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**"Snell v. Beadle" (the Privy Council on Roman law,
Norman customary law and the ius commune)**

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Citation

Zwalve, W. J. (2002). "Snell v. Beadle" (the Privy Council on Roman law, Norman customary law and the ius commune). In *"Viva vox iuris romani"* (Essays in honour of J.E. Spruit) (pp. 379-386). Amsterdam: Gieben. Retrieved from <https://hdl.handle.net/1887/3416>

Version: Not Applicable (or Unknown)

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Note: To cite this publication please use the final published version (if applicable).

SNELL V. BEADLE - THE PRIVY COUNCIL ON ROMAN LAW,
NORMAN CUSTOMARY AND THE *IUS COMMUNE*

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INTRODUCTION

There are two great divides in the history of continental-European private law that have had a prejudicial effect on the continuity and the organic development of the law. The first is the 'reception' of Roman law, a fait accompli practically everywhere on the continent (and in Scotland) by the end of the fifteenth century. The second is the French revolution and its aftermath, bringing the phenomenon of rigid legislative codes to practically all continental-European countries. The rise of 'nation states' on the continent excluded the preservation of the doctrine of sources of law prevailing before the onslaught of the revolutionary wars. That doctrine had insisted on pluriformity, diversity and a relative (and largely conceptual) unity brought about by the reception of a 'common law' (*ius commune*) as a subsidiary to local 'coutumes', usages and statutes. All this was obliterated on the European continent (but not in Scotland) in the course of the nineteenth century by a doctrine insisting on uniