeable decline in the use of these contracts. Nevertheless, around 5,000 contracts for the sale of land in return for an annuity are concluded every year in France: A Bodescot, ‘De nouvelles idées pour le viager’ (*Le Figaro*, 25 September 2010); A-H Pommier, ‘Vendre en viager: attrayant mais risqué’ (*Le Figaro*, 11 March 2011).

¹⁶⁷ G Cornu, ‘Rente viagère’ 72 *RTDciv* (1979) 396, 396. The ‘almost mathematical’ nature of the threshold is apparent in *Lesénéchal c Dupont* (Cass req, 15 May 1899: D.1899.1.312). In this case, the *Cour de cassation* affirmed a decision of the *Cour* of Caen which had held that the price was not *dérisoire* as the annuity exceeded the annual interest on the capital value of the land.

¹⁶⁸ F Collart Dutilleul and P Delebecque, *Contrats civils et commerciaux* (8^e éd, Dalloz 2007) 166-167. As the *Cour* of Douai observed in *Bocave c Montborne* (30 November 1847: D.1848.2.71), the justification for this rule is that the purchaser would be able to acquire the land ‘without opening her purse’ as the land would effectively pay for itself. However, the numerous fallacies in this argument are highlighted by Planiol in his note to Cass req, 1 May 1911 (*Pellet v Prabel*): D.1911.1.353 and G Baudry-Lacantinerie and L Saignat, *Traité théorique et pratique de droit civil: de la vente et de l’échange* (3^e éd, Sirey 1908) 130-131.

¹⁶⁹ Article 1676 of the *Code civil* is discussed in more detail in the text below from n415 to n422.

Until recently, it was generally accepted that the application of the doctrine of *prix dérisoire* led to *nullité absolue* rather than *nullité relative*.¹⁷⁰ In 2011, the third chamber of the *Cour de cassation* muddied the waters by holding that the application of the doctrine of *prix dérisoire* leads to *nullité relative*.¹⁷¹ However, this debate is now less significant since the introduction of the *loi* of 17 June 2008, which reformed the law on prescription, as the prescription period for both types of *nullité* is now five years.¹⁷² Nevertheless, the period within which a claim under the doctrine of *prix dérisoire* must be initiated still greatly exceeds the period of two years which Article 1676 of the *Code civil* prescribes for claims based on Article 1674. As a result, the doctrine of *prix dérisoire* will continue to play an important role in contracts for the sale of land in return for an annuity.

It is clear from the very earliest cases on the doctrine of *prix dérisoire* that one of the primary objects of this rule was to evade Article 1676 of the *Code civil* and allow courts to set aside contracts for the sale of land at too low a price. This is particularly evident in *Bocave*, where the *Cour de cassation* rejected the purchaser's argument that the vendor's only claim lay in Article 1674 and that this claim could not succeed as more than two years had passed since the conclusion of the contract.¹⁷³ Similarly, in *Pellet*, the purchaser argued that the only claim lay in Article 1674 and that this claim could not succeed as it was initiated about eighteen years after the conclusion of the contract of

¹⁷⁰ F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (10^e édn, Dalloz 2009) 310-311. For example, in Cass com, 23 October 2007, the commercial chamber of the *Cour de cassation* held that the annulment of a contract for the sale of shares on the ground of *prix dérisoire* led to '*nullité absolue*'.

¹⁷¹ Cass civ 3, 21 September 2011. E Savaux notes that 'on this point, the case flagrantly contradicts *une jurisprudence abondante*': *RDC* (2012) 47, 52.

¹⁷² See Articles 1304 and 2224 of the *Code civil*. Nonetheless, the question of whether there is '*nullité relative*' or '*nullité absolue*' is still important as other consequences such as whether the contract can be affirmed, flow from this distinction: Savaux (n171) 54.

¹⁷³ *Bocave* (n166).

sale.¹⁷⁴ However, the *Cour de cassation* rejected this argument and annulled the contract. In a note to this case, Planiol expressly highlighted the fact that the courts were evading Article 1674 when they annulled contracts for the sale of land in return for an annuity on the ground of the doctrine of *prix dérisoire*.¹⁷⁵

The merits and demerits of various aspects of the French law of obligations have been subject to considerable scrutiny in recent years. The *Avant-projet Catala*, which was published in 2005, is ‘the most ambitious attempt at reforming the core areas of French private law since 1804’.¹⁷⁶ The *Avant-projet Catala* recommends numerous reforms throughout French contract law. However, Article 1674 was not examined in the *Avant-projet Catala*.¹⁷⁷ Therefore, unlike many other aspects of the French law of contract, there has been no recent reflection on whether Article 1674 should be retained or rejected.

If Article 1674 were examined afresh in the cold light of the second decade of the twenty-first century, it is possible that it would not be retained in the *Code civil*. Since 1804, the policy of preserving family wealth, on which Article 1674 is based, has been outflanked to a significant extent by the principle of freedom of contract. The abolition in 2007 of the rules on the contractual incapacity of prodigals is a recent illustration of the decline of the policy of preserving family wealth and the consequent ascension of the principle of freedom of contract.

¹⁷⁴ Pellet (n168).

¹⁷⁵ M Planiol, Pellet (n174).

¹⁷⁶ S Vogenauer, ‘The *Avant-projet de réforme*: an overview’ in J Cartwright, S Vogenauer and S Whittaker (eds), *Reforming the French law of obligations: comparative reflections on the Avant-projet de réforme du droit des obligations et de la prescription* (‘the *Avant-projet Catala*’) (Hart 2009) 3, 3. The *Avant-projet Catala* is translated and analysed in essays in Cartwright, Vogenauer and Whittaker (n176).

¹⁷⁷ The *Avant-projet Catala* did not review the law on special contracts.

The rules on the contractual incapacity of prodigals had always been very clearly based on the preservation of family wealth. As the *conseiller* Emmery stated in the *Corps législatif* during the debates on the *Code civil* in 1803, the restrictions on prodigals were justified as *l'Etat, intéressé à la conservation des familles ne peut admettre que le droit de propriété soit pour un citoyen le droit de ruiner sa famille en contentant de misérables fantaisies ou même de honteuses caprices*.¹⁷⁸ Similarly, in the *Conseil d'Etat* in 1802, Cambacérès observed that 'a prodigal can become a dangerous man, and the State cannot be indifferent to the fate of families'.¹⁷⁹

There were specific rules on the contractual incapacity of prodigals in the *ancien régime*¹⁸⁰ and in 1803, there was an extensive debate in the *Conseil d'Etat* on the question whether prodigals should continue to be subjected to some form of contractual incapacity. The policy of preserving family wealth outweighed the principle of freedom of contract and the rules on the contractual incapacity of prodigals were enshrined in Article 513 of the *Code civil* in 1804.

For over a hundred a fifty years, there was no definition of 'prodigal' in the *Code civil* and as a result the meaning of this term had to be determined by the courts.¹⁸¹ The definition of prodigality which was applied by the *Cour* of Paris in 1894 in the well

¹⁷⁸ Fenet, tome X (n4) 715. Portalis, who was from Provence, drew a distinction between the morals of Parisians and those of people from other parts of France. He observed that the rules on prodigals might not be welcomed in a capital city where '*les goûts, les fantaisies, le luxe ont tant d'empire, ou l'esprit d'ordre et d'économie sont moins connus*'. However, he stated that one will find many apologists for these rules in other areas of France, where '*l'esprit de famille et les principes d'une sage administration*' have been preserved: Fenet, tome X (n4) 691.

¹⁷⁹ Fenet, tome X (n4) 686.

¹⁸⁰ Pothier (n34) 29-31.

¹⁸¹ Nevertheless, during the debates on the *Code civil* in the *Conseil d'Etat* in 1803, certain *conseillers* outlined their conception of a prodigal. A prodigal was a man who spent too much of his fortune 'on gambling and debauchery' according to Tronchet. Bigot de Préameneu considered that a prodigal was a man who 'ruined himself by indulging in guilty passions'. Portalis associated 'vices', 'passions', 'disorder and scandal' with prodigals: Fenet, tome X (n4) 688, 687, 690. The colourful language which the *conseillers* used to depict a prodigal is reminiscent of the language which they used almost one year later to describe a vendor who sells his land at too low a price in the debates on *lésion*. See section (i)(b) above.

known case of *Lebaudy c Lebaudy*¹⁸² was particularly influential until the introduction of the *loi* of 3 January 1968.¹⁸³ In this case, the *Cour* of Paris held that a person would be considered to be a prodigal if there was a risk that his capital would be dissipated by the extent of his expenditure.¹⁸⁴

The *loi* of 1968, which was drafted by the famous jurist Jean Carbonnier,¹⁸⁵ introduced significant reforms in the law on persons who lack mental capacity and in particular it established a new conception of prodigality.¹⁸⁶ Articles 488 and 508-1 of the *Code civil* provided that a person ‘who, through prodigality, intemperance or idleness, is at risk of failing to provide for his own needs or failing to fulfil his family obligations’ could be deprived of full contractual capacity (by being placed under the regime of *la curatelle*).

¹⁸² *Cour* of Paris, 31 January 1894: D.1894.2.233.

¹⁸³ Hereafter, ‘the *loi* of 1968’.

¹⁸⁴ *Lebaudy* (n183). In this case, a mother did not succeed in her attempt to deprive her son of full contractual capacity on the ground that he was a prodigal. It was held that while he had squandered almost half of his income of 1,300,000 francs on ‘foolish expenditure’, he could not be considered to be a prodigal as his capital was not at risk.

In a note to the case in Dalloz, Planiol argued that the law should be more restrictive and that even the richest families are entitled to the protection of the law. He asked ‘*n’est-il pas déplorable de voir les pires extravagances autorisées dès qu’elles émanent de millionnaires?*’: M Planiol, *Lebaudy* (n183).

¹⁸⁵ P Malaurie, *Les personnes: la protection des mineurs et des majeurs* (Defrénois 2010) 224.

¹⁸⁶ The rules on prodigals were certainly not dead letters. Until the rules on prodigals were abolished in the *loi* of 5 March 2007, a significant number of people had been found to be prodigals. From 1846 to 1880, an annual average of 292 were found to be prodigals, in 1880 there were 394, in 1900 there were 306, and from 1905 to 1940, there was an annual average of 276: L Julliot de la Morandière, *Traité de droit civil de A Colin et H Capitant* tome 1 (Dalloz 1957) 1026.

The *loi* of 1968 provided that prodigality was one of the reasons for which a person could be placed under the regime of *la curatelle*. The number of people placed under *la curatelle* was consistently increasing. In 1980, 2,674 people were placed under *la curatelle* and in 1990 this figure had risen to 11,650: E Paillet, ‘Incapables majeurs’, *Rép civ Dalloz* (1994) 59. In 2001, around 26,000 people were placed under *la curatelle*: P Malaurie, *Les personnes: les incapacités* (2^e éd., Defrénois 2005) 299.

As prodigality was only one of the reasons why a person could be placed under *la curatelle*, it is unclear how many people were placed under this regime on the ground that they were prodigals. Malaurie, notes that under the *loi* of 1968, the rules on prodigals were infrequently invoked: Malaurie (n186) 300. Therefore, it seems that the majority of people placed under *la curatelle* after the *loi* of 1968 were not prodigals. However, given that the number of people placed under *la curatelle* in 2001 was almost one hundred times greater than the number of people who were found to be prodigals before 1968, it is probable that in absolute terms, at least as many people were found to be prodigals after 1968 as before the introduction of the *loi* of 1968.

The purpose of the new rules on prodigality which were introduced by the *loi* of 1968 was to place more emphasis on the protection of the prodigal rather than on the preservation of his property.¹⁸⁷ However, the decision of the *Cour de cassation* in 1995 in *Axel et Marc X c Marc Louis X* indicates that the policy of preserving family wealth was still the primary purpose of the rules on prodigality after the enactment of the *loi* of 1968.¹⁸⁸ In this case, two sons succeeded in placing their father under *la curatelle* on the ground that he was a prodigal. Their father had sold various assets such as a house in California and land and goods in France. The sons initiated proceedings when their father sought to sell the rest of his land in France.

The *Cour de cassation* held that the father should be placed under *la curatelle* as he was a prodigal. The court stated that while he had to pay a debt to tax authorities in United States, he was unable to justify why he needed the rest of the money. While the court noted that the father had simply expressed his desire to put the money into profitable investments in the future, it concluded that if he continued to ‘squander his capital’, his resources would be reduced to the income from his pensions.

However, the facts should not have come within Article 488 of the *Code civil* as it had not been established that the father would have dissipated his capital and even if he had lost all of his capital, it is likely that his pensions would have sufficed to meet his own needs and his family obligations. Therefore, by placing the father under *la curatelle*, the court clearly sought to preserve the family wealth for the benefit of the sons who seem to have been motivated by ‘the fear of seeing the assets of their father slip from their grasp’.¹⁸⁹

¹⁸⁷ Malaurie (n185) 323.

¹⁸⁸ Cass civ 1, 24 October 1995: D.1997.22 note B Fillion-Dufouleur.

¹⁸⁹ *Axel et Marc X* (n188).

The rules on prodigals were abolished in the most recent reform of the law on mental capacity in the *loi* of 5 March 2007 on the grounds that they were inconsistent with the principle of individual freedom and that the preservation of family wealth was no longer considered to be a significant policy. In the *Sénat*, Henri de Richecourt strongly supported the proposal to remove the rules on prodigals for these reasons. He argued that ‘*nous avons le droit de nous comporter comme des polissons et de nous ruiner!*’¹⁹⁰ De Richecourt also expressly dismissed the importance of the policy of preserving family wealth. He stated that ‘there is no right to an inheritance’ and that ‘nobody can be obliged to leave his goods to anyone’.¹⁹¹

In 1800, in his *discours préliminaire* in the *Conseil d’Etat*, Portalis emphasised the importance of tranquil families in the establishment of a stable State. ‘*C’est par la petite patrie, qui est la famille que l’on s’attache à la grande. Ce sont les bons pères, les bons maris, les bons fils qui font de bons citoyens*’.¹⁹² The policy of preserving family wealth played a key role in the formation of ‘*les bons pères, les bons maris, les bons fils*’. Therefore, it is unsurprising that the preservation of family wealth, which was a policy of great importance to the State in 1804, influenced various rules in the *Code civil*.

¹⁹⁰ Debate in the *Senat* on 15 February 2007.

See <www.senat.fr/seances/s200702/s20070215/s20070215001.html#section52> accessed 3 October 2012.

¹⁹¹ Debate in the *Senat* on 15 February 2007.

See <www.senat.fr/seances/s200702/s20070215/s20070215001.html#section52> accessed 3 October 2012. However, this is not a completely accurate depiction of French law. The rules on the *réserve héréditaire* provide that a testator must leave a certain portion of his wealth to particular relatives. Numerous provisions prevent the testator from circumventing this rule by making gifts during his lifetime. See Articles 912 to 930-5 of the *Code civil*.

The rules which restricted the ability of prodigals to dispose of their property in French law reinforced the rules on the *réserve héréditaire*. The dissipation of the property of a prodigal during his lifetime effectively disinherits those whom he cannot disinherit in his will. Nevertheless, by promulgating the *loi* of 5 March 2007, French legislators clearly affirmed the primacy of individual freedom rather than the preservation of family wealth in at least one corner of French law.

¹⁹² Fenet, tome I (n4) 522.

However, the abolition of the rules on prodigals shows that this policy has fallen from the pedestal on which it was placed in 1804. Therefore, it is possible that Article 1674, which is firmly based on the policy of preserving family wealth, would not be retained in French law if this rule were examined closely today.

(ii) English law

Unlike French law, *laesio enormis* was never adopted in English law.¹⁹³ In 1683, in *Nott v Hill* Lord Nottingham ‘said, by the civil law a bargain of double the value shall be avoided...’.¹⁹⁴ Similarly in 1754, in *How v Weldon and Edwards*, Sir Thomas Clarke MR declared that unlike ‘the rules of civil law’ under which ‘if half had been paid’ the sale ‘would have been a mere nullity’, in English law ‘the inadequateness of the value will not of itself be sufficient to set aside the contract’¹⁹⁵.

The failure to incorporate *laesio enormis* into English law seems to have been a conscious decision as it is clear that judges have been aware of the rule since at least the seventeenth century. Subsequent to *Nott*¹⁹⁶ in the seventeenth century and *How*¹⁹⁷ in the eighteenth century, *laesio enormis* was discussed by the Privy Council in *Godfray v Godfray*¹⁹⁸ in the nineteenth century, in *Ponnupillai v Kumaravetpillai*¹⁹⁹ in the twentieth century and in *Snell v Beadle*²⁰⁰ in the twenty-first century.

¹⁹³ Gutteridge states that English law was not influenced by *laesio enormis*: HG Gutteridge, ‘La révision des contrats par le juge en droit anglais’ in *Travaux de la semaine internationale de droit, tome II: la révision des contrats par le juge – rapports préparatoires et discussions* (Sirey 1937) 33, 34. Similarly, while Gordley notes that ‘a few cases briefly mention the civil law rule that relief is available when the contract price deviates by one-half from the just price’, he does not state that English law adopted *laesio enormis*: Gordley (n12) 150.

¹⁹⁴ (1682) 2 Cas Ch 120, 121. As stated in a note to *Copis v Middleton*, in *Nott* (n194), Lord Nottingham was ‘plainly intimating that such was not then the law’: (1818) 2 Madd 410, 421.

¹⁹⁵ (1754) 2 Ves Sen 516, 517.

¹⁹⁶ *Nott* (n194).

¹⁹⁷ *How* (n195).

¹⁹⁸ (1865) 3 Moo PC 316. This was an appeal from the Royal Court of Jersey. The law of Jersey is based on the *coutume* of Normandy. *Laesio enormis* was also discussed in the Court of Chancery in Ireland in the nineteenth century. In *Butler v Miller*, John Edward Walsh MR stated that ‘our law does not adopt the rigid rule of the Civil Law, which appears to have fixed one-half the value of land purchased as the limit of consideration below which the sale could not be maintained’: (1867) IR 1 Eq 195, 211. Similarly, in *Burrowes v Lock*, Sir William Grant MR referred to ‘the principle of the Roman law; requiring that the price should exceed half the value’: (1805) 10 Ves 470, 475.

(a) Rescission and refusing specific performance of contracts on the ground of an unfair price in the past

In English law today, a contract cannot be rescinded simply on the ground that the price is unfair.²⁰¹ Moreover, specific performance of a contract will not be refused solely on the ground that the price is unfair.²⁰²

These statements would appear self-evident and even superfluous²⁰³ to an English contract lawyer today. However, the role of unfair prices in rescission and specific performance was unclear and the subject of significant debate in numerous cases in the eighteenth and nineteenth centuries.

This debate is important for three reasons. First, the fact that this debate occurred shows that at one point, intervention in contracts on the ground of an unfair price was a conceivable and plausible rule in English law. Secondly, the rules that contracts could be rescinded on the ground of an unfair price and that specific performance could be refused on the ground of an unfair price were never unequivocally adopted as they impinged too significantly on the principle of freedom of contract. Thirdly, in the nineteenth century, both Fry and Pollock discussed Article 1674 when considering whether English law should refuse specific performance on the ground of an unfair price.

¹⁹⁹ [1964] 2 AC 155. This was an appeal from the Supreme Court of Ceylon. The law of Ceylon is based on Roman-Dutch law.

²⁰⁰ [2001] 2 AC 304. This was an appeal from an appeal from the Court of Appeal of Jersey.

²⁰¹ G Treitel, *The law of contract* (13th edn, by WE Peel, Sweet & Maxwell 2011) 77-78, 80.

²⁰² While Treitel notes that the 'authorities...are not easy to reconcile', he states that '*mere* inadequacy of consideration is not a ground for refusing specific performance': Ibid 1108.

²⁰³ For example, the question of whether specific performance can be refused on the ground of an unfair price is addressed quite parsimoniously in Treitel (n201) 1108 where it fills up only a half a page, in G Treitel, 'Chapter 27: specific performance and injunction' in HG Beale (ed), *Chitty on contracts* vol I (30th edn, Sweet & Maxwell 2011) 27-033 where it is addressed in only one paragraph and in J Beatson, A Burrows and J Cartwright, *Anson's law of contract* (29th edn, OUP 2010) 100-101, where it merits only two lines.

There is a significant debate on the role of unfair prices (and unfair contracts more generally) in the history of contract law. Atiyah argues that the idea that ‘the adequacy of consideration is for the parties alone’ became widespread in English law only in the nineteenth century.²⁰⁴ He argues that in the eighteenth century English law was ‘fundamentally concerned about the fairness of an exchange’.²⁰⁵ Similarly, Horwitz contends that in both English and American law, ‘only in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of the exchange’.²⁰⁶

However, Simpson and Barton reject this view. Simpson rejects the view that eighteenth-century contract law was ‘benign’, ‘anti-commercial’ and based on a theory of substantive justice.²⁰⁷ Similarly, Barton contends that ‘unequal bargains were legally enforced before the nineteenth century’.²⁰⁸

For the purposes of this thesis, it is unnecessary to enter into a deeper discussion of this debate between legal historians. Nothing in this discussion purports to support or undermine the claims advanced by Atiyah, Horwitz, Simpson and Barton.²⁰⁹ All four legal historians agree that there are some cases in which contracts were rescinded or specific performance was refused on the ground of an unfair price before the nineteenth century. Furthermore, all four scholars agree that the idea that contracts could be

²⁰⁴ PS Atiyah, *The rise and fall of freedom of contract* (Clarendon Press 1979) 168.

²⁰⁵ Atiyah (n204) 168.

²⁰⁶ M Horwitz, ‘The historical foundations of modern contract law’ (1974) 87 *Harv L Rev*, 917, 917.

²⁰⁷ AWB Simpson, ‘The Horwitz thesis and the history of contracts’ (1979) 46 *U Chicago L Rev*, 533, 562.

²⁰⁸ JL Barton, ‘The enforcement of hard bargains’ *LQR* (1987) 118, 118.

²⁰⁹ On the other hand, in section (ii)(b) (in the text from n333 to n335 below), we argue that the creation and survival of the rule on the sale of reversions in the nineteenth century is contrary to Atiyah’s thesis.

rescinded and that specific performance could be refused on the ground of an unfair price was rejected by the nineteenth century.

The role of unfair prices in specific performance will be considered after the following discussion of the role of unfair prices in rescission.

In the first quarter of the eighteenth century, in *Savile v Savile*, Lord Macclesfield LC (Sir Thomas Parker) set aside a contract for the sale of land on the ground that the price was unfairly high.²¹⁰ He referred to the fact that the contract had been concluded during the South Sea Bubble and he observed that

a court of equity ought to take notice under what a general delusion the nation was at the time when this contract was made... when there was thought to be more money in the nation than there generally was, which induced people to put imaginary values on estates.²¹¹

However, the idea that contracts could be rescinded on the ground of an unfair price was discarded by the last quarter of the eighteenth century. In *Griffith v Spratley*, ‘a sailor, who appears to be very poor’ sold his land for an unfairly low price.²¹² The Court of

²¹⁰ (1721) 1 PW 745. Nevertheless, the purchaser was compelled to forfeit his deposit: *Savile* (n210) 748.

²¹¹ *Savile* (n210) 746-747. In the note to the case it is stated that ‘this is not the general law of the Court; and the decision was probably founded on the general delusion of the times...’: *Savile* (n210) 748. However, the particular context of the South Sea Bubble might not wholly explain the decision to rescind the contract on the ground that the price was unfair. It is possible that unfair prices played an important role in different aspects of contract law for Lord Macclesfield LC. Ten years earlier, in *Mitchel v Reynolds* (1711) 1 PW 181, Parker CJ (who subsequently became Lord Macclesfield LC) held that a fair price was a necessary element of a valid contract in restraint of trade. This case is mentioned in section (ii)(b) in chapter 2.

²¹² (1787) 1 Cox 383, 388. In this case, it is stated that the claimant had a fee simple in ‘reversion of... two-thirds of the... premises’: (n212) 383. This reversionary interest was not a future interest as the land was subject to the determination of a lease rather than the determination of another estate such as a life estate. Therefore, the reversionary interest in this case is distinct from the reversionary interests which are discussed below in part (b) of this section. The reversionary interests which are discussed below in part (b) of this section are future interests as they are interests which are subject to the determination of a prior estate.

Exchequer refused to set aside the contract on the ground that the price was unfair. Eyre LCB affirmed that he ‘never can agree that inadequacy of consideration is in itself a principle upon which a party may be relieved from a contract, which he has wittingly and willingly entered into’.²¹³ He stated that ‘the common law knows no such’ principle and that ‘common sense knows no such principle’.²¹⁴ There is an ominous tone to his comment that ‘if Courts of Equity are to unravel all these transactions, they would throw every thing into confusion and set afloat all the contracts of mankind’.²¹⁵

The importance of the principle of freedom of contract in the rejection of such a rule is particularly evident in *Day v Newman*.²¹⁶ In this case, the purchaser agreed to pay £20,000 for land which was held not to be ‘worth more than £10,000 at the outside’.²¹⁷ Arden MR emphasised the fact that there had been no procedural unfairness in the conclusion of the contract. He noted that in this case that ‘a young man thinks fit to make a bargain seemingly with his eyes open, and without any appearance of fraud practised’ and that he ‘makes a foolish bargain’.²¹⁸ As a result, he held that the purchaser had ‘no right to ask the Court to prevent the consequences of his own solemn act’.²¹⁹ Therefore,

²¹³ *Griffith* (n212) 388-389. Hotham B was equally unequivocal. He stated that ‘Inadequacy of value can never be sufficient, when naked and unattended with other circumstances to set aside a contract...’: *Ibid* 391.

²¹⁴ *Ibid* 388. There was an equity side to the Court of Exchequer from the middle of the sixteenth century until it was abolished by statute in 1841 (5 Vict c 5): WH Bryson, *The equity side of the Exchequer: its jurisdiction, administration, procedures and records* (CUP 1975) 160-165.

²¹⁵ *Griffith* (n212) 388.

²¹⁶ (1788) 2 Cox 77. In this case, Arden MR cited the earlier decision of *Griffith* (n212) in the Court of Exchequer Chamber with approval: (n216) 82-83. The decisions of the equity side of the Court of Exchequer were usually followed by the Court of Chancery and vice versa: See Bryson (n214) 5, 160.

²¹⁷ *Day* (n216) 80.

²¹⁸ *Ibid*.

²¹⁹ *Ibid* 83.

by the end of the eighteenth century, a contract could not be rescinded merely on the ground of an unfair price.

Where specific performance was refused but the contract was not set aside, it was still possible to claim damages at law for breach of contract.²²⁰ However, the refusal of a court to decree specific performance of a contract was often a very beneficial outcome for a party who had breached his contract, as the other party could not be sure that he would succeed in obtaining the financial value of his contract in a claim for damages at law.

The extent to which a claimant could obtain adequate damages at law where specific performance had been refused on the ground of an unfair price is a contested point amongst legal historians. Atiyah and Horwitz state that where specific performance was refused on the ground that the price was unfair, the innocent party would not be fully compensated at law for the loss of his bargain as the jury would mitigate the damages.²²¹ However, Simpson and Barton contend that there is no evidence that juries reduced damages where the price in the contract was unfair.²²² According to Simpson, while juries may have mitigated damages in some cases, it does not necessarily follow that the damages were reduced on the ground that the price was unfair. He observes that 'jury awards were largely uncontrollable in the eighteenth century' and that therefore,

²²⁰ This is evident in one of the arguments made before the House of Lords in *Keen v Stuckely* where it was stated that 'if a bargain and sale was unconscionable, the person who had got such a bargain was not to demand a performance of it in a Court of Equity, but he could only demand damages for not performing the bargain ...the Court of Equity was to leave them to Law': (1721) Gilb Rep 155, 155-156.

²²¹ Atiyah (n204) 149; Horwitz (n206) 924.

²²² Simpson (n207) 573; Barton (n208) 130.

for all one knows, or may ever know, juries may sometimes have reduced the sum recovered when the price appeared exorbitant, or for that matter when they thought the plaintiff's girth exorbitant.²²³

Nonetheless, it seems that Simpson, Barton, Horwitz and Atiyah all agree that where the claimant was denied specific performance of a contract, he did not *always* obtain the full financial benefit of his contract when he subsequently sought damages against the other party at law.²²⁴

The idea that specific performance could be refused on the ground of an unfair price lingered on for a significantly longer period than its counterpart in rescission. In *Keen*, the House of Lords considered the question of whether specific performance of a contract for the sale of land should be refused on the ground of an unfair price and concluded that it 'was a very doubtful point' and 'this point was left doubtful'.²²⁵ Nevertheless, the Lords discussed some arguments for and against refusing specific performance of a contract on the ground of an unfair price. On the one hand, it was observed that 'the court of Equity was only to assist to carry conscionable bargains into execution, and where they did not find them fit to be carried into execution, the court of Equity was to leave them to law'.²²⁶ However, it was also contended that 'a man was obliged in conscience to perform a bargain, though it was a hard one; and where he was obliged in conscience, it was no hardship to be compelled thereto'.²²⁷

²²³ Simpson (n207) 574.

²²⁴ This point is perhaps implicit in the defendant's argument in *Collier v Brown* that the refusal of specific performance 'did not preclude... [the claimants] from *such damages as they might recover* at law' (my emphasis): (1788) 1 Cox 428, 431.

²²⁵ *Keen* (n220) 155, 156.

²²⁶ *Ibid* 155, 156.

²²⁷ *Ibid* 155, 156.

Subsequently, in *Day*, while Arden MR refused to rescind a contract for the sale of land on the ground that the price was unfairly high, he also refused to grant specific performance of the contract. He held that ‘most certainly this is too hard a bargain for the Court to assist in’ as the price was ‘so enormous, that all mankind must at the first mention of it concur in thinking so’ notwithstanding the fact that it was a ‘bare case of two men sui juris, bargaining with their eyes open’.²²⁸

However, a line of conflicting decisions appeared from the end of the eighteenth century until the middle of the nineteenth century. The significance of the principles of freedom of contract in the rejection of the idea that specific performance could be refused on the ground of an unfair price is particularly evident in *Collier*.²²⁹ In this case, the Court of Exchequer decreed specific performance of the contract under which a ‘very old and infirm’ woman had sold land at an unfairly low price.²³⁰ The court observed that ‘the parties bargained with their eyes open’ and that the vendor had been ‘very well satisfied with her bargain until she found she could get more for the premises’.²³¹

The Court of Chancery reached a similar conclusion in subsequent cases in the eighteenth and nineteenth centuries.²³² As a result, in 1858, the first edition of Fry’s treatise on specific performance stated that while in the ‘older cases’, specific performance was refused on the ground of an unfair price, ‘it seems now to be established that mere inadequacy of consideration is no defence to specific performance’.²³³

²²⁸ *Day* (n216) 82.

²²⁹ *Collier* (n224).

²³⁰ *Ibid* 428-429.

²³¹ *Ibid* 431.

²³² See for example, *Collier* (n224), *White v Damon* (1802) 7 Ves 30, *Burrowes* (n198), *Abbott v Sworder* (1852) 4 De G & Sm 448 and *Haywood v Cope* (1858) 25 Beav 140.

²³³ E Fry, *A treatise on the specific performance of contracts* (Butterworths 1858) 128, 129.

However, a conflicting decision soon disturbed the apparent consistency and certainty on this point.

In *Falcke v Gray*, Sir RT Kindersley V-C expressly stated that specific performance could be refused simply on the basis that the price was unfair.²³⁴ In this case, the defendant had agreed to sell her china jars at an unfairly low price. Sir RT Kindersley V-C reviewed many of the cases on this question and concluded that

in some cases the Court has refused specific performance on the ground of the harshness of the bargain, where there has been not the least impropriety of conduct on behalf of the person seeking specific performance.²³⁵

Therefore, he held that he ‘ought to refuse specific performance on the mere ground of inadequacy of price, even if there were none other’.²³⁶

*Falcke*²³⁷ threw the already uncertain law on the question whether specific performance could be refused on the ground of an unfair price into disarray. In the second edition of his treatise on specific performance, Fry had to accommodate *Falcke*²³⁸ within the corpus of cases on this point. After *Falcke*,²³⁹ the cases were no longer consistent with

²³⁴ (1859) 4 Drew 651.

²³⁵ *Falcke* (n234) 660. He considered that *Day* (n216) was one of the cases which was ‘decisive on the point’: *Falcke* (n234), 664. The cases in which it was held that specific performance could not be refused on the ground of an unfair price were ignored. In particular, he overlooked the then very recent decisions of Lord St Leonards LC (Edward Sugden) in *Abbott* (n232) and Sir John Romilly MR in *Haywood* (n232).

²³⁶ *Falcke* (n234) 664. The ‘other’ relevant circumstances were that the parties had agreed that the price should be fixed by a third party. Thus, ‘the intention of the parties was that a fair and reasonable price’ should be paid and it ‘was not the case of a bargain between seller and buyer, the one trying to get the highest, and the other to give the lowest, price’. However, the third party was not a competent valuer, and he undervalued the jars. Even though the vendor knew that the third party was not a competent valuer, specific performance was refused as the purchaser ‘knew that the price... was not a fair one’: Ibid 664-665.

²³⁷ *Falcke* (n234).

²³⁸ Ibid.

²³⁹ Ibid.

the neat chronological explanation which he had developed in the first edition. Even though *Falcke*²⁴⁰ could not be reconciled with the most recent decisions on this point, Fry did not reconsider his chronological explanation of the evolution of the law. Instead, he discussed *Falcke*²⁴¹ separately and highlighted that it was ‘one case... which must be referred to as it appears to break the recent current of authorities’.²⁴²

The uncertainty about whether specific performance can be refused on the ground of an unfair price is also evident in Pollock’s treatise on contract law. In the first edition in 1876, Pollock observed that the law on this point is ‘not so clear’.²⁴³ He stated that as ‘the authorities are so conflicting... the best course seems to be to set them against one another and leave the matter to the reader’s judgment’.²⁴⁴

The happy consequence of the uncertainty on the question whether specific performance could be refused on the ground of an unfair price was that it inspired discussions of Article 1674 in English legal literature. Before *Falcke*,²⁴⁵ Fry included only a cursory reference to French law (citing Pothier rather than the *Code civil*) following his analysis of the question whether specific performance should be refused on

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² E Fry, *A treatise on the specific performance of contracts* (2nd edn, Stevens & Sons 1881) 194. In principle, Fry was emphatically against a rule which would allow courts to refuse specific performance on the ground of an unfair price. He relied mainly on the principle of freedom of contract in his rejection of such a rule: Fry (n242) 195.

²⁴³ F Pollock, *Principles of contract* (Stevens and Sons 1876) 521.

²⁴⁴ Pollock (n243) 522. Nonetheless, similar to Fry, in principle, Pollock was not in favour of a rule which would allow courts to refuse specific performance on the ground of an unfair price. This conclusion was based on the ‘discrepancies’ which he observed in foreign legal systems on this point. Pollock also noted that refusing to enforce specific performance on the ground of an unfair price ‘is on the whole the better supported and the more likely to be upheld whenever the point comes before a court of final appeal’: Pollock (n243) 526, 522.

²⁴⁵ *Falcke* (n234).

the ground of an unfair price.²⁴⁶ After *Falcke*,²⁴⁷ Fry expanded his discussion on French law. In the second edition of his treatise, he examines Article 1674, observing that it was ‘remarkable for the stringency of its provisions’.²⁴⁸

Similarly, having noted the ‘conflicting’ authorities on the question whether specific performance should be refused on the ground of an unfair price, Pollock proceeded to discuss the question of unfair prices in contracts in other legal systems in order to ‘enable the reader to make a comparison which may be of some interest’.²⁴⁹ While Pollock refers to Roman law, Prussian law, Austrian law and Italian law, it is French law and particularly, Article 1674 which he discusses in most detail.²⁵⁰

If one looks only at the relevant cases rather than the legal literature, the law on this point is still as uncertain as it was in 1859 after *Falcke*.²⁵¹ Since then, there has been no other clear authority on whether specific performance can be refused merely on the ground of an unfair price.²⁵² However, for Pollock, at the beginning of the twentieth century, all doubts dissipated suddenly even though there had been no further cases on

²⁴⁶ Fry (n233) 131. There is a brief discussion of Roman law in addition to the one line on French law before 1789: *Ibid*.

²⁴⁷ *Falcke* (n234).

²⁴⁸ Fry (n242) 196. Fry also observes that Article 1674 is ‘remarkable... for the discussion in the Conseil d’Etat of which it was the result, a discussion in which the First Consul took a prominent part’: *Ibid*. See section (i)(b) above for an analysis of the debates in the *Conseil d’Etat* on Article 1674 and the significant role of Napoleon in the promulgation of this rule.

²⁴⁹ Pollock (n243) 522, 524.

²⁵⁰ *Ibid* 524 -526.

²⁵¹ *Falcke* (n234).

²⁵² While this question was addressed in *Mountford v Scott* [1975] 1 All ER 198, it was discussed neither clearly nor properly and as a result, this case is not a good authority on the question whether specific performance can be refused on the ground of an unfair price. None of the relevant cases, many of which are discussed here, were mentioned in argument or in the judgments in the High Court and in the Court of Appeal.

this point since *Falcke*.²⁵³ This journey from the realm of uncertainty to the certainty that specific performance cannot be refused on the ground of an unfair price is evident in the evolution of the treatment of this topic in the ten editions of Pollock's treatise on contract.

The significance of the question whether specific performance can be refused on the ground of an unfair price diminishes progressively in the later editions of Pollock's treatise on contract. Until the seventh edition in 1902, Pollock still considers the question to be uncertain. He states that 'in the absence of any final decision, it is still thought right to set out the conflicting authorities and leave the matter to the reader's judgment'.²⁵⁴ However, in the eighth edition in 1911, Pollock affirms that while 'it was long doubtful', the question whether specific performance of a contract can be refused on the ground of an unfair price 'is now settled by general consent in the negative' even though there had been no further authorities on the point since the first edition of the book in 1876.²⁵⁵

Thus, at the beginning of the twentieth century there were no longer any doubts as to whether, as a general rule, courts could rescind contracts or refuse specific performance of contracts simply on the ground of an unfair price. In the second half of the nineteenth century, legal writers turned to Article 1674 in order to resolve the uncertainty on whether specific performance could be refused on the ground of an unfair price. However, at the beginning of the twentieth century, discussions of Article 1674 disappeared from legal writing. This portion of Fry's treatise was retained in every

²⁵³ *Falcke* (n234).

²⁵⁴ F Pollock, *Principles of contract* (7th edn, Stevens and Sons 1902) 620.

²⁵⁵ F Pollock, *Principles of contract* (8th edn, Stevens and Sons 1911) 661. In contrast, Fry's discussion of this point remains essentially unchanged from the second edition to the sixth (and final) edition. As noted above in the text from n237 to n242, it was necessary to amend the text of the first edition after *Falcke* (n234), which was decided just after the publication of the first edition.

edition, including the final edition in 1921.²⁵⁶ Pollock had completely discarded his discussion of Article 1674 more than two decades earlier. In 1878, in the third edition of Pollock's treatise on contracts, the analysis of Article 1674 was relegated to the appendix. By the sixth edition in 1894, this topic was not even included in the appendix.

(b) The rule on the sale of reversions

In the nineteenth century, one rule in English law was analogous to Article 1674. In fact, in some respects, in its zealous protection of the vendor of a reversion from unfair prices, the English rule went far beyond Article 1674. Moreover, similar to French law, this rule was also based on the policy of preserving family wealth.

This rule, which allowed a vendor of a reversionary interest to set aside the contract on the ground of undervalue was created by the Court of Chancery in 1810. Subsequently, this rule was rigorously applied in numerous cases before it was abolished by statute in 1867.

The rule applied to a wide range of transactions involving future interests. In addition to the sale of reversions (or remainders), mortgages or charges of the reversion²⁵⁷ fell within the scope of the rule.²⁵⁸ As Sir John Romilly MR observed in *Perfect v Lane*, this was 'a class of cases' which came 'very frequently before the Court'.²⁵⁹ Reversionary interests were not uncommon in the nineteenth century. At this time, the strict settlement

²⁵⁶ GR Northcote, *E Fry: A treatise on the specific performance of contracts* (6th edn, Stevens & Sons 1921) 213-214.

²⁵⁷ In these cases, the claimant argued that he had received a sum which was less than the fair price for the greater sum which was secured on the reversion and which would be payable when (and if, where the reversion was contingent) the estate fell into possession. See for example the mortgages of contingent reversions in *Aldborough v Trye* (1840) West 221 and *Bromley v Smith* (1859) 26 Beav 644.

²⁵⁸ *Tottenham v Emmet* (1865) 14 WR 3, 5 (Lord Westbury LC).

²⁵⁹ (1861) 30 Beav 197, 202. See also *Edwards v Burt* (1852) 2 De GM&G 55, 56-57 (Lord Cranworth).

was a particularly common method of creating successive interests.²⁶⁰ In contrast to the current position, before 1925, three freehold estates (fees simple, fees tail and life estates) could be created in land at law.²⁶¹ Similarly, in the nineteenth century, fees simple, fees tail and life estates could be created in land in equity.²⁶² It was also possible to create reversionary interests in personal property under a trust.²⁶³

Reversionary interests were also frequently sold. While many individuals purchased reversionary interests, it is notable that there were also many businesses which specialised in purchasing reversions. In *Perfect*, the claimant sold his reversionary interest to the Norwich Union Reversionary Interest Society and it was also noted that ‘this reversion had been offered for sale to various other offices, and among others to the English and Scottish Law Life Reversionary Interest Company’.²⁶⁴ Many businesses which specialised in purchasing reversions had been operating in this market for a long time. In an advertisement in the *Weekly Notes* in 1870, the Equitable Reversionary Interest Society, which had been established in 1835, stated that it ‘purchases reversionary property, life interests... and grants loans on these securities’.²⁶⁵

²⁶⁰ See the text from n354 to n356 below. The strict settlement used both life estates and fees tail. These settlements were ‘strict’ as there was a limitation to trustees in order to preserve contingent remainders (usually for the unborn sons of the life tenant). As a result of this limitation, the life tenant could not break the settlement and destroy the contingent remainders: AWB Simpson, *A history of the land law* (OUP 1986) 236.

²⁶¹ Section 1 of the Law of Property Act 1925 provides that the fee simple is now the only freehold estate which can be created at law. If successive interests are created, they now take effect only in equity. However, schedule 1, paragraph 5 of the Trusts of Land and Appointment of Trustees Act 1996 provides that it is no longer possible to create fees tail. See EH Burn and J Cartwright, *Cheshire and Burn’s modern law of real property* (18th edn, OUP 2011) 584, 605.

²⁶² Burn and Cartwright (n261) 56. As mentioned in n261, it is no longer possible to create a fee tail.

²⁶³ Until 1926, it was not possible to create a fee tail in personal property at law or in equity. Section 130(1) of the Law of Property Act 1925 then provided that an estate tail could be created in personal property under a trust: Burn and Cartwright (n261) 599. However, as discussed in n261 above, since 1997, it is no longer possible to create any entailed estates.

²⁶⁴ (1861) 3 De GF & J 369, 378 (Turner LJ).

²⁶⁵ (1870) WN 211.

The prevalence of sales of reversionary interests is evident in the plot of Anthony Trollope's novel *Ralph the heir*, which was first published in 1871. In this novel, a young heir to 'a handsome estate in Hampshire', who had led a life of leisure and extravagance reluctantly planned to sell his reversion in order to pay off his creditors.²⁶⁶ The heir is suddenly saved from this expedient when his uncle, the life tenant, dies unexpectedly while hunting.

The wide scope and frequent application of the rule that the sale of a reversion can be rescinded on the ground of undervalue is apparent in the eclectic range of claimants who invoked this rule in the nineteenth century. In *Aldborough*, the rule was successfully invoked in the House of Lords by a dissolute aristocrat, the Earl of Aldborough, who had charged his reversionary interest in an estate which was worth £8,000 a year.²⁶⁷ The rule was also invoked by more humble and wholesome subjects. In *Hincksman v Smith*, Sir John Leach MR rescinded the sale of a reversionary interest in an estate of forty-seven acres.²⁶⁸ In this case, the vendor was 'a young man just of age', who had sold his interest in order to procure some money for a relative.²⁶⁹

The rule that sales of reversions can be rescinded on the ground of undervalue was formulated and established by Sir William Grant MR in *Gowland v De Faria* in 1810.²⁷⁰ In this case, Sir William Grant MR observed that

it is incumbent upon those who have dealt with an expectant heir relative to his reversionary interest to... show that a full and adequate consideration was paid...

²⁶⁶ A Trollope, *Ralph the heir* (OUP 1990) 56.

²⁶⁷ *Aldborough* (n257).

²⁶⁸ (1827) 3 Russ 433.

²⁶⁹ *Hincksman* (n268) 435.

²⁷⁰ (1810) 17 Ves Jr 20.

and that case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In all these cases the issue is upon the adequacy of the price.²⁷¹

This rule is related to but distinct from the rule on ‘catching bargains’ with expectant heirs.²⁷² The latter rule is of more ancient origin than the former and required some element of procedural unfairness in addition to an unfair price. The rule on sales of reversions seems to have been a particularly strict offshoot of the rule on ‘catching bargains’.

The rule under which courts set aside ‘catching bargains’ with expectant heirs was never formulated very clearly before the leading case of *Chesterfield v Janssen*.²⁷³ The requirement of some procedural unfairness in addition to an unfair price is evident in this case. Lord Hardwicke states that a ‘head of fraud on which there has been relief, is that which infects catching bargains with heirs, reversioners or expectants in the life of the father’²⁷⁴. He observes that in these cases, ‘there is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness’.²⁷⁵

²⁷¹ *Gowland* (n270), 24-25.

²⁷² Pollock emphasises this point. He states that there were ‘two branches’ and that it was only the rule on the sale of reversions which was abolished by the Sales of Reversions Act 1867 (31 & 32 Vict c 4). He also acknowledges that the rule on the sale of reversions ‘which is abrogated was intimately connected both in principle and in practice with that which remains...’: Pollock (n243) 529.

²⁷³ (1750) 2 Ves 124. Pollock observes that the ‘reports of the cases on this head anterior to *Chesterfield v Janssen* are unfortunately so meagre that it is difficult to ascertain whether they proceeded on any uniform principle’: Pollock (n243) 529.

²⁷⁴ *Chesterfield* (n273) 156.

²⁷⁵ *Ibid* 156.

In *Shelly v Nash*, Sir John Leach V-C distinguished between the rule on the sale of reversions and that on ‘catching bargains’.²⁷⁶ He observed that

in the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such persons; but in more recent times it has been considered... a fit rule of policy, to impose upon all who dealt with expectant heirs and reversioners, the onus of proving that they had paid a fair price, and otherwise to undo their bargains, and compel a re-conveyance of the property purchased.²⁷⁷

The distinction between the rule on sales of reversions and that on ‘catching bargains’ is also evident in the cases which were decided after the Sales of Reversions Act 1867. As will be explained below, this Act abolished the rule on sales of reversions.²⁷⁸ Nonetheless, in subsequent cases, it was frequently emphasised that the rule on ‘catching bargains’ still existed and applied in many situations. The effect of the 1867 Act is evident in *Fry v Lane*.²⁷⁹ In this case, Kay J noted that before 1867,

the Court of Chancery would relieve against a sale of or other dealing with a remainder or reversion at an undervalue on that ground alone, and this even where the remainderman was of mature age and accustomed to business.²⁸⁰

Even though an unfair price was no longer sufficient, Kay J held that the sale of the reversionary interest before him could still be set aside as in addition to the inadequate

²⁷⁶ (1818) 3 Madd 232.

²⁷⁷ *Shelly* (n276) 235-236.

²⁷⁸ See the text from n320 to n333.

²⁷⁹ (1888) 40 ChD 312. See also the earlier decision of the Court of Appeal in *Aylesford v Morris* (1873) LR 8 Ch App 484. In this case, Lord Selborne LC (Roundell Palmer) carefully distinguished the rule on the sale of reversions from that on ‘catching bargains’ with expectant heirs: *Aylesford* (n279) 489-491. Having represented parties in many cases in which the rule on sales of reversions was invoked and having proposed the bill which abolished this rule (see the text from n321 to n330), Lord Selborne LC was in a particularly privileged position to comment on the law in this area.

²⁸⁰ *Fry* (n279) 320.

consideration, the defendant had purchased the reversionary interest from ‘a poor and ignorant man’ who had not had the benefit of independent advice.²⁸¹ Therefore, after 1867, even reversioners had to demonstrate something more than merely an unfair price.²⁸² As Lord Selborne LC observed in *Aylesford*, while the 1867 Act has removed ‘the arbitrary rule of equity as to sales of reversions’, it ‘leaves undervalued still a material element in cases in which it is not the sole equitable ground for relief’.²⁸³ It is the rule on ‘catching bargains’, shorn of its more extreme appendage on the sale of reversions for which an unfair price was sufficient, which is the progenitor of the modern rule on unconscionable bargains.²⁸⁴

Three aspects of the rule on the sale of reversions are examined in the remainder of this discussion. First, we will see that while judges generally disliked the rule, they could not abolish it once it had become entrenched in English law.²⁸⁵ Secondly, the very rigorous and extreme ways in which this rule was applied will be considered. Thirdly, the legal, political and social background of the rule will be analysed in order to explain why a rule which allowed courts to set aside sales of reversions on the ground of an unfair price was created and developed at a time when freedom of contract was at its zenith.

²⁸¹ *Ibid* 322.

²⁸² Nonetheless, in practice, many cases which would have come within the scope of the rule on sales of reversions would also fall under the rule on ‘catching bargains’. As a result, as Pollock noted, the 1867 Act ‘has modified the practice of the Court of Chancery less than might be supposed’: Pollock (n243) 528.

²⁸³ *Aylesford* (n279) 490.

²⁸⁴ See for example, *Cresswell v Potter* [1978] 1 WLR 255 where the claimant relied successfully on *Fry* (n279) and *Aylesford* (n279) in her claim to set aside the contract on the basis that it was an unconscionable bargain. In *Cresswell*, while Megarry J updated the elements of the rule in *Fry* (n279) (which he noted were derived from Lord Selborne LC’s judgment in *Aylesford* (n279) 491) so that they would be more consistent with contemporary ‘social conditions’, he stated that he did not ‘think that the principle has changed’: (n284) 257.

²⁸⁵ This point illustrates the role of precedent in English law and the consequent restrictions on the freedom of judges to abolish rules which they have created. In contrast, French judges are much less constrained. For example (as discussed in section (iii) in chapter 5), in 2004, French courts suddenly abolished the rule on unfair prices in the sale of *offices* which had been applied for almost a hundred years. The role of judges in the creation and abolition of rules on unfair prices in contracts in English and French law is examined in section (ii) in chapter 6.

After the establishment of the rule on the sale of reversions in *Gowland*, the rule was subsequently affirmed and applied in numerous cases.²⁸⁶ In *Hincksman*, Sir John Leach MR observed that while in *Gowland*,²⁸⁷ Sir William Grant MR did not think that he was ‘laying down a new rule... since that case, the rule has so far been regarded as the settled law of the Court’.²⁸⁸ The rule was ultimately affirmed by the House of Lords in *Aldborough* in 1840.²⁸⁹ In this case, Lord Cranworth LC stated that the rule had ‘been established in the case of *Gowland*,²⁹⁰ and has been recognised since’.²⁹¹

However, the rule on the sale of reversions which was established in *Gowland*²⁹² was frequently criticised in subsequent cases. In *Shelly*, where it was held that the rule did not apply to sales by auction, Sir John Leach V-C stated that ‘the principle and the policy of the rule may be both equally questionable’.²⁹³ He noted that ‘sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms’.²⁹⁴ In his view, a negative consequence of the rule was that expectant heirs who sell their reversions ‘from the pressure of distress, are

²⁸⁶ See for example *Shelly* (n276) and *Hincksman* (n268).

²⁸⁷ *Gowland* (n270).

²⁸⁸ *Hincksman* (n268) 435.

²⁸⁹ *Aldborough* (n257). As Lord Cranworth LJ stated in *Burt*, ‘the rule on this subject was finally and distinctly established by the House of Lords’ in *Aldborough* (n257): (n259) 57.

²⁹⁰ *Gowland* (n270).

²⁹¹ *Aldborough* (n257), 248.

²⁹² *Gowland* (n270).

²⁹³ *Shelly* (n276) 236.

²⁹⁴ *Shelly* (n276) 236.

thrown, by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them'.²⁹⁵

Similarly, in *Headen v Rosher*,²⁹⁶ Sir William Alexander LCB criticised the rule on the sale of reversions and refused to apply it on the facts even though the evidence showed that the purchase price constituted only two-thirds of the value of the reversion. He observed that the rule established in *Gowland*²⁹⁷ 'would be a very inconvenient restraint on the power of the owners of such property' and that while a 'private sale is, no doubt, sometimes an imprudent exercise of that power', it is often 'wise and provident'.²⁹⁸

Nevertheless, unlike *Shelly*²⁹⁹ and *Headen*,³⁰⁰ in subsequent cases, while the rule on the sale of reversions was often the subject of express judicial disapproval, the courts acknowledged that the rule was binding and applied it to the facts of the cases before them.

In *Hincksman*,³⁰¹ Sir John Leach MR once again expressed a negative view of the rule on the sale of reversions. He observed that he had 'upon more than one occasion judicially questioned both the principle and policy of the rule'.³⁰² However, unlike

²⁹⁵ *Shelly* (n276) 236.

²⁹⁶ (1825) M'Cle & Y 89.

²⁹⁷ *Gowland* (n270).

²⁹⁸ *Headen* (n296) 100.

²⁹⁹ *Shelly* (n276).

³⁰⁰ *Headen* (n296).

³⁰¹ *Hincksman* (n268).

³⁰² *Ibid* 435.

Shelly,³⁰³ where he established the exception that the rule did not apply to sales by auction, in *Hincksman*, he stated that since *Gowland*,³⁰⁴ the rule has 'been regarded as the settled law of the Court' and therefore, 'it would not become this Court to make a precedent in direct opposition to it'.³⁰⁵

In other cases, while the judges referred to various criticisms of the doctrine, they often refrained from expressly outlining their own opinion of the rule and continued to apply it to the cases before them. In *Aldborough*,³⁰⁶ Lord Cranworth LC outlined the arguments against and in favour of the rule. He observed that the rule 'has been considered as interfering a good deal with that proper discretion which persons who are capable, according to the law of this country, of disposing of their own property, ought to be at liberty to exercise'.³⁰⁷ On the other hand, he noted that the doctrine 'has the effect of protecting persons who are, generally speaking, very much in need of protection'.³⁰⁸ Nevertheless, Lord Cranworth LC stated that 'of the policy of that rule it is not my purpose to say anything; that rule has been established in the case of *Gowland*, and has been recognised since'.³⁰⁹

Similarly, while Sir John Romilly MR referred to criticisms of the rule on the sale of reversions, he insisted that his judicial position required him simply to apply the law and he therefore refused to express an opinion against or in favour of the rule. In

³⁰³ *Shelly* (n276).

³⁰⁴ *Gowland* (n270).

³⁰⁵ *Hincksman* (n268) 435.

³⁰⁶ *Aldborough* (n257).

³⁰⁷ *Ibid* 248.

³⁰⁸ *Ibid*.

³⁰⁹ *Ibid*.

Bromley, he observed that ‘it was argued, with much force, that the doctrine of the Court, in such matters, is in truth an injury to the persons intended to be protected...’ as it ‘adds to the transaction the additional element of uncertainty which must be paid for by the borrower’.³¹⁰ However, he concluded that

it is not my province, in this place, nor am I disposed, to express any dissent from or assent to the argument just adduced. The province of the judge sitting in the Court is to administer and not to reform the law, and so long as the legislature thinks fit to leave the law in its present state, this Court must apply the principles it finds established, and must administer relief to expectant heirs...³¹¹

Similarly, in *Perfect*, Sir John Romilly MR observed that

whether it is beneficial to the owners of reversions, by causing them to obtain a smaller price for reversions than they otherwise would get, is not a matter to be considered by me; I have only to enforce the doctrines of the Court of Equity.³¹²

Following the affirmation of the rule on the sale of reversions by the House of Lords in *Aldbrough*,³¹³ the rule was rigorously applied in the cases in which it was invoked. It has been suggested that it was the consistently rigorous application of the rule which incited the legislature to abolish it by statute in 1867. In 1871, in *Tyler v Yates*, Lord Hatherly LC observed that ‘the law as to sales of reversions was altered’ as ‘the doctrine of this Court had been carried to an extravagant length on that subject’.³¹⁴ Similarly, in 1876, Frederick

³¹⁰ *Bromley* (n257) 665.

³¹¹ *Ibid.*

³¹² *Perfect* (n259) 202.

³¹³ *Aldbrough* (n257).

³¹⁴ (1871) 6 Ch App 665, 669.

Pollock stated that ‘the modern cases almost look as if the Court, finding it too late to shake off the doctrine, has sought to call the attention of the legislature to its inconvenience by extreme instances’.³¹⁵ Three aspects of the rule highlight the particularly ‘extravagant’ or ‘extreme’ application of the doctrine.

First, a small difference between the purchase price and the market value of the reversion was sufficient to set aside a contract. In *Foster v Roberts*, Sir John Romilly MR held that ‘£30 out of £400 is quite a sufficient deficiency in price... to annul the transaction’.³¹⁶ Similarly, in *Jones v Ricketts*, Sir John Romilly MR held that as the purchase price ‘was £38 (that is rather less than one-fifth) under its value, the price paid for it being £200... it is impossible that the sale of this reversion can stand’.³¹⁷

Secondly, a delay of many years between the conclusion of the contract and the initiation of proceedings to set the contract aside was not a bar to relief. In *Salter v Bradshaw*, Sir John Romilly MR held that ‘the great length of time which has elapsed since the transaction took place, namely forty years’ cannot constitute a bar to relief where the vendor had initiated proceedings one year after the reversion had fallen into possession.³¹⁸

Thirdly, as the rule allowed the court to set aside a contract solely on the ground that the price was too low, other factors were not seen as legally significant. Thus, numerous cases highlight the irrelevance of extrinsic factors. In *Bromley*, Sir John Romilly MR observed that the findings that the claimant ‘was a gentleman of mature

³¹⁵ Pollock (n243) 531.

³¹⁶ (1861) 29 Beav 467, 470.

³¹⁷ (1862) 31 Beav 130, 131.

³¹⁸ (1858) 26 Beav 161, 165.

years, in the vigour of his life and intellect’ and that ‘he perfectly understood the nature and extent of the transaction, do not... disentitle the plaintiff to relief’.³¹⁹ Similarly, in *Foster*, while Sir John Romilly MR states that ‘it is proper to observe that there is perfect bona fides on both sides’, the contract was set aside on the ground of undervalue.³²⁰

As earlier noted, the rule on the sale of reversions was abolished by the Sale of Reversions Act 1867.³²¹ Section 1 of this short Act declared that ‘no purchase, made *bona fide* and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue’.

The bill to abolish the rule was proposed by Roundell Palmer and Robert Collier in the House of Commons on November 26, 1867. At this time, Palmer and Collier were part of the Liberal opposition to the minority Conservative government under Lord Derby which was in power from 1866 to 1868.³²² Palmer and Collier had been law officers during the previous Liberal governments under Lord Palmerston from 1859 to 1865 and Lord Russell from 1865 to 1866.³²³ Palmer had been Solicitor-General from 1861 to 1863

³¹⁹ *Bromley* (n257) 661, 665.

³²⁰ *Foster* (n316) 470.

³²¹ This statute was repealed and essentially restated in section 174 of the Law of Property Act 1925 which is still in force.

³²² The Liberal government resigned in June 1866 when ‘some government supporters (especially conservative-minded Whigs)’ voted against a bill introduced by William Gladstone which proposed to extend the franchise: MJ Turner, ‘Political Leadership and Parties, 1846-1900’ in C Williams (ed), *A Companion to Nineteenth Century Britain* (Blackwell 2004) 145.

³²³ Lord Palmerston died in October 1865. Lord Russell replaced Lord Palmerston as prime minister in 1865: MJ Turner (n322) 143-144.

and Attorney-General from 1863 to 1866.³²⁴ Collier had been Solicitor-General from 1863 to 1866.³²⁵

Palmer had extensive knowledge of the operation of the rule on the sale of reversions. Before becoming a law officer in 1861, he had acted as counsel in numerous cases in which the rule had been invoked. In *Burt*³²⁶ and *Salter*,³²⁷ Palmer appeared on behalf of the purchaser while in *Foster*³²⁸ and *Bromley*³²⁹ he appeared on behalf of the vendor.

The only speech on the bill which became the Sales of Reversions Act 1867 was given by Lord Chelmsford LC (Frederick Thesiger) in the House of Lords on December 3, 1867. He declared that ‘the object was to place the sales of reversions and ordinary sales of land in possession on an equal footing’ as ‘under the existing law a purchaser of a reversion must prove that he has given adequate value for the property, a proof which was not required in the case of a sale of property in possession’.³³⁰ It is notable that Lord Chelmsford LC, in his judicial capacity as Lord Chancellor, had previously expressed his unfavourable opinion of the rule six months previously in the case of *Webster v Cooke*.³³¹ In this case, he observed that ‘the policy of the law, which throws its protection round all reversioners, may be questionable, and has been questioned, and the principle ought not

³²⁴ GR Rubin, ‘Palmer, Roundell (Lord Selborne)’ in AWB Simpson (ed), *Biographical dictionary of the common law* (Butterworths 1984) 399, 399.

³²⁵ W Holdsworth, *A history of English law* vol XVI (AL Goodhart and HG Hanbury eds, Sweet and Maxwell 1966) 167.

³²⁶ *Burt* (n259).

³²⁷ *Salter* (n318).

³²⁸ *Foster* (n316).

³²⁹ *Bromley* (n257).

³³⁰ HL, 3 December 1867, vol CXC.

³³¹ (1867) 2 LR Ch App 542.

to be extended by analogy'.³³² The Bill swiftly passed the other stages without any opposition or indeed, debate.

The widespread aversion towards the rule on the sale of reversions at the end of its life is particularly apparent in section 3 of the 1867 Act which provides that, subject to pending suits, the abolition of the rule operates retrospectively. As Pollock observed, this provision was 'remarkable inasmuch as the right taken away... was (as in the case of a sale voidable on any other ground) not a mere right of suit, but an interest which was transmissible by descent or devise'.³³³

The elimination of the rule on the sale of reversions removed a particularly anomalous exception to the principle of freedom of contract from English law. After 1867 the sale of a reversion could no longer be set aside merely on the ground of an unfair price.

It is curious that the rule on the sale of reversions was both created and applied so rigorously for so long in a century in which the principle of freedom of contract penetrated almost every other crevice of contract law.³³⁴ The life of this rule is not very consistent with Atiyah's thesis that from 1770-1870, under the influence of liberal economics and liberal philosophy and as a result of the development of a more industrial and capitalist society, English law was altered to fit with the principles of freedom of contract.³³⁵

³³² *Webster* (n331) 546.

³³³ Pollock (n243) 331-332.

³³⁴ See Atiyah (n204) *passim*. Nonetheless, there were other significant exceptions to the principle of freedom of contract in English law at this time. See Atiyah (n204) *passim*. In relation to unfair prices in particular, see also the rules on unfair prices in salvage contracts which are discussed in chapter 4 below.

³³⁵ *Ibid* 219, 292, 398.

However, the principle of freedom of contract eventually reached the haven of the rule on the sale of reversions and swept the rule away. The significance of the principle of freedom of contract in the demise of this rule on the sale of reversions is evident when one compares the wider legal, political and economic developments at the time of the creation of the rule with that at the time of the abolition of the rule. Between the creation of the rule on the sale of reversions in *Gowland* in 1810³³⁶ and the abolition of that rule by statute in 1867, the corn laws had been repealed³³⁷ and the usury laws had been abolished.³³⁸ Moreover, there was a significant debate on the issue of ‘free trade in land’ within and outside of Parliament throughout the nineteenth century.³³⁹ The Radical Liberals who advocated free trade in land focused most of their ire on primogeniture and strict settlements.³⁴⁰ While the most significant steps in favour of free trade in land were taken after 1867,³⁴¹ the abolition of the rule on the sale of reversions in 1867 could be seen as an earlier product of this movement.³⁴²

³³⁶ *Gowland* (n270).

³³⁷ The corn laws were repealed in 1846: N McCord and B Purdue, *British history: 1815-1914* (2nd edn, OUP 2007) 181-186.

³³⁸ The usury laws were abolished by statute in 1854 (17 & 18 Vict c 90). Before 1854, ‘certain exceptions had been made from the usury laws in favour of certain bills of exchange and loans exceeding £10 not secured on land’: Pollock (n243) 532. See also Atiyah (n204) 550-551.

³³⁹ Simpson (n260) 283-287. See also AV Dicey, ‘The paradox of the land law’ (1905) 21 *LQR* 221, 226-231.

³⁴⁰ Simpson (n260) 284. Registration of title was also a desideratum of the movement for free trade in land. See P Offer, ‘The origins of the Law of Property Acts 1910-25’ (1977) 40 *MLR* 505, 505-506.

³⁴¹ The Settled Land Act 1882 was the ‘bold step forward’ in the law on strict settlements as it significantly increased the freedom of the life tenant to deal with the land under the settlement: Simpson (n260) 285. See also n345 to n356 below on the strict settlement. The Administration of Estates Act 1925 abolished primogeniture.

³⁴² Free trade in land was already a very significant issue at the time when the rule on the sale of reversions was abolished. In 1864, Richard Cobden, the famous advocate of free trade, advocated the establishment of ‘a League for free trade in land just as we had a League for free trade in corn’: FML Thompson, ‘Cobden, free trade in land and the road to the Abbey National’ in A Howe, S Morgan (eds), *Rethinking nineteenth-century liberalism: Richard Cobden bicentenary essays* (Ashgate 2007) 68, 68.

The rule on the sale of reversions was created in 1810 and survived for over half a century as the rationale on which it was based, the policy of preserving family wealth maintained its precedence over the competing principle of freedom of contract during this period. Similar to Article 1674, it is clear that the policy of preserving family wealth, particularly land, was the rationale underlying the rule on the sales of reversions.

The policy of keeping land within the vendor's family is evident in the cases on the rule on the sale of reversions. In *Portmore v Taylor*, Sir L Shadwell V-C observed that the

mere fact, that Lord Portmore was not only the heir apparent of his father, but also the expectant heir to a peerage, also brings the case distinctly within the rule laid down by this court, and which is founded on general policy, namely, that this court will not allow the heir of a family of rank to be reduced to poverty and distress by dealing with his expectancies.³⁴³

Similarly, in *Tynte v Hodge*, Sir W Page Wood V-C noted that

one of the grounds on which the Court has rested this doctrine throughout the whole series of cases, and rested it with considerable emphasis, is that such transactions are to be discouraged on account of their leading the heir to gratify, it may be his necessities, or it may be his caprices, and to destroy the family estate behind the back of those who have an interest in seeing the estate preserved...³⁴⁴

Given the supreme importance of the policy of preserving family wealth in the legal system of the nineteenth century, the rule on the sale of reversions is not particularly incongruous. The strict settlement, in particular, exemplifies the importance of the policy

³⁴³ (1831) 4 Sim 182, 213.

³⁴⁴ (1864) 2 H & M 287, 296.

of preserving family wealth. Many claimants who invoked the rule on the sale of reversions had interests in settled land.³⁴⁵ Therefore, it is important to consider the role of strict settlements in the legal system at this time and in the development of the rule on the sale of reversions in particular.

The strict settlement was a legal technique which ensured that land (and after the Settled Land Act 1882, wealth)³⁴⁶ remained within one family generation after generation. The rule against perpetuities restricted the power of landowners to tie up their land and prevented entails from operating indefinitely. Nonetheless, the strict settlement allowed land to be kept within the family in a way which was consistent with the rule against perpetuities.³⁴⁷ As Dicey observed in 1905, while ‘the rule against perpetuities excludes the possibility of a real entail... strict settlements serve as an admirable substitute...’.³⁴⁸

The strict settlement was based on a combination of life interests and fees tail. In order to prevent anyone from enjoying the power to dispose freely of the land, it was important to ensure that the person who possessed the land at any one time had only a life interest.³⁴⁹ While the heir, who usually had a reversion in fee tail, could sell his interest,

³⁴⁵ See for example, *Aldborough* (n257) and *Tottenham* (n258).

³⁴⁶ As mentioned above (see the text from n338 to n342), the legal, social, economic and political value of strict settlements was one aspect of land law which was the subject of significant debate during the nineteenth century. See for example, F Pollock, *The land laws* (Macmillan 1883) 179-186; TE Scrutton, *Land in fetters, or the history and policy of the laws restraining the alienation and settlement of land in England* (CUP 1886). As a result of this debate, important changes were made to strict settlements in the Settled Land Act 1882. This Act significantly increased the powers of the life tenant and it provided that the interests of beneficiaries became interests in ‘a shifting fund’ rather than in land. See Simpson (n260) 285.

³⁴⁷ The strict settlement which was used in the nineteenth century was based on the one which was devised by conveyancers, particularly Sir Orlando Bridgman, at the end of the seventeenth century. See Simpson (n260) 235.

³⁴⁸ Dicey (n339) 222.

³⁴⁹ Simpson (n260) 235-237. The protection of family wealth from the depredations of life tenants can be achieved in English law through the establishment of a protective trust. See JE Martin, *Modern equity* (18th edn, Sweet and Maxwell 2009) 197-206.

this course was unappealing as a reversion in fee tail was not very valuable.³⁵⁰ The prospect of an increased income,³⁵¹ in addition to the desire to keep the land within the family for another generation,³⁵² generally prompted the heir to join with his father, the life tenant, in a resettlement of the estate.³⁵³ Thus, despite the fact that land could not be tied up in perpetuity, in practice, land was resettled and retained within the family for many generations.³⁵⁴

The strict settlement was ubiquitous in the nineteenth century. In 1883, Pollock noted that the strict settlement ‘is practised by a great proportion of landowners to this day’.³⁵⁵ Similarly, it has been estimated that in the nineteenth century, ‘just under half the area of England was subject to settlement’ and that ‘the habit of settling their estates was typical of the entire order of landowners, aristocracy and gentry’.³⁵⁶

The prevalence of the strict settlement illustrates the extent to which preserving family wealth, particularly land, was a significant social and legal objective in the nineteenth century. As Simpson observes,

the whole history of settlements can only be made intelligible if we remember that although the family as such was not treated as a legal entity by the common law,

³⁵⁰ If the tenant in tail disentailed on his own he could create only a base fee. A base fee ‘could be sold but not for very much’: Simpson (n260) 236.

³⁵¹ As Underhill noted, ‘the alternative is gently placed before him: do your duty to the family by surrendering your future estate tail, receiving instead a future life estate and a present handsome allowance, or remain during your father’s lifetime without funds’: A Underhill, ‘Changes in the law of real property during the nineteenth century’ in *Select essays in Anglo-American legal history* vol III (CUP 1909) 673, 675.

³⁵² Thompson observed that ‘it was the deeply held convictions of the landowners, quite as much as the parchments, which protected the integrity of their estates’: FML Thompson, *English landed society in the nineteenth century* (Routledge and Kegan Paul 1963) 69.

³⁵³ In order to bar the entail (and resettle the estate) it was necessary for the life tenant and the tenant in tail to act in concert: Simpson (n260) 237.

³⁵⁴ Simpson (n260) 235-237.

³⁵⁵ Pollock (n346) 2.

³⁵⁶ Thompson (n352) 68, 66.

which dealt only in individual property rights, landed society did nevertheless view property as ultimately belonging to the family in some moral sense, and the legal system reflected this.³⁵⁷

Similarly, Thompson notes that in nineteenth century society, ‘the family interest and the family reputation were normally superior to the claims of any individual within it’.³⁵⁸

This view is also reflected in a contemporary novel. In Trollope’s *Ralph the heir*, the narrator reacts to the possibility that the heir might be compelled to sell his reversionary interest in the family estate by exclaiming that ‘...the thing to be sold was in all its bearings so valuable... it carried with it a value which, in the eyes of... all Englishmen... was far beyond all money price...’.³⁵⁹

In the nineteenth century, much land was held by successive owners. In addition to strict settlements,³⁶⁰ land was often held by life tenants in reversion³⁶¹ or tenants in fee simple in reversion³⁶² who would come into possession only when the life tenant in

³⁵⁷ Simpson (n260) 209.

³⁵⁸ Thompson (n352) 17.

³⁵⁹ Trollope (n266) 210. Vestiges of the idea that land really belonged to the family rather than the individual even if there are no successive interests, survived in the twentieth century. This is evident in Lord Denning MR’s dissenting opinion in *Re Estate of Brocklehurst (Deceased)* [1978] Ch 14. In this case, a rich baronet, 87 years of age, had made an *inter vivos* gift of a 99 year lease of shooting rights over his estate (which he held in fee simple) to a friend who owned a small garage in a nearby village. This gift had reduced the value of the estate by £90,000. In his will, the baronet left the estate to his sister’s grandson. After the death of the baronet, the executors of his estate sought to set aside the gift. The majority held that the gift could not be set aside. As Bridge LJ stated, the baronet ‘was an absolute owner, of sound mind, entitled to dispose of his property as he chose’: (n359) 49.

In contrast, Lord Denning MR held that the gift should be set aside. The preservation of family wealth clearly underpins his decision that the testator was not able to gift the lease of shooting rights to his friend. Lord Denning MR rejected the argument that the baronet was ‘entitled to do what he liked with his own’, that he ‘could be a foolish and irresponsible as he liked’ or that he could gift his estate ‘to any Tom, Dick or Harry as he pleased’. He stated that the baronet was ‘morally, though not in law, only a life tenant’ and that ‘it was his duty to preserve the estate in the interests of his family, the neighbourhood and the country at large’: (n359) 30, 32.

³⁶⁰ See for example, *Aldbrough* (n257).

³⁶¹ See for example, *Burt* (n259).

³⁶² See for example, *Gowland* (n270).

possession died.³⁶³ Even if land was not settled, the other ways in which ownership was fragmented often shows that the primary object of the tenant in fee simple who carved out the lesser estates was to ensure that land would be retained within the family for a certain period. This is evident in many of the cases in which the rule on the sale of reversions was invoked. For example, in *Gowland*,³⁶⁴ the claimant had a fee simple in reversion which would fall into possession on the death of his mother who was the life tenant. In *Burt*³⁶⁵ and *Bromley*,³⁶⁶ the claimants had reversionary life estates which would fall into possession on the death of the life tenants in possession, the mother in the former case and the father in the latter.

The abolition of the rule on the sale of reversions in the 1867 Act occurred not only at a time when the principle of freedom of contract was at its zenith³⁶⁷ but also at a time when the importance of the policy of preserving family wealth was fading. The decline in the prominence of the policy of preserving family wealth is evident in the progressive weakening of the institution of the strict settlement in the second half of the nineteenth century. Long before the introduction of the momentous Settled Land Act 1882,³⁶⁸ the powers of the life tenant under a strict settlement were increased in a series of statutes from the 1840s to the 1870s.³⁶⁹ Therefore, it is not surprising that Parliament

³⁶³ As noted above, three different successive estates could exist at law before the introduction of the Law of Property Act 1925. See the text from n260 to n261.

³⁶⁴ *Gowland* (n270).

³⁶⁵ *Burt* (n259).

³⁶⁶ *Bromley* (n257).

³⁶⁷ See the text from n333 to n342 above

³⁶⁸ See n341 and n346 above. The Settled Land Act 1882 did not go as far as some wished. For example, Scrutton observed that ‘... it is said that the preservation of ancient families can only be affected by some such means as this. It may be answered that families worth preserving will preserve themselves’: Scrutton (n346) 157.

³⁶⁹ Underhill (n351) 679-680.

placed the principle of freedom of contract above the policy of preserving family wealth in the context of the sales of reversions when it abolished the rule which allowed courts to set aside contracts for the sale of reversions on the ground of an unfair price in the 1867 Act.

After the abolition of the usury laws in 1854, it was argued that the rule on the sale of reversions should be abandoned or at least applied less restrictively as this rule was ultimately based on the usury laws. In *Tottenham*, the idea that the rule on the sale of reversions was based on the usury laws was rejected and it was held that this rule was not affected by the abolition of the usury laws.³⁷⁰ In this case, Lord Westbury LC emphasised that the rule on the sale of reversions operated independently of the usury laws.³⁷¹ He noted that ‘the value of an expectancy or reversionary interest may be ascertained now as well as it could be when the law against usury was in existence’. He acknowledged that while the purchaser,

Mr Emmet might have lent the £500 to Mr Tottenham at £40 or £50 per cent interest, and that the loan would have been legal and valid... if Mr Emmet took for such a contract with an expectant heir any charge or security affecting his expectancy (in which word I include remainders and reversionary interests), the contract would still have to be tried by the settled rules and principles of this court...³⁷²

If there is a link between the usury laws and the rule on the sale of reversions, it is only indirect. The shadow of the usury laws is often evident in the transactions concluded by

³⁷⁰ *Tottenham* (n258).

³⁷¹ *Ibid* 5-6. The vendor had paid £680 to the purchaser in return for either £2,000 or £3,000 (depending on when the estate of the life tenant in possession eventually determined) when the reversion fell into possession.

³⁷² *Ibid* 6.

the claimants in the cases in which the rule on the sale of reversions is invoked. First, in many cases, the purchaser pays a certain sum to the vendor immediately in return for a promise by the vendor to pay a greater sum, which is charged on the reversion, if and when the reversion falls into possession.³⁷³ These transactions were clearly designed to facilitate loans of money which would fall outside the restrictions imposed by the usury laws. These transactions fell outside the usury laws as it was never certain that the purchaser would recover the sum which was secured on the reversion.³⁷⁴ The purchaser would recover nothing if the vendor died before his estate fell into possession.

Secondly, the indirect impact of the usury laws is often apparent in the very need to sell the reversion. As the usury laws restricted the supply of credit, it is probable that many vendors who needed money were compelled to sell their reversions as it was not possible to borrow the money which they needed at the rate permitted by the usury laws.³⁷⁵ As Bentham observed in 1787,

suppose the law to be efficacious as far as it goes, and that the prodigal son find none of those monsters called usurers to deal with him, does he lie quiet? no such thing: he goes on and gets the money he wants, by selling his interest instead of borrowing.³⁷⁶

³⁷³ See for example *Shelly* (n276) where the claimant would come into possession only if he survived his grandfather and father.

³⁷⁴ As Byles stated ‘If the principal be, by the terms of the contract, put in hazard, it is not usury... In every usurious loan... the principal must be contracted to be repaid at all events. It matters not *when*, or on what event, provided the event be one which must happen; nor *how*, whether in one sum or by instalments’: JB Byles, *Observations on the usury laws* (Sweet 1845) 87. This is also the reason why other transactions such as bottomry and the sale of annuities (usually for the life of the vendor) in return for an immediate sum did not come within the usury laws. See Holdsworth, vol VIII (n325) 104 and vol XI (n325) 604-605. The sale of annuities was a particularly popular method of obtaining money before the abolition of the usury laws. See S Campbell, ‘Usury and annuities of the eighteenth century’ (1928) 44 *LQR* 473.

³⁷⁵ This seems to be the explanation for the sale of the reversion in *Hinckman* where the ‘object of... the sale was to assist a relation with a loan’: (n268) 433.

³⁷⁶ J Bentham, *Defence of usury* (2nd edn, T Payne 1790) 23.

The ability of a reversioner to sell his interest at any price was, as Bentham identified, a chink in the usury armour in 1787.³⁷⁷ However, the creation of the rule on the sale of reversions in *Gowland* in 1810³⁷⁸ closed this gap.

Nonetheless, as the usury laws were abolished in 1854, they clearly had no effect, direct or indirect, on the contracts for the sale of reversions which were concluded after that date.³⁷⁹

³⁷⁷ While Bentham does not make this particular point, he sees the underlying issue at a later stage in the book when he questions ‘whether there ever was an instance where... a bargain was rescinded, merely because a man had sold too cheap, or bought too dear’: Ibid 42-43.

³⁷⁸ *Gowland* (n270).

³⁷⁹ See for example, *Perfect* (n264), where the contract was concluded in 1856. With the benefit of hindsight, one might argue that the very fact that the rule on the sale of reversions survived for thirteen years after the abolition of the usury laws demonstrates that the former was always quite independent of the latter. However, that argument would not be conclusive given the history of the rules on collateral benefits in mortgages. Despite the abolition of the usury laws, many collateral benefits in mortgages which did not clog the equity of redemption were still held invalid until the decision of the House of Lords in *Kreglinger v New Patagonia Meat Company* [1914] AC 25.

(iii) Article 1674 of the *Code civil* and the rule on the sale of reversions:
similarities and differences

In 1682, Lord Nottingham ‘said, by the civil law a bargain of double the value shall be avoided, and wished it were so in England’.³⁸⁰ As earlier explained, in the nineteenth century, English law developed a rule which was analogous to the rule in the ‘civil law’ to which Lord Nottingham referred and to Article 1674. Indeed, several aspects of the rule on the sale of reversions went far beyond Article 1674.

There are three common features in the English rule on the sale of reversions and Article 1674. First, the protection of the vendor of land from an unfair price is the focus of both rules.³⁸¹ In French law, Article 1674 applies only to the sale of land and Article 1683 of the *Code civil* provides that the rule does not extend to a purchaser of land who has paid too high a price. Similarly, in English rule on the sale of reversions, the focus is on the vendor and the sale of land. There are no cases in which a purchaser seeks to rescind the sale of a reversion on the ground that the price is too high and there are no suggestions that the rule would have applied in such a case. Furthermore, while the rule on the sale of reversions applied to personal property as well as to land,³⁸² it is land which is the focus of the claim in the majority of cases in which the rule is invoked.³⁸³

³⁸⁰ *Nott* (n194) 121.

³⁸¹ Simpson also notices this point. However, he does not discuss it in any detail. He states that ‘the doctrine of *laesio enormis* in the civil law protected landowners; in England the case law in Chancery on sales at low value and on ‘catching bargains’ with expectant heirs appears to have largely performed the same function’: Simpson (n207) 601.

³⁸² The rule was applied to a reversionary interest in a sum of money in *Foster* (n316). The application of the rule to reversionary interests in personal property is also evident in section 1 of the Sale of Reversions Act 1867 which provides that ‘no purchase... of any reversionary interest in real or *personal estate* shall hereafter be opened or set aside merely on the ground of undervalue’ (my emphasis).

³⁸³ In certain cases, the claimant sought to rescind a sale of a reversionary interest in both real and personal property. See for example, *Perfect* (n264), where the claimant sold a reversionary interest in one-sixth of a fund including bank stock and land.

Unlike Article 1674, the rule on the sale of reversions in English law did not apply to all sales of land as it did not apply to the sale of interests in possession.³⁸⁴ Pollock observes that as Article 1674 does not apply to the sale of *droits successifs*,³⁸⁵ French law is ‘just the reverse of our own law as it stood before 1868’.³⁸⁶ However, this comparison is not very apt as *droits successifs* are not analogous to reversionary interests.³⁸⁷ It is the doctrine of estates which allows the concept of a reversionary interest to exist in English law.³⁸⁸ As the doctrine of estates does not exist in French law, there is nothing in French law which is equivalent to a reversionary interest. *Droits successifs* are rights to the whole or a part of a deceased’s estate which has not yet been distributed to the beneficiaries. In the *ancien régime*, *lésion* did not apply to *droits successifs* as the value of *droits successifs* was ‘very uncertain’.³⁸⁹ This rule was preserved by the courts after the promulgation of the *Code civil* in 1804, even though *droits successifs* are not expressly excluded from the scope of Article 1674.³⁹⁰

³⁸⁴ See for example, *Webster* (n331). In this case, Lord Chelmsford LC held that the rule on the sale of reversions was not applicable as the interest sold by the vendor was an interest in ‘a life estate in possession’ rather than a reversionary interest: *Webster* (n331) 546.

³⁸⁵ Citing Pothier, Pollock states that *lésion* did not apply in this situation in French law before 1789: Pollock (n243) 525. See Pothier (n34) 23; Pothier (n40) 159-160. Domat expresses a similar view: Domat (n34) 45.

³⁸⁶ Pollock (n243) 525.

³⁸⁷ This is the only comparative point on Article 1674 and the rule on the sale of reversions which Pollock ventures to make in this treatise.

³⁸⁸ Burn and Cartwright (n261) 52-57.

³⁸⁹ The value of *droits successifs* is uncertain as the purchaser will not know exactly how much the estate is worth at the time of the contract. Pothier stated that the uncertainty is caused by the fact that debts can ‘suddenly appear’: Pothier (n34) 23. A more comprehensive explanation is that as the estate has not been distributed nobody has an exact knowledge of the extent of the assets and liabilities. On the one hand, the value of the assets may exceed ‘all possible predictions’. On the other hand, there may be ‘hidden debts’ which significantly diminish the value of the assets or ‘even totally consume the assets’: Rép civ Dalloz, ‘Vente’ (1858) 372-373.

³⁹⁰ Rép civ Dalloz, ‘Vente’ (1858) 372-375. In fact, *droit successifs* were not mentioned during the extensive debates on *lésion* in the *Code civil* in 1803 and 1804.

Therefore, while Pollock viewed French law as ‘just the reverse’ of English law, it would be more accurate to say that while Article 1674 applies to all landowners, the rule on the sale of reversions covered only reversioners, which was certainly a more limited category. Nonetheless, the rule in English law on the sale of reversions could have been invoked by many landowners as reversionary interests in land were frequently created and sold in England in the nineteenth century³⁹¹. Furthermore, as reversionary interests in land were created and sold by both aristocrats and small farmers,³⁹² it is possible to state that like Article 1674, the rule on the sale of reversions was not limited to the highest echelons of society.

Secondly, the rationale underlying Article 1674 and the rule on the sale of reversions is the preservation of family wealth, particularly land. In the first decade of the nineteenth century when these rules were created in both French and English law, land was still the most significant source of wealth and power.³⁹³ Article 1674 and the rule on the sale of reversions reflect the idea that land is a uniquely important asset which in practice, though not in strict law, belongs to the family rather than the individual.³⁹⁴

Thirdly, in both systems, the focus of the courts in these cases is on the value of the land: the ‘immoveable right’ in French law³⁹⁵ and the reversionary interest in English law. Under the English rule on the sale of reversions, everything turned on the question

³⁹¹ See the discussion in the text above from n259 to n269.

³⁹² As noted above in the text from n266 to n269, this is evident in *Aldbrough* (n257) where the claimant was a Viscount (and then an Earl when his father died) who had a reversionary interest in a vast estate in Ireland and in *Hinckman* (n268) where the land consisted of only 46 acres.

³⁹³ Thompson (n352) *passim*; Moulin (n103) 57.

³⁹⁴ See the text above from n123 to n140 on French law and from n356 to n359 on English law.

³⁹⁵ Article 1674 applies to the sale of ‘an immoveable’. Therefore, this provision has been applied not just to the sale of absolute ownership in land but to the sale of all ‘immoveable rights’ such as servitudes and usufruct: Collart Dutilleul and Delebecque (n168) 157. Nonetheless, it is appropriate to state that ‘the focus of the court in these cases is on the value of the land’ as there is a contract for the sale of absolute ownership in land in most cases in which the claimant invokes Article 1674.

whether the purchaser had paid ‘the full and ample value’³⁹⁶ or ‘the fair market value’³⁹⁷ for the reversion. As Turner LJ observed in *Perfect*, the ‘case... seems to me to resolve itself into the dry question of the market value of the reversion of these properties...’.³⁹⁸ Similarly, in French law, the key question under Article 1674 is whether the purchaser had paid less than five-twelfths of the market value of the land. Five out of the twelve articles in the *Code civil* (Articles 1674 to 1685) which delineate the contours of this rule, specifically address the question of valuation (Article 1675 and Articles 1677 to 1680).

Therefore, in both systems, valuers were (and in French law still are) essential and omnipresent actors in cases in which these rules are invoked. In one case in English law, the claimant relied on the expertise of ‘nine witnesses (consisting of four auctioneers, four actuaries and a land surveyor)’ and the defendant used ‘seven witnesses (consisting of four actuaries, two auctioneers and the solicitor of a reversionary interest society)’.³⁹⁹

In contrast, in French law, there is no such cacophony of voices. The *Code civil* provides specific rules on this point in Articles 1677 to 1680. Article 1677 of the *Code civil* states that the judge must be convinced that the facts are ‘sufficiently genuine and serious’ to justify a presumption that the purchase price was less than five-twelfths of the fair price in order for the case to proceed. At this point, while it is not necessary, the claimant generally produces the opinion of a valuer in support of his claim.⁴⁰⁰ If the judge decides that there is some merit to the claimant’s claim, he will allow the case to proceed

³⁹⁶ *Perfect* (n259), 202 (Sir John Romilly MR).

³⁹⁷ *Burt* (n259), 57 (Lord Cranworth LJ).

³⁹⁸ *Perfect* (n264), 377.

³⁹⁹ *Perfect* (n259), 200-201.

⁴⁰⁰ For a recent example, see *Cour d’appel* of Paris, 24 November 2011 (*Grouchka c SA SIEMP*) in which, at this stage in the proceedings, the claimant used a report which had been prepared by an *expert* who was on a list of *experts* approved by the *Cour de cassation*. *Experts* play a significant role in civil procedure in French law: J Bell, S Boyron and S Whittaker, *Principles of French law* (2nd edn, OUP 2008) 106-108.

and three *experts* must be appointed to determine the value of the land under Article 1678 of the *Code civil*.⁴⁰¹ Dissident views are marginalised as Article 1678 of the *Code civil* provides that the three *experts* must compose a single report and give only one opinion as to the value of the land, which, nevertheless, may be determined by a majority of two to one.⁴⁰²

While valuers play an important role in these cases in both systems, it is the judge who ultimately determines the value of the land (in French law) or the reversionary interest (in English law). For example, in *Foster*, Sir John Romilly MR held that the value of the reversion was the sum which he derived from ‘an average of the valuations of all the witnesses’.⁴⁰³ In other cases, the judges often preferred the evidence of one side to that of the other.⁴⁰⁴

Similarly, as the *Cour d’appel* of Agen stated in a relatively recent case, judges are not obliged to follow the opinion of the *experts* or to order another valuation ‘*si leur*

⁴⁰¹ Article 1680 of the *Code civil* provides that the *experts* will be chosen by the court unless the parties agree to nominate them together.

⁴⁰² Article 1679 of the *Code civil* states that while the reasons for differences of opinion shall be outlined in the report, it cannot disclose which *experts* were of which opinion. The role of *experts* was a very controversial point during the debates on *lésion* in the *Conseil d’Etat* in 1803 and 1804. During these debates, Tronchet highlighted the problems which had arisen in the *ancien régime*. As each party appointed an *expert*, the *expert* often believed that he had to give an opinion which favoured the person who appointed him rather than act independently as an ‘*arbitre*’. Therefore, the opinions of the two *experts* always diverged and as a result, the court had to nominate a ‘*sur-expert*’ who would essentially be the only judge of the value: Fenet, tome XIV (n4) 61-62.

Articles 1677 to 1680 of the *Code civil* minimise the problems which arose during the *ancien régime*. Portalis stated that a claim under Article 1674 would henceforth be treated ‘*avec la même circonspection que pourrait l’être une question d’état*’. However, Berlier opposed the use of *experts* on the ground that the fate of contracts would still turn on a ‘*périlleuse expertise*’. Moreover, he emphasised the principle of freedom of contract in his observation that ‘*tout ce débat se réduit à préférer l’opinion d’un expert à la clause d’un contrat*’: Fenet, tome XIV (n4) 144, 51, 61-62.

⁴⁰³ *Foster* (n316) 471. This point is also evident in *Burt* where Lord Cranworth LJ overturned a decision of the Master of the Rolls. Lord Cranworth LJ observed that it could ‘hardly be a matter of surprise’ that he had come to a different result as the determination of the ‘market value’ of a reversion was ‘a doubtful question of fact... which different minds may naturally view in very different lights’: (n259) 64.

⁴⁰⁴ See for example, *Burt* (n259) and *Perfect* (n264).

conviction s'y oppose'.⁴⁰⁵ In this case, the court affirmed a decision of the *Tribunal de grande instance* of Agen which had held that the price received by the vendor was less than five-twelfths of the fair price even though the *experts* had reached the opposite conclusion.⁴⁰⁶

Nonetheless, in practice, valuers play a more significant role in the application of Article 1674 in French law than they did in the application of the rule on the sale of reversions in English law. This is apparent in two characteristics of the use of *experts* in French law more generally. First, it is the *expert* rather than the judge who 'has seen, sometimes searched for, and evaluated the evidence'.⁴⁰⁷ Secondly, 'notwithstanding the overriding responsibility of the court for determinations of fact, the *expert's* report is usually decisive'.⁴⁰⁸ The essential role of the *expert* is particularly evident in the fact that it is the *expert* rather than the judge 'who must be convinced by the successful party'.⁴⁰⁹ There is nothing in the cases in which Article 1674 is invoked to suggest that these statements are not equally applicable in that context.⁴¹⁰

⁴⁰⁵ *Cour d'appel* of Agen, 28 June 2007 (*SCI RLC c Penicaud*). Similarly, during the debates on the *Code civil* in 1803, Portalis stated that the judge is not bound by the report produced by the *experts*: Fenet tome XIV (n4) 42. This position is consistent with the role of *experts* more generally in the French legal system. See Bell, Boyron and Whittaker (n400) 108.

⁴⁰⁶ However, courts rarely refuse to follow the *expert's* report, both in general (see the text from n407 to n408) and in a claim under Article 1674.

⁴⁰⁷ J Beardsley, 'Proof of fact in French civil procedure' (1986) 34 *Am J Comp L* 459, 484.

⁴⁰⁸ Beardsley (n407) 481.

⁴⁰⁹ *Ibid* 484. Beardsley's wider argument is that the way in which *experts* are used in French law ultimately amounts to a 'mini-trial' and thus a delegation of the judicial function: Beardsley (n407) 481-484.

⁴¹⁰ However, at the initial stage of the claim, before the appointment of the three *experts*, Article 1677 of the *Code civil* requires the claimant to convince the judge that there is sufficient merit to the claim in order for the case to proceed. The significance of the role of *experts* in this rule and in the other rules on unfair prices in contracts in French law which are discussed in this thesis is considered in section (i)(d) in chapter 6.

Three significant differences between Article 1674 and the rule on the sale of reversions show that English law was more extreme than French law on this point. First, the amount by which the fair price could safely exceed the purchase price differed in both systems. In French law, Article 1674 provides that the contract can be set aside only if the purchase price is less than five-twelfths of the fair price. This rule is applied rigorously. For example, in a recent case in the *Cour d'appel* of Nîmes, the contract was not rescinded as even though the purchase price of €60,068 was less than half of the fair price of €123,037, it exceeded the inflexible threshold of five-twelfths of the fair price, which was €51,266.⁴¹¹

In contrast, under the English rule on the sale of reversions, a contract could be set aside if there was any difference, however small, between the purchase price and the fair price. For example, contracts for the sale of reversions were set aside in *Edwards v Browne* and *Foster* where the difference between the purchase price and the fair price was just 11% and 7.5% respectively.⁴¹²

Secondly, the period within which the rule on the sale of reversions could be invoked in English law was significantly longer than that within which a claim can be initiated in French law under Article 1674. While there was no fixed period in English law, the rule on the sale of reversions could be invoked during 'a reasonable time'⁴¹³ after the estate fell into possession rather than a 'reasonable time' after the conclusion of the contract.⁴¹⁴ As a result, this 'reasonable time' often lasted for what seems now to be an unreasonably long period. In *Salter*, Sir John Romilly MR set aside a contract for the sale

⁴¹¹ *Cour d'appel* of Nîmes, 8 November 2011 (*Segura c Chicheportiche*).

⁴¹² (1845) 2 Coll 100, 106; *Foster* (n316) 470.

⁴¹³ *Burt* (n259) 57 (Lord Cranworth LJ).

⁴¹⁴ This is evident in *Salter* (n318).

of a reversion despite ‘the great length of time which has elapsed since the transaction took place, namely forty years’.⁴¹⁵

In contrast, Article 1676 of the *Code civil* provides that a claim based on Article 1674 must be initiated within two years of the conclusion of the contract.⁴¹⁶ In the wider context of French law on *prescription*, Article 1676 of the *Code civil* is particularly strict. As Article 1676 of the *Code civil* is considered to be a *délai préfix* rather than a *délai de prescription*,⁴¹⁷ it is very unlikely that this period would be extended beyond two years after the conclusion of the contract.

The inflexibility of Article 1676 of the *Code civil* was recently challenged in the *Cour de cassation* in *Rivoallan c Chrétien*.⁴¹⁸ In this case, the claimant argued that the *délai préfix* in Article 1676 of the *Code civil* was incompatible with Article 6 of the European Convention on Human Rights which protects the right to a fair trial. The claimant had been placed under the regime of *la tutelle* in 1990 due to his lack of mental

⁴¹⁵ Ibid 165.

⁴¹⁶ See also the text above from n168 to n175. Napoleon played a key role in shaping the scope of Article 1674. This is particularly apparent in the discussions on Article 1676 of the *Code civil*. On 28 January 1803, Napoleon arrived in the middle of the session during the debate on the period of time during which the vendor should be able to initiate proceedings on the grounds of Article 1674. Before the arrival and the intervention of Napoleon, it seemed that the *Conseil d’Etat* was prepared to adopt Crétet’s proposal that the period should be only one year: Fenet, tome XIV (n4) 66.

The rejection of Crétet’s proposal and the adoption of a period of two years can be attributed to Napoleon who directed the debate as soon as he arrived in the *Conseil d’Etat*. While Napoleon proposed that the period should be four years, he argued that a period of at least two years should be adopted. In the final speech on this issue, Napoleon emphasised the importance of a longer period by arguing that the right to invoke Article 1674 should not be rendered ‘illusory’ and by painting a melodramatic image of a vendor who, ‘*violenté par le besoin*’, deprives his descendants of their inheritance and reduces his family to misery. The *Conseil d’Etat* then promptly adopted Article 1676 of the *Code civil* which provides that the vendor must initiate proceedings within two years of the sale of the land: Fenet, tome XIV (n4) 69, 71-72.

⁴¹⁷ Collart Dutilleul and Delebecque (n168) 159-160. Unlike a *délai préfix*, a *délai de prescription* can be suspended for various reasons such as incapacity (for example, if the claimant has been placed under the regime of *la tutelle*). The *loi* of 17 June 2008 significantly altered the rules on *prescription* in French law. However, in general, *délais préfix* are not affected by the *loi* of 2008. See Terré, Simler and Lequette (n170) 1447-1448, 1471-1473. Furthermore, the *loi* of 2008 did not make any changes to Article 1676 of the *Code civil*.

⁴¹⁸ Cass civ 3, 20 May 2009: Bull civ III n°117.

capacity and in 1997 his house had been sold by his *représentant légal*. In February 2003, the claimant recovered his mental capacity and he was released from *la tutelle*. Three months later he sought to rescind the contract under Article 1674.

The *Cour d'appel* of Rennes had held that the claim could not succeed as it been initiated outside the period set out in Article 1676 of the *Code civil*. The *Cour de cassation* refused to quash this decision and held that Article 1676 of the *Code civil* was compatible with Article 6 of the European Convention on Human Rights. The court noted that Article 1674 was a proportionate method of achieving the legitimate objective of 'ensuring legal certainty' and that access to the court had not been blocked as the claimant's rights could have been invoked by his *représentant légal*.⁴¹⁹

The difference between English and French law on the period within which a contract could be challenged on the ground of an unfair price is particularly evident in the sharply contrasting fates of the Reverend Salter and Jean Rivoallan. In *Salter*, the Reverend successfully invoked the rule on the sale of reversions forty years after the conclusion of the contract of sale.⁴²⁰ However, in *Rivoallan*, Jean Rivoallan who had suffered from a mental incapacity, was unable to invoke Article 1674 five years after the conclusion of the contract for the sale of his house.⁴²¹

Thirdly, the burden of proof differed in each system. In English law, the purchaser of the reversion had to establish that the purchase price was not less than the fair price. As Sir John Romilly MR observed in *Foster*, the 'cases... establish that the burden of proof

⁴¹⁹ In practice there was an additional safeguard in this case. As the court also observed, the claimant's house could have been sold only with the permission of a *juge des tutelles*.

⁴²⁰ *Salter* (n318).

⁴²¹ *Rivoallan* (n418).

lies upon the purchaser of a reversionary interest to establish that he has given the full and complete value for it, and that if he fail in that, the transaction cannot stand'.⁴²²

Moreover, it was often very difficult to discharge the burden of showing that a fair price had been paid. In *Salter*, the contract was set aside as forty years after the conclusion of the contract, the purchaser could not prove that the price was not less than the fair price.⁴²³ In this case, Sir John Romilly MR observed, somewhat unreasonably, that the purchaser 'has not thought fit to preserve any evidence of its value when he bought it...'.⁴²⁴ The other evidence which the defendant provided was considered to be unsatisfactory.⁴²⁵

The burden of proof had important consequences in the rule on the sale of reversions. As it was not easy for the purchaser to prove that the reversion 'was of the value, and of no greater value, than that which he gave for it',⁴²⁶ the vendor of the reversion succeeded in almost every case.⁴²⁷ In a particularly perceptive passage in *Foster*, Sir John Romilly MR considered

⁴²² *Foster* (n316) 471. Similarly, in *Perfect*, Turner LJ observed that 'it is not sufficient for the company to say that they gave substantial value... it was incumbent on them to shew... that they gave the fair value': (n264), 377.

⁴²³ *Salter* (n318).

⁴²⁴ *Ibid* 165.

⁴²⁵ *Ibid* 163.

⁴²⁶ *Ibid* 164 (Sir John Romilly MR).

⁴²⁷ *Perfect* (n264) was one of the rare cases in which the purchaser succeeded in discharging the burden of proof.

the present state of the law on this subject practically to amount to this:... unless a person gives much more than the value, it is impossible to purchase a reversionary interest with safety except under a sale by auction.⁴²⁸

In contrast to the rule in English law on the sale of reversions, in a claim under Article 1674 in French law, the burden of proving that the purchase price was less than five-twelfths of the fair price lies on neither the purchaser nor the vendor. Article 1677 of the *Code civil* states that the court must determine whether the facts are ‘sufficiently genuine and serious’ to justify a presumption that the purchase price was less than five-twelfths of the fair price. It is clear that Article 1677 of the *Code civil* does not place the burden of proof on the vendor. In *Collière c Rubbio*, the *Cour de cassation* held that Article 1677 of the *Code civil* does not require the vendor to convince the court that the purchase price actually was less than five-twelfths of the fair price.⁴²⁹ In this case, the *Cour de cassation* quashed the decision of the *Cour d’appel of Toulouse* which had rejected the vendor’s claim under Article 1674 on the ground that it was not satisfied that the evidence which she had provided to the court established that the purchase price was less than five-twelfths of the fair price.

As discussed earlier,⁴³⁰ if the court decides that the facts are ‘sufficiently genuine and serious’ to justify a presumption that the purchase price was less than five-twelfths of the fair price, three *experts* will be appointed to determine the value of the land under

⁴²⁸ *Foster* (n316) 471. In *Shelly*, it was established that the rule on the sale of reversions did not apply when the reversion had been sold at an auction. The rationale for this rule was that ‘the sale by auction is evidence of the market price’: (n276) 236 (Sir John Leach V-C). There is a similar but narrower exception to Article 1674 in French law. Article 1684 of the *Code civil* provides that sales which must be conducted under ‘*autorité de justice*’ cannot be rescinded on the ground of an unfair price. Such sales, which include the sale of land belonging to minors, occur at an auction which is supervised by a judge: Collart Dutilleul and Delebecque (n168) 158. On the other hand, where a vendor chooses to sell his land by auction, he can invoke Article 1674. This is evident in Cass com, 8 July 1980: Malaurie, Aynès and Gautier (n166) 153.

⁴²⁹ Cass civ 3, 20 December 1994: Bull civ III n°230.

⁴³⁰ See the text above from n400 to n402.

Article 1678 of the *Code civil*. Therefore, unlike the English rule on the sale of reversions, at no point is the burden of proof on the purchaser in French law in a claim under Article 1674. On the other hand, at no point is the burden of proving that the price was actually less than five-twelfths of the fair price on the vendor. Under Article 1677 of the *Code civil*, the vendor is required only to provide some evidence which leads the court to believe that the facts are ‘sufficiently genuine and serious’ to justify a presumption that the purchase price was less than five-twelfths of the fair price.

The differences between the English rule on the sale of reversions and Article 1674 in French law in relation to the extent of the difference between the fair price and the purchase price, the period within which claims can be made and the burden of proof demonstrate that English law on this point was much more extreme than French law. Nonetheless, but also perhaps because of this, Article 1674 is still applicable in 2012, over two hundred years after it was promulgated in French law, while the rule of the sale of reversions did not even stagger into the twentieth century in English law.

CHAPTER 4

A COMMON PRIORITY: SALVAGE

The maritime laws of England and France comprise a special body of rules which often deviate significantly from the general principles of law in both systems.¹ One particularly striking illustration of the distinctiveness of maritime law in both systems is the rule which allows courts to intervene in salvage contracts on the ground of an unfair price by awarding the salvor a higher sum or the salvee a lower sum. The origin of this rule, the application of this rule in practice and the rationales underpinning this rule in English and French law will be considered in this chapter. It is principally a story of similarities rather than differences.

In both systems, the rule that courts can intervene in salvage contracts on the ground of an unfair price is based on the policy of protecting salvees as they are considered to be weak parties to salvage contracts. This rule is also based on the policy of promoting salvage operations on the ground that shipping plays an essential economic role in England and France. The policy of protecting salvors on the ground that they are also weak parties to salvage contracts is present only in English law.

Furthermore, this chapter shows that the rule on unfair prices in salvage contracts in French law is derived from a similar, older rule in English law. This legal transplant from English to French law is particularly surprising for two reasons. First, intervention in contracts on the ground of an unfair price is much more characteristic of French law than English law. Secondly, unlike other branches of English law, civil law is an essential source of many aspects of English maritime law. Therefore, it is particularly significant

¹ Bonassies and Scapel state that there are more special rules in maritime law than in other discrete areas of French law such as commercial law or labour law: P Bonassies and C Scapel, *Traité de droit maritime* (2^e éd., LGDJ 2010) 4. Similarly, English maritime law (which is also commonly called admiralty law) is distinct from the common law. As Lord Halsbury LC observed in *Currie v M'Knight*, 'the Admiralty law... differs from the common law of England...': [1897] AC 97, 101.

that the rule on unfair prices in salvage contracts was imported into French law from English law rather than vice versa.

(i) Contractual and extracontractual claims for salvage

‘Treacherous in calm, and terrible in storm’, the ‘unfathomable sea’ has always been perilous for sailors, ships and cargo.² Where there is a risk that the ship or cargo may be lost or significantly damaged, the salvees may accept or request the help of salvors and enter into a salvage contract.

While salvors and salvees may enter into a contract under which the salvors agree to perform salvage services for a certain price, salvors may also provide salvage services in the absence of a contract. In both English and French law, a salvor can claim remuneration for the salvage services which he has provided to the salvee even though the parties did not enter into any contract.

In general, in English law, a person who saves the property of another cannot recover the expenses which he has incurred, the value which he has conferred on the other party or any other award. As Bowen LJ famously stated in *Falcke v Scottish Imperial Insurance Co*, the

general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another does not according to English law create any lien upon the property saved or benefited, nor, even standing alone, create any obligation to repay the

² PB Shelley, ‘Time’ in *Posthumous poems of Percy Bysshe Shelley* (Hunt 1824) 215.

expenditure. Liabilities are not to be forced upon people behind their backs anymore than you can confer a benefit upon a man against his will.³

However, salvage is one of numerous exceptions to this general rule.⁴ In English law, it is well established that a salvor can claim remuneration for his services even in the absence of a contract. As Bruce J observed in *The Hestia*, ‘... the parties may by contract determine the amount to be paid; but the right to salvage is in no way dependent upon contract...’.⁵ He stated that where

property has been salvaged from sea perils, and the claimants have effected the salvage, the law confers upon them the right to be paid salvage reward out of the proceeds of the property which they have saved or helped to save.⁶

In the absence of a contract, the court will award a sum which covers not only the expenses incurred by the salvor and the value of the services provided to the salvee but also an element of reward in order to promote the policy of encouraging salvors to undertake such operations.⁷ The generous remuneration of salvors is based on the policy

³ (1886) 34 Ch D 234, 248.

⁴ In *Falcke* (n3) 248, Bowen LJ observes that salvage ‘is an exception to this proposition’. In certain other circumstances, the law allows a necessitous intervener to obtain an award. For example, a claimant who pays for a burial may recover the expenses from a relative of the deceased and an agent of necessity may recover his expenses from his principal. See A Burrows, *The law of restitution* (3rd edn, OUP 2010) 470-474.

⁵ [1895] P 193, 199. This rule enshrined in Article 12.1 of the Salvage Convention 1989 which was incorporated into English law by the Merchant Shipping Act 1995, s 224. The Salvage Convention 1989 is set out in Schedule 11 of this Act.

⁶ *The Hestia* (n5) 199.

⁷ FD Rose, *Kennedy and Rose: law of salvage* (7th edn, Sweet and Maxwell 2010) 22-24. There are sharply differing views on the question whether the rule that a salvor can claim remuneration for his salvage services from the salvee in the absence of a contract is based on the principle of restitution for unjust enrichment. It has been argued that this principle can explain extracontractual claims in salvage. See Rose (n7) 19-21. However, given that the sum awarded to salvors covers more than the benefit conferred on the owners of the ship and cargo, it is difficult to explain the claim on the basis of the principles of restitution for unjust enrichment. Therefore, it has been argued that salvage cannot be explained by the principles of restitution for unjust enrichment. See P Birks, *Unjust enrichment* (2nd edn, OUP 2005) 22-24; J Edelman

of encouraging salvors to undertake salvage operations. As Willmer J observed in *The Telemachus*, it is important

to arrive at such an award as will fairly compensate the master and the crew of the salving vessels without injustice to the salvee's interests, and such an award as will, in the interests of public policy, encourage other mariners in like circumstances to perform like services.⁸

Similarly, in French law, a salvor can claim remuneration for the provision of salvage services even in the absence of a contract. This rule was clearly affirmed by the courts in the late nineteenth century⁹ and it was then enshrined in legislation in Article 8 of the *loi* of 29 April 1916, which was subsequently replaced by Article 16 of the *loi* of 7 July 1967.¹⁰ As in English law, Article 12.1 of the Salvage Convention 1989 is the current basis of this rule in French law.¹¹

In contrast to English law, in French law, the general rule is that necessitous interveners can recover the expenses which they incur while doing something useful for another person. Article 1372 of the *Code civil* provides that the quasi-contract of *gestion d'affaires* arises when one person voluntarily does something useful for another person.

and E Bant, *Unjust enrichment in Australia* (OUP 2006) 305; G Virgo, *The principles of the law of restitution* (OUP 2006) 302-303; Burrows (n4) 486.

⁸ [1957] P 47, 59. This policy is also evident in Article 13.1 of the Salvage Convention 1989 which provides that 'the reward shall be fixed with a view to encouraging salvage operations...'

⁹ C Lyon-Caen, 21 *RCLJ* (1892) 356, 356-358. This rule is also evident in the cases in which a salvor was remunerated for his services even though the salvage contract was annulled on the ground of *violence*. See for example, Cass req, 27 April 1887 (*Le Rolfe*): D.1888.263, S.1887.372, *Cour d'appel* of Aix, 19 April 1893 (*Le Titian*): 9 *RIDM* (1893-1894) 185 and *Tribunal de commerce* of Saint-Nazaire, 3 July 1896 (*Le Garibaldi*): 13 *RIDM* (1897-1898) 94.

¹⁰ Hereafter, the *loi* of 1916 and the *loi* of 1967 respectively.

¹¹ The Salvage Convention 1989 was incorporated into English law by section 224 of the Merchant Shipping Act 1995 and it was incorporated into French law by the *décret* n° 2002-645 of 23 April 2002.

The *gérant* can recover the necessary and useful expenses which he incurs from the *maître* under Article 1375 of the *Code civil*.

Nonetheless, as the *Cour de cassation* affirmed in 1997 in *Le Tevera*, the remuneration awarded to salvors in the absence of a contract in French law cannot be explained by the principle of *gestion d'affaires*.¹² Article 1375 of the *Code civil* provides that the *gérant* can recover only his expenses from the *maître*. However, as in English law, French law has always awarded salvors a sum which exceeds the expenses which they incur while performing the service. This is evident in the *Le Rolfe*,¹³ where the *Cour d'appel* of Rouen held that even though the contract should be set aside on the ground of *violence*, the salvor was entitled to be remunerated for his service. The court held that in order to determine the amount of the award it was fair to consider the value of the ship and its cargo and especially the exertions of the salvor and the risks of the operation. The court held that the sum of 4,190 francs which was awarded to the salvor at first instance by the *Tribunal de commerce* of Rouen was based on these criteria and should therefore be upheld. In a passage which is reminiscent of the observation of Willmer J in *The Telemachus*, the *Cour d'appel* of Rouen stated that it is important to encourage rescues by giving generous remuneration to those who undertake salvage operations.¹⁴ While the

¹² Cass com, 14 October 1997 (*Le Tevera*): DMF 1997.1080. In this case, the *Cour de cassation* also rejected the claimant's argument that the rule was based on the principle of *enrichissement sans cause*. This principle is not set out in the *Code civil*. It was established as a ground of liability in French law in Cass req, 15 June 1892 (*Patureau-Miran c Boudier*): S.1893.281.

The view that the rule that a salvor could claim remuneration from the salvee in the absence of a contract was based on the principles of *gestion d'affaires* or *enrichissement sans cause* had previously been rejected by Ripert: G Ripert, *Droit maritime* tome III (4^e éd., Dalloz 1953) 142-143. Maritime law was one of Ripert's many areas of expertise. He was appointed as professor of comparative commercial law and maritime law at the University of Paris in 1918: J-L Halpérin, 'Georges Ripert' in P Arabeyre, J-L Halpérin and J Krynen (eds), *Dictionnaire historique des juristes français XII^e-XX^e siècle* (PUF 2007) 669, 669.

¹³ *Le Rolfe* (n9).

¹⁴ However, the *Cour d'appel* of Rouen also observed that 'nevertheless, it is important that a salvage operation does not become a means of speculating on the danger or misfortune of another person'. (See the report in Dalloz (n13) for the entire judgment of the *Cour d'appel* of Rouen.)

award was upheld by the *Cour de cassation*, this point was not discussed in the judgment of that court.

Thus, salvors can receive remuneration for their services in English and French law in the absence of a contract. However, in both systems, since the nineteenth century, salvage services have usually been provided after the parties have concluded a salvage contract.¹⁵ Therefore, in English and French law, the rules on salvage contracts are much more significant in practice than those on salvors' claims for remuneration outside of contract.

Nevertheless, the rules on the remuneration of salvors in the absence of a contract constitute a very important backdrop to the rule which allows courts to intervene in salvage contracts on the ground of an unfair price by awarding the salvor a higher sum or the salvee a lower sum. As a salvor can claim remuneration in the absence of a contract in both English and French law, it is impossible to say whether courts set aside salvage contracts on the ground of an unfair price and then award the salvor a sum on the basis of the extracontractual rules on salvage or whether courts simply increase or decrease the price agreed in salvage contracts. In practice, the result is the same in both instances. However, in theory, altering the price is a much more significant infringement of the

¹⁵ Bonassies and Scapel (n1) 352; Rose (n7) 5, 400-401. Salvage contracts became common only in the nineteenth century in English and French law. Bonassies and Scapel note that salvage contracts first appeared in French law in the second half of the nineteenth century as ships became stronger and could perform salvage services more easily: Bonassies and Scapel (n1) 343. Similarly, as is evident from the cases discussed in this thesis, in English law, most of the cases on unfair prices in salvage contracts date from the second half of the nineteenth century. However, certain significant cases were decided in the second quarter of the nineteenth century. See for example *The Mulgrave* (1827) 2 Hagg 77 and *The True Blue* (1843) 2 W Rob 176. Reeder notes that there 'is little evidence of a practice of making formal salvage agreements... until the nineteenth century' when the power of steam made salvage more feasible: J Reeder, *Brice on maritime law of salvage* (5th edn, Sweet and Maxwell 2011) 321. Rose observes that salvage contracts became more common as a result of technological developments in shipbuilding and communications: Rose (n7) 1. Therefore, it is probable that the use of salvage contracts in English law at an earlier point in the nineteenth century than in French law can be attributed to the fact that the United Kingdom was the dominant force in world shipping throughout the nineteenth century. See the text below from n230 to n237. See also, R Hope, *A new history of British shipping* (John Murray 1990) 263-348.

principle of freedom of contract than setting aside the contract and awarding a sum on the basis of the extracontractual rules on salvors.¹⁶

The remainder of this chapter will consider the origin, rationales and application of the rule on unfair prices in salvage contracts in English and French law.

¹⁶ This point is considered in more detail in section (i)(b) in chapter 6.

(ii) Unfair prices in salvage contracts in English law

The general rule in English law is that salvage contracts are binding on the salvors and the salvees. The Court of Admiralty found it necessary to affirm this general rule when salvage contracts began to appear in cases in the second quarter of the nineteenth century. The rule is evident in *The Mulgrave*¹⁷ where Sir William Scott (Lord Stowell)¹⁸ held that the salvors could not claim an award for salvage as they had entered into a contract with the salvees to perform the service for a certain price and the contract was binding on them. In *The True Blue*,¹⁹ Dr Lushington referred to Lord Stowell's judgment in *The Mulgrave*²⁰ and affirmed this general rule. Dr Lushington held that 'an agreement... can be legally made' between salvors and salvees.²¹ Similarly, in *The Helen and George*, Dr Lushington observed that contracts between salvors and salvees 'will generally be enforced'.²²

However, the court will not enforce a salvage contract that is unjust or unfair. In *The Helen and George*, Dr Lushington observed that the court would not enforce a contract if it was 'totally contrary to justice and the equity of the case'.²³ After the Judicature Acts 1873-1875, this rule was also affirmed by the Court of Appeal in

¹⁷*The Mulgrave* (n15).

¹⁸ William Scott was an important figure in the development of admiralty law. He was a judge of the Court of Admiralty from 1798 until 1828. See HJ Bourguignon, *Sir William Scott, Lord Stowell: judge of the High Court of Admiralty, 1798-1828* (CUP 1987). Holdsworth described William Scott as 'the greatest of all the civilians in the whole history of English law': W Holdsworth, *A history of English law* vol XIII (AL Goodhart and HG Hanbury eds, Sweet and Maxwell 1952) 679. John Scott (Lord Eldon) who served twice as Lord Chancellor was the younger brother of William Scott.

¹⁹ *The True Blue* (n15).

²⁰ *The Mulgrave* (n15).

²¹ *The True Blue* (n15) 179.

²² (1858) Swab 368, 369.

²³ *The Helen and George* (n22) 369.

Akerblom v Price, where Brett LJ referred to this ‘great and fundamental rule’.²⁴ He stated that ‘if the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just’.²⁵

Therefore, the court will set aside a contract between a salvor and a salvee which stipulates a price which is either too high or too low. In *The Henry*, Dr Lushington stated that

The Court would be very reluctant, under ordinary circumstances, to disturb an agreement made between parties on account of the sum appearing too large or too small, but I do not say that there are not cases in which I should not hesitate for a single moment to pronounce against an agreement either on one ground or the other.²⁶

This rule has been applied in numerous cases.

First, contracts in which the price is too low will be set aside in favour of the salvor. In *The Phantom*, a smack entered Lowestoft harbour to take refuge from a gale and also as she had broken her boom.²⁷ The master of the Phantom entered into a contract with seven beachmen to bring the Phantom from the south side of the harbour to the north side in order to avoid collisions with other vessels which were rushing in to the harbour at the same time. There were ‘masts and spars falling on all sides’.²⁸ It took the salvors two

²⁴ (1881) 7 QBD 129, 133.

²⁵ *Akerblom* (n24) 133.

²⁶ (1851) 15 Jur 183, 183.

²⁷ (1866) A & E 58.

²⁸ *The Phantom* (n27) 60.

hours to bring the Phantom to the north side of the harbour and during this time, the Phantom collided with another vessel.

The salvees alleged that the salvors had agreed to perform the service for 8s 6d. The salvors contended that there had been no contract and they sought to be remunerated for their services on an extracontractual basis. At first instance, a bench of magistrates dismissed the salvors' claim on the ground that there had been no salvage as there had never been any danger. In the Court of Admiralty, Dr Lushington overturned this decision. He assumed that the salvors and the salvees had entered into a contract under which the salvees agreed to pay the salvors 8s 6d. Nonetheless, Dr Lushington held that the contract should be set aside on the ground that the price was 'utterly futile'.²⁹ The salvors were awarded £10 for their services.

In *The Phantom*,³⁰ it is evident that freedom of contract was subordinate to the rule that the salvor must not receive too low a price. Dr Lushington observed that a contract between a salvor and a salvee must be 'just and equitable' as 'however much it has been agreed upon by both parties, the court is in the habit of overruling such an agreement if it is unjust and inequitable'.³¹

While there are not many cases in which contracts were set aside on the basis that the price was too low, Dr Lushington was eager to emphasise that the courts were willing to protect salvors as well as salvees. In *The Theodore*, a case in which the contract between the salvors and the salvees was set aside on the basis that the price was too high,

²⁹ Ibid 61.

³⁰ Ibid.

³¹ Ibid. See also *The Silver Bullion* (1854) 2 Sp E & A 70 where the salvage contract was set aside on the ground that the price paid to the salvor was too low. In this case, the contract was concluded after the salvage operation had been completed.

Dr Lushington noted that even though the court was protecting the salvees in this case, ‘the Court would be just as ready, in favour of salvors, to set aside an agreement, if satisfied that it was wholly inequitable’.³²

A contract between a salvor and a salvee will also be set aside where the price is too high. The cases in which the contract has been set aside on the ground that the price is too high are far more numerous than those in which the contract has been set aside on the ground that the price is too low.³³ The application of this rule is particularly evident in three cases in the second half of the nineteenth century.

In *The Theodore*,³⁴ the master of the Theodore, who had been onshore, was brought out to his barque in the Yarmouth Roads by twenty beachmen. The barque had lost her port anchor and she was dragging her other anchor. When the master reached his barque, he entered into a contract with the beachmen to bring the barque safely into Lowestoft harbour for £200.

The owners of the barque subsequently refused to pay the £200 to the salvors. The salvors contended that the contract was binding on the salvees. Dr Lushington held that the contract should be set aside as the price was too high. He stated that the assistance provided by the salvors had been ‘in some degree serviceable, and... requisite’ but that ‘the actual service was not difficult, and lasted only between three and four hours’.³⁵ Therefore, Dr Lushington held that the contract to pay the salvors £200 was ‘an exorbitant demand, and such as no Court of justice would be justified in carrying into

³² (1858) Swab 351, 352.

³³ R Goff and G Jones, *The law of restitution* (7th edn, Sweet and Maxwell 2007) 376.

³⁴ *The Theodore* (n32).

³⁵ *Ibid* 352.

effect'.³⁶ The salvors were instead awarded £50 which was the sum that had been tendered by the salvees.

*The Silesia*³⁷ and *The Cargo ex Woosung*³⁸ provide particularly stark illustrations of the subordinate role of freedom of contract in the context of salvage contracts. In these cases, the contract was set aside on the basis that the price was too high, despite the fact that in both cases the salvees had ample time for reflection as there was no immediate danger and the salvors and the salvees had vigorously negotiated the price of the salvage operation.

In *The Silesia*,³⁹ the steamship *Silesia*, which had been on a voyage from New York to Hamburg, was disabled as a result of a broken propeller and she was lying 340 miles from Queenstown. There was no immediate danger. 'The weather was fine and the sea was smooth' and the ship was 'tossing about for four of five days' before the master decided to request help by sending out signals of distress.⁴⁰ Another steamship, the *Vaderland*, which had been travelling from Antwerp to Philadelphia, then arrived at the scene.

The captain of the *Silesia* and the captain of the *Vaderland* entered into a contract under which the *Vaderland* would tow the *Silesia* to Queenstown for £15,000. Before the contract was signed, the captains negotiated the price. While there was conflicting evidence, it was clear that while the captain of the *Vaderland* had initially asked for

³⁶ Ibid.

³⁷ (1880) 5 PD 177.

³⁸ (1876) 1 PD 260.

³⁹ *The Silesia* (n37).

⁴⁰ Ibid 183.

£20,000, he ultimately agreed to accept £15,000. The salvees subsequently refused to pay £15,000 to the salvors.

Sir Robert Phillimore held that the contract should be set aside on the ground that the price was too high. He held that ‘the sum specified in the agreement is so exorbitant that the Court ought to exercise its equitable jurisdiction and not to assist in the carrying of it into effect’.⁴¹ He held that £7,000 was ‘the proper sum to award’.⁴²

Similarly, in *The Cargo ex Woosung*,⁴³ a contract between salvors and salvees was set aside on the ground that the price was too high even though the danger was not immediate and there were protracted negotiations between the parties. In this case, a steamship, which was on a voyage from Calcutta to London, struck a reef off an island in the Red Sea. The captain of the *Woosung* sought to recover as much of the cargo as possible from the wreck. First he entered into a contract with a Greek trader who arranged for local Arabs to recover the cargo. This contract provided that the salvors would be paid one-third of the proceeds of the cargo which they recovered. Two weeks later, the captain entered into another contract with the captain of the *Kwangtung* who had been sent out with English sailors by the owners of the cargo. The captain of the *Woosung* initially offered to pay the English salvors one-third of the proceeds of the cargo which they could recover. However, they refused to agree to the same terms which the Greek trader had accepted. It was only ‘after much bargaining’⁴⁴ that the captain of the *Woosung* entered

⁴¹ *Ibid* 185.

⁴² *Ibid*. The owners of the *Vaderland* had suffered loss as they had to charter a vessel to perform another contract due to the delay caused by the salvage operation and they also incurred penalties under other contracts as a result of the delay. Sir Robert Phillimore held that the owners of the *Vaderland* should be awarded £500 as compensation for the loss on the charter and the parties came to their own arrangement on the issue of compensation for the penalties incurred as a result of the delay.

⁴³ *The Cargo ex Woosung* (n38).

⁴⁴ *Ibid* 261.

into a contract under which he agreed to pay the salvors half of the proceeds of the cargo which they could recover. The salvors recovered 'a considerable portion of the cargo, which ultimately realised on sale about £37,000'.⁴⁵ It was almost two months after the ship struck the reef that the ship was eventually destroyed by a gale. Therefore, there was clearly no immediate danger when the contract was concluded with the captain of the *Woosung*. The owners of the cargo subsequently refused to pay half of the proceeds to the salvors.

At first instance, Sir Robert Phillimore held that the contract could not be set aside on the ground that the price was too high as the price which the salvee agreed to pay to the salvor was not 'exorbitant and inequitable'.⁴⁶ This decision was overturned in the Court of Appeal where it was held that the price was too high. Bagallay JA referred to Dr Lushington's judgment in *The Helen and George*⁴⁷ and affirmed the rule that 'the ground of exorbitancy of the agreement would be sufficient to set it aside'.⁴⁸ Nonetheless, it was held that 'the compensation ought to be on a liberal scale'⁴⁹ and the salvors were awarded £6,000.

While courts can intervene in salvage contracts if the price is unfair, they will not disregard the price stipulated in the contract unless it is significantly lower or higher than the value of the salvage services. This is evident in *The Helen and George*,⁵⁰ where Dr Lushington refused to decrease the price agreed in the salvage contract. While he

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *The Helen and George* (n22).

⁴⁸ *The Cargo ex Woosung* (n38) 270.

⁴⁹ *Ibid* 271.

⁵⁰ *The Helen and George* (n22).

refrained from ‘saying that these facts entirely justify the sum of money agreed upon’, he stated that the price was not ‘so exorbitant as to warrant the Court interfering with it’.⁵¹ Similarly, where the price is less than the value of the services, the court will not increase the price unless it is excessively low. This is apparent in *The Firefly* where Dr Lushington held that even ‘though it seems a hard bargain, it is not such as the Court would be justified in setting aside’.⁵²

The rule on unfair prices in salvage contracts will not apply where the price is considered to be too high or too low due to a change in circumstances subsequent to the conclusion of the contract which makes the service easier or harder to perform than the parties had initially envisaged. This is particularly evident in two cases. First, in *The True Blue*, Dr Lushington observed that

it is no argument against the validity of the contract, that in the first instance it was entered into under the impression that the service would be light, but that, in consequence of a change in weather, or other circumstances of that nature, it subsequently becomes more onerous... the parties who enter into the engagement take the risk of any change of circumstances which may, in effect, alter the extent of the stipulated service.⁵³

Similarly, in *The Strathgarry*,⁵⁴ it is clear that subsequent changes in circumstances are not relevant to the rule that a contract can be set aside on the ground that the price is too high or too low. In this case, Butt LJ observed that

⁵¹ Ibid 369.

⁵² (1857) Swab 240, 241.

⁵³ *The True Blue* (n15) 180.

⁵⁴ [1895] P 264.

in forming an opinion on the fairness or unfairness of the agreement... the Court must regard the position of the parties at the time the agreement was entered into. The agreement cannot become fair or unfair by reason of circumstances which happened afterwards.⁵⁵

The rule that salvage contracts can be set aside on the basis that the price is too low or too high is still in force in English law.⁵⁶ Soon after the Judicature Acts 1873-1875 merged the common law, equity and civil law courts into one Supreme Court of Judicature, there were suggestions in some cases that courts could intervene in these contracts on the ground of an unfair price only if there had also been some procedural unfairness. For example, in *The Medina*, where a salvage contract was set aside, James LJ stated that ‘pressure had been exercised’,⁵⁷ Baggallay JA observed that ‘there may have been some unfair dealing in the transaction’⁵⁸ and Brett JA noted that there had been ‘practical compulsion’.⁵⁹

However, the traditional position was trenchantly reaffirmed by the Court of Appeal in *The Cargo ex Woosung*⁶⁰ and by the Court of Admiralty in *The Silesia*.⁶¹ In

⁵⁵ *The Strathgarry* (n54) 271.

⁵⁶ However, there have been no significant cases on unfair prices in salvage contracts since the beginning of the twentieth century. The paucity of cases can be attributed to the use of standard form salvage contracts which initially provided that any dispute as to the fairness of the price would be referred to arbitrators and since 1972, standard form salvage contracts provide that the price itself will be determined by arbitrators. See the text below from n98 to n127.

⁵⁷ (1876) 2 PD 5, 6.

⁵⁸ *The Medina* (n57) 7.

⁵⁹ *Ibid* 7, 8.

⁶⁰ *The Cargo ex Woosung* (n38).

⁶¹ *The Silesia* (n37). The term ‘Court of Admiralty’ is used in this thesis to designate any English court which is exercising admiralty jurisdiction. After the Judicature Acts 1873-1875, the jurisdiction of the Court of Admiralty was exercised by the High Court of Justice in the Probate, Divorce and Admiralty Division. Since 1971, this jurisdiction has been exercised in the Queen’s Bench Division: Rose (n7) 7. In this thesis, the context or the date of the decision which is being discussed will indicate whether the term

The Cargo ex Woosung, the claimant argued that ‘the power of the Court of Admiralty in setting aside any such agreement is no greater than that of any other Court’.⁶² The claimant stated that there must be therefore ‘fraud in some shape’ in order to set aside the salvage contract and that in this case ‘not even duress can be alleged’.⁶³ However, Baggallay JA referred to Dr Lushington’s judgment in *The Helen and George*⁶⁴ and held that ‘the ground of exorbitancy of the agreement would be sufficient to set it aside’.⁶⁵

Similarly, in *The Silesia*, while the claimant argued that a salvage contract could be set aside only if it had been concluded ‘under compulsion’, the defendant contended that the price agreed was ‘grossly exorbitant’ and that the court could ‘on that ground alone, refuse to assist in carrying it out’.⁶⁶ Sir Robert Phillimore clearly stated that ‘the only question... is whether... the sum agreed upon between the two masters, is so exorbitant as to induce the Court to set the salvage agreement aside...’ and he did not make any reference to compulsion.⁶⁷ Therefore, the rule that the court can intervene in

‘Court of Admiralty’ refers to the former Court of Admiralty which existed prior to the Judicature Acts 1873-1875.

Given that in *The Medina* (n57) an unfair price was not considered to be sufficient to justify intervention in salvage contracts, this case is actually an atypical case on unfair prices in salvage contracts. Modern contract lawyers often view salvage contracts through the lens of Lord Denning’s doctrine of inequality of bargaining power which he expounded in his famous judgment in *Lloyd’s Bank v Bundy* [1975] QB 326. While Lord Denning did not mention *The Medina* (n57) in his judgment in *Lloyd’s Bank*, he referred to two subsequent cases on salvage contracts and he used them to support the existence of a doctrine of inequality of bargaining power under which it was necessary to demonstrate more than an unfair price in order to rescind a contract: (n61) 338-339. Therefore, the fact that salvage contracts are often considered in light of Lord Denning’s doctrine of inequality of bargaining power might create the misleading impression that the courts cannot intervene in salvage contracts solely on the ground of an unfair price.

⁶² *The Cargo ex Woosung* (n38) 267.

⁶³ *Ibid* 267.

⁶⁴ *The Helen and George* (n22).

⁶⁵ *The Cargo ex Woosung* (n38) 270.

⁶⁶ *The Silesia* (n37) 181-182.

⁶⁷ *Ibid* 183.

salvage contracts on the ground of an unfair price ultimately emerged intact from the absorption of the Court of Admiralty into the unified Supreme Court of Judicature.

This rule was later enshrined in legislation. Section 224 of the Merchant Shipping Act 1995 incorporates the Salvage Convention 1989 into English law. Article 7 of the Salvage Convention 1989 provides that a ‘contract or any terms thereof may be annulled or modified if... the payment under the contract is in an excessive degree too large or too small for the services actually rendered’.⁶⁸

What are the rationales underlying the rule on unfair prices in salvage contracts? Three rationales are discernible in English law. First, the rule that courts can intervene in salvage contracts on the ground that the price is too low is based on the policy of protecting the salvor as he is a weak party to the contract. For example, the view that salvors are ignorant and unable to look after their own interests is evident in *The Silver Bullion* where a salvage contract was set aside on the ground that the price was too low.⁶⁹ Dr Lushington observed that salvors were ‘ignorant persons’ who were not ‘competent judges’ of the value of their services.⁷⁰

The Court of Admiralty was equally protective of sailors outside the context of salvage contracts.⁷¹ In *Robinett v The Ship ‘Exeter’*, which involved a claim for wages by a mate on a ship in the East India service, Sir William Scott observed that ‘common

⁶⁸ There are two other separate rules in Article 7 of the Salvage Convention 1989 but they are irrelevant for the purposes of this thesis. Hereafter, Article 7 of the Salvage Convention 1989 refers only to the rule on unfair prices in salvage contracts.

⁶⁹ *The Silver Bullion* (n31).

⁷⁰ Ibid 75. The eagerness of the Court of Admiralty to protect salvors is also evident in *The Theodore* (n32). In this case, a salvage contract was set aside on the ground that the price was too high. Dr Lushington stated that he had reached this decision with ‘regret’ as the Court of Admiralty is ‘generally anxious to protect the interests of salvors’: Ibid 352.

⁷¹ See Bourguignon (n18) 78-79, 255 and P Luther, ‘Campbell, Espinasse and the sailors: text and context in the common law’ 19 *LS* (1999) 526, 543-544.

mariners' were entitled to 'the indulgence and favourable attention of the Court', and that they were 'placed in a peculiar manner under the tender protection of the Court' due to their 'ignorance and helpless state'.⁷² Similarly, in *The Juliana*, which also involved a sailor's claim for his wages, Lord Stowell noted that 'the common mariner is easy and careless, illiterate and unthinking...'.⁷³

The considerate and protective attitude towards sailors which is evident in the decisions of the Court of Admiralty is also apparent in legislation in the eighteenth and nineteenth centuries, in decisions of the courts of equity and even in decisions of the courts of common law.⁷⁴ In the eighteenth century, the legislature passed a statute which protected sailors in their contracts of service⁷⁵ and two statutes which protected sailors who sold their shares in prize money.⁷⁶ Furthermore, in the nineteenth century, the 'paternalist provisions' of two statutes significantly improved the position and the working conditions of sailors.⁷⁷

A protective attitude towards sailors is also evident in the court of Chancery in the eighteenth century. In *Baldwin and Alder v Rochford*, Lord Hardwicke set aside a contract for the sale of a sailor's share in prize money and stated that every contract with a sailor must be 'fair' as 'there cannot be a more useful set of men to the public, nor a

⁷² *Robinett v The Ship 'Exeter'* (1799) 2 C Robinson 261, 261.

⁷³ (1822) 2 Dod 504, 509.

⁷⁴ The protection of sailors 'in Equity and in legislation throughout the eighteenth century, and right into the middle of the nineteenth century' has been described as 'one of the forgotten episodes of legal history': PS Atiyah, *The rise and fall of freedom of contract* (Clarendon Press 1979) 171. See also Luther (n71) 540-545.

⁷⁵ 2 Geo 2, c 36 (1729): Luther (n71) 542.

⁷⁶ 21 Geo 2, c 24 (1747) and 26 Geo 3, c 63 (1786): Luther (n71) 541.

⁷⁷ The Merchant Seaman Act 1844 (7 & 8 Vict c 112) and the Merchant Shipping Act 1854 (17 & 18 Vict c 104): Atiyah (n74) 543-544.

more unthinking sort of people than common sailors...'.⁷⁸ Similarly, in *How v Weldon and Edwards*, where a contract for the sale of a sailor's share in prize money was also set aside, Sir Thomas Clarke MR stated that sailors are 'a race of men loose and unthinking, who will almost for nothing part with what they have acquired perhaps with their blood'.⁷⁹

Unlike the legislature, the Court of Admiralty and the Court of Chancery, the courts of common law did not give special treatment to sailors in the eighteenth and nineteenth centuries. The courts of common law heard numerous cases on maritime law,⁸⁰ and in general, there is little evidence of a protective attitude towards sailors at this time. This is apparent in the harsh results of the famous decisions of the Court of King's Bench in *Cutter v Powell*⁸¹ and in *Stilk v Myrick*.⁸²

However, on the other hand, it seems that the courts of common law were not implacably hostile towards sailors in the eighteenth and nineteenth centuries. In *Cutter v Powell*, while the court held that the claimant (who was the sailor's widow) could not recover any wages under the contract of service, Lord Kenyon CJ expressed his respect for sailors by describing them as 'so useful a body of men'.⁸³ Similarly, it is significant

⁷⁸ (1748) 1 Wils KB 229, 230. The protective attitude of equity towards sailors was not limited to the equity which was applied in the Court of Chancery. A contract for the sale of a sailor's share in prize-money was also set aside in a subsequent case against the same defendant in the equity side of the Exchequer in *Taylor v Rochfort* (1751) 2 Ves Sen 281.

⁷⁹ (1754) 2 Ves Sen 516, 518.

⁸⁰ From the second half of the sixteenth century, the common law courts began to encroach on the jurisdiction of the Court of Admiralty. Jurisdictional disputes between the courts of common law and the Court of Admiralty lingered until the middle of the nineteenth century when the Court of Admiralty recovered 'many of the powers, and much of the jurisdiction of which it had been deprived in the seventeenth century': Holdsworth, vol 1 (n18), 552-558. See also n190 below.

⁸¹ (1795) 6 TR 320.

⁸² (1809) 2 Camp 317, 6 Esp 129.

⁸³ *Cutter* (n81), 325.

that *Couch v Steel*,⁸⁴ one of the early cases on breach of statutory duty in which the courts adopted a less restrictive view of this doctrine than the view which has prevailed since *Atkinson v The Newcastle and Gateshead Waterworks Company*⁸⁵ and *Gorris v Scott*,⁸⁶ the Court of King's Bench decided in favour of a sailor who become ill on his ship due to a lack of adequate medical supplies.

Secondly, the rule that courts can intervene in salvage contracts on the ground that the price is too high is based on the policy of protecting the salvee as he is a weak party to the contract. First, it is considered that salvees agree to pay an unfairly high price in salvage contracts as they have in practice either very limited or no other options. In *The Medina*, where 550 pilgrims were stranded on a rock in the Red Sea as their ship had been wrecked, the absence of options which were open to the salvees was stressed in the Court of Appeal.⁸⁷ James LJ observed that 'there was one ship, and one ship only, near them...'.⁸⁸ Brett LA noted that 'if the captain refused to accept the terms, he took upon himself the responsibility of allowing 550 human beings under his care to be left to the danger of being drowned'.⁸⁹ Baggallay JA stated that the salvees 'in order to obtain assistance in their extremity, have been required to pay a large price for the assistance'.⁹⁰

Salvees are also considered to be in a weak position as they are not always at the scene of the danger. The category of salvees can include the owners of the ship and cargo

⁸⁴ (1854) 3 E & B 402.

⁸⁵ (1877) 2 Ex D 441.

⁸⁶ (1874) 9 Ex 125. On this point, see M Lunney and K Oliphant, *Tort law: text and materials* (4th edn, OUP 2010) 612.

⁸⁷ *The Medina* (n57).

⁸⁸ *Ibid* 6.

⁸⁹ *Ibid* 8.

⁹⁰ *Ibid* 7.

in addition to the sailors on the ship which is salvaged. In the decision of the Court of Admiralty in *The Medina*, Sir Robert Phillimore observed that the rule that courts can intervene in salvage contracts on the ground that a price is too high is ‘partly for the protection of absent owners’.⁹¹ There is plainly a risk that the salvors at the scene of the danger may carelessly agree to accept too high a price for the salvage services if they do not own the ship or the cargo. In addition, there is a risk that the price stipulated in the salvage contract may be the result of collusion between the salvors and the salvees who are at the scene of the danger.⁹² The spectre of collusion between the salvors and the salvees who are at the scene of the danger is apparent in *The Theodore* where Dr Lushington stated that while ‘the Court is very much indisposed to set aside an honest agreement... it must be satisfied that the agreement is honest’.⁹³

Thirdly, the rule on unfair prices in salvage contracts is based on the policy of promoting salvage operations for economic reasons. In the nineteenth century, when this rule was developed, shipping made a very significant contribution to the strength of the United Kingdom’s economy.⁹⁴ As Dr Lushington observed in *The Albion*, salvage operations are ‘of the utmost importance to the safety of shipping’.⁹⁵ Therefore, it was

⁹¹ (1876) 1 PD 272, 275.

⁹² Nevertheless, Simpson observes that ‘in the days of sail’, the position of captains ‘depended on a relationship of trust with the owners’ and that it was ‘not uncommon’ for captains ‘to be part owners of the vessel’: AWB Simpson, ‘Contracts for cotton to arrive: the case of the two ships Peerless’ 11 *Cardozo L Rev* (1989) 287, 294. Such factors would have reduced the risk of collusion between salvors and salvees.

⁹³ *The Theodore* (n32) 352.

⁹⁴ For example, in the balance of payments, shipping was initially ‘probably the most important’ invisible item on the credit side. ‘Until the early 1870s its earnings exceeded the interests and dividends from British investments abroad’: EJ Hobsbawm, *Industry and Empire* (rev edn, Penguin 1999) 123.

⁹⁵ (1861) Lush 282, 282.

considered to be important to promote the safety of shipping by inciting salvors to offer their services to salvees and by encouraging salvees to accept the services of salvors.⁹⁶

In *The Harriett*, Dr Lushington observed if the sum awarded to salvors ‘was not sufficient to compensate them for their services it would tend to discourage all those who labour to save cargoes on the coasts of this kingdom’.⁹⁷ On the other hand, in *The Inca*, Dr Lushington noted that ‘it must be remembered that if too large a rate of salvage is decreed, other evils may result from such a practice. I fear that there would often be a disinclination on the part of the masters of vessels to accept the assistance of salvors...’.⁹⁸ Therefore, as prices which were too low or too high impeded the pursuit of the policy of promoting salvage operations, it is not surprising that the Court of Admiralty developed the rule that courts could intervene in salvage contracts on the ground of an unfair price.

While the rule on unfair prices in salvage contracts remains in force in English law, the practical importance of this rule has declined as it is now rare for salvors and salvees to enter into contracts in which the parties agree that a particular price will be paid to the salvor. Most contracts now include a clause which provides that the price paid to salvors will be determined by an arbitrator after the salvage service has been rendered.⁹⁹ The Lloyd’s Standard Form of Salvage Agreement (‘No Cure – No Pay’),

⁹⁶ Dr Lushington believed that the content of the rules in the law of salvage were particularly important as the rules influenced the actions of salvors and salvees. In *The Silver Bullion*, he noted that ‘the general principles of salvage are... well known... by the public at large’: (n31) 74.

⁹⁷ (1857) Swab 218, 219.

⁹⁸ (1858) Swab 370, 373.

⁹⁹ Rose (n7) 5, 436; Reeder (n15) 322. In section (i)(d) in chapter 6, we will argue that this method of having the price determined by arbitrators after the performance of the contract rather than by the parties beforehand is the most appropriate way of dealing with rules on unfair prices in contracts.

which is known as the Lloyd's form, is the most commonly used standard form.¹⁰⁰ The most recent form, which dates from 2011, is known as LOF 2011.¹⁰¹

Standard form salvage contracts first appeared at the end of the nineteenth century. The development of these contracts is linked to the emergence of professional salvors in the last quarter of the nineteenth century.¹⁰² Up until this time, most salvage services were provided by sailors who happened to be near to the ship in distress. The provision of salvage services on a professional basis was made possible by technological advances in shipbuilding and communications which enabled salvage operations to be more effective than they had been in the past.¹⁰³

In the last decade of the nineteenth century, several standard form salvage contracts were approved or created by Lloyd's. The first standard form salvage contract

¹⁰⁰ Rose (n7) 401. This kind of standard form contract belongs to the first category identified by Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, 624. It is analogous to contracts such as 'bills of lading, charterparties, policies of insurance' and 'contracts of sale in the commodity markets' which 'set out the terms on which mercantile transactions of common occurrence are to be carried out'. Unlike the contracts in the second category, the terms of which have been 'dictated' by the party with superior bargaining power, in the contracts in the first category, the 'standard clauses... have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade': *Schroeder* (n100) 624.

¹⁰¹ LOF 2011 is available on the Lloyd's website. See <www.lloyds.com/The-Market/Tools-and-Resources/Lloyds-Agency-Department/Salvage-Arbitration-Branch/~media/Files/The%20Market/Tools%20and%20resources/Agency/Salvage%20Arbitration%20Branch/Agency_LOF_2011.pdf> accessed 3 October 2012.

¹⁰² Rose (n7) 400-402. In *N v Bureau Wijsmuller (The Tojo Maru)*, Lord Diplock stated that 'before 1875, professional salvage contractors did not exist...': [1972] AC 242, 292. However, it appears that there were some professional salvors as early as 1858. In *The Inca*, Dr Lushington rejected the suggestion that in every instance of salvage service... the property is saved by vessels in prosecution of some other business; on the contrary, along the greater part of the coast of this country, there are persons employed exclusively in rendering salvage services, who build vessels peculiarly fitted and appropriated to that service and who go out for the sole and express purpose of rescuing vessels in distress: *The Inca* (n98) 373.

¹⁰³ See Hope (n15) 263-348 for a discussion of the significant technological developments in shipbuilding and communications in the nineteenth century. The progress made in shipbuilding and communications in the second half of the nineteenth century was extraordinary. For example, the invention and subsequent refinement of the compound engine increased the efficiency of steam power. Developments in material science led to the use of iron and then steel in shipbuilding which allowed the construction of larger and stronger ships. Finally, an extensive telegraphy system was developed during this period. In 1887, there were over 100,000 miles of telegraph cables: Hope (n15) 287-348.

which was approved by Lloyd's appeared in 1890 and it was used by Vincent Grech¹⁰⁴ who was 'the principal local salvor' in the Dardanelles.¹⁰⁵ In 1890 and in 1891, Lloyd's approved various types of standard form salvage contracts which were used by different salvage contractors.¹⁰⁶ In 1892, one salvage contractor agreed to use a type of standard form salvage contract which had been approved by Lloyd's and which was also used by two other salvage contractors.¹⁰⁷ Lloyd's then used this type of standard form salvage contract when it decided to publish its first standard form salvage contract in 1892.¹⁰⁸

The primary purpose of the approval and creation of standard form salvage contracts was to ensure that any disputes arising from salvage contracts between salvees and foreign salvors were not determined by the 'sometimes obsolete views and practice' of courts in foreign countries.¹⁰⁹ In 1896, Lloyd's published a memorandum on 'the objects sought to be attained' by the standard form salvage contracts.¹¹⁰ There were two primary goals. First, it was necessary to discourage 'contracts between masters and foreign salvors for fixed sums or percentages' as there was 'no effectual appeal' from

¹⁰⁴ A copy of this contract is reproduced in M Williams, *No cure-no pay: the story of salvage at sea* (Hutchinson Benham 1978) 233.

¹⁰⁵ See the preamble to a standard form salvage contract from 1891 in Williams (n104) 239. An example of an earlier standard form contract which provided for arbitration was the standard form contract of the Cotton Brokers' Association which dates from 1863. See AWB Simpson (n92) 311-313, 321-322; AWB Simpson, 'The origins of futures trading in the Liverpool cotton market' in P Cane and J Stapleton (eds) *Essays for Patrick Atiyah* (Clarendon Press 1991) 179, 182-185, 188.

However, there is one significant difference between the Lloyd's form and the standard form contract of the Cotton Brokers' Association. As discussed below (in the text from n115 to n121), from 1890 to 1967, the standard form salvage contracts approved or published by Lloyd's and then the Lloyd's form replicated the rule on unfair prices in salvage contracts which had been developed by the Court of Admiralty. In contrast, the standard form contract of the Cotton Brokers' Association incorporated the customs which had been developed outside the courts in the cotton trade: AWB Simpson (n92) 311-312.

¹⁰⁶ Rose (n7) 401.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* A copy of this contract is reproduced in Williams (n104) 243.

¹⁰⁹ Williams (n104) 248.

¹¹⁰ *Ibid.*

such contracts in foreign courts.¹¹¹ Secondly, Lloyd's sought to avoid the 'detention of valuable vessels and increased legal expenses' of courts in foreign countries.¹¹² As underwriters covered the costs of salvage services which were provided to ships which they had insured, Lloyd's was eager to devise a legal technique which would obviate the disadvantages of contracts between salvees and foreign salvors in which a certain price was stipulated. In 1896, Lloyd's concluded that as a result of the use of standard form salvage contracts, 'these objects have been attained in a very high degree'.¹¹³

While Lloyd's had approved various types of standard form salvage contracts in 1890 and in 1891 in addition to publishing its own standard form salvage contracts in 1892, 1896 and 1897, in 1908, Lloyd's decided that there should be henceforth only one type of standard form contract. The first Lloyd's form was published in 1908.¹¹⁴ Since 1908, the Lloyd's form has been frequently amended and eleven other versions have been published.¹¹⁵ The twelfth and most recent version of the Lloyd's form, which is known as LOF 2011, was published on 9 May 2011.

While the original purpose of standard form salvage contracts was to avoid the referral of disputes between salvors and foreign salvees to foreign courts, the primary effect of the widespread use of standard form salvage contracts is to marginalise in

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid. Nevertheless, Lloyd's conceded that 'there may be some truth' in the objection that a master may agree to pay a salvor too high a price and refrain from 'making due efforts to reduce the salvor's demands' as the salvee knows that the sum stipulated in the agreement will be subject to arbitration: Ibid 249.

¹¹⁴ Rose (n7) 401. A copy of this contract is reproduced in Williams (n104) 252. In this thesis, the Lloyd's form refers to any of the twelve standard form salvage contracts which have been published by Lloyd's since 1908. Any standard form salvage contract which was devised before 1892 is referred to as a standard form salvage contract approved by Lloyd's. Any standard form salvage contract which was created between 1892 and 1908 is referred to as a standard form salvage contract published by Lloyd's.

¹¹⁵ The dates on which the eleven previous versions of the Lloyd's form were published are set out at the end of the second page of LOF 2011.

practice the rule that courts can intervene in salvage contracts on the ground of an unfair price.

The significant reduction in the practical significance of the rule on unfair prices in salvage contracts since the appearance of standard form salvage contracts at the end of the nineteenth century occurred in two stages. First, the initial effect of standard form salvage contracts was to transfer the application of the rule on unfair prices in salvage contracts from courts to arbitral tribunals. Secondly, since at least the second half of twentieth century, the price of the salvage services has been determined by arbitrators rather than by the parties to the salvage contract as salvors and salvees no longer stipulate a price in their contracts.

The rule on unfair prices in salvage contracts was replicated in the clauses of all the standard form salvage contracts which were approved or published by Lloyd's from 1890 until 1967. At the end of the nineteenth century and in the first half of the twentieth century, salvors and salvees usually stipulated the price of the salvage services in their contracts. This is evident in the clauses of the standard form salvage contracts which were approved or published by Lloyd's from 1890 until 1967.

In the first standard form salvage contract which was used by Vincent Grech in 1890, clause I provided a space in which the parties could insert the price of the salvage services.¹¹⁶ Clause IX then provided that Lloyd's 'may either reduce or increase the amount agreed upon' in the salvage contract.¹¹⁷ Similarly, in a standard form salvage

¹¹⁶ Williams (n104) 233.

¹¹⁷ Ibid 234. Therefore, while the cases in which courts had intervened in salvage contracts on the ground that the price was too low were not as numerous as those in which courts had intervened on the ground that the price was too high (see the text above from n26 to n52), it is clear that both situations were envisaged by the terms of the earliest standard form salvage contracts which were approved or published by Lloyd's.

contract published by Lloyd's which probably dates from 1897,¹¹⁸ clause 1 provided a space in which the parties could stipulate the price of the salvage service and stated that this would be the price 'unless this sum shall afterwards be objected to... in which case the remuneration for the services rendered shall be fixed by arbitration in London...'. Clause 13 of this Lloyd's form then provided that certain parties 'may object to the sum named in clause 1 as excessive or insufficient...'.¹¹⁹

In the first six versions of the Lloyd's form, which were published between 1908 and 1967, there was a space for the parties to stipulate the sum which the salvee had agreed to pay to the salvor. Nevertheless, at least by 1958, in practice, a price was seldom stipulated in the salvage contract.¹²⁰ In contrast, in the six versions of the Lloyd's form, which were published between 1972 and 2011, there is no space for the parties to stipulate the price of the salvage services. Clause 1 of the LOF 1972 stated that the price of the salvage services 'shall be fixed by arbitration in London...'.¹²¹ Similarly, the current version of the Lloyd's form, LOF 2011 does not provide any space in which the

¹¹⁸ This early standard form salvage contract is set out in AR Kennedy, *WR Kennedy: a treatise on the law of civil salvage* (2nd edn, Stevens & Sons 1907) 271-273. It is probable that this was the standard form salvage contract which had been published by Lloyd's in 1897. The first Lloyd's standard form salvage contract was published in 1892 and it was subsequently amended in 1896 and 1897. See above from n103 to n114. See also Rose (n7) 401.

The sudden appearance and swift development of standard form salvage contracts is illustrated by the fact that there were no references to any standard form salvage contract in WR Kennedy, *A treatise on the law of civil salvage* (Stevens & Sons 1891), a leading contemporary treatise on salvage law which was published in 1891.

¹¹⁹ Kennedy (n118) 272-273. See also the standard form salvage contract published by Lloyd's which was examined by the Court of Appeal in *The City of Calcutta* (1898) 8 Asp MLC 442.

The City of Calcutta (n119) is the only case on a standard form salvage contract published by Lloyd's which is cited Kennedy (n118). Therefore, it is probably the first case in which a standard form salvage contract was considered by the courts.

¹²⁰ McGuffie KC, *Kennedy's civil salvage* (4th edn, Stevens & Sons 1958) 302.

¹²¹ A copy of LOF 1972 is reproduced in Williams (n104) 256-261.

parties can stipulate a price for the salvage services. Clause I of LOF 2011 also provides that the price will be determined by arbitration in London.¹²²

Therefore, since the beginning of the second half of the twentieth century, the use of the Lloyd's form has led to the complete marginalisation of the rule on unfair prices in salvage contracts. First, the power to assess the fairness of the price in salvage contracts was given to arbitrators in the standard form salvage contracts approved or published by Lloyd's at the end of the nineteenth century and in the first six Lloyd's forms in the twentieth century. Then, the rule on unfair prices in salvage contracts disappeared from even arbitral tribunals when, in 1972, the space in which the parties to a salvage contract could stipulate the price of the salvage services was removed from the Lloyd's form. Thus, since 1972, the price of salvage services has usually been determined by arbitrators rather than by the salvor and the salvee. When the parties could no longer stipulate the price of the salvage services in the Lloyd's form, there was no need to give the arbitrators the power to intervene in salvage contracts on the ground of an unfair price. As a result, this provision was duly removed from the Lloyd's form in 1972.

The content of the Lloyd's form is significant in practice as it is so widely used. In 1938, in *Admiralty Commissioners v Valverda (Owners)*, Lord Roche observed that 'counsel for the respondents was probably not far from the mark in saying that in these days of Lloyd's salvage agreements the larger number of salvages are regulated by agreement'.¹²³ Similarly, in 1972, in *The Tojo Maru*, Lord Diplock stated that 'today, in

¹²² Clause J of the LOF 2011 also provides that 'this agreement and any arbitration hereunder shall be governed by English law'. A similar clause was included in all the previous versions of the Lloyd's form.

¹²³ [1938] AC 173, 202. In this case, Lord Maugham also referred to 'Lloyd's well known form': *Admiralty Commissioners* (123) 197.

the latter half of the twentieth century, most salvage services... are performed by professional salvors under a salvage agreement in Lloyd's Standard Form'.¹²⁴

The drastic effect of the Lloyd's form on the rule on unfair prices in salvage contracts is evident in the fact that there were very few cases on this rule in the twentieth century.¹²⁵ All the significant cases on unfair prices in salvage contracts were decided in the nineteenth century before the Lloyd's form became ubiquitous.¹²⁶

However, it is clear that numerous disputes still arise between salvors and salvees after the salvage services have been provided. Since the development of standard form salvage contracts in the last decade of the nineteenth century, most of these cases are heard by arbitrators rather than by the courts. From 1990 to 2010, the mean number of new cases on salvage contracts which were submitted to arbitrators at Lloyd's was 112.¹²⁷

¹²⁴ *The Tojo Maru* (n102) 292.

¹²⁵ See for example, *The Crusader* [1907] P 196. This case is a rare example of intervention in a salvage contract on the ground of an unfair price in the twentieth century. Similarly, in relation to the standard form contract devised by the Cotton Brokers' Association in the second half of the nineteenth century, Simpson observes that 'the use of arbitration explains the relative rarity of reported legal cases dealing with the vast cotton trade': AWB Simpson, 'The origins of futures trading in the Liverpool cotton market' in P Cane and J Stapleton (eds) *Essays for Patrick Atiyah* (Clarendon Press 1991) 179, 183.

¹²⁶ See the cases discussed throughout this section.

¹²⁷ The median is 121 cases. This figure is based on the statistics published on the Lloyd's website. See <www.lloyds.com/The-Market/Tools-and-Resources/Lloyds-Agency-Department/Salvage-Arbitration-Branch/LOF-statistics> accessed 3 October 2012.

(iii) Unfair prices in salvage contracts in French law

Similar to English law, in French law, courts can intervene in salvage contracts on the ground that the price which is stipulated in the salvage contract is too low or too high. This rule was first enshrined in French law in Article 7 of the *loi* of 1916. The purpose of the *loi* of 1916 was to incorporate the provisions of the Salvage Convention 1910 into French law.¹²⁸ Article 7 of the *loi* of 1916 essentially reproduced the text of Article 7 of the Salvage Convention 1910.¹²⁹

Many aspects of French maritime law were updated between 1966 and 1970.¹³⁰ In 1967, the *loi* of 1916 was replaced by the *loi* of 1967 and Article 7 of the *loi* of 1916 was replaced by Article 15 of the *loi* of 1967. While, the wording of Article 15 of the *loi* of 1967 differs from that of Article 7 of the *loi* of 1916, the substance of the rule that courts could intervene in contracts on the ground of an unfair price was not altered.

Further changes to the law of salvage occurred when the Salvage Convention 1989 replaced the Salvage Convention 1910.¹³¹ Article 7 of the Salvage Convention 1989 replaced Article 7 of the Salvage Convention 1910. However, there were no substantive alterations to the rule on unfair prices in salvage contracts. This rule is now set out in Article 7 of the Salvage Convention 1989.

¹²⁸D.1917.309, note (1) (Victor Augagneur, Minister for the Marine in the *Chambre des Députés*).

¹²⁹ There are two other separate rules in Article 7 of the Salvage Convention 1910 and Article 7 of the *loi* of 1916 but they are irrelevant for the purposes of this thesis. Hereafter, Article 7 of the Salvage Convention 1910 and Article 7 of the *loi* of 1916 refer only to the rule on unfair prices in salvage contracts.

¹³⁰ This process was initiated by René Rodière, a professor of law in the University of Paris and Jean Foyer, the Minister for Justice from 1962 to 1967 in the first three governments led by the Prime Minister Georges Pompidou: Bonassies and Scapel (n1) 18.

¹³¹ The primary purpose of the Salvage Convention 1989 was to allow salvors to receive remuneration for their attempts to prevent pollution even if the salvage services were ultimately unsuccessful: M Kerr, 'The International Convention on Salvage 1989 – how it came to be' 39 *ICLQ* (1990) 530.

The Salvage Convention 1989 was incorporated into French law by the *décret* n° 2002-645 of 23 April 2002. Therefore, similar to English law, in French law, the rule on unfair prices in salvage contracts is now based on Article 7 of the Salvage Convention 1989.¹³²

Before the *loi* of 1916, there were no specific rules on salvage contracts in French law. This can be explained by two factors. First, French law distinguishes between *sauvetage* which covers the recovery of objects which have been abandoned at sea or along the coast and *assistance* which deals with the rescue of ships and people in danger.¹³³ However, until the nineteenth century, the concept of *assistance* was not known in French law.¹³⁴

Secondly, similar to English law, salvage contracts (*contrats d'assistance*) began to appear in French law only in the nineteenth century.¹³⁵ As there were no special courts which dealt specifically with maritime law after the Revolution of 1789¹³⁶ and as there

¹³² Bonassies and Scapel (n1) 358. On English law, see the text above from n67 to n68.

¹³³ D.1917.309, note (1) (Victor Augagneur, Minister for the Marine in the *Chambre des Députés*). However, in practice, it is difficult to distinguish between *sauvetage* and *assistance*: D.1917.309, note (1) (Victor Augagneur, Minister for the Marine in the *Chambre des Députés*) and Bonassies and Scapel (n1) 343.

¹³⁴ Bonassies and Scapel (n1) 343. While there was no specific legislation on *assistance* before the *loi* of 1916, *sauvetage* has been the subject of specific legislation since Jean-Baptiste Colbert's *ordonnance de la marine* in 1681. Most of this *ordonnance* was incorporated into the *Code de commerce* which was promulgated by the *loi* of 25 September 1807. Nevertheless, certain provisions of the *ordonnance de la marine* of 1681, which were not covered by the *Code de commerce* remained in force after 1807 and it was only recently that they were abrogated by Article 7 of the *ordonnance* n° 2006-460 of 21 April 2006. As the concept of *assistance* was still unknown to French law when the *Code de commerce* was introduced in 1807, the *Code de commerce* does not deal with salvage contracts: Bonassies and Scapel (n1) 17-18, 344.

¹³⁵ Such contracts first appeared in French law only in the second half of the nineteenth century, which was later than in English law. See n15.

¹³⁶ Before the Revolution of 1789, the *Amirautés* (admiralty courts) had jurisdiction over maritime cases. There were 'around fifty' *Amirautés* in 1789. Depending on where a particular *Amirauté* was located, its decision could be appealed to the *Table de Marbre* of Paris, the *Table de Marbre* of Rouen or the *Parlement* of the jurisdiction in which the *Amirauté* was located if it was not within the jurisdiction of either *Table de Marbre*. The *Parlements* of Paris and Rouen heard appeals from the *Tables de Marbre* of Paris and Rouen respectively as the *Tables de Marbres* were not sovereign courts: RE Mousnier, *Les*

was no specific legislation on *assistance* at this time, salvage contracts were subject to the jurisdiction of the ordinary civil law courts and were governed by the general principles of civil law.¹³⁷

Before Article 7 of the *loi* of 1916, there was no rule that allowed courts to intervene in salvage contracts on the ground of an unfair price. Nevertheless, before the introduction of this legislation, there were numerous cases in which the French courts annulled salvage contracts in which the parties had stipulated too high a price and awarded the salvors a fair price instead. However, these contracts were annulled on the ground that the salvee's consent was vitiated by *violence* (Articles 1108, 1109, 1111 and 1112 of the *Code civil*) rather than on the ground that the price was unfair.

This is evident in *Le Rolfe*.¹³⁸ In this famous case, a Danish steamship, the *Rolfe*, ran aground in the bay of the Seine. It was stuck on the bank for about nine hours before a tug, which responded to the signals of distress sent from the *Rolfe*, arrived at the scene. The salvor offered to perform salvage services in return for 5 per cent of the value of the ship and cargo which amounted to 18,150 francs. The salvee initially tried to obtain a

institutions de la France sous la monarchie absolue 1598-1789, volume 2: les organes de l'Etat et de la société (PUF 1980) 292-293.

The *Amirautés* did not survive the Revolution of 1789. However, unlike the *Amirautés*, the *Prud'hommes pêcheurs de la Méditerranée* survived the Revolution of 1789: Ripert (n12) 52-53, 52. The *Prud'hommes pêcheurs de la Méditerranée* is now the one remaining special court in maritime law. This court exists only on the Mediterranean coast and it has certain administrative powers in addition to its jurisdiction over certain disputes between fishermen. Another unique feature of the *Prud'hommes pêcheurs de la Méditerranée* is the fact that it is not possible to either appeal the decisions of this court or even seek to have its decisions quashed by the *Cour de cassation*: Bonassies and Scapel (n1) 81.

¹³⁷ While salvage contracts are no longer governed by special rules rather than the general principles of civil law since the *loi* of 1916, cases on salvage contracts and other aspects of maritime law still fall within the jurisdiction of the ordinary civil law courts (apart from the jurisdiction of the *prud'hommes pêcheurs de la Méditerranée* which is discussed in n136). Cases on maritime law will be heard by the *Tribunaux de commerce* at first instance, and then by the *Cour d'appel* if there is an appeal and by the *Cour de cassation* if one party seeks to quash the decision of the *Cour d'appel*: Bonassies and Scapel (n1) 81-84 and G Ripert, *Droit maritime* tome I (4^e édn, Dalloz 1950) 53-54. As Ripert observes, while there are some representatives of the maritime world in the *Tribunaux de commerce* in the large ports, in other *Tribunaux de commerce*, maritime cases are determined by the '*petit commerçant*': Ripert (n137) 53.

¹³⁸ *Le Rolfe* (n9).

reduction in the price. However, when it was clear that the salvor would not accept a lower sum, the salvee eventually agreed to pay 5 per cent of the value of the ship and cargo. When the salvage services had been performed, the salvee refused to pay this sum. He was willing to pay 3,000 francs for the service but salvor rejected this offer.

At first instance, the *Tribunal de commerce* of Rouen held that the contract should be annulled and awarded 4,000 francs to the salvor. The *Cour d'appel* of Rouen upheld this decision and it was not subsequently quashed by the *Cour de cassation*.

It is striking that the discussion of the legal basis of this decision is particularly equivocal in all three courts. While the *Tribunal de commerce* of Rouen held that the consent of the captain of the Rolfe had been vitiated by *violence*, it did not refer to any provisions of the *Code civil*. The *Cour d'appel* of Rouen upheld this decision on the ground that the salvee had not freely consented to the contract but this court also failed to refer to any provisions of the *Code civil*. The *Cour de cassation* relied primarily on Article 1108 of the *Code civil*.¹³⁹ It declared that under Article 1108 of the *Code civil* consent was an essential element of a valid contract and that where a party entered into a contract under the influence of an immediate and significant fear for his safety or that of his possessions, the contract could be annulled. It concluded that there was no consent in this case as the salvee entered into the contract only in order to save his ship which he feared would be submerged and lost by the next tide.

Therefore, before the introduction of the rule on unfair prices in salvage contracts in the *loi* of 1916, French courts intervened in salvage contracts in which the parties had stipulated too high a price by applying the doctrine of *violence*. However, the unease with

¹³⁹ It also tersely rejected the argument that the lower court had not correctly applied 'Articles 1109, 1111 *et suiv*' of the *Code civil*.

which the courts in *Le Rolfe*¹⁴⁰ discussed the legal basis of the decision to award a lower sum to the salvor shows that the doctrine of *violence* was a clumsy tool in such cases. The application of the doctrine of *violence* to salvage contracts in which the parties had stipulated too high a price caused theoretical and practical problems.

In theory, it was difficult to justify the annulment of salvage contracts in which the parties had stipulated too high a price on the ground that the salvee's consent was vitiated by *violence*. In order to annul a contract on the ground of *violence*, Articles 1109, 1111 and 1112 of the *Code civil* provide that the illegitimate pressure which vitiates the consent of one party must be exercised by the other party to the contract or by a third party. Therefore, the application of the doctrine of *violence* to contracts in which salvees agree to pay too high a price to salvors, such as in *Le Rolfe*,¹⁴¹ was inappropriate as in these situations '*la menace ne provient pas des hommes, mais des événements*'.¹⁴² This theoretical problem probably explains why neither the *Cour d'appel* of Rouen nor the *Cour de cassation* in *Le Rolfe* expressly refer to the term '*violence*' in their judgments.¹⁴³

Nevertheless, it seems that, before the introduction of Article 7 of the *loi* of 1916, the majority of jurists approved of the application of the doctrine of *violence* to salvage contracts in which the parties had stipulated too high a price.¹⁴⁴ For example, in a note on the decision of the *Cour d'appel* of Aix in *Le Vulcan* in 1891,¹⁴⁵ Charles Lyon-Caen, a

¹⁴⁰ *Le Rolfe* (n9).

¹⁴¹ *Le Rolfe* (n9).

¹⁴² Ripert (n12) 138. See also F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (10^e éd, Dalloz 2009) 255-256.

¹⁴³ *Le Rolfe* (n9).

¹⁴⁴ Ripert (n12) 137.

¹⁴⁵ *Cour d'appel* of Aix, 30 January 1890 (*Le Vulcan*): 5 *RIDM* (1889-1890) 486.

leading commercial lawyer, referred approvingly¹⁴⁶ to the decision of the *Cour de cassation* in *Le Rolfe*.¹⁴⁷

However, one rare discordant voice was that of Baudry-Lacantinerie and Barde who unequivocally opposed the use of the doctrine of *violence* to annul salvage contracts in which the salvee had agreed to pay too high a price.¹⁴⁸ They stated that it was difficult to approve of the decision of the *Cour de cassation* in *Le Rolfe*¹⁴⁹ as the salvee's fear had been caused by the danger to the ship rather than by the actions of the salvor.¹⁵⁰ They also lamented the fact that the decision of the *Cour de cassation* in *Le Rolfe*¹⁵¹ 'a fait jurisprudence' and they observed that the consequences of this decision were serious as similar cases arise very often.¹⁵²

Furthermore, the application of the doctrine of *violence* to salvage contracts in which the parties had stipulated too high a price also caused practical problems. There was little consistency in the decisions in the cases in which the courts considered whether or not to annul such salvage contracts. This was probably the inevitable result of the application of a doctrine which was theoretically unsuitable to allow courts to intervene in salvage contracts where the salvee had agreed to pay too high a price to the salvor.

¹⁴⁶ C Lyon-Caen, 20 *RCLJ* (1891) 405, 406. Along with Edmond-Eugène Thaller, Lyon-Caen was 'the master of French commercial law at the turn of the nineteenth and twentieth centuries': J-L Halpérin, 'Charles Lyon-Caen' in Arabeyre, Halpérin and Krynen (n12) 522, 523.

¹⁴⁷ *Le Rolfe* (n13).

¹⁴⁸ G Baudry-Lacantinerie and L Barde, *Traité théorique et pratique de droit civil: des obligations* tome I (3^e édn, Sirey 1906) 120-121.

¹⁴⁹ *Le Rolfe* (n9).

¹⁵⁰ Baudry-Lacantinerie and Barde (n148) 121.

¹⁵¹ *Le Rolfe* (n9).

¹⁵² Baudry-Lacantinerie and Barde (n148) 121.

In certain cases, the courts refused to annul the salvage contracts if other options had been open to a salvee before the conclusion of the salvage contract. This is evident in the decision of the *Cour d'appel* of Rennes in *Le Saint-Marc*.¹⁵³ In this case, a steamship, the Saint-Marc, broke down due to a fracture in its propeller. The Saint-Marc immediately sent out distress signals and about five hours later an English steamship, the Edith, arrived at the scene. The captain of the Edith offered to provide salvage services for £5,000. The captain of the Saint-Marc tried to convince the captain of the Edith to provide the salvage services for a lower sum. However, when the captain of the Edith refused to accept a lower sum, the captain of the Saint-Marc decided not to enter into any contract with him.

The following morning, another steamship, the Lancelot arrived at the scene. The captain of the Lancelot offered to provide salvage services for £2,000. After negotiations which lasted 'several hours' between the captains of the Saint-Marc and the Lancelot, the captain of the Saint-Marc agreed to pay £1,600. However, when the salvage services had been provided, the captain of the Saint-Marc refused to pay the salvor the sum which the parties had agreed in the contract.

The *Cour d'appel* of Rennes refused to annul the contract on the ground of *violence* on the basis that the salvee had other options. The court noted that the Saint-Marc had not been in 'imminent danger' and that it had been lying in a place which many steamers passed by every day. It also observed that just as the captain of the Saint-Marc had refused the offer of the captain of the Edith, he could equally have refused to enter

¹⁵³ *Cour d'appel* of Rennes, 18 May 1895: 12 *RIDM* (1896-1897) 268. See also *Cour* of Bordeaux, 19 November 1884 (*T et J Harrison c Compagnie Bordelaise de navigation à vapeur*) 1 *RIDM* (1885-1886) 37.

into a contract with the captain of the Lancelot in the hope that he would soon find another ship which would rescue the Saint-Marc.¹⁵⁴

In contrast, in other cases, the courts applied the doctrine of *violence* in a less rigorous way and annulled salvage contracts in which the parties had stipulated too high a price even though the salvee had other options. This is apparent in the contrasting decisions of the *Tribunal de commerce* of Marseilles and the *Cour d'appel* of Aix in *Le Vulcan*.¹⁵⁵ In this case, the German ship, the Vulcan broke down due to a fracture in its propeller. The Vulcan sent out signals of distress. When the Junon arrived at the scene, the captains of both ships engaged in lengthy negotiations about the price of the salvage services. The captain of the Vulcan ultimately agreed to pay 60,000 francs to the captain of the Junon.

However, before the salvage operation commenced, the captain of the Vulcan gave the captain of the Junon a document written in German in which the former stated that he had been compelled by the dangerous situation in which he found himself to enter into the salvage contract. This document was later translated in Marseilles when the captain of the Vulcan refused to pay the salvor the sum which had been agreed in the salvage contract.

¹⁵⁴ The facts of *Le Saint-Marc* (n153) were very similar to those of *The Silesia* (n37). However, in sharp contrast to *Le Saint-Marc* (n153), the Court of Appeal in *The Silesia* (n37) intervened in the salvage contract on the ground that the price was unfair.

Similarly, the decision of the *Tribunal de commerce* of Havre in *L'Atlantique* (21 April 1896: 12 *RIDM* (1896-1897) 146) contrasts sharply with that of the Court of Appeal in *The Cargo ex Woosung* (n38) given that the facts of the former, which take place in the Straits of Magellan, are remarkable similar to those of the latter. In *L'Atlantique* (n154), the court refused to annul a salvage contract in which the salvee had agreed to pay too high a price as he had had time for reflection and had negotiated with other parties before concluding the salvage contract. In contrast, the Court of Appeal set aside the salvage contract in *The Cargo ex Woosung* (n38). The different outcome in these two cases further illustrate the sharply different rules on unfair prices in salvage contracts in English and French law at this time.

¹⁵⁵ *Tribunal de commerce* of Marseille, 22 October 1889 (*Le Vulcan*): 5 *RIDM* (1889-1890) 389 and *Le Vulcan* (n145)

At first instance, the *Tribunal de commerce* of Marseilles refused to annul the salvage contract on the ground of *violence*. The court held that the salvee had other options and that ‘no imminent and certain danger’ compelled the captain of the *Vulcan* to agree to pay the price sought by the captain of the *Junon*. As the weather was good and the sea was calm, the *Vulcan* could have reached some port by using its sails. The court also noted that as the *Vulcan* had broken down in a busy shipping lane, the captain could have easily entered into a contract with another captain at a lower price that night or the following day.

In contrast, the *Cour d’appel* of Aix took a very different view of these facts and overturned the decision of the *Tribunal de commerce* of Marseille. The *Cour d’appel* of Aix annulled the salvage contract on the ground of *violence* and awarded the salvors 30,000 francs instead of the sum of 60,000 which had been agreed in the salvage contract. The court observed that while the captain of the *Vulcan* might have overestimated the damage which had been done to his ship and the need for an immediate rescue, the salvage contract should be annulled as he did not freely consent to enter into the contract.

The decision of the *Cour d’appel* of Rennes in *Le Saint-Marc*¹⁵⁶ and the contrasting decisions of the *Tribunal de commerce* and the *Cour d’appel* of Aix in *Le Vulcan*¹⁵⁷ highlight the inconsistent application of the doctrine of *violence* to salvage contracts in which the salvee agreed to pay too high a price to the salvor. As Lyon-Caen noted, there is only one question to answer in such cases: ‘given the circumstances, did

¹⁵⁶ *Le Saint-Marc* (n153).

¹⁵⁷ *Le Vulcan* (n155).

the salvee freely consent?’¹⁵⁸ While the question might have been concise and clear, the courts muddied the waters by providing inconsistent answers.

As a result of the cases in which French courts used the doctrine of *violence* to intervene in salvage contracts in which the salvee agreed to pay too high a price to the salvor, it is widely considered that the rule introduced in Article 7 of the *loi* of 1916 did not introduce a new rule into French law. For example, Ripert observed that Article 7 of the *loi* of 1916 was not ‘*une innovation*’ in French law.¹⁵⁹ However, it is clear that the rule that courts could intervene in salvage contracts on the ground that the price was too high or too low which was introduced in Article 7 of the *loi* of 1916 did constitute ‘*une innovation*’ in French law for three reasons.

First, while Article 7 of the *loi* of 1916 provided that a court could intervene in a salvage contract on the ground that the price was too low, there were no cases in French law before the introduction of this rule in 1916 in which a salvor sought to obtain the annulment of a contract in which the price which he had agreed to accept was too low. The absence of any such cases is not very surprising given the focus on the doctrine of *violence* as the appropriate tool with which courts could intervene in salvage contracts on the ground of an unfair price.¹⁶⁰ It would be difficult to imagine a scenario in which a salvor who agreed to accept too low a price could argue that the contract should be annulled on the ground of *violence*. While the application of the doctrine of *violence* to salvage contracts in which the salvee agreed to pay too high a price was inappropriate in

¹⁵⁸ C Lyon-Caen, 23 *RCLJ* (1894) 488, 488.

¹⁵⁹ Ripert (n12) 137. See also Bonassies and Scapel (n1) 358.

¹⁶⁰ Given the relative paucity of cases in English law in which a salvor claimed that the price which he agreed to accept was too low (see the text above from n26 to n32), it would be very surprising to find that the cases in which a salvor agreed to accept too low a price are as common as cases in which the salvee agreed to pay too high a price in French law. Nevertheless, the absence of any cases in which a salvor claimed that the price which he agreed to accept was too low is significant.

theory as Articles 1109, 1111 and 1112 of the *Code civil* require the pressure to be the result of the actions of people rather than simply the result of events, the fear of the victim is at least a common feature in both situations. However, in light of the facts of decisions such as *The Phantom*¹⁶¹ and *The Silver Bullion*¹⁶² in English law, it is more likely that a salvor would agree to accept too low a price as a result of naivety, ignorance and a lack of sophistication rather than fear. Thus, the rule that courts can intervene in contract on the basis that a salvor received too low a price was clearly ‘*une innovation*’ as it did not exist in French law before the introduction of Article 7 of the *loi* of 1916.

Secondly, it is likely that some of the cases in which courts intervened in salvage contracts on the basis of Article 7 of the *loi* of 1916 would have been decided differently before the introduction of this rule. After the introduction of Article 7 of the *loi* of 1916 a salvage contract could be set aside on the ground of an unfair price. However, as the decision in *Le Saint-Marc* illustrates,¹⁶³ before the introduction of Article 7 of the *loi* of 1916, an unfair price was not a sufficient ground on which to intervene in salvage contracts.

For example, while the salvor successfully invoked Article 7 of the *loi* of 1916 in *Le Trait*¹⁶⁴, it is unclear whether the salvage contract would have been annulled on the ground of *violence* before 1916. In this case, the *Trait* had run aground. The captain of the *Trait* consulted the owners of the ship who had insurance and they gave instructions to the captain. Six days later, after ‘ample time for reflection’, the captain of the *Trait* agreed to pay the salvors a sum which amounted to 50 per cent of the value of undamaged goods

¹⁶¹ *The Phantom* (n27).

¹⁶² *The Silver Bullion* (n31).

¹⁶³ *Le Saint-Marc* (n153).

¹⁶⁴ *Tribunal de commerce* of Bordeaux, 16 December 1938 (*Le Trait*): S.1939.126.

which were saved, 75 per cent of the value of damaged goods which were saved and 50 per cent of the insured value of the ship less the cost of necessary repairs. Ultimately the sum which had been agreed in the contract amounted to 75 per cent of the value of the ship when it was brought back to the harbour. The owners of the *Trait* refused to pay this sum to the salvors.

The *Tribunal de commerce* of Bordeaux held that the contract should be set aside on the basis of Article 7 of the *loi* of 1916 as the sum agreed in the contract was ‘*absolument inhabituel, prohibitif est hors de proportion avec le service rendu*’. Nevertheless, the court stated that the salvors should be remunerated for undertaking this particularly difficult salvage operation. The salvors were awarded the lesser sum of 4 million francs.

Finally, the perception of the rule that courts could intervene in salvage contracts on the ground of an unfair price as alien and incongruous to French jurists further demonstrates that this rule was ‘*une innovation*’ in French law when it was introduced in the *loi* of 1916. This perception is evident in a contemporary thesis on the *loi* of 1916.¹⁶⁵ In this thesis, André de Robillard de Beaurepaire observed that Article 7 of the Salvage Convention 1910 was ‘extraordinary’ and ‘in complete antinomy’ with the general principles of French contract law.¹⁶⁶ He wondered whether freedom of contract was henceforth only a ‘worthless word’.¹⁶⁷ Similarly, Demontès acknowledged that the *loi* of 1916 ‘*n’est pas absolument une loi d’inspiration nationale*’.¹⁶⁸ These observations clearly

¹⁶⁵ A de Robillard de Beaurepaire, *La loi du 29 avril 1916 sur l’assistance et le sauvetage maritimes* (Imprimerie de la Vicomté 1924).

¹⁶⁶ De Robillard de Beaurepaire (n165) 40.

¹⁶⁷ *Ibid.*

¹⁶⁸ E Demontès, *De la lésion dans les contrats entre majeurs: étude de droit positif et de législation comparé* (LGDJ 1924) 157.

indicate that there was no rule which allowed courts to intervene in salvage contracts on the ground of an unfair price before the introduction of the *loi* of 1916.

What are the rationales of the rule on unfair prices in salvage contracts in French law? First, the policy of protecting the salvee on the basis that he is a weak party to the contract is highlighted in numerous cases from the end of the nineteenth century.¹⁶⁹ Salvees are considered to be in a weak position as they have in practice either very limited or no other options. For example, in *Le Rolfe*, the *Cour de cassation* emphasised the weak position of the salvee at the time when he entered into the contract with the salvor.¹⁷⁰ The court stated that the salvee agreed to enter into the contract only because his ship was about to be submerged and lost. Similarly, in *Le Vulcan*, the *Cour d'appel* of Aix observed that as the salvee could not manoeuvre the ship he was forced to enter into the salvage contract in order to save his ship.¹⁷¹

Secondly, the economic reasons underlying this rule in French law are evident in numerous cases from the end of the nineteenth century. For example, in *Le Vulcan*, the *Cour d'appel* of Aix emphasised the importance of awarding adequate, but not excessive, remuneration for salvage services as it was '*dans l'intérêt même de la navigation, en vue de conserver les vies humaines des gens de l'équipage, les capitaux considérables que représentent les bâtiments de mer*'.¹⁷² Similarly, in *L'Hudson*, the *Cour d'appel* of Aix observed that courts should encourage salvors to undertake salvage operations by

¹⁶⁹ However, as these cases were decided before the *loi* of 1916, the courts intervened in salvage contracts where the parties had stipulated too high a price on the ground of *violençe* rather than on the ground of an unfair price.

¹⁷⁰ *Le Rolfe* (n13).

¹⁷¹ *Le Vulcan* (n155).

¹⁷² *Ibid.*

awarding them adequate remuneration as salvage services were ‘extremely important’ for maritime commerce.¹⁷³

These two rationales for the rule on unfair prices in salvage contracts in French law are similar to those underpinning the analogous rule in English law. However, in contrast to English law, there is no trace of a policy of protecting the salvor on the basis that he is a weak party to the contract in French law. In fact, in French law, there is evidence of hostility towards this policy and the rule that a court can intervene in a salvage contract on the ground that the price is too low which is underpinned by this policy. De Robillard de Beaurepaire considered the rule that a court could intervene in a salvage contract on the ground that the price was too low, and thus in favour of a salvor, particularly ‘perplexing’.¹⁷⁴ He was astonished that ‘*le capitaine assistant ou sauveteur pourrait... agir de même!*’.¹⁷⁵ Thus, it is clear that the policy of protecting a salvor on the basis that he is a weak party to the contract does not underpin the rule on unfair prices in salvage contracts in French law.

Therefore, in addition to the existence of a similar rule on unfair prices in salvage contracts in both English and French law, two of the three rationales underlying this rule in English law are also apparent in French law. A third and striking similarity between English and French law is the fact that in practice, this rule is marginalised in both systems as a result of the widespread use of standard form salvage contracts.

¹⁷³ *Cour d’appel* of Aix, 3 August 1892 (*L’Hudson*): 8 *RIDM* (1892-1893) 52. More generally, Bonassies and Scapel state that while shipping is not ‘strictly speaking a *service public*, it is undoubtedly an activity of public importance’: Bonassies and Scapel (n1) 7.

¹⁷⁴ De Robillard de Beaurepaire (n165) 42.

¹⁷⁵ *Ibid.*

Similar to English law, in French law, in practice, the salvor and the salvee do not usually fix the price in advance in the contract.¹⁷⁶ In most cases, the parties will enter into a standard form salvage contract which will provide that the price will be determined by arbitration after the salvage service has been rendered.¹⁷⁷

As in English law, the Lloyd's form is the standard form salvage contract which is most commonly used in French law.¹⁷⁸ The Lloyd's form has been used widely in French law since at least 1953.¹⁷⁹ However, as the Lloyd's form provides that the price will be determined by arbitrators in London,¹⁸⁰ it is not always possible for salvees and salvors to use this standard form salvage contract due to French rules on choice of jurisdiction. Article 2 of the *décret* of 19 January 1968 provides that salvors and salvees cannot agree to submit any dispute which arises on the basis of their salvage contract to a foreign court or a foreign arbitral tribunal if both parties are French and if the salvage operation takes

¹⁷⁶ Bonassies and Scapel (n1) 357.

¹⁷⁷ Ibid. They also observe that, in practice, the price is fixed by arbitrators only in a 'minority' of cases. After the salvage services have been provided, the salvor and the salvee's insurer usually agree on the price after lengthy negotiations: Ibid.

Similarly, in English law, arbitral decisions on salvage contracts are not numerous. The mean number of annual decisions in Lloyd's is only 120 (see the text from n126 to n127). This dearth of arbitral decisions on salvage contracts in English law indicates that in practice, in the majority of cases, the price is determined by the parties (or perhaps by their insurers) independently of the arbitral tribunal after the salvage services have been provided.

¹⁷⁸ Ibid 352-353.

¹⁷⁹ The Lloyd's form is the only example of a standard form salvage contract which is cited in Ripert (n12) 135. This edition, the fourth, is the final edition of this treatise which was published by Ripert. In the previous edition of this treatise, there was no reference to the Lloyd's form even though Ripert noted that the parties 'can, if they prefer' agree that the price will be determined by arbitrators after the salvage services have been provided: G Ripert, *Droit maritime* tome III (3^e édn, Rousseau 1930) 148.

¹⁸⁰ The most recent Lloyd's form, LOF 2011 stipulates in Clause I that the price will be determined by 'arbitration in London'.

place in French waters. The purpose of this *décret* was to prevent French salvors and salvees from using the Lloyd's form.¹⁸¹

While the Lloyd's form is the most commonly used standard form salvage contract in French law, there are various other standard form salvage contracts which are indigenous to French law. The most important French standard form salvage contract is the *formule Villeneau*.¹⁸² The *formule Villeneau* was created by Jacques Villeneau, who was a famous French maritime lawyer.¹⁸³ The first version of the *formule Villeneau* was published in 1962 and the second and latest version was published in 1990.¹⁸⁴ Similar to the last six versions of the Lloyd's form,¹⁸⁵ there is no space in the 1990 version of the *formule Villeneau* in which the parties can stipulate a price for the salvage services.¹⁸⁶ Clause III of the 1990 version of the *formule Villeneau* provides that the price will be determined by the arbitrators and Clause X stipulates that the arbitration will take place in Paris.¹⁸⁷

¹⁸¹ Bonassies and Scapel (n1) 368. Presumably, the legislator sought to encourage the use of the *formule Villeneau* which was a French standard form salvage contract that had been created only six years earlier (see the text below from n182 to n184).

¹⁸² Ibid 353. Two other standard form salvage contracts in French law are the *convention de Concarneau* and the *convention de Boulogne*. These standard form salvage contracts are attached to the French insurance policies of certain fishing vessels. The *convention de Concarneau* is used by fishing vessels of less than 700 horsepower and the *convention de Boulogne* is used by fishing vessels of more than 700 horsepower. These standard form salvage contracts provide that the price of certain salvage services will be determined by an index and the price of other salvage services will be determined by arbitration: Ibid 357-358.

¹⁸³ Ibid 353.

¹⁸⁴ The 1962 version of the *formule Villeneau* is set out in N Reuter, *La notion d'assistance en mer* (Librairies techniques, 1975) 348-350. The 1990 version of the *formule Villeneau* is set out in J Villeneau, 'Le contrat français d'assistance maritime' (1990) *DMF* 236, 237-240.

¹⁸⁵ See the text above from n120 to n122.

¹⁸⁶ Similar to the 1990 version of the *formule Villeneau*, the 1962 version does not provide a space in which the parties can stipulate a particular sum. Clause VIII of the 1962 version of the *formule Villeneau* provides that the price will be determined by arbitration: Reuter (n184) 349.

¹⁸⁷ Unlike the 1962 version, Clause X of the 1990 version of the *formule Villeneau* provides that the price will be determined by arbitration which will take place in Paris on the basis of the rules of the *Chambre*

The primacy of the Lloyd's form in French law is evident in the modest tone with which Villeneau introduced the 1990 version of the *formule Villeneau*. Villeneau observed that the purpose of his standard form salvage contract was not to 'compete with the Lloyd's form on a global scale'.¹⁸⁸ Nonetheless, he noted that French shipowners often used the *formule Villeneau* even in situations where French rules on choice of jurisdiction did not compel them to choose a French arbitral tribunal or a French court.¹⁸⁹

Therefore, in English and French law, the rules on unfair prices in salvage contracts have become marginalised in practice as salvors and salvees in both systems use standard form salvage contracts which provide that the price will be determined by arbitrators after the provision of the salvage services.

Arbitrale Maritime de Paris. This arbitral tribunal did not exist when the 1962 version of the *formule Villeneau* was first published: Villeneau (n184) 237.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

- (iv) The similar origin of the rules on unfair prices in salvage contracts in English and French law

The rules in English and French law which allow courts to intervene in salvage contracts on the ground that the price is too high or too low have a common origin. The current rules in both systems can be traced back to the decisions of Dr Lushington in the Court of Admiralty in the middle of the nineteenth century.¹⁹⁰

At first glance, it might seem likely that this rule derives from the civil law. Unlike the common law and equity courts, the Court of Admiralty applied many rules which were derived from the civil law. The significant influence of the civil law on the rules developed in the Court of Admiralty is evident in *The Gas Float Whitton (No 2)* in which Lord Esher MR (Sir William Baliol Brett) observes that

neither the laws of the Rhodians, nor of Oleron, nor of Wisby, nor of the Hanse towns, are of themselves part of the Admiralty law of England... But they contain many principles and statements of marine practice, which, together with the principles found in the Digest, and in the French, and other Ordinances, were used by the judges of the English Court of Admiralty, when they were moulding and reducing to form the principles and practice of their Court.¹⁹¹

¹⁹⁰ The development of the rule on unfair prices in salvage contracts occurred at a time of renaissance in the Court of Admiralty. 'At the end of the seventeenth century the common lawyers had succeeded in limiting the jurisdiction of the Court of Admiralty; and right down to the beginning of the nineteenth century its business was small.' In 1840, the Court of Admiralty recovered some of the jurisdiction of which it had been deprived and 'it was not until then that it was able to construct, on the basis of Roman law and the maritime law of Europe, our modern English system of maritime law': Holdsworth, vol XIII (n18) 692.

¹⁹¹ [1896] P 42, 47.

The significance of the civil law in the Court of Admiralty is also evident in the composition of this Court.¹⁹² Until the middle of the nineteenth century, the judges and advocates of the Court of Admiralty formed a separate branch of the legal profession which specialised in civil law. In order to practice in the Court of Admiralty, it was necessary to be a member of Doctors' Commons. Doctors' Commons was a college of civilian lawyers (known as advocates) which was 'somewhat akin' to the Inns of Court for the common lawyers.¹⁹³ Until the middle of the nineteenth century, the advocates of Doctors' Commons had a monopoly on the practice of civil law in England in the ecclesiastical courts and in the Court of Admiralty. In the middle of the nineteenth century, the advocates decided to dissolve Doctors' Commons when a series of laws diminished the jurisdiction of the civilian courts and allowed common lawyers who were not members of Doctors' Commons to practise in the civilian courts.¹⁹⁴

However, despite the significant influence of the civil law on the rules developed by the Court of Admiralty, the rule on unfair prices in salvage contracts is not derived from the civil law. There is an echo of this rule in a particular rule in the Roll of Oleron which is a collection of maritime rules that was probably originally compiled in the

¹⁹² Furthermore, the procedure of the Court of Admiralty was derived from civil law. For example, it 'sat without a jury and relied on written testimony': Reeder (n15) 8.

¹⁹³ FL Wiswall, *The development of admiralty jurisdiction and practice since 1800: an English study with American comparisons* (CUP 1970) 75. There were never very many Fellows of Doctors' Commons. There were seventeen when the college was incorporated in 1768 and only 26 in 1858. Proctors, which were the equivalent of solicitors, also practised in the civilian courts. However, while the proctors had their offices in Doctors' Commons, they were not members of Doctor's Commons: Wiswall (n193) 78, 80-81.

¹⁹⁴ The monopoly of the civil lawyers in admiralty law was abolished by a statute in 1859 (22 & 23 Vict c 6) which allowed the common lawyers to practise in the Court of Admiralty. However, it was the loss of the monopoly on probate cases which was effectively the death knell of Doctors' Commons. The Court of Probate Act 1857 (20 & 21 Vict c 77) abolished this monopoly and provided that the members of Doctors' Commons could distribute the assets of Doctors' Commons to the current members, surrender its charter and dissolve the college. Despite significant opposition to the dissolution of the college, the majority of Fellows voted to distribute the assets in 1858: Wiswall (n193) 90, 87-91. Nonetheless, as the charter was never actually surrendered, Doctors' Commons continued to exist until 8 March 1912 when the last member, Dr Tristram, died: GD Squibb, *Doctors' commons: a history of the College of Advocates and Doctors of Law* (Clarendon Press 1977) 108-109.

twelfth century on the island of Oléron off the West coast of France.¹⁹⁵ Rule IV provided that if the salvees promised to pay the salvors a sum which was equal to one third or one half of the value of the salvaged goods,

*la iustice du pays doit bien regarder quelle peine et quel labour ilz auront mys a les saulver, et selon icelle peine, nonobstant celle promesse que lesdictz maistres et marchands leur auroient faictes, ler guerdonner.*¹⁹⁶

Thus, this rule in the Roll of Oleron allowed courts to disregard salvage contracts and award a sum to the salvors which was equal to the value of the service which they provided. However, it is unclear whether courts could both decrease and increase the price, or whether they could decrease the price only or increase the price only. Moreover, there is no reference to this rule in cases such as *The Henry*,¹⁹⁷ *The Silver Bullion*,¹⁹⁸ *The Phantom*¹⁹⁹ and *The Theodore*,²⁰⁰ which are the principal cases in which the rule on unfair prices in salvage contracts was developed in English law.

It appears that the rule on unfair prices in salvage contracts was created by Dr Lushington in the Court of Admiralty in the middle of the nineteenth century and that it was not based on a rule in the civil law or an older rule in English law. Dr Lushington did not cite any authority from English law or any rules from the civil law in his judgments in

¹⁹⁵ TFT Plucknett, *A concise history of the common law* (5th edn, Butterworth 1956) 658. As noted above (text to n191), the Roll of Oleron is one of the civil law sources which influenced the development of English maritime law.

¹⁹⁶ T Twiss, *The black book of the admiralty* vol II (Longman and Trübner, 1873) 436 (original spelling). Twiss notes that this part of Rule IV (on the price stipulated in salvage contracts) was omitted in some versions of the Roll of Oleron: Twiss, vol I (n196) 92-93; Twiss, vol II (n196) 212-215; Twiss, vol III (n196) 6-9.

¹⁹⁷ *The Henry* (n26).

¹⁹⁸ *The Silver Bullion* (n31).

¹⁹⁹ *The Phantom* (n27).

²⁰⁰ *The Theodore* (n32).

The Henry,²⁰¹ *The Silver Bullion*,²⁰² *The Phantom*²⁰³ and *The Theodore*,²⁰⁴ when he developed the rule on unfair prices in salvage contracts. Furthermore, there is no other evidence which suggests that this rule can be traced back further than these cases in the Court of Admiralty in the middle of the nineteenth century. The absence of any references to English cases or to rules from the civil law in these cases is not particularly surprising as reasoning from first principles is one of the most distinctive features of the judgments of Dr Lushington in the Court of Admiralty.²⁰⁵

It was possible for Dr Lushington to create the rule on unfair prices in salvage contracts from first principles as there were very few restraints on his freedom to develop rules in the Court of Admiralty. First, there were few binding precedents as there were no regular reports of cases in the Court of Admiralty until the nineteenth century.²⁰⁶ Secondly, the decisions of Dr Lushington were rarely appealed as appeals from the Court of Admiralty were heard by the Privy Council and this was an expensive step.²⁰⁷ Therefore, as Waddams observes, ‘Dr Lushington, as the judge of the Admiralty Court from 1838 to 1867, had a more complete control over the law of salvage than almost any other judge at any other time over any area of law.’²⁰⁸ This was the unusual context in

²⁰¹ *The Henry* (n26).

²⁰² *The Silver Bullion* (n31).

²⁰³ *The Phantom* (n27).

²⁰⁴ *The Theodore* (n32).

²⁰⁵ Waddams notes that none of Dr Lushington’s judgments ‘contains what could be called a technical legal discussion, appeal being made throughout to general principle, rather than to particular precedent’: S Waddams, ‘Dr Lushington’s Contribution to Law of Maritime Salvage (1838-67)’ [1989] *LMCLQ* 59. 65.

²⁰⁶ Waddams (n205) 59.

²⁰⁷ *Ibid* 59. Before 1833, appeals from the Court of Admiralty were heard by the High Court of Delegates: Wiswall (n193) 36-37.

²⁰⁸ Waddams (n205) 59.

which Dr Lushington was able to create and entrench the rule on unfair prices in salvage contracts.

In contrast, the rule in French law on unfair prices in salvage contracts was first introduced into French law in Article 7 of the *loi* of 1916, which essentially reproduced Article 7 of the Salvage Convention 1910. As will be seen, it is likely that Article 7 of the Salvage Convention 1910 was based on the English rule on unfair prices in contracts. Therefore, the decisions of Dr Lushington in the Court of Admiralty in the middle of the nineteenth century are the common origins of the rules on unfair prices in salvage contracts in both English and French law.

The Salvage Convention 1910 was the result of a quarter of a century of efforts by jurists from numerous countries to unify certain aspects of national maritime laws. In 1885 and 1888, the Belgian government organised diplomatic conferences on maritime law and a draft international convention was prepared.²⁰⁹ However, this convention was not ultimately adopted. The principal reason for the failure of this international convention was that it tried to deal with too many issues in maritime law.²¹⁰

Nevertheless, in 1897, a number of jurists from various countries decided to pursue the goal of unifying national maritime laws by establishing the *Comité maritime international* in Antwerp.²¹¹ The *Comité maritime international*, is a non-governmental

²⁰⁹ A different but contemporary attempt to unify certain aspects of national maritime laws, led by the International Law Association, resulted in the formulation of the York-Antwerp rules on general average in 1890. These rules, which have been amended on several occasions since 1890, are still of significant importance in English and French law on general average today. See Bonassies and Scapel (n1) 11, 373-381; JHS Cooke and RR Cornah, *Lowndes and Rudolf: the law of general average and the York-Antwerp Rules* (13th edn, Sweet and Maxwell 2008) 43-65.

²¹⁰ P Govare, 'Etude sur les tentatives faites en vue d'uniformiser le droit maritime' 1 *RDIP* (1905) 593, 600. Govare also attributes the failure of this convention to the 'bad faith of the British government' and 'the ephemeral nature' of the conferences: Govare (n 210) 600.

²¹¹ Bonassies and Scapel (n1) 12.

organisation which still exists today.²¹² It was the *Comité maritime international* which decided to focus the efforts to unify national maritime laws on salvage and collisions and two draft conventions were prepared.²¹³

In 1903, the Belgian government decided to support the work of the *Comité maritime international* by convening a series of diplomatic conferences on salvage and collisions at sea.²¹⁴ The draft conventions on salvage and collisions at sea which had been prepared by the *Comité international maritime* were discussed and amended at four diplomatic conferences in 1905, 1909 and 1910.²¹⁵ An agreement was ultimately reached on 23 September 1910 when the Salvage Convention and the Collision Convention were signed in Brussels by the representatives of numerous states.²¹⁶

The diversity of rules in national legal systems was the primary reason for trying to unify the rules on salvage in an international convention. In 1905, it was observed that this diversity was frequently causing ‘serious problems’ as shipowners, cargo owners and insurers could not predict the extent of their liability.²¹⁷ It was thought that it was necessary to unify the rules of national legal systems so that similar solutions were given to similar problems regardless of which national court heard the case.²¹⁸

²¹² Ibid 11-12.

²¹³ Govare (n210) 601.

²¹⁴ Ibid 602.

²¹⁵ 8 *RDIP* (1912) 531, 531.

²¹⁶ Ibid. The Collision Convention 1910 was incorporated into English law by the Maritime Conventions Act 1911 c 57. The Salvage Convention 1910 was never incorporated into English law, presumably on the basis that it was unnecessary as it simply reproduced English law on this point. See n231 below.

²¹⁷ Govare (n210) 593, 593-595

²¹⁸ Ibid 594-595.

The precise origins of Article 7 of the Salvage Convention 1910 are somewhat obscure.²¹⁹ It had been the subject of ‘a lengthy debate’ before the final version of the Article was adopted.²²⁰ Nevertheless it is probable that this provision was derived from English law rather than French law or any other legal system.

It is unlikely that Article 7 of the Salvage Convention 1910 is derived from French law. First, at this time, French courts did not intervene in contracts on the ground of an unfair price.²²¹ The rule on unfair prices in salvage contracts first appeared in French law in Article 7 of the *loi* of 1916.

Secondly, Frédéric-Charles Autran, who was one of the French representatives at the diplomatic conferences in Brussels in 1905, 1909 and 1910, strongly opposed Article 7 of the Salvage Convention 1910. Autran stated that to allow courts to intervene in salvage contracts on the ground that the price is too high or too low would ‘open the door to all kinds of disputes’.²²² In an echo of Article 1134 of the *Code civil*, Autran observed that it was important to remember that contracts constituted ‘the law of the parties’ and that the courts could intervene in contracts only on the grounds of fraud, mistake or undue pressure. Autran also noted that it was ‘particularly inappropriate’ to deviate from this general principle by giving special treatment to ‘merchants and captains who are perfectly capable of looking after their own interests’.²²³

²¹⁹ Wildeboer notes that the debates on Article 7 of the Salvage Convention 1910 were ‘confused’: IH Wildeboer, *The Brussels Salvage Convention* (Sijthoff 1964) 167.

²²⁰ D.1917.310 (Georges Ancel in the *Chambre des députés*).

²²¹ The contrary argument which has been advanced by French jurists in this century and in the last is implausible as discussed in section (iii) above.

²²² 8 *RDIP* (1912) 531, 538.

²²³ *Ibid* 539. During the debates on the *loi* of 1916 in the *Chambre des députés*, Ancel stated that the final text of Article 7 can be attributed to Autran: D. 917.309, 310. While this assertion might be accurate, it is

On the other hand, it is likely that Article 7 of the Salvage Convention 1910 is derived from English law. First, Sir William Pickford,²²⁴ the senior representative of the United Kingdom at the diplomatic conferences was the only national representative to argue in favour of this rule.²²⁵ He stated that it is ‘appropriate’ for a court to intervene in salvage contract on the ground that the price is too high or too low as one of the parties might be unaware of an essential fact.²²⁶ He also observed that it was necessary to set this rule out in clear terms in order to avoid any ambiguity.²²⁷

Furthermore, Article 7 of the Salvage Convention 1910 replicated the English rule on unfair prices in salvage contracts. This rule was well established in English law at this time.²²⁸ In addition, this rule had been reproduced in all the standard form salvage contracts which had been approved or published by Lloyd’s since 1890.²²⁹ The Lloyd’s form of 1908 was the Lloyd’s form which was being used when the Salvage Convention 1910 was concluded. Clause 13 of this standard form salvage contract provided that

significant that there is no reference in the debates in the *Chambre des députés* and the *Sénat* to Autran’s hostility to the rule on unfair prices in salvage contracts in Article 7 of the Salvage Convention 1910.

²²⁴ Sir William Pickford (who became Lord Sterndale when he was appointed president of the Probate, Divorce and Admiralty Division of the High Court in 1918) had a keen interest in the unification of maritime law. ‘As a young lawyer’, Pickford was an active member of the *Comité Maritime International* and from 1905, when he was still a barrister, he was the senior representative of the United Kingdom at the conferences which produced the Salvage Convention 1910 and the Collision Convention 1910. Pickford’s judicial career commenced in 1907, when he was appointed to the King’s Bench Division in the High Court: See FD Mackinnon and H Mooney, ‘Pickford, William, Baron Sterndale (1848-1923)’, in *Oxford Dictionary of National Biography* (OUP 2004): <www.oxforddnb.com/view/article/35525> accessed 3 October 2012.

²²⁵ 8 *RDIP* (1912) 531, 539. While Autran, the French representative was patently hostile to the rule on unfair prices in salvage contracts in Article 7 of the Salvage Convention 1910 (see the text to n222), the Italian representative, François Berlingieri, simply argued that this rule was ‘superfluous’ in light of the other provisions in Article 7: 8 *RDIP* (1912) 531, 538.

²²⁶ *Ibid* 539.

²²⁷ *Ibid*.

²²⁸ See section (ii) above.

²²⁹ See section (ii) above.

arbitrators could intervene in salvage contracts on the ground that the price which had been agreed was 'excessive or insufficient'.²³⁰

Finally, in 1910, the British Empire was the leading power in world shipping and France was a declining power. Therefore, it is not surprising that Article 7 was based on a rule derived from English law rather than French law or the law of any other jurisdiction.²³¹

The British Empire clearly dominated world shipping at the time of the Salvage Convention 1910. In 1900, the merchant fleet of the British Empire represented 61 per cent of the total world tonnage of the principal maritime powers.²³² The British Empire also dominated the global shipbuilding industry. In 1914, almost 60 per cent of ships were constructed in the British Empire.²³³

In contrast to the dominant position of the British Empire in world shipping at the time of the Salvage Convention 1910, France was in decline as a maritime power. Ripert observes that it would be 'puerile' to ignore the 'relative decadence of the French merchant navy in the nineteenth century'.²³⁴ In 1842, France was the third largest maritime power in the world after the British Empire and the United States.²³⁵ However, the position of France deteriorated further at the beginning of the twentieth century. In 1914, France was only the fifth largest maritime power after the British Empire, the

²³⁰ A copy of this contract is reproduced in Williams (n104) 252.

²³¹ Kerr states that 'it was accepted – and virtually inevitable – that the text' of the Salvage Convention 1910 'would substantially reproduce the position in English law': Kerr (n131) 531.

²³² Hope (n15) 307.

²³³ *Ibid* 336.

²³⁴ Ripert (n137) 15.

²³⁵ *Ibid*.

United States, Germany and Norway.²³⁶ The relative insignificance of France in world shipping at the time of the Salvage Convention 1910 is evident in the fact that in 1914, there was no French port in the list of the ten busiest ports in the world.²³⁷

In summary, there are four strikingly similarities in English and French law on unfair prices in salvage contracts. In both systems, there are rules which allow courts to increase or decrease the price agreed in salvage contracts if it is unfair. In addition, similar rationales underpin these rules in both systems. A further similarity is the fact that these rules have been marginalised in practice as a result of the widespread use of the Lloyd's form in both systems. Finally, both rules originate from the same source. They can both be traced to the decisions of Dr Lushington on unfair prices in salvage contracts in the Court of Admiralty in the middle of the nineteenth century.

²³⁶ Ibid.

²³⁷ Ibid. The frequent appearance of English ships and contracts in English pounds in French cases on salvage contracts at the end of the nineteenth century further illustrates the superior position of British shipping in relation to French shipping at this time. English ships appear in *Le Saint-Marc* (n153) and *Le Titian* (n9). The price is stipulated in English pounds in the salvage contracts in *Le Saint-Marc* (n153) and *L'Hudson* (n173).

CHAPTER 5

PRIORITIES PECULIAR TO FRENCH LAW: LABOUR, FARMING, VENAL OFFICES, SMALL
BUSINESSES AND ART AND LITERATURE

This chapter examines the rules on unfair prices in contracts in French law for which there are no equivalents in English law. Chapters 2 and 3 illustrate that English and French law have intervened in similar contracts on the basis of an unfair price. However, beyond the shared priorities of land and salvage, French law has forged a path where English law has never trodden. In contrast to English law, French law has intervened on the ground of an unfair price in contracts on for the provision of certain services, for the sale of *offices ministériels*, for the sale of fertiliser, seeds, plants and food for animals, for the sale of businesses in the Great Depression and for the assignment of copyright. This chapter will analyse the genesis of these rules, the rationales underpinning these rules and how they have operated in practice.

Each of the rules which are discussed in this chapter can be explained either by the policy of protecting a weak party to a contract or by the policy of giving special treatment to a particular group for economic, social, cultural or political reasons or by both of these policies.

The rules in this chapter are discussed chronologically in order to illustrate the fact that unlike English law, there has been a constant accumulation of rules on unfair prices in French law in the last two centuries. Of the five rules in French law which are considered in this chapter, only two are no longer in force.

(i) The price of labour: often too high but never too low

In French law, the price of labour can sometimes be reduced if it is too high, but it cannot be increased if it is too low.¹ Since 1824, the courts have reduced the fees stipulated in contracts between business agents or professionals² and their clients on the ground of an unfair price.³ However, the courts have consistently refused to increase the wages stipulated in contracts between workers and employers on the ground of an unfair price.⁴ These two points will be addressed in detail in this section.

Part (a) of this section will analyse the origin and development of the rule on unfair fees and it will be argued that this rule is based on the policy of protecting clients

¹ Similar to the use of the terms ‘too high’, ‘too low’, and ‘unfair’ throughout this thesis, in this chapter, these terms are all relative to the objective or market value. Therefore, an unfairly low wage is a wage which is lower than the objective value of the labour. The question of a minimum wage, which is discussed below in n64 addresses a different issue. A minimum wage is not determined by the objective or market value of labour. In this thesis, an unfair wage may be less than or greater than the minimum wage.

² The terms ‘business agent’ and ‘professional’ are translations of the terms ‘*agent d'affaires*’ and ‘*professionnel*’. While courts use the term ‘*agent d'affaires*’, they refrain from using the term ‘*professionnel*’. Instead, when courts use the term ‘*honoraire*’, it is evident that the other party to the contract is a ‘*professionnel*’ rather than an ‘*agent d'affaires*’. Nevertheless, the term ‘*professionnel*’ is used by legal writers when they discuss the scope of this rule.

The terms ‘*agent d'affaires*’ and ‘*professionnel*’ are imprecise. The term ‘*agent d'affaires*’ includes brokers, estate agents and other businessmen who provide a wide range of services to their clients. The term ‘*agent d'affaires*’ can also denote a business agent who has concluded a contract of *mandat* with his client. A contract of *mandat* is an agency contract which allows the *mandataire* to enter into contracts on behalf of his client or to conclude other *actes juridiques* on behalf of his client: P Malaurie, L Aynès and P-Y Gautier, *Les contrats spéciaux* (4^e édn, Defrénois 2009) 272, 286. The contract of *mandat* is set out in Articles 1984 to 2010 of the *Code civil*. However, as the cases discussed below in this section demonstrate, an *agent d'affaires* is often not a *mandataire*. The term ‘*professionnel*’ includes accountants, architects, genealogists and management consultants in addition to the liberal profession of *avocat*.

³ F Terré, P Simler and Y Lequette, *Droit civil: les obligations* (10^e édn, Dalloz 2009) 324-326. Hereafter, this rule will also be described as ‘the rule on unfair fees’.

There are some similarities between the doctrine of undue influence in English law and the rule on unfair fees in French law. In *Royal Bank of Scotland plc v Etridge (No 2)*, Lord Nicholls noted that the ‘law would be out of touch with everyday life’ if the presumption of undue influence were to apply to ‘an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser’: [2002] AC 773, [24]. The implication here is that the presumption of undue influence would arise if a client or patient agreed to pay unreasonably high fees. However, in contrast to the rule on unfair fees in French law, an unfair price is neither a necessary nor a sufficient element in the doctrine of undue influence in English law (as discussed in section (ii)(a) in chapter 2).

⁴ E Périn, *De la lésion dans le contrat de travail* (Bonvalot-Jouve 1908) 20-25; G Chantepie, *La lésion* (LGDJ 2006) 286.

on the basis that they are weak parties in contracts for the provision of services by business agents and professionals. In part (b) of this section, the creation and extension of the rule on unfair fees will be contrasted with the steadfast refusal of the courts to establish a rule which would have allowed them to increase the unfairly low wages of workers. It will be argued that this choice can clearly be ascribed to a policy of opposing socialism and preserving a liberal economic order in the aftermath of the Revolution of 1848.

(a) The rule on unfair fees

The rule on unfair fees was first proclaimed by *Cour de cassation* in *Isart c Desgardes* in 1824.⁵ In this case, the beneficiaries of a testamentary estate employed a business agent to recover the sums owed by debtors to the estate and to distribute the estate to each of the beneficiaries. The business agent and the beneficiaries agreed that the business agent would be paid five per cent of the debts owed to the estate. The parties also agreed that the business agent would receive this price even if the beneficiaries terminated the contract prematurely. The beneficiaries terminated the contract before the business agent had completed the task and they offered to pay a price which was lower than that which they had stipulated in the contract. The business agent refused to accept a lower price and argued that the contract was binding on the beneficiaries under Article 1134 of the *Code civil*.

The price agreed in the contract between the beneficiaries and the business agent was reduced by the *Tribunal de première instance* of Meaux, and this decision was confirmed by the *Cour royale* of Paris and the *Cour de cassation*. The longest judgment

⁵ Cass req, 11 March 1824: S.1822-1824.412.

was given by the *Tribunal de première instance* of Meaux which observed that ‘the salary which is being demanded... for this work which is far more mechanical than intellectual, is clearly disproportionate to the price which would be legitimately due’. That court also held that ‘*il est du devoir du tribunal d’apprécier à leur juste valeur de semblables stipulations et de réduire à son taux légitime le salaire qu’elles ont pour objet.*’ The judgments of the *Cour royale* of Paris and of the *Cour de cassation* were more laconic. The *Cour royale* of Paris and the *Chambre des requêtes* of the *Cour de cassation* simply held that ‘*tout salaire d’agent d’affaires est sujet d’évaluation et règlement par le juge.*’ It is striking that no provision of the *Code civil* was cited as the basis of this rule in any of the three courts.⁶

The status of the rule on unfair fees was quite uncertain for four decades after *Isart*.⁷ In general the rule on unfair fees was consistently applied and the courts reduced the unfairly high fees of business agents or professionals.⁸ However, there was one ‘frankly dissident’⁹ decision in the *Tribunal civil* of the Seine,¹⁰ and this decision was

⁶ The question of the legal basis of the rule on unfair fees is examined below in the text from n47 to n57.

⁷ *Isart* (n5). In a note on two cases in 1866, A Boullanger, an *arrétiste*, stated that the question whether courts can reduce the fees agreed in a contract between a business agent and a client was ‘controversial’: S.1866.1.273, 275.

⁸ See for example, Cass req, 18 April 1855 (*Trannoy c Marc*): S.1855.1.527; *Cour* of Bordeaux, 12 February 1857 (*Coeffard c Charpentier*): S.1858.2.554; Cass req, 12 January 1863 (*Picque et Mayaud c Paillard*): S.1863.1.249; *Cour* of Paris, 5 April 1870 (*Naegelen c Monplot*): S.1870.2.53 Courts and jurists have used three different terms to describe what we call ‘the rule’ on unfair fees. The term ‘*le droit et le devoir*’ was first used in *Isart* (n5) and was frequently repeated in cases in the nineteenth century. See for example, *Cour* of Paris, 12 January 1856 (*Trécul c Lefèvre*): S.1856.2.293. The term ‘*la règle*’ was used in the note in *Dalloz* to Cass civ, 29 January 1867 (*Poictevin c de Seraincourt*): D.1867.1.53; S.1867.1.245 and the term is used today in Malaurie, Aynès and Gautier (n2) 291. The term ‘*le pouvoir*’ is the one which is most commonly used now. See for example, Cass civ 1, 5 May 1998 (*Lobre c Andriveau*) and Terré, Simler and Lequette (n3) 324.

⁹ J Perrin, *Essai sur la réductibilité des obligations excessives* (Marchal et Billard 1905) 136.

¹⁰ *Tribunal civil* of the Seine, 16 January 1862 (*Aubert et Mongin c Navoit*): S.1863.1.249. This decision was upheld by the *Cour* of Paris, 27 June 1863: S.1863.1.249. In a very laconic judgment, the *Cour* of Paris simply stated that it agreed with the reasons given by the *Tribunal civil* of the Seine.

confirmed by the *Cour* of Paris and the *Cour de cassation*.¹¹ Furthermore, two of the leading legal writers at this time had sharply opposing views on the rule on unfair fees. While Demolombe was firmly against the rule, Troplong, who also happened to be president of the *Cour* of Bordeaux in a case in which the rule on unfair fees was applied,¹² was in favour of this rule.¹³

However, ‘this period of uncertainty ended’¹⁴ in 1867 when the rule was firmly established by the *chambre civile* of the *Cour de cassation* in *Poictevin*.¹⁵ In this case, a borrower had agreed to pay a business agent 90,000 francs in order to arrange a loan of 500,000 francs. The widow of the borrower subsequently sought to recover the 90,000 francs from the business agent. The *Tribunal* of the Seine held that the widow could recover this sum.

The business agent relied on ‘*le principe de la liberté des conventions*’ in his appeal to *Cour* of Paris but that court declared that the price paid to a business agent constituted ‘*le salaire d’un mandat, lequel salaire peut être apprécié et déterminé par les tribunaux, alors même qu’il a été convenu entre les parties et réglé entre elles*’. It was held that while the widow could not recover the entire sum paid to the business agent, the price should be reduced to 4,000 francs.

¹¹ Cass civ, 7 May 1866 (*Aubert et Mongin c Navoit*): S.1866.1.276. Nonetheless, unlike the *Tribunal civil* of the Seine, the *Cour de cassation* did not expressly reject the rule on unfair fees in this case. The *Cour de cassation* simply held that the rule did not apply on the facts as the contract was principally a contract for the sale of a secret (the fact that the purchaser was the beneficiary of a deceased’s estate) rather than for the provision of services. In fact, contracts for the sale of such secrets by genealogists were excluded from the rule on unfair fees until the decision of the *Cour de cassation* in *Lobre* (n8). The significance of this case is highlighted in J Mestre, *RTDciv* (1998) 901.

¹² *Coeffard* (n8).

¹³ S.1866.1.273, 273, note A Boullanger.

¹⁴ J Perrin (n9) 141.

¹⁵ *Poictevin* (n8).

In the *Cour de cassation*, the business agent argued that the price agreed in the contract could not be reduced on the ground that it was unfair. He invoked Articles 6 and 1134 of the *Code civil* which enshrine the principles of freedom of contract and the binding force of contracts and Article 1986 of the *Code civil* which provides that while a contract of *mandat* is gratuitous in nature, the parties may nevertheless agree on a price. The *Chambre civile* of the *Cour de cassation* which was then presided by the *premier président* Troplong, refused to quash the decision of the *Cour* of Paris and clearly affirmed the rule on unfair fees. The *Cour de cassation* stated that a contract of *mandat* is gratuitous in nature and thus, where the parties agree on a price, the courts can reduce the price where it is disproportionate to the service rendered.¹⁶

Since the creation of the rule on unfair fees in 1824, French courts have intervened in contracts to protect clients against a diverse cast of business agents and professionals. The development of this rule can be divided into three distinct periods.

In the first period which runs from the creation of the rule in 1824 until the end of the nineteenth century, there were three principal situations in which the rule on unfair fees was applied. The courts applied this rule to contracts in which business agents promised to manage their client's claims in court,¹⁷ broker loans for their clients¹⁸ or manage the distribution of a deceased's estate by recovering the sums owed by debtors and paying the assets to their clients, the beneficiaries.¹⁹

¹⁶ The inadequacy of this particular legal basis and the more general question of the legal basis of the rule on unfair fees are considered below in the text from n47 to n57.

¹⁷ Cass civ, 9 May 1866 (*Darrieux c Ferradou*): S.1866.1.273; *Tribunal civil* of the Seine, 26 January 1870 (*L c de S*): D.1871.3.22; *Naegelen* (n8).

¹⁸ *Poictevin* (n8); Cass req, 8 April 1872 (*Leroy c Arman*): S.1872.1.207.

¹⁹ *Isart* (n5); *Trannoy* (n8).

The first half of the twentieth century is the second period. At this time, the rule on unfair fees was mainly applied to contracts in which business agents sold land or businesses for their clients.²⁰ The rule was applied to business agents who had found purchasers for a landed estate in 1908,²¹ for a hotel in 1911²², for a paper factory in 1913,²³ and for a grocery shop in 1951.²⁴

In the third period, which runs from the start of the second half of the twentieth century to the present, the courts have extended the rule on unfair fees to a wide range of professionals. The rule was applied to an architect in 1962,²⁵ a management consultant²⁶ and an *avocat* in 1969,²⁷ an accountant in 1986,²⁸ and a genealogist in 1998.²⁹ Moreover, it has been held that the rule on unfair fees can be invoked even if the clients are companies. For example, in 1993, the rule was successfully invoked by a company which had agreed to pay unfairly high fees to a management consultant.³⁰ Similarly, in 1997, the

²⁰ However, a very early example of this type of case is *Coeffard* (n8) where the business agent found a purchaser for his client's house.

²¹ Cass req, 27 January 1908 (*Salomon-Lévy c Alizard*): D.1908.155.

²² Cass req, 12 December 1911 (*Julliard c Marchal*): D.1913.129.

²³ Cass req, 11 March 1913 (*Amyot c Breton*): D.1913.408.

²⁴ *Cour d'appel* of Douai, 25 July 1952 (*Davroux c Gibour*): D.1953.1.47.

²⁵ Cass civ 1, 4 June 1962.

²⁶ *Cour d'appel* of Rennes, 17 April 1969: *RTDciv* (1971) 172; Cass com, 2 March 1993 (*Société Biscuiterie Delfour c Compagnie Française des Conseils Indépendants*).

²⁷ Cass civ 1, 14 May 1969.

²⁸ Cass civ 1, 3 June 1986.

²⁹ *Lobre* (n8).

³⁰ *Société Biscuiterie Delfour* (n26).

Cour de cassation held that the rule was applicable to a contract in which a company had agreed to pay a certain amount in fees to an *avocat*.³¹

The creation and development of the rule on unfair fees can be explained by the policy of protecting clients as they are weak parties in the contracts for services which they conclude with business agents and professional.

The courts emphasise the fact that it is difficult to determine how much work will be required and what it will be worth where the business agent or professional concludes the contract with his client before the services are provided. This is apparent in the decision of the *Tribunal civil* of the Seine in *L c de S*.³² In this case, the court stated that the parties to a contract in which a business agent agreed to manage his client's claim in the courts, could not know at the time of the conclusion of the contract 'how much care' the business agent would have to give to the client's claim.

While the courts state that the parties cannot easily estimate how much work will be necessary and how much it will be worth, it is clear that the clients are considered to be in a much weaker position than the business agents or professionals. First, as the *Cour* of Paris observed in *Trannoy c Marc*, clients are often people who are '*peu éclairées*' or '*entièrement étrangères aux affaires*'.³³ As a result, they are not able to 'assess the scope and the consequences' of the contracts for services which they conclude with business agents. In contrast, business agents and professionals are generally more likely to know how much work will be required and how much their services will be worth. In fact, as

³¹ Cass civ 1, 2 April 1997. However, the company's claim did not succeed on the facts. See the text below from n45 to n46.

³² *L c de S* (n17). See also *Darrieux* (n17).

³³ *Cour* of Paris, 25 November 1854: S.1855.1.527. The *Cour de cassation* refused to quash this decision in *Trannoy* (n8).

Boullanger observed in a note in Sirey in 1866, ‘a business agent has an incentive to exaggerate the difficulties’ of the service which he promises to provide for his client.³⁴

Secondly, the fact that the courts have never suggested that the rule could apply in favour of business agents or professionals who agreed to accept too low a price demonstrates that only clients are considered to be in a weak position. As Boullanger stated in 1866, the courts would ‘obviously not’ award a higher sum to a business agent if he had agreed to accept too low a price in the contract with his client.³⁵

Furthermore, up to and including the decision of the *Cour de cassation* in *Poictevin* in 1867,³⁶ the courts treated business agents with great suspicion and in some cases, business agents appeared to be particularly devious and unscrupulous. In this context, it is not surprising that the conception of clients as weak parties in the contracts for services which they conclude with business agents was prevalent in the courts.

Boullanger notes that there is a willingness to treat business agents as ‘a category of suspects who deserve to be placed... outside the general law’.³⁷ Similarly, in *Aubert et Mongin*, the *Tribunal civil* de la Seine conceded that ‘in such cases, fraud can be presumed more easily than in ordinary cases’.³⁸ The general suspicion with which business agents were viewed in the courts is also apparent in the indulgent tone of the argument presented by the *avocat* of the business agent in the *Cour de cassation* in

³⁴ S.1866.1.273, 274, note A Boullanger.

³⁵ *Ibid.*

³⁶ *Poictevin* (n8).

³⁷ This observation is perhaps an implicit reference to *Trannoy* (n33) in which the *Cour* of Paris stated that contracts in which a business agent promised to provide services for his client were outside ‘the ordinary principles of law on the performance of contracts’. See also *Trécul* (n8).

³⁸ *Aubert et Mongin* (n10). However, the court emphasised that there was no fraudulent conduct in this case.

Darrieux c Ferradou.³⁹ He stated that ‘*que l’on se montre sévère pour eux, rien de mieux; que l’on recherche avec soin dans les contrats... s’il y a eu de leur part fraude, ruse coupable ou surprise, rien de plus juste encore...*’. However, he contended that the court would infringe Article 1134 of the *Code civil* if it reduced the price agreed in the contract on the basis that it was unfair.

In addition, it appears that the suspicion with which the courts often treated business agents was not completely unfounded as in several cases in which the rule on unfair fees is invoked, business agents appear to be particularly cunning and unscrupulous characters. In *Darrieux c Ferradou*, the business agent had ensured that the contract falsely stipulated that the sum of 5,000 francs owed by the client was a loan and not a fee for the provision of services.⁴⁰ Similarly, in *Poictevin*, where a business agent brokered a loan for his client, the business agent concealed the fact that his client had paid him 90,000 francs from the *notaire* and the lender.⁴¹ The business agent initially claimed that the 90,000 francs constituted remuneration for other services which he had performed for his client. However, the business agent then denied that he had ever received 90,000 francs from his client and he even stated that he had never provided any

³⁹ *Darrieux* (n17).

⁴⁰ *Darrieux* (n17). In this case, it is possible that the business agent sought to evade the rule on unfair fees by stipulating that the sum of 5,000 francs was a loan rather than remuneration for services.

In the middle of the nineteenth century, the *Cour* of Paris drew an analogy between business agents and *officiers ministériels* in order to justify the rule on unfair fees. See section (iii) below on *officiers ministériels*. In *Trannoy* (n33), the *Cour* of Paris stated that it could reduce the fees agreed in contracts between business agents and their clients as business agents essentially performed the same functions as *officiers ministériels* and the State fixed the fees charged by *officiers ministériels*. However, in *Aubert et Mongin* (n10) the *Tribunal civil* of the Seine explained why it was inappropriate to extend the rules on *officiers ministériels* to business agents. See also the additional arguments of the *avocat* of the business agent before the *Cour de cassation* in *Aubert et Mongin* (n11).

Nonetheless, there is another reason why it is significant that an analogy was drawn between business agents and *officiers ministériels*. The fraudulent and unscrupulous behaviour of many *officiers ministériels*, particularly *notaires*, was notorious during the nineteenth century. See section (iii) below. It is notable that the business agent in *Darrieux* (n17) was ‘a former *notaire*’.

⁴¹ *Poictevin* (n8).

services for his client. The *Cour de cassation* held that the claimant had proven that these assertions were false.⁴²

The policy of protecting the weak party to the contract is also evident in a significant limitation on the rule on unfair fees. Since the end of the nineteenth century, the courts have consistently refused to apply this rule where a client has agreed to pay a certain amount in fees to a business agent or a professional in a contract which is concluded after the services have been provided.⁴³

A particularly clear example of the application of this limitation is the decision of the *Cour d'appel* of Rouen in *Larrousse c Longuemare* in 1928.⁴⁴ In this case, a client agreed to pay five per cent of the purchase price of her business to an agent who had found a purchaser and negotiated the contract of sale. The client subsequently argued that the fee was unfairly high and she refused to pay the business agent. The *Cour d'appel* of Rouen held that the rule on unfair fees does not apply where the client has agreed to pay the fee after the service has already been provided. The court stated that the client is then in a position to evaluate the service as she is aware of 'how much work was done, whether there were any difficulties and the outcome' of the service. Therefore, in this case, as the client had agreed to pay five per cent of the purchase price to the agent after he had already found a purchaser and negotiated the contract of sale, it was held that the

⁴² Some business agents were trustworthy and conscientious. The *Tribunal* of the Seine expressly praised the 'soins intelligents et dévoués' provided by the business agent in *L c de S* (n17). Nevertheless, the court still reduced the price which the client had agreed to pay in her contract with the business agent.

⁴³ This limitation was affirmed for the first time in *Cour* of Rouen, 12 December 1881 (*Lireux c Lugand*): S.1882.2.227. This case is the earliest case which is cited on this point in G Baudry-Lacantinerie and A Wahl, *Traité théorique et pratique de droit civil: des contrats aléatoires, du mandat, du cautionnement, de la transaction* (3^e éd., Sirey 1907) 393. Furthermore, the note to *Lireux* (n43) in Sirey and the references to this case in the notes to subsequent cases on this point indicate that this was the earliest case in which the limitation was clearly adopted. See *Cour* of Montpellier, 6 February 1893 (*Malleville c Abet*): S.1894.2.208 and *Cour* of Paris, 13 December 1894 (*Theuret c F Mallet*): S.1897.2.215.

⁴⁴ *Cour d'appel* of Rouen, 26 October 1928: D.1928.599.

fee could not be reduced. The court emphasised the fact that the fee had been 'freely agreed' after the completion of the service.

This limitation was affirmed more recently by the *Cour de cassation* in a case in which a company had agreed to pay an unfairly high fee to an *avocat* for advice on the distribution of a new product.⁴⁵ Three days after the *avocat* had provided the advice sought by the company, the company agreed to pay the *avocat* 150,000 francs. The company then paid 23,720 francs to the *avocat* but it refused to pay any more. The *avocat* put his claim to recover the price agreed in the contract with his client before the *bâtonnier* of the *ordre des avocats au barreau de Paris*. The *bâtonnier* held that the client should pay the sum which the parties stipulated in their contract. The company appealed this decision to the *Cour d'appel* of Paris. That court reduced the fee of 150,000 francs which was stipulated in the contract to the sum of 23,720 francs which the company had already paid to the *avocat*. However, the *Cour de cassation* quashed this decision and stated that the price agreed in the contract could not be reduced as the contract had been concluded after the *avocat* had provided the advice to the company. The court observed that when the client agreed to pay the price stipulated in the contract, it was aware of the extent of the services which had been provided by the *avocat*.

This limitation indicates that the underlying rationale of the rule is the policy of protecting clients on the basis that they are weak parties in contracts in which they agree to pay a fee to business agents or professionals.⁴⁶ When the price is agreed in a contract between a client and a business agent or a professional after the service has been

⁴⁵ Cass civ 1, 2 April 1997.

⁴⁶ Terré, Simler and Lequette (n3) 325.

provided, the client is no longer in a position of ignorance or uncertainty as he has the opportunity to properly evaluate the services which have been provided.

The legal basis of the rule on unfair fees has always been controversial. The principal justification which has been advanced is that the rule on unfair fees can be justified by the conception of the contract of *mandat* as gratuitous in nature.⁴⁷ However, this justification is an inadequate basis for this rule.

The conception of the contract of *mandat* as gratuitous in nature has been cited as the basis of the rule in *Isart*⁴⁸ and *Poictevin*⁴⁹ which are the two foundational cases on the rule on unfair fees. It was stated that as the contract of *mandat* is gratuitous in nature, where the parties agree on a fee, the courts can reduce the fee if it is disproportionate to the service rendered.

However, there are two reasons why the rule cannot be based on the conception of the contract of *mandat* as gratuitous in nature. First, Article 1986 of the *Code civil* states that a contract of *mandat* is gratuitous unless the parties provide otherwise in their contract. Therefore, Article 1986 of the *Code civil* expressly permits the parties to a

⁴⁷ It has also been suggested that the rule on unfair fees is based on a similar rule which was applied by the *parlements* during the *ancien régime*. See J Perrin (n9) 120-132; E van Dievoet and G van Dievoet, 'Le pouvoir du juge de réduire le salaire contractuellement fixé de l'agent d'affaires: histoire d'une jurisprudence', in *Mélanges en l'honneur de J Dabin, tome II: droit positif* (Bruylant 1963) 911, 918. The rule on unfair fees was created during the Second Restoration (1815-1830) in *Isart* (n5). At this time, the courts often based their decisions on the laws of the *ancien régime* in addition to the provisions of the *Code civil*, despite the existence of the *loi* of 30 ventôse an XII (21 March 1804) which abrogated the laws of the *ancien régime* which had been replaced by the *Code civil*: J-L Halpérin, *Histoire du droit privé français depuis 1804* (PUF 1996) 54. However, there is no evidence in the cases on unfair fees which suggests that the current rule is based on a similar rule which was applied during the *ancien régime*. Furthermore, even if such evidence existed, it could not provide a legal basis for the current rule which patently conflicts with Article 1134 of the *Code civil*.

⁴⁸ *Isart* (n5). The *Tribunal de première instance* referred to the contract of *mandat*. However, the *Cour royale* of Paris and the *Cour de cassation* formulated the rule on unfair fees without referring to the contract of *mandat* or to any provisions of the *Code civil*.

⁴⁹ *Poictevin* (n8).

contract of *mandat* to agree on a price for the services and it does not state that this price should be reduced if it exceeds the value of the services.

In the debates on the *Code civil* in 1804, the legislators envisaged that the price agreed in contracts between clients and *mandataires* would not be excessive. In a speech to the *Corps législatif*, Berlier, emphasised the gratuitous nature of the contract of *mandat* and stated that any price would be '*moins un lucre qu'une indemnité*'.⁵⁰ Similarly, in a speech to the *Tribunat*, Tarrible, a member of the *Tribunat*, observed that '*une récompense donnée ou promise n'est jamais réputée dans ce contrat qu'une indemnité; elle n'est point un bénéfice*'.⁵¹ Nevertheless, despite the aspirations of the legislators, Article 1986 of the *Code civil* does not restrict the freedom of the parties to a contract of *mandat* to determine the price of the services which will be provided by the *mandataire*.

Secondly, even if Article 1986 of the *Code civil* is interpreted as allowing courts to reduce the unfairly high fees agreed in contracts between clients and their *mandataires*, the rule on unfair prices cannot be justified by the conception of the contract of *mandat* as gratuitous in nature as this rule has been applied to a wide range of contracts which cannot be categorised as contracts of *mandat*. A contract can be classified as a contract of *mandat* under Article 1984 of the *Code civil* only if the *mandataire* has the power to enter into a contract on behalf of his client or conclude other *actes juridiques* on behalf of his client.⁵² However, the rule on unfair fees has frequently been applied to reduce the fees of business agents and professionals who were not acting as *mandataires* for their clients. For example, the courts have reduced the fees of architects, management consultants and

⁵⁰ PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, tome XIV (Marchand du Breuil 1827) 585.

⁵¹ Fenet, tome XIV (n29) 592.

⁵² Malaurie, Aynès and Gautier (n2) 272, 286.

business agents who did not perform any services which would be considered as falling within a contract of *mandat*.⁵³ Therefore, the rule on unfair fees cannot be justified by the conception of the contract of *mandat* as gratuitous in nature.

Therefore, it is clear that this rule is not based on any provision of the *Code civil*. This is evident in the general reluctance of courts to refer to any specific provision of the *Code civil* in the application of the rule. In numerous cases, the courts simply assert that they can reduce unfair prices in contracts for the provision of certain services. In *Isart*, the case in which the *Cour de cassation* first affirmed the rule, the court simply stated that '*tout salaire d'agent d'affaires est sujet à évaluation et règlement par le juge*'.⁵⁴ Similarly, in a more recent case, in which the *Cour de cassation* applied the rule to a contract between an accountant and his client, the rule was formulated in very wide terms and it was not based on any specific provision of the *Code civil*. The court stated that '*les tribunaux peuvent, quand une convention a été passée en vue de l'exécution de travaux donnant lieu à honoraires, réduire ces derniers lorsqu'ils paraissent exagérés...*'.⁵⁵

Thus, as the *arrétiste*, Feuilloley observed in 1913,

*quand les arrêts parlent du pouvoir de contrôle et de révision qui appartient aux tribunaux, il est permis de demander de quelle loi, de quelle principe découle ce pouvoir. C'est ce que les arrêts n'expliquent point: ils se bornent à une simple affirmation....*⁵⁶

⁵³ See for example *Julliard* (n22), where the court reduced the unfairly high fees of a business agent who had found a purchaser for his client's business, Cass civ 1, 4 June 1962 where the court reduced the unfairly high fees of an architect and *Société Biscuiterie Delfour* (n26) where the court reduced the unfairly high fees of a management consultant.

⁵⁴ *Isart* (n5).

⁵⁵ Cass civ 1, 3 June 1986.

⁵⁶ *Julliard* (n22) 130 note Feuilloley.

This objection to a rule which is a remarkable example of judicial creativity contrary to Articles 1118 and 1134 of the *Code civil* is equally valid today.⁵⁷

Where the rule does not apply or where the rule is not invoked, clients will be bound by a contract to pay unfairly high fees to business agents or professionals. The case of *Crocker c Doyen* is a particularly dramatic example of the harsh world of freedom of contract which lies just beyond the sanctuary of the rule on unfair fees.⁵⁸ In April 1904, a rich American, George Crocker and his wife, entered into a contract with a famous French doctor, Eugène-Louis Doyen, who had invented a special serum for treating cancer.⁵⁹ Under the contract, Dr Doyen agreed to treat Mrs Crocker who was suffering from breast cancer. The parties agreed on the fee of 100,000 francs for the treatment and Mr Crocker paid this sum to Dr Doyen. However, less than one month later, Mr Crocker asked Dr Doyen to suspend the treatment as his wife was very weak. A few weeks after

⁵⁷ The significance of the role of the courts in the creation of rules on unfair prices will be examined in section (ii) in chapter 6.

⁵⁸ *Tribunal civil* of the Seine, 23 February 1907: D.1907.53. The case was widely discussed in American and French newspapers at the time: R Didier, *Docteur Doyen: chirurgien de la belle époque* (Maloine 1961) 145.

⁵⁹ Dr Doyen was a well known figure in France at this time. He wrote numerous medical books, invented various surgical instruments and pioneered the filming of surgical procedures for pedagogical purposes. See Didier (n58). Nonetheless, given his extravagant claim about the effects of the serum, this particular contract seems to stray into the field of quackery. There was a fine line between legitimate medicine and quackery in France and England at this time: T Zeldin, *France: 1848-1945* vol 1 (Clarendon Press 1973) 26; AWB Simpson, 'Quackery and contract law: the case of the carbolic smoke ball' (1985) *JLS* 345, 366, 384.

A contemporary case in English law on contracts and quackery is *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256. However, unlike the decision of the *Cour de cassation* in *Crocker* (n58), the Court of Appeal in *Carlill* (n59) came to a conclusion which was unfavourable to the quacks. In fact, Simpson suggests that the court was influenced by the fact that the defendants were quacks and held that the contract was binding only by 'fictitiously extending the concept of acceptance to cover the facts': Simpson (n59) 378. The unsympathetic attitude of the court towards the quacks who had produced and marketed the carbolic smoke ball is particularly evident in Lindley LJ's judgment ((n59) 265) and in that of Bowen LJ ((n59) 268).

this request was made, Mr and Mrs Crocker returned the United States where Mrs Crocker died in July 1904.⁶⁰

Mr Crocker subsequently sought to recover the 100,000 francs which he had paid to Dr Doyen.⁶¹ First, Mr Crocker argued that the contract should be annulled on the ground that his consent had been vitiated by *violence* and *dol*. However, these arguments were rejected by the court. The court also observed that it was important to note that the claimant had employed an agent to conclude the contract and that the contract had been concluded only after negotiations between the agents of both parties.

Secondly, Crocker contended that Dr Doyen should only receive a fee which was equal to the value of the treatment provided before the termination of the contract. However, this argument was also rejected by the court. It was held that Dr Doyen had fulfilled his obligations under the contract and that Crocker was therefore under an obligation to pay the fees which had been agreed. Moreover, the court strongly affirmed the principles of freedom of contract and the binding force of contracts. The court observed that while '*il est permis de trouver exagérée la somme de 100,000 réclamée à titre d'honoraires... la loi est la convention des parties*'.⁶² Furthermore, the court declared

⁶⁰ 'Based on Moral Violence: Crocker sues Prof. Doyen of Dreyfus Trial Fame', *New York Times*, 29 September 1904.

⁶¹ The *New York Times* reported that Crocker intended to donate any sum recovered from Dr Doyen to the Pasteur Institute of France: *Ibid*.

⁶² At this time, the wealth of the client and the renown of the doctor were factors which were considered to be relevant in the determination of the fee which the doctor could charge his client. It was common for doctors to charge wealthier clients more than poorer clients. Zeldin notes that 'there was an enormous amount of haggling over fees and the doctors contributed to it by varying their fees according to what they thought they could extract from their patients'. In addition, the *Concours Médical*, an association of doctors, stated that 'the highest masters of medicine' should receive a fee which is ten times higher than the usual fee: Zeldin (n59) 34.

The practice of charging rich patients more than poor patients is also evident in an explanation of the contract given to the court by Dr Doyen. He stated that in the United States, Mr Crocker earned '50,000 francs a day' and that he had therefore asked him to pay a fee which equalled only two days' work. Dr Doyen then asked 'would any Parisian worker not agree to pay two days' wages to treat and save his wife?' The reporter for *Le Figaro* observed that Mr Crocker's *avocat* had no reply and that this moment 'was a turning point in the case': Didier (n58) 218.

that '*le tribunal ne peut, sans porter atteinte à une règle fondamentale de notre droit, modifier un pacte qui a été formé d'un commun accord et ne se heurte à aucune disposition législative.*'⁶³

(b) The refusal to create a rule on unfair wages

While the courts developed a rule that unfair prices in contracts for the provision of certain services can be reduced, the courts were unwilling to create a rule which would allow them to increase unfair wages in contracts between workers and their employers.⁶⁴ This position was established in the middle of the nineteenth century when the *Cour de cassation* affirmed that the principles of freedom of contract and the binding force of contracts apply to contracts between employers and workers in which the parties agree on a wage which is less than the value of the work.

At the beginning of the Second Empire, the *Cour de cassation* decided two important cases on the question whether a contract in which an employer had agreed to pay a worker wages which were less than the value of the work done was binding on the

⁶³ Strangely, *Crocker c Doyen* (n58) is sometimes cited as an authority for the proposition that the rule on unfair fees applies to contracts between clients and their doctors: See for example, Terré, Simler and Lequette (n3) 325 and Chantepie (n4) 319. However, the outcome and reasoning in this case (where the rule on unfair fees was not even mentioned) show that this case is clearly an authority for the principles of freedom of contract and the binding force of contracts rather than for the rule on unfair fees.

⁶⁴ However, there has been a minimum wage in French law since 1950. The *loi* of 11 February 1950 introduced the *salaires minimum interprofessionnel garanti* (*smig*) which was a minimum wage based on the cost of living. The *loi* of 2 January 1970 replaced the *smig* with the *salaires minimum interprofessionnel de croissance* (*smic*). In contrast to the *smig*, the *smic* is based on the average wage in addition to cost of living. While the objective of the *smig* was to preserve the purchasing power of workers on low wages, the objectives of the *smic* are to preserve the purchasing power of workers on low wages and enable workers on low wages to benefit from economic growth. See B Teyssié, *Droit du travail, tome 1: Relations individuelles de travail* (Litec 1992) 510-515.

In contrast to French law, a minimum wage was introduced much later in English law by the National Minimum Wage Act 1998. See I Smith and A Baker, *Smith and Wood's employment law* (10th edn, OUP 2010) 212-216.

In both English and French law, when the employer is required to pay a minimum wage to the worker, this wage may be more or less than the value of the work done.

parties.⁶⁵ This was a period of significant social and political unrest in France. Workers were becoming more assertive and politically active after the Revolution of 1848, in which they had played a central role.⁶⁶

The cases of *Hébert*⁶⁷ and *Aron, Hesse et Mathieu*⁶⁸ are integrally linked to the social and political upheaval of the Revolution of 1848. In both cases, the *Cour de cassation* quashed decisions of the *Conseil des Prud'hommes* which had increased the wages of two tailors on the ground that the value of the work done by the tailors exceeded the wages paid by the employer.⁶⁹ There were significant changes in the composition of the *Conseil des Prud'hommes* after the Revolution of 1848 and it is likely that these changes led to the decisions of the *Conseil des Prud'hommes* in favour of the workers in these two cases. Until the Revolution of 1848, employers held a majority of seats in the

⁶⁵ The two cases are Cass civ, 20 December 1852 (*Hébert c Durand*): D.1853.1.95; S.1853.101 and Cass civ, 12 December 1853 (*Aron, Hesse et Mathieu c Picot*): D.1854.1.20; S.1854.1.333.

The Second Empire was established on 2 December 1852. Louis-Napoleon Bonaparte, who had been President of the Second Republic, became Emperor and he took the name Napoleon III: M Agulhon, *1848 ou l'apprentissage de la République 1848-1852* (Seuil 1992) 243.

⁶⁶ The Revolution of 1848 took place in February of that year. On 24 February 1848, Louis-Philippe d'Orléans abdicated and the Second Republic was established. The political significance of workers in the Revolution of 1848 is evident in the presence of the worker Alexandre Martin, who was known as the *ouvrier* Albert, in the provisional government which was formed on 24 February 1848: Agulhon (n56) 39, 43, 91-92.

Two articles of the Preamble of the Constitution of 4 November 1848 also indicate the political significance of workers at this time. Article IV provided that '*le Travail*' was one of the foundations of the Second Republic and Article VIII stated that the State would provide work for its needy citizens 'within the limits of its resources': J Godechot and H Faupin (éds), *Les constitutions de la France depuis 1789* (Flammarion 2006) 263-264.

⁶⁷ *Hébert* (n65).

⁶⁸ *Aron, Hesse et Mathieu* (n65).

⁶⁹ In the middle of the nineteenth century, the textile industry was the largest industry in France: Zeldin (n59) 64. Therefore, it is not surprising that the textile industry was the backdrop to the first important decisions of the *Cour de cassation* on the question of whether courts can intervene in contracts of employment and increase the wages of a worker on the ground that the wages are unfairly low.

It is likely that the businesses owned by Hébert and Aron, Hesse et Mathieu were not large. Zeldin states that there was little concentration in the textile industry and 'family control of small units was the rule'. Hébert and Aron, Hesse et Mathieu were not among 'the most famous names in the industry... like Dolfuss in Mulhouse and Motte in Roubaix, which had built up a network of firms, related by marriage...': Zeldin (n59) 65.

Conseil des Prud'hommes.⁷⁰ However, for a brief but significant period which lasted from 1848 to 1853, the workers held a majority of seats⁷¹ and thus they were thus in a position to ensure that the *Conseil des Prud'hommes* adopted a more favourable attitude to workers in its decisions.

In *Hébert c Durand*, a clothing manufacturer agreed to pay 13 francs to a tailor for the manufacture of two overcoats.⁷² When the overcoats were made, the tailor refused to deliver them to the clothing manufacturer on the ground that the price agreed in the contract was less than the real value of the work. The *Conseil des prud'hommes* stated that '*il n'est point permis de payer le salaire moins qu'il ne vaut*' and held that the contract was not valid on the ground that it was contrary to public policy. The court also held that the price of 13 francs agreed in the contract should be increased to 24 francs.

This decision was quashed by the *Cour de cassation*. The decision of the *Cour de cassation* and the report on the case by the *rapporteur* Alcock highlight the wider political significance of the issue of unfair prices in contracts. In this case there was a vigorous debate between the parties on the underlying principles of law, political economy and society.

The clothing manufacturer contended that the decision of the *Conseil des prud'hommes* should be quashed on the basis that it violated the principles of freedom of contract and the binding force of contracts which are enshrined in Article 1134 of the *Code civil*. He argued that Article 1134 of the *Code civil* precluded courts from allowing parties to escape from contracts into which they had freely entered.

⁷⁰ Zeldin (n59) 201.

⁷¹ Ibid.

⁷² *Hébert* (n65).

The clothing manufacturer acknowledged that contracts could be annulled on the ground of public policy. However, he argued that *‘l’ordre public consiste dans l’observation exacte des grands principes sur lesquels repose l’organisation de la société...’*. Therefore, he contended that it was the decision of the *Conseil des prud’hommes* rather than his contract with the tailor which was contrary to public policy. The clothing manufacturer argued that the freedom to work and the freedom of commerce and industry, which were proclaimed by the *Assemblée Constituante* in the *loi* of 2-17 March 1791, were fundamental legal principles which enshrine the more specific freedom to determine the amount of wages in contracts between employers and workers.

Moreover, the clothing manufacturer outlined the practical implications of a political economy based on freedom of contract. He observed that *‘si l’ouvrier n’est pas satisfait du salaire, qu’il s’adresse à un autre maître, comme le maître peut choisir un autre ouvrier. C’est là la liberté consacrée par les lois, c’est là un droit réciproque...’*.

On the other hand, the tailor argued that the decision of the *Conseil des prud’hommes* should not be quashed. He stated that *‘the Conseil des prud’hommes is confronted every day with the misery of numerous workers’* and that it was aware that there are manufacturers who exploit this misery by paying such low wages that the worker can barely afford enough food. He argued that the *Conseil des prud’hommes* was justified in holding that this exploitation is immoral and contrary to public policy on the basis that the workers remain mired in misery and therefore they contribute to political unrest and subscribe to utopian social ideas.

The *Cour de cassation* quashed the decision of the *Conseil des prud’hommes*. The *Cour de cassation* held that the contract was binding on the parties and that a court cannot disregard a contract which was freely entered into by an employer and a worker by

substituting the price agreed by the parties for one determined by the judge. The *Cour de cassation* strongly disapproved of the decision of the *Conseil des prud'hommes* which it considered to be 'arbitrary' and a manifest violation of Article 1134 of the *Code civil*.⁷³ Furthermore, the *Cour de cassation* endorsed the arguments advanced by the clothing manufacturer by stating that the decision of the *Conseil des prud'hommes* was also a clear violation of all the principles on which the laws on freedom of commerce and industry were based.⁷⁴

Therefore, in the middle of the nineteenth century, the *Cour de cassation* firmly rejected the argument that courts could disregard contracts into which the parties had freely entered and increase the wages of workers on the ground that they were less than the value of the work done. This position was subsequently reaffirmed by the *Cour de cassation* at the beginning of the twentieth century.⁷⁵

The refusal of the courts to create a rule which protects workers who agree to accept an unfair wage from their employers contrasts sharply with the willingness of the courts to create and develop a rule which protects clients who agree to pay unfairly high fees to business agents or professionals. This anomaly is accentuated by the fact that

⁷³ Despite the discussion of '*l'ordre public*' in this case, there is no reference to Article 6 of the *Code civil* in the decision of the *Conseil des prud'hommes* or in that of the *Cour de cassation*.

⁷⁴ Almost one year after the decision in *Hébert* (n65) the *Cour de cassation* reached a similar conclusion in *Aron, Hesse et Mathieu* (n65), a case which also involved a contract in which a tailor agreed to make overcoats for a clothing manufacturer in exchange for the payment of an unfairly low wage. Similar to *Hébert* (n65) social and political ideas were significant factors in the decisions reached by the *Conseil des prud'hommes* and the *Cour de cassation* in *Aron, Hesse et Mathieu* (n65). In *Aron, Hesse et Mathieu* (n65), the *Conseil des prud'hommes* annulled the contract on the ground that 'it is contrary to public policy and destroys the good faith and trust on which commerce and industry in France rely and which is the essence of all contracts'. However, the *Cour de cassation* quashed this decision and held that it violated the principles of freedom of contract and industry. Furthermore, the *Cour de cassation* observed that if contracts which were freely entered into were not binding on the parties, both workers and employers would face dangerous uncertainty.

⁷⁵ Cass civ, 20 November 1906 (*Borassat c Lopez*): D.1907. 80. In this case, the *Conseil des prud'hommes* of Mascara in Algeria increased the wages of a worker from the sum which the employer argued that the parties had stipulated in a contract. The *Cour de cassation* quashed this decision on the ground that the wages of a worker could not be increased on the basis of '*équité*'.

Troplong was *premier président* of the *Cour de cassation* in *Aron, Hesse et Mathieu* in 1853⁷⁶ when the court refused to increase the unfair wages of a worker and in *Poictevin* in 1867,⁷⁷ when the court applied and affirmed the existence of the rule that allows courts to reduce unfair prices in contracts for the provision of certain services. Furthermore, in *Poictevin*, the *Cour de cassation* expressly observed that the rule on unfair fees did not apply to contracts of employment.⁷⁸ Therefore, Troplong was perhaps conscious of the fact that this rule conflicted with the refusal of the court to intervene in contracts of employment on the ground that the wages were unfairly low.

While the *Cour de cassation* refused to create a rule that would increase the wages of a worker when the wages agreed in a contract were less than the value of the work done, in 1906 and 1907, successive governments proposed to enshrine such a rule in legislation. The protection of workers was an important political objective in 1906 and 1907. There was significant social unrest at this time. Between 1904 and 1907, there was a wave of strikes and the trade unions became more powerful social and political actors.⁷⁹ The government led by Ferdinand Sarrien, which was in power from 14 March to 25 October 1906 and the government led by Georges Clemenceau, which lasted from 25 October 1906 to 24 July 1909 were to the left of the political spectrum⁸⁰ and introduced significant measures to improve the economic and political position of workers. For example, the *loi* of 13 July 1906, which was introduced by the government led by Sarrien,

⁷⁶ *Aron, Hesse et Mathieu* (n65).

⁷⁷ *Poictevin* (n8).

⁷⁸ *Poictevin* (n8).

⁷⁹ M Rebérioux, *La République radicale? 1898-1914* (Seuil 1975) 88-94.

⁸⁰ Rebérioux (n79) 111-113.

required employers to give their employees one day of rest every week.⁸¹ Similarly, when Clemenceau became Prime Minister on 25 October 1906, he established the first Ministry of Labour and the socialist *député* René Viviani was appointed the first Minister of Labour.⁸²

It was in this context of significant social unrest that Gaston Doumergue, the Minister for Commerce in the government led by Sarrien, introduced a *projet de loi* on employment contracts in the *Chambre des députés* on 2 July 1906.⁸³ Article 11 of the *projet de loi* of 1906 provided that a clause of a contract would be invalid if one party took advantage of the needs, ignorance or inexperience of the other party in order to impose particularly unusual conditions or a wage which was less than the value of the work done.⁸⁴ Thus, a clause of a contract would be invalid only if one party had exploited the weakness of the other party in addition to the existence of a disparity between the wage and the value of the work done.⁸⁵

⁸¹ *Ibid* 93.

⁸² *Ibid* 113.

⁸³ P Pic, 'La réforme du Code civil et le nouveau Code du travail' *RTDciv* (1911) 719, 728. It is likely that the national demonstrations of workers which took place on 1 May 1906 influenced the introduction of measures to improve the economic and political position of workers in 1906. The demonstrations on 1 May 1906 occurred just before the introduction of the *projet de loi* of 2 July 1906 (hereafter, 'the *projet de loi* of 1906'), the promulgation of the *loi* of 13 July 1906 and the establishment of the first Ministry of Labour on 25 October 1906. These demonstrations were particularly effective as national demonstrations of workers had 'never before... been organised so systematically' and as they took place only a few days before the elections to the *Chambre des députés* on 6 and 20 May 1906: Rebérioux (n79) 92-94.

⁸⁴ E Chatelain, 'Rescision pour cause de lésion et tarification: A propos de l'article 11 du projet de loi sur le contrat de travail' 6 *RTDciv* (1907) 59, 59.

⁸⁵ As Perreau noted, this provision could have been invoked not only by workers who received unfairly low wages but also by employers who agreed to pay wages to workers which exceeded the value of their work if the workers exploited the fact that the employer urgently needed to perform a contract with a third party: C Perreau, 'Rapport sur le projet de loi relative au contrat de travail', 36 *RCLJ* (1907) 284, 290.

Article 11 of the *projet de loi* of 1906 was based on a proposal which had been prepared by the *Société des études législatives*.⁸⁶ The requirement that one party must have exploited the weakness of the other in addition to a disparity between the wages and the value of the work done was clearly inspired by § 138 of the *Bürgerliches Gesetzbuch* which had entered into force in Germany on 1 January 1900.⁸⁷

The *Chambre des députés* subsequently sent this *projet de loi* to the *Commission du travail* which reformulated Article 11.⁸⁸ On 27 December 1907, in the *Chambre des députés*, Claude Chambon delivered the report of the *Commission du travail*.⁸⁹ In the revised version of Article 11 of the *projet de loi* of 1906, it was provided that a contract could be terminated and damages would be awarded where the terms of the contract were significantly different to the usual terms in a particular profession or region or where there was a significant disparity between the wages and the value of the work done.⁹⁰ Therefore the *Commission du travail* eliminated the requirement that one party must have exploited the vulnerability of the other party. Chambon stated that this requirement would be an obstacle to the application of the law as it would be very difficult to prove.⁹¹ Furthermore, he observed that the revised version of Article 11 of the *projet de loi* of

⁸⁶ A Rouast and P Durand, *Précis de législation industrielle (droit du travail)* (3^e éd., Dalloz 1948) 329. The *Société des études législatives* was created in 1901 and it included all the leading *civilistes* of that era. The purpose of the *Société des études législatives* was to discuss legal reforms: Halpérin (n47) 173.

⁸⁷ P Ossipow, *De la lésion* (Roth 1940) 166; C Perreau (n85) 290. § 138 (1) of the *Bürgerliches Gesetzbuch (BGB)* provides that 'ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig' and § 138 (2) of the *BGB* provides that 'Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.'

⁸⁸ D Andronesco, *L'inégalité des prestations dans les contrats* (PUF 1922) 95-96; E Périn (n4) 51; Perreau (n85) 286.

⁸⁹ Andronesco (n88) 96, 174; Périn (n88) 51.

⁹⁰ Andronesco (n88) 174; Périn (n88) 51.

⁹¹ Andronesco (n88) 174; Périn (n88) 126.

1906 was consistent with the provisions on *lésion* in the *Code civil* which provide that a court can intervene in a contract solely on the ground of an unfair price.⁹² However, despite the research undertaken by the *Société d'études législatives* and the debate on the *projet de loi* in the *Chambre des députés*, the proposal was ultimately abandoned.⁹³

Therefore, while the courts created a rule which allows the reduction of the unfair prices stipulated in contracts between clients and business agents or professionals, both the courts and the legislators refused to create a rule which would increase the unfairly low wages agreed in contracts between workers and employers.

⁹² Andronesco (n88) 174; Périn (n88) 126.

⁹³ Rouast and Durand (n86) 329. The *loi* of 28 December 1910 introduced Book I of the *Code du travail* which included a section called 'On the contract of employment'. While the *loi* of 28 December 1910 codified sixteen previous laws, it did not create any new rules. Therefore, neither Article 11 of the *projet de loi* of 1906 nor the revised version of this rule which had been proposed by the *Commission du travail* of the *Chambre des députés* on 27 December 1907 were included in the *loi* of 28 December 1910: Pic (n83) 724-728.

(ii) Farming: the sale of fertiliser, seeds, plants and food for animals

The *loi* of 8 July 1907 provides that a purchaser of fertiliser, seeds, plants and food for animals can obtain a reduction in the purchase price if he has paid more than one quarter above the fair price.⁹⁴ The genesis of this rule can be ascribed to two factors. First, this rule can be explained by a policy of protecting the weak party to the contract for the sale of agricultural products. The primary purpose of this rule was to protect gullible and unsophisticated farmers from paying shrewd salesmen an unfairly high price for agricultural products. Secondly, this rule can be ascribed to a policy of giving special treatment to farmers for economic, social and political reasons. This rule was part of the response of the government and the legislators to the political agitation and violence of farmers which erupted in 1907 as a result of economic difficulties.

While the *loi* of 1907 expressly protects ‘any purchaser’ from unfair prices in contracts for the sale of agricultural products, the legislators were primarily motivated by the desire to protect farmers. In the debates in the *Chambre des députés* and the *Sénat*, the purchaser was consistently depicted as a weak and gullible farmer while the seller was cast as a dishonest speculator. As Ernest Gellé observed in the *Chambre des députés*, the objective of the *loi* of 1907 was to protect farmers who were ‘*naïfs ou trop confiants*’ against ‘*les industriels et les négociants malhonnêtes*’.⁹⁵

The conception of the farmer as the weak party to the contract for the sale of agricultural products was used to justify the departure from the general principle that courts cannot intervene in contracts on the basis of an unfair price. In the *Chambre des*

⁹⁴ The *loi* of 8 July 1907 (hereafter, ‘the *loi* of 1907’) initially covered only fertiliser and food for animals. The *loi* of 10 March 1937 amended the *loi* of 1907 by adding seeds and plants. Hereafter, the term ‘agricultural products’ will describe ‘fertiliser, seeds, plants and food for animals’.

⁹⁵ S.1906-1910.539.

députés, Gellé described the purchaser of agricultural products as a '*petit cultivateur*' who was as gullible and weak as a minor.⁹⁶ He then argued that given that minors are protected against unfair prices under Article 1305 of the *Code civil*, the law should also protect farmers who may pay '22 francs for goods which are really only worth 7 francs in the market'.⁹⁷

The only argument in favour of the idea that the purchaser should rely on his own judgment rather than on the vendor was advanced by Alcide Poirrier in the *Sénat*. Poirrier opposed the introduction of a rule which allowed intervention in the contract on the basis of an unfair price and he contended that the best way to protect small farmers was by educating them and by encouraging them to rely on their own judgment rather than on protective legislation.⁹⁸ However, this argument was not considered in the subsequent debates in the *Sénat* or in the *Chambre des députés*.

In addition to the policy of protecting farmers on the basis that they are weak parties in contracts for the sale of agricultural products, the policy of giving special treatment to farmers for social, economic and political reasons also contributed to the introduction of the *loi* of 1907.

French agriculture was plagued by a long recession in the last quarter of the nineteenth century and at the beginning of the twentieth century.⁹⁹ Viticulture was severely affected by the phylloxera virus which destroyed most of the vines in France in

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ See A Moulin, *Les paysans dans la société française: De la révolution à nos jours* (Seuil 1992) 118-165.

the final thirty years of the nineteenth century.¹⁰⁰ In addition, the prices of other agricultural products such as wheat, potatoes and meat fell sharply.¹⁰¹ As a result, the revenue of farmers decreased significantly during this period.

These economic difficulties also precipitated a political crisis known as the *révolte des vigneron*s which erupted in the Midi in June 1907, just before the promulgation of the *loi* of 1907.¹⁰² In the first few years of the twentieth century, the continuous fall in the price of wine and the consequent effects on landlords, farmers and labourers caused social unrest.¹⁰³ Labourers went on strike in 1904.¹⁰⁴ This unrest continued to smoulder until the beginning of 1907 when discontented landlords, farmers and labourers jointly participated in large protests in various cities in the Midi.¹⁰⁵ The fight against '*fraude*' was the vague rallying cry of the protesters.¹⁰⁶

This movement degenerated into a political crisis on 9 June 1907 when both the royalists on the right and the socialists on the left tried to use a protest in Montpellier to advance their own political ends.¹⁰⁷ Furthermore, there were also secessionist undertones to the protest movement as the protesters railed against the sugar producers of the North

¹⁰⁰ The phylloxera virus was brought to France by American vines which had been imported in 1862. In order to solve the problem, it was necessary to destroy all the vines which had been infected and to plant vines which were resistant to the phylloxera virus. The decimation caused by the phylloxera virus 'was an economic and social catastrophe... for an entire generation of winegrowers': Moulin (n99) 122, 124, 125.

¹⁰¹ Ibid 119-120.

¹⁰² See Moulin (n99) 125-129; JH Smith, 'Agricultural workers and the French wine-growers' revolt of 1907' 79 *Past and Present* (1978) 101.

¹⁰³ Moulin (n99) 125-126.

¹⁰⁴ Ibid 127.

¹⁰⁵ On 9 June 1907, over 500,000 people participated in the protest in Montpellier. This was the largest protest in France during the Third Republic: Moulin (n99) 127-128.

¹⁰⁶ Moulin (n99) 126; Rebérioux (n79) 97.

¹⁰⁷ Moulin (n99) 128.

whom they considered to be responsible for the presence of sugared wines on the market which competed with the ordinary wine which they produced.¹⁰⁸

The crisis escalated when the Prime Minister, Georges Clemenceau, ordered the army to restore order. The army killed six people in Narbonne on 20 June and one of the local regiments mutinied.¹⁰⁹ Nevertheless, the crisis was soon defused when Clemenceau succeeded in discrediting Marcelin Albert, one of the leaders of the protest movement, and when the legislature appeased the protesters by passing the *loi* of 29 June 1907¹¹⁰ which implemented measures to prevent the production of sugared wines.¹¹¹

The *loi* of 1907 was promulgated just over a week after the *loi* of 29 June 1907 which signalled the end of the *révolte des vigneronns*. While this political and economic context was not expressly mentioned in the debates on the *loi* of 1907, it is likely that given the economic depression and the political tensions, the legislators would have been particularly predisposed to pass a law which protected farmers.¹¹²

Moreover, in general, farmers had a strong voice in the legislature at this time. Ripert argued that the *loi* of 1907 was introduced as a result of the political influence of farmers in France. He stated that '*la France rurale demande à ses représentants de protéger les paysans victimes de commerçants trop habiles*'.¹¹³ The political influence of

¹⁰⁸ Ibid 127.

¹⁰⁹ Ibid 128.

¹¹⁰ S.1906-1910.541.

¹¹¹ Moulin (n99) 128-129.

¹¹² Halpérin states that the *révolte des vigneronns* of 1907 influenced the introduction of the *loi* of 29 June 1907 and the *loi* of 1907: Halpérin (n47) 259-260.

¹¹³ G Ripert, *Le régime démocratique et le droit civil moderne* (2^e édn, LGDJ 1948) 169. See also G Ripert, *La règle morale dans les obligations civiles* (4^e édn, LGDJ 1949) 110. This point is part of Ripert's argument that legislators passed the *loi* of 1907 and the *loi* of 29 June 1935 (see also n234 below) in order to maximise their votes at elections. Ripert states that when the legislator '*est sûr que le nombre et l'influence sont du côté de ceux qui réclament la mesure, il admet la lésion afin de les relever contre leurs*

farmers is evident in the debates on the *loi* of 1907. When outlining the reasons for introducing the *loi* of 1907 in the *Chambre des députés*, Gellé referred to the complaints of farmers who were frustrated by ‘*ces marchés frauduleux*’ and the chorus of denunciation in the agricultural newspapers.¹¹⁴ He also stated that agricultural organisations in various *départements* had called for legislation to prevent the sale of fertilisers at unfairly high prices.¹¹⁵ Furthermore, it is significant that the only vigorous opponent of the *loi* of 1907, the *sénateur* Poirrier,¹¹⁶ was a chemical industrialist and was therefore more likely to favour the interests of the sellers of fertiliser. In contrast, Gellé and Martin, the *députés* who first initiated the proposals which were later promulgated in the *loi* of 1907 were more predisposed to favour farmers. Gellé¹¹⁷ was a landowner and Martin¹¹⁸ was elected in Var in the Midi where many landlords, farmers and labourers had been involved in the *révolte des vigneronns*. Furthermore, both Gellé and Martin strongly supported agricultural interests throughout their political careers.¹¹⁹ Therefore, the influence of farmers in the legislature facilitated the introduction of the *loi* of 1907.

erreurs ou leurs espérances trompées’: G Ripert, *Le régime démocratique et le droit civil moderne* (2^e éd., LGDJ 1948) 171.

¹¹⁴ D.1908.173.

¹¹⁵ Ibid. As a result of the economic depression in agriculture, numerous agricultural organisations were created at local and regional levels at the end of the nineteenth century in order to defend the interests of agriculture. There were two principal national organisations and they each represented sharply different political views. The *Société des agriculteurs de France* was dominated by the right and the *Société nationale d’encouragement à l’agriculture* was established and controlled by republicans. See Moulin (n99) 135-138 and Zeldin (n59) 190-191.

¹¹⁶ Poirrier was a self-made chemical industrialist who was a member of numerous professional organisations such as the *chambre syndicale des produits chimiques* and the *chambre de commerce* of Paris: J Jolly (éd), *Dictionnaire des parlementaires français: notices biographiques sur les ministres, sénateurs et députés français de 1889 à 1940* tome VII (PUF 1972) 2719.

¹¹⁷ Gellé was a former *notaire* who had sold his *office* and become a landowner. He was a *député* for the Somme from 1895 to 1909: Jolly, tome V (n116) 1808-1809.

¹¹⁸ Martin was a *député* for the Var from 1900 to 1909 and then *sénateur* for the Var from 1909 to 1936. He was also an *avocat* and a legal writer who published numerous books on diverse topics such as constitutional law and the civil and criminal laws of the Revolution of 1789: Jolly, tome VII (n116) 2387.

¹¹⁹ Jolly, tome V (n116) 1808-1809; Jolly, tome VII (n116) 2387.

Despite the lengthy debates in the *Chambre des députés* and the *Sénat* on the *loi* of 1907 and the colourful images of the rustic world of unsophisticated ‘*modestes campagnards*’¹²⁰ and the menacing presence of ‘*les industriels et les négociants malhonnêtes*’,¹²¹ it appears that the *loi* of 1907 has rarely been invoked in practice. During the debate in the *Sénat* on the *loi* of 10 March 1937 which brought the sale of seeds and plants within the ambit of the *loi* of 1907, the *sénateur* who introduced the proposal, René Hachette, deplored the fact that the *loi* of 1907 was not well known and that it was not widely invoked by farmers.¹²² Nevertheless, he stated that the very existence of the law served to limit the rapacity of certain sellers and prevented them from trying to make excessive profits.¹²³ More recently, it has been stated that the law is ‘possibly now obsolete’.¹²⁴ This is an accurate assessment of the role of the *loi* of 1907 given the paucity of cases in which the law has been invoked.

There are two legal factors which significantly limit the efficacy of the *loi* of 1907.¹²⁵ First, there is a very short prescription period for actions based on the *loi* of 1907. Article 2 of the *loi* of 1907 provides that the purchaser must initiate the action against the vendor within forty days of the delivery of the goods.

¹²⁰ D.1908.174.

¹²¹ S.1906-1910.539.

¹²² D.1938.4.168. As early as 1924, Demontès noted that the *loi* of 1907 ‘*a eu plus de retentissement en doctrine qu’elle n’a reçu d’applications dans la pratique...*’: E Demontès, *De la lésion dans les contrats entre majeurs: étude de droit positif et de législation comparé* (LGDJ 1924) 155.

¹²³ D.1938.4.168.

¹²⁴ P Malinvaud, *Droit des obligations* 10^e éd (Litec 2007) 210.

¹²⁵ Also, one practical explanation of the desuetude of this rule may be that farmers began to co-operate with each other by buying large quantities of agricultural products. Therefore, gullible and ignorant farmers would not have been dealing directly with wily sellers very often. There is evidence that farmers co-operated in the purchase of fertilisers. Zeldin states that ‘by 1941, 57 per cent of fertilisers used in France were bought through peasant co-operatives’. However, this statement is qualified by his observation that ‘this did not mean all that much, since so little fertiliser was used’: Zeldin (n59) 191. Nonetheless, there was a significant increase in the use of fertilisers in the first half of the twentieth century. Moulin notes that ‘the use of fertiliser doubled between 1913 and 1936’: Moulin (n99) 183.

Secondly, less than one year after the promulgation of the *loi* of 1907, in *Susvelier et Lamarche c Loriette*, the *Tribunal civil* of Laon significantly restricted the scope of the law.¹²⁶ That court held that while Article 1 of the *loi* of 1907 provided that ‘any purchaser’ could invoke the *loi* of 1907, it could not be invoked by purchasers who were not farmers.

In this case, a purchaser, who was in the business of buying and selling fertiliser, invoked the *loi* of 1907. The seller contended that as the purpose of the *loi* of 1907 was to protect ‘*petits cultivateurs*’, it did not apply to contracts between businessmen who bought and sold fertiliser.

At first instance, the *juge de paix* firmly rejected the argument of the seller. He stated that the *loi* of 1907 is formulated in clear terms and that it is not expressly limited to disputes between farmers and sellers even if the purpose of the law had been to help the ‘*petits cultivateurs*’. He observed that he could neither extend nor restrict the law, but he was required to apply the law ‘*telle qu’elle est*’.

However, this decision was overturned on appeal by the *Tribunal civil* of Laon.¹²⁷ While the *juge de paix* followed the letter of the law, the *Tribunal civil* relied on the spirit of the law in order to restrict its application to contracts between farmers and sellers. The court observed that ‘*le législateur n’a entendu protéger que l’intérêt de la culture vis-à-vis des agissements du commerce des engrais*’. Therefore, the court stated that the *loi* of 1907 applied only to contracts between sellers and farmers who used the products which

¹²⁶ *Tribunal civil* of Laon, 29 June 1908: D.1908.397; S.1909.2.92.

¹²⁷ In the note on *Susvelier et Lamarche* (n126) in *Sirey*, the commentator criticised the reasoning and the decision of the *Tribunal civil* of Laon. He asked ‘*est-il loisible de ne pas appliquer à la lettre un texte aussi absolu dans ses termes?*’: S.1909.2.93.

they bought on their farms and that it did not apply to contracts between businessmen who bought and sold fertiliser.

Since the decision of the *Tribunal civil* of Laon in *Susvelier et Lamarche* in 1908,¹²⁸ it seems that the *loi* of 1907 has been invoked in only two cases and the claims based on the *loi* of 1907 were rejected in both cases. In *Lepage c SVB Lemaire*, a purchaser sought to invoke the *loi* of 1907 against a company which had sold him fertiliser.¹²⁹ However, the *Cour de cassation* rejected the purchaser's claim on the ground that the purchaser had not provided sufficient evidence to justify his claim.¹³⁰

In the more recent case of *GAEC Horticole du Verdon c SA Agrofino*, a business which grew geraniums for resale purchased compost from another company.¹³¹ However, the geraniums did not grow properly as the compost was defective. The *Cour d'appel* of Aix en Provence held that the seller of the defective compost was liable to the purchaser on the basis of the guarantee against latent defects under Article 1641 of the *Code civil*. In this case, it was the seller who relied on the *loi* of 1907. The seller argued the purchaser's action could not succeed as the sale of compost fell within the terms of the *loi* of 1907 and the purchaser had not initiated an action within the prescription period of forty days. However, the court held that the purchaser's action was based on Article 1641 of the *Code civil* and not on the *loi* of 1907. Furthermore, it was held that the *loi* of 1907 could not be invoked in this case as compost did not constitute 'fertiliser' within the meaning of the law.

¹²⁸ *Susvelier et Lamarche* (n126).

¹²⁹ Cass civ 1, 15 June 1973.

¹³⁰ In this case, the *Cour de cassation* also rejected the purchaser's argument that the contract should be annulled on the basis of *dol* under Article 1116 of the *Code civil* on the ground that the purchaser had not provided sufficient evidence to justify his claim.

¹³¹ *Cour d'appel* of Aix en Provence, 21 May 2002.

Therefore, it seems that the courts are reluctant to apply the *loi* of 1907. In practice the *loi* of 1907 has produced a more barren harvest than the overpriced fertiliser sold by the '*spéculeur*'¹³² or '*les industriels et les négociants malhonnêtes*'¹³³ who were decried by the legislators at the beginning of the twentieth century.

¹³² S.1906-1910.539.

¹³³ Ibid.

(iii) Venal offices: the sale of *offices ministériels*

In 1910, the *Cour de cassation* created a rule which allowed courts to reduce unfair prices in contracts for the sale of *offices ministériels* to a price which was equal to the fair price. As the *Cour de cassation* abolished this rule in 2004, it is necessary to explain both the rise and fall of this rule.¹³⁴

There is no equivalent rule in English law as *offices ministériels* are French legal institutions which have no counterparts in modern English law. In French law, an *office ministériel* is a public function related to the administration of justice which the state has delegated to an *officier ministériel*.¹³⁵ The *officiers ministériels* own their *offices ministériels* and they are free to sell them. In sharp contrast to French law, the ownership and sale of offices was abolished in English law at the beginning of the nineteenth century.¹³⁶

In French law, the rule that courts could reduce the price paid for an *office ministériel* on the basis that it was unfair can be explained by the policy of giving special treatment to the purchasers of *offices ministériels* for economic and social reasons. This rule was introduced in order to prevent *officiers ministériels* from going bankrupt, engaging in fraudulent behaviour or overcharging their clients. It was widely believed

¹³⁴ This rule has been described as both a '*droit*' and a '*règle*' in French. The term '*droit*' is used in Terré, Simler and Lequette (n3) 326 for example. The term '*règle*' was used in Cass civ 1, 7 December 2004 (*Sere de Lanauze c Bellon*): Bull civ I n°307 where the *Cour de cassation* abolished the rule on unfair prices in the sale of *offices ministériels*.

¹³⁵ J Hérail, 'Office public ou ministériel' *Répertoire civil Dalloz* (2002) 2.

¹³⁶ Holdsworth stated that 'it was not until the beginning of the nineteenth century that legislation, inspired largely by Bentham's teaching, rooted these ideas out of the judicial system': W Holdsworth, *A history of English law* vol 1 (7th edn, AL Goodhart and HG Hanbury eds, Methuen, Sweet and Maxwell 1956) 248. In 1876, Pollock noted that 'the sale of offices (which is forbidden by statutes extending to almost every case) is... void at common law'. He also observed that 'many particular offices and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times': F Pollock, *Principles of contract* (Stevens 1876) 264, 265. Furthermore, even when offices could be sold in English law, there is no indication that there was a rule that courts could reduce the purchase price on the basis that it was unfair.

that unfair prices in contracts for the sale of *offices ministériels* caused *officiers ministériels* to go bankrupt or to increase their income by charging their customers unfair prices or by engaging in illegal transactions. The abolition of the rule in 2004 can be ascribed to a judicial desire to bring the sale of *offices ministériels* within the remit of the principle of freedom of contract.

There are currently five *offices ministériels*. This category comprises *avocats* in the *Cour de cassation* and the *Conseil d'Etat*, *notaires*, *greffiers* in the *Tribunaux de commerce*, *huissiers* and *commissaires-priseurs judiciaires*.¹³⁷ The number of *officiers ministériels* is limited by the State and they have a monopoly on the particular public functions which they perform for their clients.¹³⁸ Nevertheless, the *officiers ministériels* also often provide services which fall outside their monopoly. Apart from the *avocats* in the *Cour de cassation* and the *Conseil d'Etat*, the fees charged by the *officiers*

¹³⁷ In the past, there were many other types of *offices ministériels*. See also n151 below. For example, in 1843, *courtiers*, of which there were five types, constituted *officiers ministériels*. One of these *offices ministériels* was the quaint and quintessentially French *office* of *courtier gourmet-piqueur*. The function of the *courtier gourmet-piqueur*, which existed in Paris only, was to act as an intermediary between the purchasers and sellers of wine. The *courtier gourmet-piqueur* tasted the wine in the warehouse in order to verify the vintage and the quality of the wine. If a dispute subsequently arose about the wine, the *courtier gourmet-piqueur* also acted as an *expert* who was able to provide information on the wine to the court. See E-V Foucart, *Eléments de droit public et administratif* tome 1 (3^e éd'n, Videcoq 1843) 342-343. For a description of the other *offices ministériels* in 1843, see Foucart (n137) 337-346.

Foucart was a prominent professor of administrative law who taught in the Faculty of Law of Poitiers in the second quarter of the nineteenth century. See J-J Clère, 'Emile-Victor Foucart' in P Arabeyre, J-L Halpérin and J Krynen (eds), *Dictionnaire historique des juristes français: XII^e- XX^e siècle* (PUF 2007) 305.

¹³⁸ In general, a person can become an *officier ministériel* only by purchasing an *office ministériel*. However, the State can create new *offices ministériels* if it decides that there is a need for them. If a new *office ministériel* is created, the new *officier ministériel* will be selected on the basis of a public examination. The new *officier ministériel* will also have to pay compensation to other *officiers ministériels* who practice nearby as it is considered that the other *officiers ministériels* will have fewer clients as a result of the creation of the new *office ministériel*. Nevertheless, the vast majority of *offices ministériels* are acquired by purchasing the *office ministériel* from an existing *officier ministériel*. J Hérial (n135) 2, 7.

In two instances, the monopoly of the *officier ministériel* is limited to a specific geographic area. First, the monopoly of the *huissier* is limited to the jurisdiction of a particular *Tribunal de grande instance*. Secondly, the monopoly of *notaires* can be exercised in any part of France apart from Saint-Pierre-et-Miquelon and Mayotte: Ibid 9-10.

ministériels for the performance of functions which fall within their monopoly are fixed by the State.¹³⁹

Certain *officiers ministériels* are also *officiers publics*.¹⁴⁰ An *office public* is a public function which is not related to the administration of justice.¹⁴¹ *Officiers publics* create documents which have *authenticité*. For example, an *officier de l'état civil* such as a *maire* is an *officier public*. The categories of *officiers ministériels* and *officiers publics* sometimes overlap. *Notaires*, *huissiers* and *greffiers* in the *Tribunaux de commerce* are both *officiers ministériels* and *officiers publics*.

This thesis will focus on *officiers* who are either *officiers ministériels* or *officiers ministériels et publics* as these are the only *officiers* who can sell their *offices*.¹⁴² *Avocats* in the *Cour de cassation* and the *Conseil d'Etat*, *notaires*, *greffiers* in the *Tribunaux de commerce*, *huissiers* and *commissaires-priseurs judiciaires* are currently the only *officiers* who can enter into contracts for the sale of their *offices*.¹⁴³

The ability to own and sell *offices* is a central part of the explanation of the rise and fall of the rule that allowed courts to intervene in contracts for the sale of *offices* on the ground of an unfair price. Before the Revolution of 1789, the venality of *offices*¹⁴⁴ had been a significant feature of the financial structure of the *ancien régime*. The State

¹³⁹ Ibid 10.

¹⁴⁰ Hérial states that the adjectives '*ministériel*' and '*public*' are not used very precisely: Ibid 2.

¹⁴¹ Ibid.

¹⁴² Hereafter, the term '*officier*' refers to an *officier ministériel* or an *officier ministériel et public* and the term '*office*' refers to an *office ministériel* or an *office ministériel et public*.

¹⁴³ Article 91 of the *loi* of 28 April 1816. See also n151.

¹⁴⁴ In this thesis, the term 'venality of *offices*' is used to describe both the sale of public functions by the State to the purchaser and the transformation of the *office* into an asset of the purchaser so that the purchaser can sell the *office* to a third party or the *office* is included in his estate on his death. While the term 'venality' is sometimes associated with corruption, the term 'venality of *offices*' is used here without the connotation of corruption.

created and sold numerous *offices* and subsequently taxed the holders of the *offices* in order to raise money, particularly for wars.¹⁴⁵ The proliferation of *offices* is particularly evident in the creation of an *office* for making wigs in 1673.¹⁴⁶

The venality of *offices* was abolished during the Revolution of 1789. A series of laws provided that the State could no longer sell *offices* and that an *office* was no longer an asset which the *officier* could sell or which formed part of his estate on his death.¹⁴⁷ Nevertheless, in subsequent years, despite the abolition of the venality of *offices*, *officiers* still entered into contracts for the sale of their *offices*.¹⁴⁸ The State ‘tolerated’ this practice and usually appointed the successor chosen by the *officier*.¹⁴⁹ However, the courts refused to enforce contracts for the sale of *offices* where the purchaser failed to pay the price agreed in the contract.¹⁵⁰

In 1816, at the beginning of the Second Restoration of Louis XVIII, one aspect of the venality of *offices* was resurrected when the legislature recreated the right to sell *offices*. Article 91 of the *loi* of 28 April 1816, which is still in force, provides that *officiers* have the right to choose a successor who will be appointed by the State if he

¹⁴⁵ W Doyle, *Venality: the sale of offices in eighteenth century France* (Clarendon Press 1996) *passim*.

¹⁴⁶ Doyle (n145) 24. Doyle notes that making wigs became a ‘booming trade’ in the 1670s as the ‘fashion for wigs... swept the country’: *Ibid*.

¹⁴⁷ The venality of *offices* was abolished by the *Assemblée Constituante* in a series of *lois* in the early years of the Revolution: Hérial (n135) 2. Over subsequent years, further legislation was introduced to organise the calculation and payment of compensation for the abolition of *offices*: Doyle (n145) 275-311.

¹⁴⁸ Foucart (n137) 344.

¹⁴⁹ J-B Duvergier, *Collection complète des lois, décrets, ordonnances, règlements, avis du Conseil d'état* vol 20 (2^e éd., Guyot et Scribe 1837) 291; Foucart (n137) 344.

¹⁵⁰ Duvergier, vol 20 (n149) 291; Foucart (n137) 344. In 1815, the *Cour royale* of Paris held that a contract for the sale of an *office* of *huissier* was unenforceable: *Cour royale* of Paris, 12 October 1815 (*Cannone c Huguenin*): S.1815-1818.2.63. Similarly, in 1816, the *Cour royale* of Bordeaux held that a contract for the sale of an *office* of *notaire* was unenforceable: *Cour royale* of Bordeaux, 27 January 1816 (*Grelon c Gaillardon*): S.1815-1818.2.97.

fulfils the requirements of the position.¹⁵¹ This right is known as the *droit de présentation*. In 1820, in *Lavalley c Gainé*, the *Cour de cassation* held that the contracts under which *officiers* promised to present a successor to the State in return for a price were enforceable on the basis of Article 91 of the *loi* of 1816.¹⁵² The court stated that the enforceability of contracts in which an *officier* promised to present a successor to the State in return for a certain sum was a ‘natural consequence’ of the right created by Article 91 of the *loi* of 1816.¹⁵³

Therefore, Article 91 of the *loi* of 1816 effectively created the right to sell an *office*. At first glance, it might seem that the resurrection of one aspect of the venality of *offices* during the Second Restoration was based on a policy of recreating the institutions of the *ancien régime*. Article 91 of the *loi* of 1816 was passed by a legislature which was

¹⁵¹ Article 91 of the *loi* of 28 April 1816 (hereafter, ‘Article 91 of the *loi* of 1816’) originally provided that *avocats* in the *Cour de cassation*, *notaires*, *avoués*, *greffiers*, *huissiers*, *agents de change*, *courtiers* and *commissaires-priseurs* had the right to sell their *offices*. However, only *avocats* in the *Cour de cassation* and the *Conseil d’Etat*, *notaires*, *greffiers* in the *Tribunaux de commerce*, *huissiers* and *commissaires-priseurs judiciaires* still hold the status of *officiers* today and can therefore sell their *offices*.

While certain *offices* have been abolished since the introduction of Article 91 of the *loi* of 1816, the *office* of *commissaire-priseur* has been deprived of part of its monopoly. The *loi* of 10 July 2000 reduced the monopoly of *commissaires-priseurs* from conducting all auctions of goods to conducting only auctions of goods which are required by law. As a result of the reduction in their monopoly, these *officiers* are now called *commissaires-priseurs judiciaires* instead of *commissaires-priseurs*: Héral (n135) 2.

The *office* of *avoué* in the *Cour d’appel* is the *office* which has been abolished most recently. The *office* of *avoué* in the *Cour d’appel* was abolished by the *loi* of 25 January 2011. The parties are now represented by *avocats* in all courts. The *office* of *avoué* in the *Tribunal de grande instance* was abolished much earlier by the *loi* of 31 December 1971: J Héral (n135) 2.

The *avocats* in the *Cour de cassation* were merged with the *avocats* in the *Conseils du Roi* (during the Second Restoration, the *Conseil d’Etat* was known as the *Conseil du Roi*) by the *ordonnance* of 13 November 1816 and the *ordonnance* of 10 September 1817: Foucart (n137) 339.

¹⁵² Cass req, 20 June 1820: S.1819-1821.256.

¹⁵³ The enforceability of contracts to sell *offices* is also evident in the more recent case of Cass civ 1, 16 July 1985: Bull civ 1 n°224. In this case, a *notaire* entered into an option contract in which he promised to sell his *office* to the other party to the contract if the other party was willing to match the price offered by any third party who sought to purchase the *office*. The *notaire* breached this contract by selling his *office* to a third party and presenting the third party as his successor to the State without giving the other party to the option contract the opportunity to match the price paid by the purchaser. The *notaire* argued that the contract was not valid as it was a principle of public policy that an *officier* retained the freedom to choose his successor until a successor was appointed by the State. However, the *Cour de cassation* held that while the seller was free to choose his successor, he was still liable in damages for breach of contract. The court stated that even though an *office* and the title of *officier* are *hors du commerce*, the right to present a successor (the *droit de présentation*) is an asset which can be the subject of a contract.

dominated by the *ultras*, who were zealous royalists who despised the legal legacies of the Revolution of 1789 and of Napoleon.¹⁵⁴ In general, the *ultras* did not succeed in dismantling the legal institutions created since the Revolution of 1789.¹⁵⁵ The *loi* of 8 May 1816, which abolished divorce, was the most significant achievement of this majority of *ultras*.¹⁵⁶

However, Article 91 of the *loi* of 1816 can be explained by financial concerns rather than by the policies of the *ultras*. The purpose of the *loi* of 1816 was to raise money for a State which had been drained of financial resources by the numerous wars and the two invasions of France since the Revolution of 1789.¹⁵⁷ The State raised fifty million pounds from *officiers* by obliging them to pay more money into a fund to compensate clients for losses caused by *officiers*.¹⁵⁸ The increase in the sum required from *officiers* was effectively a forced loan as this fund was controlled by the State which paid interest on the sums deposited by *officiers*.¹⁵⁹

Article 91 of the *loi* of 1816, which allowed *officiers* to sell their *offices*, compensated *officiers* for this forced loan. This rationale is evident in the circular issued by the Minister for Justice, Etienne-Denis Pasquier on 21 February 1817, in which he observed that Article 91 of the *loi* of 1816 constituted ‘*un dédommagement*’ for the

¹⁵⁴ J-J Chevalier, *Histoire des institutions et des régimes politiques de la France de 1789 à 1958* (9^e éd., Dalloz 2001) 181-184. In August 1815, in the first elections since the Second Restoration, the *ultras* obtained 350 seats out of 402 in the *Chambre des députés*. Louis XVIII described this unexpected result as ‘*la Chambre introuvable*’. However, paradoxically, this majority of *ultras* in the *Chambre des députés* was problematic for Louis XVIII and he decided to call another election in September and October of 1816: Chevalier (n154) 181-182.

¹⁵⁵ See Halpérin (n47) 46.

¹⁵⁶ Chevalier (n156) 182; Halpérin (n47) 46.

¹⁵⁷ Foucart (n137) 343.

¹⁵⁸ Doyle (n145) 314.

¹⁵⁹ Foucart (n137) 343.

increase in the sum which the State required the *officiers* to deposit in the fund.¹⁶⁰ This rationale was also noted by the *Cour de cassation* in *Lavalley*.¹⁶¹

This technique of raising money from *officiers* in return for new privileges is reminiscent of the operation of venality in the *ancien régime*.¹⁶² Furthermore as Article 91 of the *loi* of 1816 gives *officiers* the right to sell their *offices*, one important aspect of the venality of the *ancien régime* was recreated. However, Article 91 of the *loi* of 1816 did not recreate all the elements of the venality of the *ancien régime*.¹⁶³ The State no longer sells *offices* in order to raise money, and this is ‘one of the most enduring achievements of the French Revolution’.¹⁶⁴

The rule which allowed courts to reduce unfair prices in contracts for the sale of *offices* was created by the *Cour de cassation* in *Gidon c Bordessoule* in 1910.¹⁶⁵ This rule gave special treatment to the purchasers of *offices* in order to protect the clients of *officiers* from the negative social and economic consequences of unfair prices in contracts for the sale of *offices*.

While this rule was introduced in 1910, high prices in contracts for the sale of *offices* and the consequent high prices charged to clients, the numerous bankruptcies and

¹⁶⁰ Duvergier, vol 21 (n149) 94.

¹⁶¹ *Lavalley* (n152). However, this rationale is not evident in the discussions of the *loi* of 1816 in the legislature. There was no reference to Article 91 of the *loi* of 1816 in the *exposé des motifs* and in the reports of the *Chambre des députés* and the *Chambre des pairs*. Moreover, there was no debate on this Article in the *Chambre des députés* and the *Chambre des pairs*: E Bonnier, ‘De la réforme judiciaire’, 23 *Le Correspondant* (1849) 169.

¹⁶² Doyle (n145) 314.

¹⁶³ Foucart (n137) 344-345; J-L Halpérin (éd), *Avocats et notaires en Europe : les professions judiciaires et juridiques dans l’histoire contemporaine* (LGDJ 1996) 84; Doyle (n145) 318.

¹⁶⁴ Doyle (n145) 318.

¹⁶⁵ Cass req, 13 June 1910: S.1913.1.347.

the shady practices of certain *officiers* who sought to increase their income were major concerns throughout the nineteenth century.

The problem of unfair prices in contracts for the sale of *offices* was evident less than one year after the introduction of the right to sell *offices* in Article 91 of the *loi* of 1816. In the circular issued on 21 February 1817, the Minister for Justice, Pasquier, observed that there had been numerous complaints about high prices in contracts for the sale of *offices*.¹⁶⁶ In general, the prices of *offices* rose throughout the nineteenth century. For example, in Lyon, the office of *avoué* in the *Tribunal de grande instance* cost between 60,000 and 80,000 francs in the 1830s, between 100,000 and 150,000 francs from 1845 to 1870, and between 160,000 and 200,000 francs from 1890 to 1900.¹⁶⁷

The negative social and economic consequences of unfair prices in contracts for the sale of *offices* were also apparent soon after the introduction of Article 91 of the *loi* of 1816. In the circular issued on 21 February 1817, the Minister for Justice, Pasquier, stated that as a result of the high prices of *offices*, a significant amount of *officiers* sought to increase their income by extorting money from their clients.¹⁶⁸ As a result of the high prices which *officiers* had paid for their *offices*, the bankruptcy of *officiers* and the extraction of money from clients by shady or even criminal methods were widespread throughout the nineteenth century.¹⁶⁹ In the second half of the nineteenth century, ‘there

¹⁶⁶ Duvergier, vol 21 (n149) 94. Prices rose suddenly after the introduction of Article 91 of the *loi* of 1816 and they stayed at a high level: Halpérin (n163) 85. The rise in prices can probably be attributed to the fact that Article 91 of the *loi* of 1816 validated contracts for the sale of *offices*. Before the introduction of Article 91 of the *loi* of 1816, the courts refused to enforce contracts for the sale of *offices*. See the text above from n149 to n150.

¹⁶⁷ Halpérin (n163) 85.

¹⁶⁸ Bonnier (n161) 176.

¹⁶⁹ Zeldin suggests that the numerous bankruptcies were caused by the high prices which the *officiers* had paid for their *offices*. ‘After investing these large sums, notaries not infrequently went bankrupt’ and ‘many absconded with their clients’ funds’: Zeldin (n59) 45.

Suleiman states that there is a correlation between the ownership of *offices* and the fraudulent activities of *notaires*. He notes that while the ‘crooked *notaire*’ is almost unknown in the *départements* of Bas Rhin, Haut Rhin and Moselle, fraudulent *notaires* are a problem in the rest of France. Unlike *officiers*

was... practically no canton in France which had not experienced a bankrupt or criminal notary'.¹⁷⁰ For example, in *Gravelle c Regnard*, a decision of the *Cour de cassation* in 1847, a former *notaire* fled France a few months after the sale of his *office* and before the end of a criminal trial in which he was a defendant.¹⁷¹ The former *notaire*, who was bankrupt, was convicted of usury and sentenced to two years in prison.

By at least 1838, the State had begun to refuse to appoint the successors chosen by the *officier* if there was an unfair price in the contract for the sale of an *office*.¹⁷² Nevertheless, subsequent to their appointments, *officiers* often claimed that the price which they had paid to the seller was unfair. The courts initially refused to intervene in contracts for the sale of *offices* on the basis that the price was unfair. In 1820, in *Lavalley*, the *Cour de cassation* refused to reduce the price which a *greffier* in the *Tribunal civil* of Meaux had paid for his *office*.¹⁷³ The claimant argued that the price which he had agreed to pay for the *office* was higher than the sum of two years revenue from the *office*. The claimant relied on the circular issued on 21 February 1817, by the Minister for Justice, Pasquier, in which it was stated that the price of the *office* of *greffier* should not exceed a sum which equals two years of revenue from the *office*. However, the court rejected the

in the rest of France, the *officiers* in the *départements* of Bas Rhin, Haut Rhin and Moselle do not own their *offices*: EN Suleiman, *Private power and centralization in France: the notaires and the State* (Princeton: 1987) 70. The ownership of *offices* was not recreated in these *départements* when they were returned to France at the end of the First World War: Hérial (n135) 2.

¹⁷⁰ Zeldin (n59) 45.

¹⁷¹ Cass req, 2 August 1847: S.1847.1.705; D.1847.1.315.

¹⁷² In 1838, in a leading treatise on the French law of obligations, it was stated that 'if the price for the sale of an *office* appears to be too high, there is no doubt that the King would refuse to appoint the successor': C-B-M Toullier and J-B Duvergier, *Le droit civil français* vol 9 (Société typographique belge, 1838) 76. In 1908, it was stated that the State often refused to nominate the successor chosen by the seller on the ground that there was an unfair price in the contract for the sale of the *office*: G Baudry-Lacantinerie and L Saignat, *Traité théorique et pratique de droit civil: de la vente et de l'échange* (3^e éd., Sirey 1908) 81.

¹⁷³ *Lavalley* (n152). It is no longer possible to sell the *office* of *greffier* which was sold in this case. The *office* of *greffier* in the *Tribunal de commerce* is still an *office* and thus, it can be sold on the basis of Article 91 of the *loi* of 1816. However, the *loi* of 30 November 1965 abolished the *office* of *greffier* in other courts. Therefore, apart from the *greffiers* in the *Tribunal de commerce* who are *officiers*, the *greffiers* in other courts are now civil servants: Hérial (n135) 2.

claim on the grounds that there had been no *dol*, the circular of 21 February 1817 was not binding on the court and as the purchaser had agreed to pay 30,500 francs for the *office* after the publication of the circular, he had entered into the contract ‘*en parfaite connaissance de cause*’.

Nonetheless, subsequent to *Lavalley* in 1820,¹⁷⁴ the courts began to use various rules in order to reduce unfair prices in contracts for the sale of *offices*. The guarantee against hidden defects in Article 1641 of the *Code civil*, and the principle of public policy were the two rules which were most frequently used by the courts in decisions in which unfair prices in contracts for the sale of *offices* were reduced.¹⁷⁵

First, in the nineteenth century, the courts frequently reduced the price agreed in a contract for the sale of an *office* on the basis of Article 1641 of the *Code civil* which provides that sellers are responsible for hidden defects in the things which they sell to purchasers.¹⁷⁶ The indebtedness of the seller at the time of the sale constituted a hidden defect.¹⁷⁷ There was also a hidden defect in the *office* if the seller had done something which constituted a crime and if this fact became apparent only after the sale when the seller was convicted of the crime.¹⁷⁸ Both of these hidden defects are evident in the decision of the *Cour de cassation* in *Gravelle*, which was the first case in which Article 1641 of the *Code civil* was applied to contracts for the sale of *offices*.¹⁷⁹

¹⁷⁴ *Lavalley* (n152).

¹⁷⁵ Baudry-Lacantinerie and Saignat (n172) 444-448. The third edition of this book was published just two years before the creation of the rule on unfair prices in contracts for the sale of *offices* in *Gidon* (n165). Therefore, this book provides a snapshot of the rules which courts used in order to reduce unfair prices in contracts for the sale of *offices* just before the creation of the rule which expressly allowed courts to reduce unfair prices in contracts for the sale of *offices* in 1910.

¹⁷⁶ Baudry-Lacantinerie and Saignat (n172) 444.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Gravelle* (n171).

The price agreed in a contract for the sale of an *office* could be reduced on the basis of Article 1641 of the *Code civil* only when the purchaser was not aware of the defect in the *office*. However, the seller and the purchaser often colluded in falsifying the revenue of the *office* in order to justify the payment of a higher price in the contract of sale.¹⁸⁰ As a result, the State was not in a position to see that the price stipulated in the contract for the sale of the *office* was unfair and the State based its decision to approve the nomination of the successor on a false statement of the revenue of the *office*. The courts addressed this particular method of trying to ensure that the State did not know that the *office* was being sold for an unfair price by reducing the price in the contract on the ground of public policy.

¹⁸⁰ The use of a *contre-lettre* was an alternative method of ensuring that the State would not reject the appointment of a successor on the basis of the unfair price which the purchaser had really agreed to pay for the *office*. In the *contre-lettre*, the purchaser agreed to pay a higher price than that stipulated in the contract which was shown to the State.

The general rule, under Article 1321 of the *Code civil*, is that a *contre-lettre* is binding on the parties to the contract but that it has no effect on third parties. However, Article 1321-1 of the *Code civil* provides that certain *contre-lettres*, including those in which the purchaser of an *office* agrees to pay a higher price than that stated in the contract presented to the State, are not valid. Article 1321-1 of the *Code civil* derives from the rule developed by the courts in the nineteenth century to counter the use of *contre-lettres* which allowed the parties to hide the unfair price which the purchaser had agreed to pay for the *office* from the State: Terré, Simler and Lequette (n3) 560.

In 1844, in Cass civ, 30 July 1844 (*Chédeville c Delamotte*): S.1844.1.528, the *Cour de cassation* held that the purchaser of an *office* could obtain restitution of the amount by which the sum stipulated in the *contre-lettre* exceeded the price stipulated in the contract which was presented to the State. In this case, the *Cour de cassation* quashed the decision of the *Cour royale* of Rouen which had held that even though the *contre-lettre* was not valid, the purchaser could not obtain restitution as he had been under a natural obligation to pay the sum stipulated in the *contre-lettre* to the seller. Subsequent to *Chédeville* (n180), the courts consistently held that the *contre-lettre* in which the purchaser agreed to pay a higher price for an *office* was not valid. As a result the purchaser was not obliged to pay the higher price stipulated in the *contre-lettre* and if the purchaser had already paid the higher price, the courts held that the seller was obliged to repay the amount by which the price in the *contre-lettre* exceeded the price in the contract which was presented to the State.

The rule that the *contre-lettre* in which the purchaser agreed to pay a higher price for an *office* is not valid was subsequently enshrined in the *loi* of 27 February 1912. The *loi* of 27 February 1912 also extended this rule to other contracts such as contracts for the sale of land in which the parties sought to hide the stipulation of a higher or lower price in a *contre-lettre*. The *loi* of 27 February 1912 was codified in Article 1840 of the *Code général des impôts* in 1965 and in 2005, the *loi* of 27 February 1912 was incorporated in Article 1321-1 of the *Code civil*: Terré, Simler and Lequette (n3) 560.

The first case in which an unfair price in a contract for the sale of an *office* was reduced on the ground of public policy was *Maria c Salats* in 1853.¹⁸¹ In this case the purchaser agreed to pay 33,000 francs for the *office* of *avoué* in the *Tribunal* of Montargis. A few years prior to the contract, the seller had purchased the *office* for 45,000 francs. However, even though the seller had purchased the *office* for a price which was higher than 33,000 francs a few years before this contract of sale, the revenue of the *office* had been falling significantly since then. In order to justify the price stipulated in the contract, the purchaser and seller decided to present a false picture of the revenue of the *office* by rearranging the figures to make it appear that the revenue had been increasing rather than decreasing in recent years. At first instance, the *Tribunal* of Montargis held that the contract was binding on the purchaser. However, the *Cour d'appel of Orléans* followed the advice of the *premier avocat général* Lenormant and reduced the price stipulated in the contract on the ground that the contract was contrary to public policy. Subsequent to this case, the courts frequently reduced the prices agreed in contracts for the sale of *offices* on the ground of public policy throughout the second half of the nineteenth century when the parties agreed to falsify the revenue of the *office*.¹⁸²

Therefore, on the eve of the creation of the rule which allowed courts to reduce unfair prices in contracts for the sale of *offices* by the *Cour de cassation* in 1910,¹⁸³ the courts were frequently reducing unfair prices on the ground of public policy where the parties had agreed to falsify the statement of the revenue of the *office* and on the ground of Article 1641 of the *Code civil* when there were hidden defects in the *office* at the time of the conclusion of the contract.

¹⁸¹ *Cour d'appel of Orléans*, 17 August 1853: D.1853.2.194; S.1855.2.568.

¹⁸² Baudry-Lacantinerie and Saignat (n172) 447.

¹⁸³ *Gidon* (n165).

However, in 1910, in *Gidon*,¹⁸⁴ it was necessary to create the rule which allowed courts to reduce the price stipulated in contracts for the sale of *offices* on the basis of an unfair price as the facts did not fall neatly within the purview of the principle of public policy or Article 1641 of the *Code civil*. In this case, the purchaser agreed to pay 45,000 francs for the *office of notaire*. This price was approved by the State and the purchaser was appointed as the successor of the seller. The purchaser subsequently claimed that the price was unfair. The State had not considered the price to be too high in light of the revenue from the *office* in the previous five years. However, due to a change in the law during this five year period, the amount of revenue which could be earned after this date would be less than that which was earned in this five year period. Article 1641 of the *Code civil* could not be invoked in this case as there was no hidden defect in the *office*. Furthermore, the court could not reduce the price on the ground of public policy as this rule had been applied only in cases where the parties had colluded in falsifying the statement of revenue from the *office* which they presented to the State in order to justify the high price of the *office*.

Nevertheless, the court reduced the price of the *office* solely on the ground that the price was unfair and thereby created a new rule. The court held that the price stipulated in a contract for the sale of an *office* should be equal to the 'exact value' of the *office*. It held that this rule was based on the *sui generis* nature of contracts for the sale of *offices* and that public policy required that the price stipulated in the contract should be equal to the 'exact value' of the *office*.¹⁸⁵ Therefore, the *Cour de cassation* approved of the decision of the *Cour d'appel* of Riom which had held that the price should be reduced

¹⁸⁴ Ibid.

¹⁸⁵ Thus, while the rule that courts could reduce unfair prices in contracts for the sale of *offices* was based on public policy, this rule was distinct and broader than the rule which allowed courts to reduce unfair prices in contracts for the sale of *offices* on the ground of public policy where the parties had colluded in falsifying the revenue of the *office*.

to 41,000 francs as the change in the law had lowered the value of the *office* before the conclusion of the contract. The rule that the courts could reduce unfair prices in contracts for the sale of *offices* was firmly established after this decision.¹⁸⁶

This rule remained in force throughout the twentieth century.¹⁸⁷ Then, at the beginning of the twenty-first century, it was evident that the *Cour de cassation* sought to abrogate the rule. In 2002, the *Cour de cassation* quashed a decision of the *Cour d'appel* of Dijon which had reduced the price of an *office* of *notaire* from 2,000,000 francs to 1,700,000 francs on the basis that 2,000,000 francs was an unfair price.¹⁸⁸ The *Cour de cassation* rejected the argument that the parties could not deviate from the '*juste prix*' in the contract for the sale of an *office*. It was held that as there was no '*tromperie*' or '*dissimulation*', the price could not be reduced. The *Cour de cassation* also observed that even though the *Conseil régional des notaires* had drawn the attention of the purchaser to the fact that the price was high in light of the revenue of the practice, the purchaser had nevertheless proceeded with the transaction and had been nominated as the successor of the seller.

This decision of the *Cour de cassation* in 2002 presaged the abolition of the rule on unfair prices in contracts for the sale of *offices* by the *Cour de cassation* in 2004 in *Sere de Lanauze*.¹⁸⁹ In this case, the *Cour de cassation* clearly affirmed the abolition of the rule that the courts can reduce unfair prices in contracts for the sale of *offices* by

¹⁸⁶ In the note to *Gidon* (n165) in *Sirey*, it is stated that it is 'certain' that if the purchaser agrees to pay an unfair price for an *office*, the court can reduce the price. This case is cited as the origin of the rule in all the leading treatises on the French law of obligations in the twentieth century and in the twenty-first century.

¹⁸⁷ D Mazeaud, *RDC* (2005) 681, 682.

¹⁸⁸ Cass civ 1, 10 July 2002: Bull civ I n°194.

¹⁸⁹ *Sere de Lanauze* (n134). The significance of this *revirement* is considered in a comparative perspective in the discussion on the freedom of English and French courts to abolish and create rules in section (ii) in chapter 6.

stating that the general principles of law on the sale of moveable property do not allow courts to change the price stipulated in the contract between the parties and that these general principles apply to the sale of *offices*.

Since the decision of the *Cour de cassation* in 2004 in *Sere de Lanauze*,¹⁹⁰ the rule on unfair prices in contracts for the sale of *offices* no longer exists in French law. It is clear that the rule was created in order to protect the clients of *officiers* from the negative consequences of high prices in contracts for the sale of *offices*.

At first glance, the reason for the abrogation of the rule in 2004 is less apparent than the reason for the creation of the rule. The decision of the *Cour de cassation* in *Sere de Lanauze*¹⁹¹ is not particularly revealing in this regard due to the brief and concise way in which it is formulated.¹⁹² Nonetheless, the significance of the principle of freedom of contract in the decision of the *Cour de cassation* to abolish the rule on unfair prices in contracts for the sale of *offices* is evident in the *rapport* in this case.¹⁹³ The *rapporteur* emphasised that the central issue was whether ‘*la liberté contractuelle*’ applied to contracts for the sale of *offices*. He outlined several reasons why ‘*un certain interventionnisme*’ or ‘*dirigisme contractuel*’ could be justifiable in this context.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Brevity and concision have been characteristic features of the decisions of the *Cour de cassation* since the Revolution of 1789. See JP Dawson, *The oracles of the law* (University of Michigan Law School 1968) 374-431.

In notes on the decision of the *Cour de cassation* in *Sere de Lanauze* (n134), both Leveneur and Mazeaud state that it was always difficult to justify the rule that allowed courts to reduce unfair prices in contracts for the sale of *offices*: L Leveneur, *CCC* 2005.comm.60, 16, 16; D Mazeaud (n187) 682. However, they do not explain why the *Cour de cassation* suddenly decided to abrogate the rule in 2004.

Nevertheless, Mazeaud points out that the abrogation of the rule in *Sere de Lanauze* (n134) is consistent with Cass civ 1, 16 March 2004 in which the *Cour de cassation* also affirmed the principle of the binding force of contracts by rejecting the argument that a party to a contract was obliged to renegotiate a contract which was unfair at the time of the conclusion of the contract. Mazeaud also states that in contrast to developments in the previous quarter of a century, Cass civ 1, 16 March 2004 and *Sere de Lanauze* (n134) indicate a trenchant affirmation of the principle of the binding force of contracts by the *Cour de cassation*: D Mazeaud (n187) 682.

¹⁹³ The *Cour de cassation* sent the *rapport* to the author by email (24 July 2012).

Therefore, it appears that by deciding not to quash the decision of the *Cour d'appel* which had refused to apply the rule on unfair prices in contracts for the sale of *offices*, the *Cour de cassation* clearly chose the path of '*la liberté contractuelle*'.¹⁹⁴

¹⁹⁴ Furthermore, although this point is not mentioned in either the decision of the *Cour de cassation* in *Sere de Lanauze* (n134), or in the *rapport* in this case, the abrogation of the rule on unfair prices in contracts for the sale of *offices* is consistent with the acceleration in the abolition of *offices* or of part of *offices* at the beginning of the twenty-first century. The *loi* of 10 July 2000 abolished such a significant part of the *office* of *commissaire-priseur* that the *officier* is now called a *commissaire-priseur judiciaire*. Similarly, the *office* of *courtier interprète et conducteur de navires*, which was commonly known as the office of *courtier maritime*, was abolished by the *loi* of 16 January 2001. Furthermore, the *loi* of 25 January 2011, which abolished the *office* of *avoué* in the *Cour d'appel*, is also consistent with this trend. See also n151 above.

(iv) Struggling businesses: the sale of small businesses during the Great Depression

For a short period during the Great Depression of the nineteen thirties, French law came to the aid of struggling businessmen who had paid an unfairly high price for their businesses. Article 9 of the *loi* of 29 June 1935 provided that the courts could reduce the price which a purchaser of a business had agreed to pay to the seller if it was unfairly high.¹⁹⁵ The purchase price was considered to be unfair if the price paid for the intangible assets of the business exceeded their ‘real value’ by more than thirty-three per cent at the time of the sale.¹⁹⁶ This provision was subject to three significant limitations. First, it applied only to the sale of businesses which took place between 1 July 1926 and 29 June 1935. Secondly, only purchasers who still owed part of the purchase price to the seller could seek to have the purchase price reduced. Therefore, purchasers who had already paid the entire purchase price to the seller were precluded from invoking Article 9 of the *loi* of 1935. Thirdly, the court could not reduce the purchase price by an amount which exceeded the sum which the purchaser still owed the seller.

¹⁹⁵ The term ‘business’ is a translation of the term ‘*fonds de commerce*’ which is used in the *loi* of 29 June 1935 (hereafter, ‘the *loi* of 1935’). The *fonds de commerce* is a type of intangible moveable property which essentially consists of ‘*le droit à la clientèle*’. The *fonds de commerce* incorporates the tangible moveable property (including the tools and the merchandise) and the intangible moveable property of a business (the name of the business, the patents and trademarks, and the right to continue the lease of the premises). The concept of *fonds de commerce* first emerged in business practice before being expressly used in legislation. The term captures the idea that the place of business and all the assets used in the operation of the business are more important than the work which is personally done by the businessman. The term first appears in legislation in a tax law of 1872. See G Ripert, *Traité élémentaire de droit commercial* (LGDJ 1948) 175-176 and more recently, L Vogel and M Germain (ed), *G Ripert et R Roblot: traité de droit commercial* tome I, vol I (LGDJ 2001) 325-326.

A *fonds de commerce* is not necessarily a small business. However, small businesses were the primary concern of legislators during the debates on the *loi* of 1935 and all the cases which this author has examined on Article 9 of the *loi* of 1935 involved the sale of small businesses (very often from one married couple to another). See for example, *Tribunal de commerce* of Blois, 27 March 1936 (*Fromet c Morin*): D.1936.296 (a grocery shop); *Cour d’appel* of Nancy, 5 May 1936 (*Marcoux c Brasserie de Saint-Nicolas et Meyer*): D.1936.341 (a cafe); *Cour d’appel* of Caen, 7 July 1936 (*Peyret c Cot*): D.1936.451 (a grocery shop); *Cour d’appel* of Angers, 18 December 1936 (*Poupart c Lafontaine*): Gaz Pal.1937.1.318 (a cinema).

¹⁹⁶ Article 9 of the *loi* of 29 June 1935 lists some of the factors (the profits made by the business in the three years preceding the sale for example) which a court should consider when it is determining the fair price. See also n233 on the role of *experts*.

Article 9 of the *loi* of 1935 has a tortuous and protracted history. The introduction of a rule based on *lésion* rather than on the concept of *imprévision* and the choice of the percentage of thirty-three per cent were ultimately the result of a compromise between the *Chambre des députés* and the *Sénat*.¹⁹⁷

On 17 October 1933, in the *Chambre des députés*, Edouard Soulier proposed the introduction of a rule which would allow courts to reduce the purchase price of a business if the value of the business had decreased significantly subsequent to the contract of sale.¹⁹⁸ Thus, this proposal would have embraced the concept of *imprévision* rather than *lésion*.

The government, which was led by Doumerge, sought to prevent the introduction of a rule based on *imprévision* by introducing a separate proposal based on the doctrine of *lésion*.¹⁹⁹ On 17 May 1934, Henry Chéron, the Minister for Justice and Lucien Lamoureux, the Minister for Commerce and Industry proposed a rule which would have allowed courts to reduce the purchase price of a business if the price paid for the intangible assets of the business was one quarter more than their real value at the time of the contract of sale.²⁰⁰ However, both the *Chambre des députés* and the *Sénat* rejected

¹⁹⁷ Nonetheless, while a rule based on *imprévision* was rejected in favour of a rule based on *lésion* in Article 9 of the *loi* of 1935, a similar rule based on *imprévision* was subsequently introduced by the *loi* of 17 July 1937 (hereafter, ‘the *loi* of 1937’). The *loi* of 1937 provided that the court could reduce the purchase price of a business by the proportion by which the gross revenue of the business had decreased since the conclusion of the contract of sale. Similar to the rule based on *lésion* in Article 9 of the *loi* of 1935, the *loi* of 1937 provided that the court could not reduce the purchase price by more than the sum which the purchaser still owed to the seller. See n5 in chapter 1 for a discussion of the distinction between *lésion* and *imprévision*.

¹⁹⁸ S.1935.1802.

¹⁹⁹ S.1935.1802.

²⁰⁰ *Ibid*.

this proposal. While the *députés* sought to introduce a rule based on *imprévision*,²⁰¹ the *sénateurs* opposed the idea of introducing such a rule.²⁰²

In the *Sénat*, Victor Lesaché attempted to find a solution that would be acceptable to both the *Sénat* and the *Chambre des députés* by recycling the proposal to introduce a rule based on *lésion* which had previously been advocated by the government.²⁰³ Nonetheless, this proposal was initially rejected by the *Sénat*.²⁰⁴ René Caillier was the principal opponent of the introduction of Article 9 of the *loi* of 1935 in the *Sénat*. He advanced two main arguments. First, he contended that this rule was objectionable as it derogated significantly from the rules on *lésion* in the *Code civil* which allowed intervention in contracts on the basis that the price was unfair only in contracts for the sale of land and only the seller could invoke this rule.²⁰⁵ Furthermore, he argued that the result of Lesaché's proposal was undesirable as the law would help only those who owed money to others while '*les gens les plus intéressants*', who have performed their contracts and paid their debts would be treated as a fools.²⁰⁶

Lesaché then modified the rule in order to make it more stringent and thus more acceptable to the *Sénat*.²⁰⁷ The *Sénat* eventually accepted a proposal which would have allowed courts to reduce the purchase price of a business if the price paid for the

²⁰¹ Ibid.

²⁰² Ibid 1802-1803. At this point, the *Sénat* was prepared to accept only the extension of payment periods: Ibid 1803.

²⁰³ Ibid 1803-1804, 1807.

²⁰⁴ Ibid.

²⁰⁵ Ibid 1808. However, this argument was not very convincing given that French law allowed courts to intervene in contracts on the basis of an unfair price in many other situations. See the rule on unfair prices in salvage contracts in section (iii) in chapter 4 and the three rules discussed above in sections (i), (ii) and (iii) in this chapter. All of these rules were introduced before the *loi* of 1935.

²⁰⁶ Ibid.

²⁰⁷ Ibid 1804, 1808.

intangible assets of the business was fifty per cent higher than their real value.²⁰⁸ However, the *Chambre des députés* rejected this proposal as it was considered to be too restrictive and proposed that the threshold should be twenty-five per cent instead of fifty per cent.²⁰⁹ A resolution was eventually achieved when the *Chambre des députés* proposed that the rule should be applicable if the price paid was thirty-three per cent higher than the real value of the intangible assets of the business and this proposal was accepted by the *Sénat*.²¹⁰

Why did a rule which allowed courts to intervene in contracts on the basis that the price was unfair penetrate the ruthless and volatile world of buying and selling businesses? Article 9 of the *loi* of 1935 can be explained by the policy of giving special treatment to the purchasers of businesses for economic reasons and the policy of protecting the purchasers of businesses on the ground that they are the weak parties to contracts for the sale of businesses.

First, the purchasers of businesses were given special treatment for economic reasons. The prolonged economic depression in France in the nineteen thirties is the principal factor which explains the introduction of Article 9 of the *loi* of 1935. Following the Wall Street crash in October 1929, most national economies suffered in the subsequent Great Depression. In contrast to other national economies, the economic depression affected the French economy later and it lasted much longer.²¹¹ The first effects of the economic depression were evident in France at the beginning of 1931.²¹² In

²⁰⁸ Ibid 1804.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ J Jackson, *The Popular Front in France: defending democracy, 1934-1938* (CUP 1988) 20.

²¹² Jackson (n211) 20.

the middle of 1935, when the *loi* of 1935 was passed, ‘while most of the industrialized world was on the road to recovery..., France was only just entering the trough of the Depression’.²¹³

From 1934 to 1936, successive governments (which comprised coalitions of parties from the right and the centre) pursued a policy of deflation in order to overcome the economic, financial and monetary problems.²¹⁴ The most drastic deflationary measures were implemented by the government of Pierre Laval in 1935.²¹⁵ All government spending was cut by ten per cent.²¹⁶ In addition, gas, coal, electricity, mortgage payments and non-commercial rents were also reduced by ten per cent.²¹⁷ Article 9 of the *loi* of 1935, which reduced the purchase price of businesses is consistent with the general policy of deflation during this period.²¹⁸

The influence of the economic context on the *loi* of 1935 is particularly evident in the debates in the *Sé debates in the Sénat*. Paul Maulion argued that it was necessary to help the purchasers of businesses as they were seriously affected by the economic depression.²¹⁹ First, he cited various statistics which showed that between 1927 and 1930, before the beginning of the depression when ‘*la prétendue prospérité... trompait... tout le monde*’, there had

²¹³ Ibid.

²¹⁴ J Jackson, *The politics of depression in France: 1932-1936* (CUP 1985) 80 – 111.

²¹⁵ Ibid 106.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ripert observes the link between the general policy of deflation and the *loi* of 1935. He notes that businessmen claimed that they could not afford to reduce the price of their products as the cost of running a business was too high. He states that the legislators sought to lower the cost of living by introducing a rule which reduced the price which a purchaser had paid for his business as it would allow businesses to reduce the price of their products: G Ripert, *Le régime démocratique et le droit civil moderne* (2^e édn, LGDJ 1948) 169.

²¹⁹ S.1935.1801-1802.

been a significant increase in the price of businesses and in the number of businesses which had been sold.²²⁰ However, he noted that since the beginning of the crisis, prices, wages and pensions had fallen, there had been a decrease in the number of tourists, numerous banks had collapsed and more businesses were going bankrupt.²²¹

Maulion also sought to bring a particular ‘scandal’ to the attention of the legislators.²²² He stated that many purchasers of businesses who are unable to pay the fraction of the purchase price which they still owe the seller are compelled to sell the business and that it is often the original seller who repurchases the business for a derisory sum.²²³ He noted that, in one instance, a purchaser who had agreed to pay 800,000 francs for a business had managed to pay only 600,000 francs to the seller.²²⁴ As the purchaser was unable to pay the remaining 200,000 francs, he was compelled to sell the business and the original seller was able to repurchase the business for only 1,500 francs.²²⁵

Therefore, the introduction of Article 9 of the *loi* of 1935 was introduced as a result of the economic depression of the nineteen thirties. Given that shopkeepers and

²²⁰ S.1935.1801. Nevertheless, in the second half of the nineteenth century and in the first half of the twentieth century, it was common for small businesses to change hands quite often. Zeldin states that during this period, ‘the visitor to Paris who absented himself for twenty years would find very few of the same shops, owned by the same people, still active’. Zeldin states that this phenomenon can be explained by the role of small businesses in social mobility in France during this period. He states that it was usual to ‘sell up as soon as one had made a reasonable amount of money – just as one had reached prosperity – and to retire on the proceeds... and finance the rise in the world of one’s children by educating them for the liberal professions’: Zeldin (n59) 108, 87.

Furthermore, not all of the increase in the price of businesses before the Great Depression was completely ephemeral. In the long term, businesses were a profitable investment in France in the first half of the twentieth century. Zeldin observes that ‘in the country as a whole commercial properties increased in value in the first half of the twentieth century more than any other form of investment, and they were the only form of investment which did not suffer from two world wars’: Zeldin (n59) 112.

²²¹ S.1935.1801-1802.

²²² Ibid 1802.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

small businessmen, whose income dropped by eighteen per cent, were among the social categories which suffered most from the economic depression,²²⁶ it is not surprising that the legislators introduced a rule which sought to improve their fragile position.

Moreover, Article 9 of the *loi* of 1935 was consistent with numerous laws passed throughout the Third Republic which put small businessmen in a privileged position.²²⁷ For example, the *loi* of 1 March 1898 permitted businessmen to use their businesses as security for loans. Similarly, the *loi* of 30 June 1926 granted businesses the right to renew the lease of their business premises. The *loi* of 30 June 1926, provided that the owner of the premises had to pay compensation to the business if he refused to renew the lease without a legitimate reason.

The introduction of Article 9 of the *loi* of 1935 can also be explained by the policy of protecting a weak party to a contract.²²⁸ The purchasers of businesses were considered to be in a weak position as it was often difficult to accurately determine the value of a business before the conclusion of the contract of sale. Article 9 was a logical component of the *loi* of 1935 which sought to protect future purchasers of businesses in addition to purchasers who had paid an unfairly high price for businesses in the past. Article 12 of the *loi* of 1935 (which is now incorporated in Article L141-1 of the *Code de commerce*) stipulated that the vendor must set out certain information about the business in the

²²⁶ Jackson (n211) 20.

²²⁷ Halpérin (n47) 265-266. Halpérin states that during the Third Republic, the 'piecemeal' laws which favoured businesses were introduced in response to the demands of businessmen: Halpérin (n47) 265. See also G Ripert, *Aspects juridiques du capitalisme moderne* (2^e éd., LGDJ 1951) 173-213. From the beginning of the twentieth century, successive governments extolled and deliberately pursued policies which favoured 'la France des 'petits', the owners of small farms and the owners of small businesses: J-J Becker and S Bernstein, *Victoire et frustrations: 1914-1929* (Seuil 1990) 336-339.

²²⁸ Furthermore, Article 9 of the *loi* of 1935 is consistent with the plethora of laws which were introduced during this period in order to protect debtors from the effects of the economic depression. In 1936, these laws were criticised by Ripert in a famous essay: G Ripert, 'Le droit de ne pas payer ses dettes', D.1936.57. Ripert considered that these laws favoured one class over another and that they constituted 'le butin de victoire d'un parti vainqueur': D.1936.57, 60.

contract of sale so that the purchaser can accurately determine the value of the business. Article 12 of the *loi* of 1935 provided that the revenue and profits of the business in the three years prior to the contract of sale and information on the charges and guarantees given by the business must be included in the contract of sale.²²⁹ Therefore, while Article 9 of the *loi* of 1935 protected the owners of businesses who had paid an unfair price in the past, Article 12 of the *loi* of 1935 sought to protect future purchasers from the same peril.

In the *Sénat*, Lesaché invoked the protections provided to future purchasers by Article 12 of the *loi* of 1935 in order to justify the rule that courts could reduce the purchase price of businesses which had been bought before 29 June 1935 on the ground of an unfair price in Article 9 of the *loi* of 1935. Lesaché observed that as Article 12 of the *loi* of 1935 required future sellers of businesses to provide certain information to purchasers, future sellers would not be able to charge future purchasers a price which exceeded the real value of the business. Therefore, as a future seller would be unable to find ‘*un acquéreur aussi imprudent qu’il l’a été lui-même*’, Lesaché argued that it was necessary and fair to allow purchasers to seek a reduction in the purchase price which they paid for their businesses.²³⁰

Article 9 of the *loi* of 1935 applied only to businesses which had been sold between 1 July 1926 and 29 June 1935 and purchasers who sought a reduction of the purchase price had to initiate their action before the 1 March 1936.²³¹ Even though Article 9 of the *loi* of 1935 was a temporary rule, it was invoked in numerous cases by purchasers who had bought a wide variety of businesses. One case in which Article 9 of the *loi* of

²²⁹ For the current application of Article L141-1 of the *Code de commerce*, see Malaurie, Aynès and Gautier (n2) 105.

²³⁰ S.1935.1808.

²³¹ The deadline was initially 1 January 1936 but the period within which a purchaser could initiate an action under Article 9 of the *loi* of 1935 was extended to 1 March 1936 by the *loi* of 9 January 1936.

1935 was invoked will illustrate the context in which the rule was invoked and the operation of the rule in practice.

In *Fromet*, the *Tribunal de commerce* of Blois rejected what seemed to be a particularly opportunistic use of Article 9 of the *loi* of 1935.²³² On 1 March 1935, Mr and Mrs Fromet purchased a grocery shop from Mr and Mrs Morin. The price of the intangible assets of the business was 27,500 francs. This sum was paid to the sellers. The purchasers also agreed to pay 3,321 francs for the merchandise in four instalments. The first instalment was paid on the 1 June 1935. However, the purchasers failed to pay the subsequent instalments even though they had promised to pay it very soon. Therefore, the failure to pay the further instalments curiously coincided with the promulgation of the *loi* of 1935. The purchaser argued that the purchase price was unfairly high and that it should be reduced on the basis of Article 9 of the *loi* of 1935. However, the court rejected the action on the basis that the purchaser had paid the whole of the price for the intangible assets. It was held that even though a part of the price of the merchandise remained outstanding, only the price of the intangible assets of the business was relevant under Article 9 of the *loi* of 1935.

While the purchasers failed in their claim in *Fromet*, the courts often refused to dismiss the actions of the purchasers. In numerous cases it was held that the purchasers had presented sufficient evidence to justify the appointment of an *expert* to determine whether or not the purchase price was thirty-three per cent higher than the real value of the intangible assets of the business.²³³

²³² *Fromet* (n195).

²³³ See *Cour d'appel* of Orléans, 1 August 1936 (*Lecomte c Cavaroc*): D.1936.563 and *Cour d'appel* of Lyon, 16 December 1937 (*Cabanis c Sol et autres*): D.1938.171. Article 9 of the *loi* of 1935 provides that the '*juge*' should determine the value of the business and there is no reference to *experts* in this provision. Therefore, the court is not bound to appoint *experts*. In contrast, where a vendor invokes Article 1674, the

Ripert, who considered Article 9 of the *loi* of 1935 to be an undesirable addition to French law,²³⁴ highlighted the multiple difficulties which arose when courts attempted to apply it.²³⁵ The courts found it difficult to value the intangible assets of the business when this had not been expressly set out in the contract of sale and to calculate thirty-three per cent of the fair price of the business as this percentage was not exactly a third.²³⁶

When a similar rule based on *imprévision* was introduced by the *loi* of 1937, these difficulties were exacerbated as purchasers invoked both Article 9 of the *loi* of 1935 and the *loi* of 1937.²³⁷ The extent of the problem is particularly evident in *Roqueplo c Echertier*, which came before the *Cour de cassation* in 1942.²³⁸ In this case, a purchaser sought to obtain a reduction in the purchase price of his business in two separate actions. He initially sought a reduction in the purchase price of his business on the basis of Article 9 of the *loi* of 1935. This claim was still before the courts when the *loi* of 1937 was passed. The purchaser then sought a reduction in the purchase price of his business on the basis of the *loi* of 1937 in a separate action. The *Cour de cassation* held that the purchaser

court is required under Article 1678 of the *Code civil* to appoint three *experts* to determine the value of the land at the time of the sale if the vendor presents sufficient evidence of an unfairly low price. Nevertheless, the courts are not bound to accept the conclusions of the *experts*. See section (iii) in chapter 3. Similarly, even where *experts* were appointed to determine the value of the business when a purchaser invoked Article 9 of the *loi* of 1935, it is likely that the courts would not have been bound to accept the conclusions of the *experts*. The significance of the role of *experts* in the application of the rules on unfair prices which are discussed in this thesis is considered in section (i)(d) in chapter 6.

²³⁴ Ripert stated that the fact that businessmen constituted a ‘powerful electorate in the cities’ was the main reason why the legislators introduced Article 9 of the *loi* of 1935: Ripert (n218) 170. He provided a similar analysis of the *loi* of 1907. See above n113. Ripert considered both the *loi* of 1935 and the *loi* of 1937 to be ‘of questionable value’: Ripert (n195) 278.

²³⁵ Ripert (n195) 263.

²³⁶ *Ibid.*

²³⁷ See n197 above.

²³⁸ Cass soc, 30 January 1942: S.1943.1.77. In a note to this case, G Lagarde observes that many cases based on Article 9 of the *loi* of 1935 were still before the courts when new actions were introduced on the basis of the *loi* of 1937. Actions based on Article 9 of the *loi* of 1935 could not be invoked after 1 March 1936. However, the valuation of the business at the time of the conclusion of the contract was often a ‘long and complex’ process and it was possible to appeal the decisions of the *Tribunaux de commerce*. Actions based on the *loi* of 1937 could not be invoked after 15 November 1937.

could invoke both Article 9 of the *loi* of 1935 and the *loi* of 1937 as they were separate rules. The court quashed the decision of the *Cour d'appel* of Paris and sent the case down to the *Cour d'appel* of Orléans. Therefore, the case had still not been resolved seven years after the purchaser had originally initiated an action based on Article 9 of the *loi* of 1935.²³⁹

Ultimately, Article 9 of the *loi* of 1935 is a peculiar rule. Unlike the other rules in French law on unfair prices in contracts which are discussed in this thesis, Article 9 of the *loi* of 1935 only covered contracts which were concluded during a short and limited period of time.

This peculiar rule also highlights the extent to which *lésion*, which is the very idea of intervening in contracts on the ground of an unfair price, is an entrenched feature of French law. The creation of rules on unfair prices in contracts is certainly not a reflex action for legislators or the courts. Nevertheless, the decision to embody *lésion* in what was merely an impermanent rule which was created to address a temporary social and economic problem demonstrates that *lésion* is clearly an integral part of the stock of ordinary legal ideas in French law.

²³⁹ As G Lagarde observes, this case was 'far from exceptional': S.1943.1.77.

(v) Selling copyright for a *sou*

In 1957, a rule was introduced in French law which protects artists and authors from unfair prices in contracts for the assignment of the copyright in their work. Article 37 of the *loi* of 11 March 1957 which was subsequently incorporated in Article L131-5 of the *Code de la propriété intellectuelle*²⁴⁰ provides that courts can intervene in contracts for the assignment of copyright if the price received by the artist or author is less than five-twelfths of the fair price.²⁴¹ While the court cannot rescind the contract if it finds that the artist or author received an unfair price, it can increase the price stipulated in the contract to a sum which equals the fair price of the copyright at the time of the conclusion of the contract.²⁴²

There is no comparable rule in English law. Nevertheless, English law is not insensitive to the travails of artists and authors who assign the copyright in their work for an unfair price. In English law, an artist or author may succeed in rescinding a contract in which he has agreed to accept an unfair price for the assignment of the copyright of his

²⁴⁰ The *Code de la propriété intellectuelle* (hereafter, ‘the *CPI*’) was introduced by the *loi* of 1 July 1992. The *loi* of 11 March 1957 is hereafter called ‘the *loi* of 1957’.

²⁴¹ Article L131-5 of the *CPI* is subject to two significant limitations. First, Article L131-5 *al* 2 of the *CPI* stipulates that an artist or author can invoke the rule only if the parties have agreed to a fixed price in the contract. See the discussion below in the text from n254 to n260 on the rationale for this limitation. Secondly, Article L131-5 *al* 3 of the *CPI* provides that the court must also take into account other contracts concluded between the parties. Thus, even if the artist or author receives an unfair price in one contract, he will not be able to invoke the rule in order to obtain a higher price if the court considers that the imbalance in that contract has been rectified by the payment of a higher price in his other contracts with the assignee. See C Maréchal, ‘La lésion et l’imprévision en droit d’auteur’ 217 *RIDA* (2008) 31, 67-69 and J Matthyssens, ‘Sanction de la lésion dans les contrats relatifs aux droits d’auteur’, 25 *RIDA* (1959) 73, 105-111.

It is clear that the fraction of five-twelfths which is stipulated in Article L131-5 of the *CPI* is based on the similar fraction which is required under Article 1674 of the *Code civil* which allows courts to intervene in contracts for the sale of land on the basis of an unfairly low price. Gautier states that the fraction of five-twelfths is a ‘nice tribute to the sale of land’: P-Y Gautier, *Propriété littéraire et artistique* (7^e éd., PUF 2010) 538. See sections (i)(b) and (c) and (iii) in chapter 3 for a discussion of Article 1674.

²⁴² While Article L131-5 of the *CPI* states that a court can increase the price stipulated in a contract for the assignment of copyright if the price was unfair at the time of the conclusion of the contract, it also provides that the courts can increase the price if it became unfair due to subsequent events. Therefore, in addition to a rule based on *lésion*, Article L131-5 of the *CPI* includes a rule based on *imprévision*. Given the purpose of this thesis, we focus here on the rule based on *lésion* rather than that based on *imprévision*. Nonetheless, it is sometimes necessary to refer to the rule based on *imprévision*.

work on the basis of the doctrine of undue influence. In *O'Sullivan v Management Agency and Music Ltd*,²⁴³ a series of contracts including a contract for the assignment of copyright in songs, which had been concluded between Gilbert O'Sullivan, an inexperienced and unknown pop musician, and an internationally famous manager, were rescinded on the ground of undue influence. It was held that Gilbert O'Sullivan had received an unfair price in the contract for the assignment of copyright in his songs. In addition, it was held that on the facts there was a relationship of influence between the parties.

Similar to the rule in French law, the rationale of the application of the doctrine of undue influence in this case was to protect the pop musician from an unfair price. As Waller LJ observed, the claimant 'had no idea what would have been the proper price... to be paid'.²⁴⁴ Nevertheless, unlike French law, the doctrine of undue influence cannot be invoked simply on the basis that there is an unfair price.²⁴⁵ Therefore, while English law may protect artists and authors from unfair prices in certain circumstances, the rule in French law which allows courts to intervene in contracts for the assignment of copyright by artists and authors simply on the basis of an unfair price provides more extensive protection against unfair prices.

²⁴³ *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428. The benevolent attitude of the courts towards artists who sell copyright in their works is also apparent in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616. In this case, the House of Lords held that a contract between a publishing company 'with world wide connections' and an 'unknown composer' was unenforceable on the ground that it was a contract in restraint of trade. Lord Diplock emphasised the significance of fairness in determining whether or not the contract was in restraint of trade. He stated that the court must decide 'whether the publisher had used his superior bargaining power to exact from the song-writer promises that were unfairly onerous to him' and 'the question to be answered' was whether the bargain was 'fair': (n243) 618, 622, 623.

²⁴⁴ *O'Sullivan* (n243) 472.

²⁴⁵ Furthermore, a claimant may successfully invoke the doctrine of undue influence even if there is no unfair price. The leading authority on the doctrine of undue influence is *Etridge* (n3). This case and the requirements of the doctrine are discussed in section (ii)(a) in chapter 2.

The *loi* of 1957, which was promulgated in the penultimate year of the Fourth Republic, constituted the first significant legislation on copyright since the *loi* of 13-19 January 1791 and the *loi* of 19-24 July 1793.²⁴⁶ The primary objectives of the *loi* of 1957 were to update and codify the law on copyright which had been mainly developed in the courts and to strengthen the protection of artists and authors.²⁴⁷ The origins of the *loi* of 1957 can be traced to proposals advanced in the *Chambre des députés* in 1927 and 1932 and to various proposals introduced by Jean Zay, the Minister for Education and Arts in successive governments before the beginning of the Second World War.²⁴⁸ The particular rule on unfair prices in contracts for the assignment of copyright originated in a proposal advanced by Jean Zay in 1938.²⁴⁹

The introduction of the rule in French law on unfair prices in contracts for the assignment of copyright can be attributed to two factors. The first and most significant rationale underpinning this rule is the policy of protecting a weak party to a contract. Secondly, this rule can also be explained by the policy of giving special treatment to a particular group for cultural reasons.

²⁴⁶ Gautier (n241) 17-18. The *loi* of 13-19 January 1791 and the *loi* of 19-24 July 1793 were introduced during the tumultuous years of the *Constituante* and the *Convention* respectively.

²⁴⁷ See the *exposé des motifs* of the *projet de loi* which became the *loi* of 1957: 5 *RIDA* (1954) 150, 150.

²⁴⁸ J Vilbois, 'Historique' 19 *RIDA* (1958) 29, 33. Jean Zay was a prominent Minister for Education and Arts in successive governments in the three years before the Second World War. Zay was imprisoned in France during the Vichy regime and was killed by the Vichy militia on 20 June 1944, five days before the liberation of Paris: Jolly, tome VII (n116) 3232-3233; Jackson (n211) 123, 153. See also Zay's posthumously published memoirs which were written while he was imprisoned: J Zay, *Souvenirs et solitude* (Belin 2010).

²⁴⁹ Fernay notes that in contrast to the current law which specifies that the price must be less than five-twelfths of the fair price, the original proposal allowed courts to intervene in contracts for the assignment of copyright when there was '*lésion énorme*' (a large disproportion between the price agreed in the contract and the fair price). R Fernay, 'La cession et le contrat d'édition' 19 *RIDA* (1958) 257, 291.

In his memoirs, Zay described the formulation of the proposals. He lamented the fact that 'one sees literary and musical publishers paying hundreds of francs for masterpieces which earn them millions' and he sought to introduce legislation which would 'protect the author from himself': Zay (n248) 296.

A principal rationale of Article L131-5 of the *CPI* is the protection of the weak party to contracts for the assignment of copyright. Artists and authors were viewed as naive and inexperienced parties in such contracts. When the government introduced the proposal which became the *loi* of 1957, it was stated that the rule on unfair prices in contracts for the assignment of copyright was based on the desire to protect the artist or author ‘*contre l'imprudence ou la timidité dont il lui arrive de faire preuve dans la vie pratique*’.²⁵⁰ Furthermore, the artist or author was considered to be in a weaker economic position than the assignee.²⁵¹ As the cases on this rule indicate, the assignee is often a book publisher,²⁵² an advertising agency²⁵³ or a large business.²⁵⁴

Article L131-5 of the *CPI* is a consistent part the larger body of rules which regulate the payment structure in contracts for the assignment of copyright in an attempt to ensure that artists and authors receive a fair price. Article L131-4 *al* 1 of the *CPI* stipulates that the general rule is that artists and authors must be paid a proportion of the revenue which the assignee earns by using the work. The purpose of this general rule, which has been described as ‘one of the pillars of the protection of artists and authors in French law’,²⁵⁵ is to ensure that artists and authors are able to benefit from the success of their work.

²⁵⁰ See the *exposé des motifs* of the *projet de loi* which became the *loi* of 1957: 5 *RIDA* (1954) 150, 154.

²⁵¹ Matthyssens (n241) 113.

²⁵² See for example, *Cour d'appel* of Paris, 9 December 1992 (*Société Bonechi Edizioni et Société Ovet c Guillot*): 260 *RIDA* (1994) 228.

²⁵³ See for example, *Cour d'appel* of Versailles, 9 June 1986 (*Société Ted Bates c Sugar*): 131 *RIDA* (1987) 243, note J-P Oberthür; *Gaz Pal.*1986.1.630 note P Frémond and the cases discussed in J-P Oberthür, ‘La révision du prix de cession des droits d’auteur en publicité’ 126 *RIDA* (1985) 45.

²⁵⁴ See for example, *Cass civ* 1, 14 June 2007 (*Mallier c Bouygues*): D.2007.2578, note D Lefranc; 213 *RIDA* (2007) 363.

²⁵⁵ Maréchal (n241) 34.

The payment of a fixed price instead of a price which reflects the proportion of revenue from the work is permitted only in specific circumstances which are set out in Articles L131-4 *al* 2 and L132-6 of the *CPI*. Article L131-4 *al* 2 of the *CPI* provides that the parties can agree on a fixed price where it is impossible, too difficult or too costly to calculate a price which reflects a proportion of revenue from the use of the work,²⁵⁶ where the author assigns the copyright in software and when the work constitutes a subsidiary element of another work.²⁵⁷ In addition, Article L132-6 of the *CPI* stipulates that the parties can agree on a fixed price in contracts for the assignment of copyright in the first edition of numerous types of books and in other limited circumstances.²⁵⁸

Thus, while the payment of a fixed price is the exception rather than the rule in contracts for the assignment of copyright, there are numerous circumstances in which the parties can agree to a fixed price rather than a payment which reflects a proportion of the revenue from the work. Nevertheless, in Article L131-4 *al* 2 of the *CPI* which provides that in general, an artist or author must be paid a proportion of the revenue from the work, the legislators had effectively recognised that contracts which stipulated a fixed price provided less protection to artists and authors against unfair prices than contracts which provided for a price which reflected a proportion of the revenue from the work. Therefore, it was a logical and coherent step to introduce Article L131-5 of the *CPI* which allows courts to intervene in contracts for the assignment of copyright for an unfair

²⁵⁶ See for example, *Tribunal de grande instance* of Paris, 16 December 1980 (*Vijoux et Société Sept c Société Sotair*): 109 *RIDA* (1981) 223. In this case, a travel business used the drawings of an anthropomorphic pink elephant in its advertising brochures which were distributed to the public for free. It was held that the stipulation of a fixed price in the contract for the assignment of the copyright in the drawings which had been concluded between the business and the artist who had created the drawings was permitted on the ground that the public did not pay anything for the brochures.

²⁵⁷ See for example, *Tribunal civil* of the Seine, 2 November 1965 (*Rouleau c Sarfati et Julien*): *RTDcom* (1966) 599; 53 *RIDA* (1967) 30. In this case, it was held that the parties could agree a fixed price in the contract for the assignment of copyright in a particular production of Georges Bizet's opera *Carmen* in the *Opéra de Paris*.

²⁵⁸ For example, a fixed price can be agreed in contracts for the assignment of copyright in scientific or technical books, anthologies, encyclopaedias and prayer books.

price where the parties stipulate a fixed price. The purpose of this rule is to ‘counterbalance the potential negative effects for the artist or author’ of the freedom to agree to a fixed price in certain circumstances.²⁵⁹

Conversely, Article L131-5 of the *CPI* provides that the courts can intervene in contracts for the assignment of copyright only where the parties have agreed to a fixed price. Therefore, where the artist or author has agreed to accept a proportion of the revenue from the work, he cannot rely on this rule even if the price is unfair. While, this lacuna has been described as a ‘grave gap in the law’,²⁶⁰ it is consistent with the broader body of rules which regulate the payment structure in contracts for the assignment of copyright.

The introduction of the rule on unfair prices in contracts for the assignment of copyright can also be explained by the policy of giving special treatment to artists and authors for cultural reasons. Art and literature are particularly important aspects of French culture and society. As Jean Escarra, a professor at the Faculty of Law of Paris who was involved in the drafting of the *projet de loi* which became the *loi* of 1957, observed in 1954, *saisissons l’occasion qui nous est offerte d’affirmer... que la défense des œuvres de l’esprit ou du génie et de leurs créateurs demeurent la préoccupation fondamentale de la nation idéaliste que nous voulons rester.*²⁶¹

The exalted position of artists and authors in French law is also evident in their extensive moral rights.²⁶²

²⁵⁹ Maréchal (n241) 77.

²⁶⁰ Matthyssens (n241) 103.

²⁶¹ J Escarra, ‘Le projet de loi français sur la propriété littéraire et artistique’ 5 *RIDA* (1954) 3, 33.

²⁶² The policy of giving special treatment to artists and authors for cultural reasons is evident throughout French copyright law. In addition to Article 37 of the *loi* of 1957 (which was subsequently incorporated in Article L131-5 of the *CPI*) which allows courts to intervene in contracts for the assignment of copyright,

In practice, Article L131-5 of the *CPI* is not frequently invoked by artists and authors.²⁶³ Moreover, when the rule is invoked, the courts apply it restrictively. As a result, the rule has been described as ‘practically useless’.²⁶⁴

The restrictive application of the rule is particularly evident in the unwillingness of the courts to allow artists and authors to invoke the rule when it is not possible to calculate the revenue from the work. Article L131-5 of the *CPI* provides that the court can intervene in the contract when the price is less than five-twelfths of the fair price at the time when the contract was concluded (where there is ‘*lésion*’) or when the price initially agreed subsequently becomes less than five-twelfths of the fair price as the parties have underestimated the future revenue from the work (where there is ‘*une prévision insuffisante des produits de l’œuvre*’). While Article L131-5 of the *CPI* clearly indicates that the requirement of showing the ‘revenue from the work’ applies only to the

Articles 6, 19 and 32 of the *loi* of 1957 (which were subsequently incorporated in Article L121-1 *et s* of the *CPI*) set out extensive moral rights for artists and authors. Before the *loi* of 1957, the moral rights of artists and authors had been developed by the courts. On the history of moral rights in French law before the *loi* of 1957, see S Strömholm, *Le droit moral de l’auteur en droit allemand, français et scandinave avec un aperçu de l’évolution internationale: étude de droit comparé*, tome 1 (Norstedt 1967) 115-181, 271-313, 438-456. On the current application of moral rights in French law, see Gautier (n241) 205-269.

In English law, while certain aspects of moral rights were indirectly protected by common law rules such as passing off and breach of confidence, the direct protection of moral rights was introduced only in the Copyright, Designs and Patents Act 1988, ss 77-89. On moral rights in English law see L Bently and B Sherman, *Intellectual property law* (3rd edn, OUP 2009) 241-260.

Nevertheless, the protection of moral rights in English law is still less extensive than in French law. For example, the right to repent and to withdraw one’s work does not exist in English law. In contrast, in French law, the artist or author has the right to repent and to withdraw his work (subject to compensating the assignee) under Article L121-4 of the *CPI*.

²⁶³ The paucity of cases on Article L131-5 of the *CPI* was highlighted by both J-P Oberthür and P Frémond in their notes on *Société Ted Bates* (n253): 131 *RIDA* (1987) 243, 246; *Gaz Pal.*1986.1.630, 632. Nevertheless, the various cases on Article L131-5 of the *CPI* which are discussed here indicate that at least the rule is invoked more frequently than the *loi* of 1907 (which is discussed above in section (ii)).

²⁶⁴ Maréchal (n241) 77.

rule based on *imprévision*,²⁶⁵ the courts require a claimant to show the revenue from the work even if his claim is based on *lésion*.²⁶⁶

There is usually no revenue from the use of a work when it is used in advertising campaigns as the public do not pay to receive the advertisement. Therefore, where the assignee uses the work in advertising campaigns, it is unlikely that the artist or author will be able to invoke Article L131-5 of the *CPI*.

The question of whether artists or authors should be able to invoke Article L131-5 of the *CPI* when the work is used in advertising has long been a subject of debate. A majority of legal writers argue that Article L131-5 of the *CPI* should not apply when the work is used in advertising on the ground that the work does not generate any revenue.²⁶⁷

However, this argument did not succeed in the courts until the recent case of *Mallier* in the *Cour de cassation*.²⁶⁸ In this case, two musicians composed a tune and assigned the copyright in the tune to Bouygues Télécom in 1996 in return for 50,000 francs a year. Bouygues Télécom used the tune in its advertising campaigns. Six years after the conclusion of the contract, one of the composers claimed that the price was unfair and invoked Article L131-5 of the *CPI*. He sought 900,000 francs a year and he sought to increase this sum by ten per cent annually. His claim was rejected by the *Cour de cassation* on the ground that the tune had produced no revenue for the assignee.

²⁶⁵ Article L131-5 of the *CPI* stipulates that a court can intervene in a contract for the assignment of copyright where the artist or author '*aura subi un préjudice de plus de sept douzièmes dû à une lésion ou à une prévision insuffisante des produits de l'œuvre...*'.

²⁶⁶ This position was recently established in *Mallier* (n254). See the discussion of this case below in the text from n268 to n270.

²⁶⁷ See A Lucas and H-J Lucas, *Traité de la propriété littéraire et artistique* (2^e éd., Litec 2001) 438. In 1985, this position was challenged by Oberthür: J-P Oberthür, 'La révision du prix de cession des droits d'auteur en publicité' 126 *RIDA* (1985) 45, 67-75. More recently, this position has been criticised by Lefranc and Pollaud-Dulian: D Lefranc (n254); F Pollaud-Dulian, *RTDcom* (2008) 82, 86-87.

²⁶⁸ *Mallier* (n254).

Therefore, while on a literal interpretation of Article L131-5 of the *CPI* the requirement of showing that the work has produced revenue is relevant only where the claimant invokes the rule based on *imprévision* rather than *lésion*,²⁶⁹ the *Cour de cassation* in *Mallier* did not distinguish between *lésion* and *imprévision* on this point.²⁷⁰ As a result, where a work is used in advertising, the artist or author cannot invoke Article L131-5 of the *CPI* even if his claim is that the price was unfair at the time of the conclusion of the contract.

However, this conclusion is not inevitable and it was firmly rejected by the *Cour d'appel* of Versailles in the earlier case of *Société Ted Bates*.²⁷¹ In this case, a photographer had assigned the copyright in a photograph taken from an aircraft of other aircraft in flight to an advertising agency for \$1,000. He subsequently claimed that this price was unfair and invoked Article L131-5 of the *CPI*. The court rejected the argument that the photographer was precluded from relying on the rule based on *lésion* as he could not prove that the photograph had generated any revenue. It was held that as the claimant was invoking the rule based on *lésion* in Article L131-5 of the *CPI*, it was not necessary to refer to the revenue from the work. The court stated that the value of the work should be calculated at the time of the conclusion of the contract. As the claimant had produced evidence which indicated that it was probable that the price was unfair, the court decided to appoint an *expert* to value the copyright in the work before determining whether or not the assignee had paid a fair price for the photograph.²⁷²

²⁶⁹ F Pollaud-Dulian (n267) 86.

²⁷⁰ *Mallier* (n254).

²⁷¹ *Société Ted Bates* (n253).

²⁷² The court usually decides to appoint an *expert* to value the copyright in the work before determining whether the assignee has paid a fair price for the work. However, sometimes it is the court that calculates the value of the copyright in the work. See for example, *Cour d'appel* of Versailles, 23 May 1996 (*Société*

How can the restrictive application of Article L131-5 of the *CPI* in the decision of the *Cour de cassation* in *Mallier* be explained?²⁷³ The reluctance of the courts to apply Article L131-5 of the *CPI* more extensively can be attributed to the ‘reverential’ attitude of the judges towards the general principles of law which exclude any intervention in contracts on the ground of an unfair price.²⁷⁴ Articles 1118 and 1313 of the *Code civil* firmly exclude intervention in contracts on the basis of an unfair price and Article 1134 of the *Code civil* provides that parties are bound by contracts which they have lawfully concluded.

The restrictive application of the rule based on *lésion* in Article L131-5 of the *CPI* is also a consequence of the failure of the courts to consistently differentiate the rule based on *lésion* from that based on *imprévision*. While the courts sometimes distinguish between the rules based on *lésion* and *imprévision* in Article L131-5 of the *CPI*,²⁷⁵ decisions in which the courts do not differentiate between these rules are more

Tel&Tota et Société FFGM c Roy) 170 *RIDA* (1996) 290. In this case, the court valued the copyright in certain films and held that the director had received an unfair price from the assignee. The court then stipulated the sum which it considered to be the fair price.

²⁷³ *Mallier* (n254).

²⁷⁴ F Pollaud-Dulian (n267) 86. Further evidence of the eagerness of the courts to apply the general principles of law and to avoid the more protective provisions of the special law on intellectual property, is apparent in Cass civ 1, 11 December 2008. In this case, a company took photographs of a professional model. The model agreed to assign her image rights in the photographs taken in that shoot for €305 but she subsequently claimed that the price was unfair. The *Cour de cassation* rejected her argument based on the doctrine of *prix dérisoire* on the ground that the *juges du fonds* had held that the price was not excessively low and that it was the function of the *juges du fonds* to make a finding on this point. The doctrine of *prix dérisoire* is discussed in section (i)(b) in chapter 2 and section (i)(c) in chapter 3. Furthermore, the *Cour de cassation* stated that the general principle of freedom of contract rather than the special law on intellectual property applied to this contract. As Laithier observes, if the *Cour de cassation* had decided that the special law on intellectual property applied to a contract for the assignment of image rights, then in this case, the model might have succeeded in her claim if she had been able to invoke Article L131-5 of the *CPI*. Nevertheless, by not extending Article L131-5 of the *CPI* beyond the assignment of copyright in artistic and literary works to contracts for the assignment of image rights, the court was simply following the general rule set out in Article 1118 of the *Code civil*: Y-M Laithier, *RDC* (2009) 477, 480.

²⁷⁵ See for example *Société Ted Bates* (n253).

common.²⁷⁶ In many cases, the courts calculate the fairness of the price by referring to the extent to which the work was used by the assignee. Therefore, in practice, in such cases, the courts are applying the rule based on *imprévision* rather than that based on *lésion* as they are taking into account events subsequent to the conclusion of the contract.²⁷⁷

Nonetheless, as the decision of the *Cour d'appel* of Versailles in *Société Ted Bates* illustrates, a literal interpretation of Article L131-5 of the *CPI* should not preclude the application of the rule based on *lésion* where the work has produced no revenue.²⁷⁸ Thus, where the work has been used in advertising, it should be possible to invoke the rule based on *lésion* if the artist or author has received an unfair price.

While Article L131-5 of the *CPI* protects artists and authors who receive an unfair price in certain contracts for the assignment of copyright in their work, it is doubtful whether this rule is of benefit to artists and authors in practice. First, this rule is not frequently invoked by artists and authors.²⁷⁹ Secondly, and more importantly, the rule is

²⁷⁶ Maréchal (n241) 43. See for example, *Société Bonechi Edizioni et Société Ovet* (n252). In this case, it was held that a photographer who had assigned the copyright in photographs of monuments and works of art, had received an unfair price in the contract with the assignee. However, it is not clear whether the price had been unfair at the time of the contract or whether it became unfair only after the conclusion of the contract.

²⁷⁷ As a result of calculating the value of the work in this way, certain legal writers consider that Article L131-5 of the *CPI* is essentially a rule based on *imprévision* only and does not comprise one rule based on *lésion* and a separate rule based on *imprévision*. See Lucas and Lucas (n262) 436-437. Similarly, Gautier (n241) states that the line between *lésion* and *imprévision* is 'tenuous': Gautier (n241) 539. In contrast, see H Desbois, *Le droit d'auteur en France* (3^e éd., Dalloz 1973) 692 and Maréchal (n241) 43-44 for the argument that it is possible to clearly distinguish between the rules based on *lésion* and *imprévision*.

Nevertheless, it is necessary to distinguish between the rules based on *lésion* and *imprévision* when considering the application of the rules on prescription. What is the prescription period and when does it start to run? There are no provisions on prescription in Article L131-5 of the *CPI*. The answer to the first question is uncertain. The courts have applied different prescription periods in different cases: Maréchal (n241) 73-75. The second question was addressed in *Société Tel&Tota et Société FFGM* (n272) where it was held that the prescription period starts to run from the date of the conclusion of the contract when the rule based on *lésion* is applicable and that it starts to run from the date when the unfairness of the price becomes evident when the rule based on *imprévision* is applicable.

²⁷⁸ *Société Ted Bates* (n253).

²⁷⁹ See n263.

applied restrictively by the courts. As a result, the use of Article L131-5 of the *CPI* has recently been described as a game in which the rule is ‘every time you play, you lose’.²⁸⁰

²⁸⁰ F Pollaud-Dulion (n267) 82.

CHAPTER 6

CONCLUSIONS

The points which are developed throughout this thesis lead to three general conclusions. One relates to the scope and nature of freedom of contract in English and French law. The second concerns the freedom of English and French courts to create and abolish rules and the third considers the circulation of legal ideas between English and French law.

(i) Unfair prices and the scope and nature of freedom of contract

Freedom of contract includes the freedom to determine the price at which one is willing to enter into a contract in addition to the freedom to choose whether to conclude a contract at all. Intervention in contracts on the ground of an unfair price is thus the very negation of freedom of contract. Therefore, the rules on unfair prices in contracts in English and French law reveal the scope and nature of the principle of freedom of contract in both systems. Four significant conclusions on this point emerge from this thesis.

(a) The number of rules on unfair prices in contracts

The prevalence of rules on unfair prices in contracts in French law contrasts sharply with the paucity of such rules in English law and shows that, in this important respect, the scope of freedom of contract in French law is much more restrictive than in English law.

While the rules on unfair prices in French law constitute the exception rather than the general rule, chapters 3, 4 and 5 show that these rules are nevertheless quite numerous in comparison to English law. Chapter 3 examined the origin of the concept of intervening in contracts on the ground of an unfair price in Roman law and its adoption in French law since the twelfth century. Therefore, French law has never viewed rules on

unfair prices in contracts as completely alien. Nevertheless, these rules still had to overcome the formidable obstacle of the principle of freedom of contract.

There was a steady increase in the rules on unfair prices in contracts in French law from the introduction of Article 1674 in 1804 until the first decade of the twenty-first century. This is evident in the chronology of the creation of the numerous rules which are discussed in this thesis. The rule on unfair fees and the rule on unfair prices in contracts for the sale of *offices* were created by the courts in 1824 and in 1910 respectively. The rules on unfair prices in contracts for the sale of agricultural products and businesses in the Great Depression and the rules on unfair prices in salvage contracts and in contracts for the assignment of copyright were created by the legislature in 1907, 1935, 1916 and 1957 respectively.

However, several factors indicate that the rules on unfair prices in contracts in French law may not be as vibrant as this trend of consistent proliferation seems to suggest. First, the rule on unfair prices in contracts for the sale of agricultural products has been invoked only very rarely in practice. Secondly, the rule on unfair prices in contracts for the sale of businesses in the Great Depression applied only to contracts which had been concluded between 1926 and 1935. Thirdly, the rule on unfair prices in contracts for the assignment of copyright is applied restrictively by the courts and it has not been invoked very frequently. Fourthly, the *Cour de cassation* abolished the rule on unfair prices in contracts for the sale of *offices* in 2004.

In contrast to French law, the Roman law on unfair prices in contracts was never firmly embraced and developed in English law. Therefore, in English law, the concept of intervening in contracts on the ground of an unfair price had to overcome the lack of an historical legacy as well as the principle of freedom of contract. As a result, it is not

surprising that in English law, rules which allowed courts to intervene in contracts on the ground of an unfair price are very rare and generally viewed as ‘illogical’¹ or ‘not... just’.²

Nonetheless, as chapters 3 and 4 explain, English law has intervened in contracts for the sale of reversions and salvage contracts on the ground of an unfair price. In addition, as discussed in chapter 3, specific performance of contracts was sometimes refused on the ground of an unfair price. However, the ultimate primacy and enduring significance of the principle of freedom of contract in English law is evident in the abolition of the rule on the sale of reversions by statute, the desuetude of the line of authority on refusing specific performance on the ground of an unfair price and the marginalisation of the rule on unfair prices in salvage contracts by the widespread use of the Lloyd’s form.

(b) Remedies

The extent to which freedom of contract is undermined to a greater extent in French law than in English law by the rules on unfair prices is evident in the consequences which flow from the application of the various rules on unfair prices in contracts.

In both systems, where a court intervenes in a contract on the ground of an unfair price, three outcomes are possible. First, a court could refuse to grant specific performance of the contract. This remedy, which is significant only in English law due to the division between equity and law, is important in situations where the contract has not yet been executed. Secondly, a court could rescind the contract. Rescission would return the parties to the position in which they were before the conclusion of the contract.

¹ *Hart v O’Connor* [1985] 1 AC 1000, 1027 (Lord Brightman). This observation was made in the context of a decision on whether a person who lacks mental capacity can set aside a contract on the ground of an unfair price even where the other party was unaware of the lack of capacity.

² *Snell v Beadle* [2001] 2 AC 304, 324 (Lord Hope). This statement was made in the context of a decision on a rule in Jersey law which is very similar to Article 1674.

Thirdly, a court could alter the price in the contract. The parties would then be bound by the contract at the new price.

As the refusal to decree specific performance of a contract is a less extreme remedy than rescission, it is a less significant infringement of the principle of freedom of contract. If a court refused to decree specific performance, the contract remains intact and thus a claim for damages for breach of contract is still possible. The less extreme nature of a refusal to decree specific performance in comparison to rescission is evident in the fact that the conditions for the former are less restrictive than those for the latter. Chapter 3 considered the conflicting authorities on the rule that specific performance could be refused on the ground of an unfair price in English law in the nineteenth century and the obsolescence of this rule in English law today.³ Nonetheless the cases in which this rule was applied illustrate the extent to which the threshold which the courts applied to the remedy of refusing specific performance was lower than that for rescission. For example, in *Day v Newman*, where Arden MR held that although

the inadequacy of price is certainly great... I am not prepared to say that it is sufficient to induce the Court to make the party deliver up the contract; but I am satisfied it is a sufficient reason to induce the Court not to decree a specific performance.⁴

Similarly, in English contract law today, the conditions which must be satisfied before specific performance will be refused are less restrictive than those for the remedy of rescission. This is particularly clear in the law on mistake, where the situations in which

³ However, as explained in chapter 3, it is unclear to what extent the advantage of this remedy for the party who agreed to pay an unfair price was obviated in practice by the availability of a claim for damages.

⁴ (1788) 2 Cox 77, 80.

specific performance will be refused are wider than those in which a contract will be held to be void.⁵

All the other rules on unfair prices in contracts in English law which are discussed in chapters 3, 4 and 5 lead to rescission or the alteration of the price rather than a refusal to decree specific performance. Therefore, for the purposes of this thesis, the remedies of rescission and alteration of the price are more significant than the refusal to decree specific performance and it is necessary to consider these two remedies in detail here.

The significance of the distinction between rescission and alteration of the price in the context of rules which allow courts to intervene in contracts on the ground of an unfair price was discussed briefly in chapter 1. Rescission undermines both the freedom to determine the price as well as the freedom to decide whether to enter into a contract at all by depriving one party to the contract of his bargain. However, the alteration of the price infringes freedom of contract to a much more significant extent as in addition to depriving one party of his bargain, it also compels him to enter into a contract at a price to which he did not agree. This theoretical point is significant as one conclusion in this thesis is that, as the remedy of altering the price is more prevalent in the rules on unfair prices in French law, the scope of freedom of contract is less extensive in French law than in English law.

Nonetheless, this general point is not universally accepted. Gordley contends that the principle of freedom of contract comprises the freedom to decide whether to enter into a contract at the fair price and not the freedom to determine the price. He states that it

is a mistake... to think that because it is up to each party whether to contract at a given price, it is therefore up to each party to decide at what price he will

⁵ A court may refuse specific performance on the ground of mistake even where the contract is not void at law on the ground of mistake: GH Treitel, *The law of contract* (13th edn, by WE Peel, Sweet & Maxwell 2011) 346-347. The abrogation of the doctrine of equitable rescission for mistake, which had been developed in *Solle v Butcher* [1950] 1 KB 671, in *Great Peace Shipping Ltd v Tsaviliris Salvage (International) Ltd* [2003] QB 679, has not affected the rule on specific performance.

contract... a court that requires the parties to contract at the market price, if they contract at all... is not infringing on any autonomy that either party would exercise under normal circumstances in a normal market.⁶

This conception of freedom of contract is consistent with the theory of commutative justice which Gordley argues should be the foundation of contract law.⁷ However, this conception of freedom of contract does not hold true in systems, such as English and French law today, which are based on enforcing agreements on the ground that they constitute the intention of the parties, however injudicious the choice to enter into a contract at a certain price.

Even within Gordley's narrower conception of freedom of contract, two aspects of the remedies for the rules on unfair prices in contracts are considered to be problematic. First, if the court alters the price, 'it may deprive the advantaged party of the kind of autonomy that each party ought to have: the choice of whether or not to contract at a given price'.⁸ Secondly, where rescission is not possible, Gordley argues that the decision whether to alter the price or enforce the contract at the price agreed by the parties is 'uncomfortable' albeit only if the person who will benefit from the enforcement of the contract was unaware that the price was unfair.⁹ Therefore, while the conception of freedom of contract which is adopted in this thesis is broader than that advocated by Gordley, even within Gordley's narrower conception of freedom of contract, the alteration of the price is viewed as a more significant infringement of the principle of freedom of contract than rescission.

⁶ J Gordley, 'Equality in Exchange', (1981) 69 *Calif L Rev* 1587, 1618-1619.

⁷ Gordley (n6). In this article, Gordley seeks to state what the law is as well as what it ought to be.

⁸ *Ibid* 1619.

⁹ *Ibid* 1620.

The remedies of rescission and alteration of the price appear in three forms in the rules which are examined in this thesis. First, the English rule on the sale of reversions leads to rescission only. Secondly, one party may be able to choose between rescission of the contract and alteration of the price. In French law, Article 1681 of the *Code civil*¹⁰ provides that this choice is open to the purchaser where a vendor has succeeded in his claim under Article 1674. Thirdly, alteration of the price may be the only remedy. This is the case in the rules on unfair prices in salvage contracts in both English and French law, even though as discussed in chapter 4, it is unclear whether in theory, courts actually rescind the contract before awarding a sum on an extracontractual basis. Similarly, alteration of the price is the only remedy for all five of the rules on unfair prices in French law which are discussed in chapter 5. It is significant that alteration of the price is the predominant remedy in the rules on unfair prices in contracts in French law. In contrast, in the rules on unfair prices in contracts in English law, specific performance and rescission were equally important as the remedy of altering the price. Consequently, it is appropriate to conclude that, in this respect, the scope of freedom of contract is less extensive in French law than in English law.

It must be conceded that Article 1681 which allows the purchaser to choose between rescission of the contract and alteration of the price infringes the principle of freedom of contract less significantly than rules which provide for rescission only or the alteration of the price only. Where a vendor has succeeded in his claim under Article 1674, Article 1681 provides that the purchaser can decide whether to return the land to the vendor and recover the purchase price or keep the land and pay a sum which equals

¹⁰ Hereafter, 'Article 1681'.

the difference between the purchase price and the fair price minus ten per cent.¹¹ Article 1681 provides that the decision belongs to the purchaser.¹² Therefore, it undermines the purchaser's freedom of contract less significantly than rules which provide for rescission only and much less significantly than rules which lead to the alteration of the price only.

The implications of the choice of remedies in Article 1681 on the principle of freedom of contract were highlighted by Napoleon during the debates on the *Code civil* in 1804. He viewed the possibility of altering the price in Article 1681 as a concession to the purchaser rather than an additional infringement of his freedom of contract.¹³ Napoleon observed that the option of allowing the court to alter the price prevented Article 1674 from operating unjustly. Referring to the land acquired by the purchaser, Napoleon stated that '*si la rescision la lui ôtait, elle serait mauvaise et injuste; mais elle la lui laisse, et ne l'oblige qu'à en payer le véritable prix*'.¹⁴

It was also in this spirit of favouring the purchaser that Napoleon suggested that the purchaser who decides to keep the land and pay the fair price should receive a reduction of ten per cent. He stated that 'if the vendor had obstinately insisted on the fair price, the purchaser would not have bought' the land and that 'one rarely purchases

¹¹ In practice, the calculation of the sum which the purchaser must pay if he decides to keep the land has caused 'great difficulties': F Collart Dutilleul and P Delebecque, *Contrats civils et commerciaux* (8^e éd., Dalloz 2007) 161-163.

¹² This point was recently affirmed by the *Cour de cassation* in Cass civ 3, 6 June 2007: Bull civ III n°102. In this case, the vendor sought to use Article 1674 in order to obtain a higher price rather than rescission of the contract. The court rejected his claim on the ground that Article 1681 clearly states that the choice of remedy belongs to the purchaser only.

¹³ In an article on the decision of the *Cour de cassation* in Cass civ 3, 6 June 2007 (n12), Brun fails to notice this point. Furthermore, he asserts that '*la différence entre les deux sanctions n'est pas nécessairement si marquée*' : P Brun, *RDC* (2007) 1203, 1204. However, as argued throughout this section, there is a very significant difference between rescission and altering the price.

¹⁴ PA Fenet, *Recueil complet des travaux préparatoires du Code civil*, tome XIV (Marchand du Breuil 1827) 77. The conception of Article 1681 as a rule which did not infringe the principle of freedom of contract to the same extent as a rule which allowed rescission only or the alteration of the price only, is also evident in the existence of *lésion énorme* in some parts of French during the *ancien régime*. The submission of the *Tribunal d'appel* of Besançon on the *Code civil* to the *Conseil d'Etat* in 1800, states that this rule applied when a vendor received less than a quarter of the fair price and it led to the remedy of rescission only: Fenet, tome III (n14) 173.

something at its exact value'.¹⁵ Thus, this aspect of Article 1681, which did not exist either in Roman law or in the law of the *ancien régime*,¹⁶ was invented by Napoleon.¹⁷

The alteration of the price is the only remedy for the rule on unfair prices in salvage contracts in English and French law and for the five rules on unfair prices in contracts in French law which are considered in chapter 5. Therefore, unlike English law, the alteration of the price is the principal remedy for the rules on unfair prices in contracts in French law. However, in general, the implications of this point for the scope of freedom of contract in French law are not highlighted by French legal writers.¹⁸

Legal writers who have addressed the distinction between rescission and alteration of the price in the context of the rules on unfair prices advance arguments which are unrelated to the principle of freedom of contract to support the view that alteration of the price is preferable to rescission. These arguments are not very persuasive. Mazeaud asserts that alteration of the price is the preferable remedy as it combines 'justice and contractual stability'.¹⁹ However, a 'stability' which involves rewriting the principal provision in a contract is a very peculiar and even unstable kind of 'stability'.

One of Chantepie's strongest arguments is that as certain contracts such as those which provide 'shelter and work' are 'vital', the rescission of the contract would constitute a significant loss for the party who had agreed to pay or accept an unfair

¹⁵ Fenet, tome XIV (n14) 73.

¹⁶ As Portalis observed, the provision which allowed a reduction of ten per cent was '*une décision nouvelle*': Ibid 146.

¹⁷ Ibid 73-75. As explained in section (i)(b) in chapter 3, this provision was only one of Napoleon's many significant contributions to the debates on *lésion*.

¹⁸ One exception is Chantepie. However, it is surprising that he mentions this point only very briefly and then dismisses it rather peremptorily in the twenty one pages which he devotes to rescission and alteration of the price in the context of the French rules on unfair prices in contracts: G Chantepie, *La lésion* (LGDJ 2006) 374-375, 369-390.

¹⁹ D Mazeaud, 'Lésion' in *Rép civ Dalloz* (2007) 13.

price.²⁰ However, none of the rules in chapter 5, for which alteration of the price is the only remedy, allow intervention in contracts which are in any way ‘vital’ to the existence of one of the parties. For example, contracts for the sale of *offices* and contracts for the sale of agricultural products are certainly not as ‘vital’ as contracts for shelter or work.²¹ Similarly, while a salvage contract may be concluded when the ship and cargo are in grave danger, this is not necessarily or even mostly the case as discussed in chapter 4.

Nonetheless, one could argue that alteration of the price is preferable to rescission as restitution is either impossible, inconvenient or impractical in the situations in which the only remedy is the alteration of the price. The impossibility of restitution was the primary justification for allowing only the remedy of altering the price in cases in which the rule on unfair prices in contracts for the sale of *offices* was applied. It was argued that restitution is not possible in this situation as the purchaser of an *office* will already have been appointed to his position by the State.²² Therefore, there were certain obstacles to the reversal of the appointment of *officiers*, given that they exercise public functions.

However, in theory, there are no reasons why it would be particularly inconvenient or impractical to order restitution in the situations in which any of the other rules on unfair prices in contracts for which the only remedy is alteration of the price were invoked. The services of salvors, business agents and professionals can be valued. Fertiliser, seeds, plants and food for animals can be returned to the vendor if they are unused or they can be valued if they have already been consumed. The businesses sold

²⁰ Consequently, he also contends that if the only remedy is rescission, the party who had agreed to pay or accept an unfair price will be dissuaded from making a claim: Chantepie (n18) 371.

²¹ On the other hand, perhaps contracts for the assignment of copyright could be considered to be analogous to ‘work’ if this was the primary way in which an artist or author eked out a living.

²² R Beudant and P Lerebours-Pigeonnière, *Cours de droit civil français* tome XI (2^e édn, Rousseau 1938) 99.

during the Great Depression could have been returned to the vendors. Copyright can be returned to the artist or writer.

Where the rules on unfair fees and on unfair prices in salvage contracts apply, the services have usually been provided. Therefore, in practice, the ultimate result is likely to be the same whether there is an alteration of the price or rescission and then restitution. However, there are particular reasons why alteration of the price is the preferred remedy for the rule on unfair prices in contracts for the sale of agricultural products and businesses during the Great Depression and in contracts for the assignment of copyright. In the first situation, the remedy of rescission is rejected on the ground that the vendor would then resell the products at an unfair price to other 'fools'.²³ In the second situation, the remedy of alteration of the price was chosen as it was more consistent with the objective of reducing prices during the Great Depression, which was one of the primary rationales of this rule.²⁴ Finally, alteration of the price is the preferred remedy for the rule on unfair prices in contracts for the assignment of copyright as it is thought that the vendor should not be placed in a position in which he is compelled to find another purchaser who will enter into a new contract at a fair price.²⁵

In summary, the numerous rules in French law on unfair prices in contracts and the primacy of the remedy of altering the price contrast sharply with English law and show that the scope of freedom of contract is less extensive in French law than in English law.

²³ D.1907.538, 539 (P Decker-David and J Ruau).

²⁴ See section (iv) in chapter 5.

²⁵ P-Y Gautier, *Propriété littéraire et artistique* (7^e éd., PUF 2010) 539.

(c) Rationales

Chapters 3, 4 and 5 demonstrate that in both English and French law, three different policies were considered to be sufficiently important to justify departing so significantly from the principle of freedom of contract by creating rules which allowed courts to intervene in contracts on the ground of an unfair price. All the rules on unfair prices in English and French law which are considered in this thesis can be ascribed to the policies of preserving family wealth, protecting weak parties and giving special treatment to certain contractors for economic, political, social or cultural reasons. Each rule can be attributed to one or two of these policies, but no rule can be explained by all three policies.

Two significant conclusions emerge on this point. First, the policy of preserving family wealth is no longer very significant in either system. Chapter 3 demonstrates that the policy of preserving family wealth underpins both the English rule on the sale of reversions and Article 1674 in French law. The rule on the sale of reversions was abolished by Parliament in 1867 when the principle of freedom of contract was considered to outweigh the policy of preserving family wealth. In French law, the policy of preserving family wealth, which underpins Article 1674, is currently declining in importance. This is evident in the abolition of the rules which restricted the contractual capacity of prodigals by the legislature in 2007. Therefore, it is possible that Article 1674, which is the foundational rule on unfair prices in contracts in French law, would be abolished, as it was in 1795, if it were subjected to the scrutiny of legislators today.

The second conclusion is that many of the rules on unfair prices in both systems have been applied to protect parties who act in the course of a business. Article 1674 has been successfully invoked by companies and individual vendors who were acting in a business capacity. In all the cases on unfair prices in salvage contracts in English and

French law which are examined in this thesis, the salvors and salvees are acting in the course of a business. In French law, the rules on unfair fees have been invoked by companies as well as individuals who were acting in a business capacity, by selling their businesses for example. The rules on unfair prices in the sale of *offices* and businesses in the Great Depression also clearly apply only in a business context. Furthermore, the rule on unfair prices in contracts for the assignment of copyright protects artists and writers principally in a business context.

However, there are exceptions to this general trend. In English law, the rule on the sale of reversions was not applied in a business context. In addition, in French law, the courts refused to apply the rule on unfair prices in contracts for the sale of agricultural products to purchasers who were reselling rather than using these products.

Three reasons explain the application of several rules on unfair prices in contracts to protect parties who are acting in the course of a business in both English and French law. First, where the particular rule can be explained by the policy of protecting a weak party to the contract, the reason why that party is in a weak position is often not considered to be absent where the parties are acting in the course of a business.

Secondly, rather than or in addition to the policy of protecting the weak party, several rules on unfair prices in contracts can be ascribed to the policy of giving special treatment to certain contractors for economic, political, social or cultural reasons. Therefore, it would be incongruous if these rules did not apply to protect parties who were acting in the course of a business.

Finally, it is particularly peculiar to find that companies or individuals who sell land in the course of a business have successfully invoked Article 1674 given that this rule is based on the policy of preserving family wealth. This result is the consequence of the very general terms in which this rule is formulated. Article 1674 can be invoked by

‘vendors’ and parties who are acting in the course of a business are not expressly excluded.²⁶

Nonetheless, in French law, the extent to which the rules on unfair prices protect parties who are acting in the course of a business is particularly surprising. In 1801, in his *discours préliminaire* on the *Code civil*, Portalis observed that ‘*on aurait tort de raisonner sur les affaires civiles comme sur les affaires de commerce*’ and he expressly referred to *lésion*.²⁷ He stated that

*jamais on n’a admis, dans le commerce, l’action rescisoire pour lésion d’outre-moitié du juste prix... la mobilité des objets commerciaux, les risques, les incertitudes, les cas fortuits qui environnent les opérations du commerce, ne saurait comporter cette action.*²⁸

There are echoes of this view in the following century. During the debates on the Salvage Convention 1910, Autran, the representative of the French government, was opposed to the inclusion of the rule on unfair prices in salvage contracts for similar reasons. He declared that it was ‘particularly inappropriate’ to deviate from the principle of freedom of contract in salvage contracts as they are concluded by ‘merchants and captains who are perfectly capable of looking after their own interests’.²⁹ Similarly, Ripert did not believe that rules on unfair prices in contracts were appropriate in the commercial sphere. As a result, he was not in favour of the rule on unfair prices in contracts for the sale of businesses during the Great Depression. He argued that this rule was unjustified as

²⁶ However, as discussed in section (ii) in chapter 5, in 1908, the *Tribunal civil* of Laon held that the rule on unfair prices in contracts for the sale of agricultural products could not be invoked by a purchaser who bought and sold fertiliser in the course of his business even though Article 1 of the *loi* of 8 July 1907, which introduced this rule, stipulated that it could be invoked by ‘*tout acheteur*’: 29 June 1908 (*Susvelier et Lamarche c Lorette*): D.1908.397; S.1909.2.92.

²⁷ Fenet, tome I (n14) 513.

²⁸ *Ibid* 513.

²⁹ 8 *RDIP* (1912) 169 and 531, 539.

businessmen should be ‘sufficiently shrewd and tough to negotiate their own contracts’.³⁰ However, Article 1674, the rule on unfair prices in salvage contracts and many other rules on unfair prices in contracts which were subsequently introduced in French law, have been applied to protect parties who are acting in the course of a business.

(d) Determining the fair price: the role of judges, *experts* and arbitrators

Who determines the fair price when the rules on unfair prices in contracts are applicable? In French law, this role has been undertaken by judges, *experts* and arbitrators. In contrast, in English law only judges and arbitrators have determined the fair price. It will be suggested here that the method of having the price determined by arbitrators after the performance of the contract rather than by the parties beforehand is the most appropriate way of dealing with the rules on unfair prices in contracts. This is the method which is currently adopted in both English and French law in the context of salvage contracts.

In French law, *experts*, in particular, have played a central role in the application of almost all of the rules on unfair prices in contracts. As mentioned in chapter 3, the role of *experts* is unique to French civil procedure and as a result, there are no equivalent legal actors in English law. The use of *experts* is compulsory in claims based on Article 1674. Article 1678 of the *Code civil* provides that proof that the price is unfair can be provided only by a report prepared by three *experts*. In contrast, the use of *experts* is not compulsory in the application of the other rules on unfair prices in contracts in French law. Nonetheless, *experts* have been used to determine the fair price very often in practice. *Experts* have determined the fair price in contracts for the sale of businesses during the Great Depression³¹ and in contracts for the assignment of copyright even

³⁰ G Ripert, *Le régime démocratique et le droit civil moderne* (2^e éd., LGDJ 1948) 170.

³¹ See for example, *Cour d'appel* of Orléans, 1 August 1936 (*Lecomte c Cavaroc*): D.1936.563, where a former *notaire* was appointed as an *expert*.

though neither rule expressly requires the participation of *experts*.³² Similarly, in 1907, the legislators envisaged that the fair price of agricultural products would be determined by *experts* even though no provision in the rule on unfair prices in contracts for the sale of agricultural products expressly states that this is necessary.³³

Furthermore, *experts* have played a key role in the application of the two rules on unfair prices in contracts which have been created by the courts, even though here too, the participation of *experts* is not necessary. In *Gidon c Bordessoule*, the case in which the *Cour de cassation* established the rule on unfair prices in contracts for the sale of *offices*, the value of the *office* was determined by *experts*.³⁴ Similarly, *experts* have been used to determine the value of services rendered by business agents and professionals, in cases where their clients have invoked the rule on unfair fees.³⁵

As discussed in chapter 3, in theory, judges can decide not to follow the opinion of the *experts*. However, as judges very rarely hold that the fair price is different to the price determined by the *experts*, the fair price is effectively determined by *experts* in all the cases in which their presence was either compulsory or simply desirable.

The use of *experts* inevitably increases the length and cost of the litigation. This is particularly evident in the application of Article 1674 as there are two stages to such a claim.³⁶ As explained in chapter 3, under Article 1677 of the *Code civil*, the judge must

³² See for example, *Cour d'appel* of Versailles, 9 June 1986 (*Société Ted Bates c Sugar*): 131 RIDA (1987) 243; Gaz Pal.1986.1.630.

³³ S.1906-1910.538 (Poirrier); 539 (Martin); 540 (Poirrier).

³⁴ Cass req, 13 June 1910: S.1913.1.347.

³⁵ See for example, Cass com, 2 March 1993 (*Société Biscuiterie Delfour c Compagnie Française des Conseils Indépendants*).

³⁶ This is also evident in the rule on unfair prices in the sale of businesses during the Great Depression. In a note to Cass soc, 30 January 1942 (*Roqueplo c Echertier*), G Lagarde stated that the use of '*expertises, souvent longues et délicates*' was one of the reasons why that case was still before the courts seven years after the claim had initially been initiated: S.1943.1.77

be convinced that the facts are ‘sufficiently genuine and serious’ to justify a presumption that the price was less than five-twelfths of the fair price before the three *experts* are appointed to determine the fair price. The *experts* must then be given sufficient time to consider the relevant issues and prepare their report. For example, in a recent case, the *Cour d’appel* of Paris gave the *experts* four months within which to prepare their report.³⁷

In contrast, in English law, until the end of the nineteenth century, the fair price was determined by judges in the situations in which the rules on unfair prices in contracts were applied. First, it was the Admiralty judge who determined the fair price in salvage contracts. Even though the Court of Admiralty sometimes sat with ‘nautical assessors’, the Elder Brethren of Trinity House, who provided advice on technical matters,³⁸ it does not appear that the Elder Brethren were involved in any of the cases on unfair prices in salvage contracts.

In the cases in which the rule on the sale of reversions was invoked, it seems that much time, effort and resources were devoted to the task of determining the fair price. As discussed in chapter 3, the parties often presented the evidence of numerous valuers.³⁹ In addition, the price which the claimant argued was fair frequently deviated significantly from that suggested by the defendant. For example, in *Foster v Roberts*, it was noted that the ‘evidence of eleven witnesses as to the value was, as usual, very conflicting’.⁴⁰ Thus, the determination of the fair price was quite a complex exercise.

³⁷ *Cour d’appel* of Paris, 24 November 2011 (*Grouchka c SA SIEMP*).

³⁸ FL Wiswall, *The development of admiralty jurisdiction and practice since 1800: an English study with American comparisons* (CUP 1970) 17-18. Wiswall states that while the Elder Brethren were not present ‘in a majority of causes... they had certainly become features of the Court before the nineteenth century’ and that they were involved in ‘cases of collision or salvage’: Wiswall (n38) 17-18. The Elder Brethren still play an important role in English admiralty law today, although as Reeder notes, the participation of the Elder Brethren is now ‘not usually ordered in salvage cases’: J Reeder, *Brice on maritime law of salvage* (5th edn, Sweet and Maxwell 2011) 119.

³⁹ See for example, *Perfect v Lane* (1861) 30 Beav 197, 200-201.

⁴⁰ *Foster v Roberts* (1861) 29 Beav 467, 469.

As considered in chapter 4, standard form salvage contracts were developed at the end of the nineteenth century in English law. As a result, the task of determining the fair price was transferred from judges to arbitrators. Initially, the parties continued to stipulate a price in the salvage contract. However, from the middle of the twentieth century, it became common for the parties to refrain from stipulating a price in their salvage contract and to have the price determined by the arbitrators after the services had been provided. The Lloyd's form was duly altered to reflect this change in practice and there is no longer any place in this standard form contract where the parties can stipulate the price of the salvage services. As discussed in chapter 4, this development is common to French law too.

Therefore, in both English and French law, the parties to salvage contracts do not now engage in any negotiations or discussions in relation to the price of the salvage services. They simply decide whether or not to enter into a contract for the provision of salvage services at a fair price and that price will be determined by arbitrators after the performance of the contract.

In this discussion and throughout this thesis, we have considered the three ways in which the fair price has been determined in English and French law. The approach currently adopted in the context of salvage contracts appears to be the most appropriate way of dealing with the rules on unfair prices in contracts in other contexts too for three reasons.

First, where the rules on unfair prices in contracts apply, freedom of contract means merely that the parties have the freedom to enter into a contract at the fair price. Essentially, the freedom to determine the price is an illusion as, depending on the particular rule, the contract may be rescinded or the price may be altered if the price determined by the parties is subsequently held to be unfair. Thus, there is really no

freedom to determine the price in these situations. This point has been taken to its logical conclusion only in the context of salvage contracts where the parties no longer expend any time on the stipulation of a price. Nevertheless, this point is equally applicable in all the other instances in which English and French law have intervened in contracts on the ground of an unfair price.

Secondly, the approach adopted in the context of salvage contracts removes much of the transactional uncertainty caused by all the other rules on unfair prices in contracts. If the fair price is determined by arbitrators after the performance of the contract then there is no danger that the contract will be rescinded or that the price which was stipulated by the parties will subsequently be altered.

Finally, it seems that the approach adopted in the context of salvage contracts is the least costly method of dealing with the rules on unfair prices in contracts. As outlined earlier,⁴¹ the determination of the fair price in both systems by judges or *experts* takes a considerable amount of time and effort (and is consequently quite expensive). Arbitration offers a much swifter and inexpensive way in which the fair price can be determined.

Therefore, in conclusion, it appears that having the price determined by arbitrators after the performance of the contract rather than by the parties beforehand is the most appropriate method of dealing with rules on unfair prices in contracts. In fact, the adequacy of this solution might explain why the rule on unfair prices in salvage contracts is the only rule on unfair prices discussed in this thesis which has managed to survive in English law until the twenty-first century.

⁴¹ See the text above from n35 to n37 and n38 to n40.

(ii) Judicial freedom and constraints: the creation and abolition of rules

Two general conclusions emerge on this point. The first relates to the significant freedom of French courts to create rules. The second conclusion highlights one way in which French courts enjoy more judicial freedom in practice than English courts notwithstanding and indeed because of the fact that in theory, French courts are unable to create rules at all.

(a) Judicial freedom

In English law, judges play an uncontroversially key role in the creation and development of rules through their decisions in individual cases. In contrast, in French law, in theory, judges have no similar powers.⁴² The subordinate status of *jurisprudence* in French law is particularly evident in two rules. First, Article 5 of the *Code civil*, which provides that ‘*il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*’, expressly prohibits judges from creating rules. As Faure observed in the *Corps législatif* during the debates on the *Code civil* in 1803, ‘*suivant Article 5, les juges ne doivent pas s’ériger en législateurs*’.⁴³ Secondly, French courts are not bound either by their own previous decisions or by the decisions of higher courts.⁴⁴

Therefore, while it is not surprising to find that the rule on the sale of reversions and the rule on unfair prices in salvage contracts were created by the courts rather than by the legislature in English law, it is remarkable, at first sight, to find that two of the French

⁴² As mentioned in chapter 1, the restricted role which is in theory assigned to French judges today is a legacy of the controversial political role of the *Parlements* during the *ancien régime* and the reaction to that during the Revolution of 1789: JP Dawson, *The oracles of the law* (University of Michigan Law School 1968) 262-431.

⁴³ Fenet, tome VI (n14) 388.

⁴⁴ J Bell, *French legal cultures* (CUP 2001) 66. In certain instances, a decision of the *Assemblée plénière* of the *Cour de cassation* in a particular case is binding on lower courts in that very same case. However, ‘even this arrangement... does not formally make the ruling binding in subsequent cases’: Bell (n44) 66.

rules on unfair prices in contracts were created by the courts. As discussed in chapter 5, the *Cour de cassation* introduced the rule on unfair fees in 1824 and in 1910, that court created the rule on unfair prices in contracts for the sale of *offices*.

Nevertheless, in practice, many important rules in different branches of French law have been created by the courts rather than by the legislature. As Bell has observed ‘the branches of law... lie on a spectrum’ and the significance of the role of *jurisprudence* in the creation of rules differs from one branch of French law to another.⁴⁵ While numerous fundamental principles of administrative law were created by judges, the role of *jurisprudence* in criminal law is much more limited.⁴⁶ Bell places civil law ‘in the middle’ as the courts have created several significant rules in this area of law.⁴⁷

The creation of the rule on unfair fees in 1824 and the introduction of the rule on unfair prices in contracts for the sale of *offices* in 1910 coincide with particularly notable moments of judicial creativity in French law. Dawson observes that ‘both retreat to the past and new invention were promoted after 1814 when the Bourbon kings were restored to power’ and that ‘in the period from 1815 to 1830 there were numerous lines of decision, followed fairly consistently, which rested on ideas both old and new that had little connection with the Code itself’.⁴⁸ Nonetheless, while Dawson also notes that ‘many doctrines that took shape in this period have survived in modern French law’,⁴⁹ he provides no specific examples. It is suggested that rule on unfair fees which was created by the *Cour de cassation* in 1824 and is still in force today could be viewed as one example of this phenomenon.

⁴⁵ Bell (n44) 245.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Dawson (n42) 385.

⁴⁹ *Ibid.*

Furthermore, two of the most significant innovations in *jurisprudence* in civil law occurred just before the creation of the rule on unfair prices in contracts for the sale of *offices* in 1910.⁵⁰ In 1892, the *Cour de cassation* established the new ground of liability of *enrichissement sans cause* based on *équité*.⁵¹ Subsequently, in 1896, the *Cour de cassation* invoked Article 1384 *al* 1 to proclaim a new ground of liability for the actions of inanimate objects.⁵²

(b) Judicial constraints

The second general conclusion on this point concerns the ability of English and French courts to abolish rules. It appears that in practice, French courts exercise more freedom than English courts even though it is the latter which in theory play a key role in the development of rules. This paradoxical conclusion is the result of a comparison of the abolition of the rule on the sale of reversions in English law and the rule on unfair prices in contracts for the sale of *offices* in French law.

English courts enjoy considerable freedom to create rules. However, the doctrine of precedent significantly restricts the power of English courts to abolish rules which they have created. This point is particularly evident in the inability of English courts to abrogate the rule on the sale of reversions after it had been affirmed by the House of Lords in *Aldbrough v Trye*.⁵³ As discussed in chapter 3, judges frequently expressed their dissatisfaction with the rule when it was invoked in cases before them. Nonetheless, due to the doctrine of precedent, the judges felt compelled to apply the rule on the sale of

⁵⁰ J-L Halpérin, *Histoire du droit privé français depuis 1804* (PUF 1996) 179.

⁵¹ Cass req, 15 June 1892 (*Patureau-Miran c Boudier*): S.1893.281.

⁵² Cass civ, 16 June 1896 (*Oriolle, Guisnez et Cousin c Teffaine*): S.1897.1.17.

⁵³ (1840) West 221.

reversions to facts which came within the contours of previous decisions until Parliament intervened and abolished the rule in 1867.⁵⁴

The abolition of the rule on unfair prices in contracts for the sale of *offices* by the *Cour de cassation* in 2004 provides a striking contrast to English law and illustrates the significant freedom of French courts. As explained in chapter 5, this rule had been consistently applied for almost one hundred years before the *Cour de cassation* decided that it was no longer appropriate to exempt the sale of *offices* from the general principle of freedom of contract. The *Cour de cassation* was able to abolish this rule so suddenly and peremptorily as unlike English courts, French courts are not bound by the doctrine of precedent. The absence of a doctrine of precedent is the direct result of the absence of a power to create rules.

The contrast between English and French law on this point is consistent with and indeed illustrates one of Dawson's general observations about judicial freedom in French law in his influential treatise on judicial reasoning. He notes that

an effective case-law technique... has the purpose and should have the effect of limiting the powers of judges. Its absence in France has resulted from a desire to limit the power of judges, but it has produced instead a much greater freedom for judges than we would consider tolerable.⁵⁵

Thus, while the purpose of depriving the courts of the ability to create rules in French law is intended to restrict their powers, it in fact produces the opposite result. As Dawson observes, 'a principle directed toward restraining judicial power thus serves to enlarge it'.⁵⁶

⁵⁴ In contrast, as the rule that specific performance can be refused on the ground of an unfair price was never firmly established, the courts could legitimately ignore one line of authority and follow the other.

⁵⁵ Dawson (n42) 415.

⁵⁶ *Ibid* 431.

(iii) The circulation of legal ideas

The extent to which the rules on unfair prices in contracts in French law have influenced analogous rules in English law or have simply been discussed in English law and vice versa was considered in chapters 3 and 4. There are two significant conclusions on this point.

(a) French law in English law

First, one might have expected to find more extensive discussion of *laesio enormis*, *lésion* and particularly Article 1674 in English cases and legal writing and to discover that the rule on the sale reversions was influenced by French law. However, as discussed in chapter 3, overall the references to *laesio enormis* and *lésion* in English cases are brief and rare (and Article 1674 is not mentioned at all) and these rules did not influence the creation of the analogous rule on the sale of reversions in English law. Furthermore, Fry and Pollock are the only English jurists who engage in a discussion of *lésion* and Article 1674.

These two conclusions are surprising given the significant influence of French law in English law in the nineteenth century. French contract law was frequently cited by legal writers and judges in England at this time and as a result many rules in English contract law were influenced by analogous rules in French law.⁵⁷ Equally, French law influenced certain aspects of English land law in the nineteenth century.⁵⁸

⁵⁷ AWB Simpson contends that the introduction of many new doctrines into English contract law in the nineteenth century can be attributed to the appearance of treatises on English contract law for the first time during this period and the discussion of jurists from civil law systems in these treatises. French contract law in particular was discussed in many treatises on English contract law in the nineteenth century. See AWB Simpson, 'Innovation in nineteenth century contract law' (1975) 91 *LQR* 247.

⁵⁸ See AWB Simpson, 'The rule in *Wheeldon v Burrows* and the Code Civil' (1967) 83 *LQR* 240 on the influence of French law in the rules on easements in English law. Similarly, Harpum notes that 'the development of English conveyancing law in the nineteenth century owed much to the influence of writers on natural law'. In particular, Harpum highlights numerous dicta which 'are strongly reminiscent of a passage in RJ Pothier's *Treatise on the Contract of Sale...*' on the weak position of a purchaser in contracts

In particular, the rarity of references to *laesio enormis*, *lésion* or Article 1674 in English cases and legal writing is striking given that Pothier devoted twenty three pages of his treatise on sale to *lésion*.⁵⁹ Pothier's writings were very influential in English law in the nineteenth century. As Best J stated in 1822 in *Cox v Troy*, 'the authority of Pothier... is as high as can be had, next to the decision of a Court of Justice in this country'.⁶⁰ Pothier was usually mentioned whenever French law was discussed in English cases on contract law.⁶¹ Therefore, it is unlikely that many English judges and legal writers were unaware of Pothier's detailed discussion of *lésion*.

(b) English law in French law

Secondly, given that civil law is a fundamental source of English maritime law, one might have expected to find that the rule on unfair prices in salvage contracts in French law influenced the creation of the analogous in English law. However, as explained in chapter 4, the available evidence suggests that the rule in French law is in fact a transplant from English law. The dominance of British shipping at the end of the nineteenth century and at the beginning of the twentieth century is the primary cause of

for the sale of land: C Harpum, 'Exclusion clauses and contracts for the sale of land' (1992) *CLJ* 263, 265-266.

⁵⁹ RJ Pothier, *Traité du contrat de vente* in *Œuvres de Pothier* vol II (Pichon-Béchet 1827) 155-178.

⁶⁰ (1822) 5 B & Ald 474, 480. Simpson observes that Pothier 'was the most influential' foreign jurist in English law. English translations of treatises written by Pothier were published in England at the beginning of the nineteenth century: Simpson (n57) 256.

⁶¹ For example, Pothier was considered in detail in the leading cases of *Byrne & Co v Van Tienhoven & Co* (1880) 5 CPD 344, 348 (Lindley J), *Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346, 350-351, 352 (Lush J) and *Taylor v Caldwell* (1863) 3 B & S 826, 834-835, 837 (Blackburn J).

Other sources in French law were also often examined in great detail in English cases. For example, in *Appleby v Myers* (1867) 2 CP 651, an important case on the consequences of the termination of a contract in English law, French law was the focus of much of the debate in the Court of Exchequer Chamber. Counsel for the defendant, James Hannen, referred to Pothier and Articles 1788 to 1790 of the *Code civil*. Counsel for the plaintiff, Mr Holl, discussed Pothier and Domat, the contemporary legal writers Duranton and Troplong, Article 1135 of the *Code civil* and rather unusually, a case decided by the *Cour de cassation* in 1861: *Appleby* (n61) 652, 653-657.

the adoption of the rule on unfair prices in salvage contracts in French law via the Salvage Convention 1910.

It is significant that this transplant occurred at a time when French jurists were aware of many aspects of English maritime law. This is evident in the translation of the reports of numerous English cases in the *Revue internationale de droit maritime* which was published in Paris from 1886.⁶²

Furthermore, the influence of English law on French law on this point is discernible in an additional way. The marginalisation of the rule on unfair prices in salvage contracts in practice in English law by the use of the Lloyd's form has been replicated in French law. It is significant that the very same English standard form contract is used to circumvent this rule in English law and French law.

⁶² The author has been able to access the fifteen volumes from 1886 to 1900 only. In the numerous English cases which are translated in these volumes, there are no cases on the rule on unfair prices in salvage contracts.

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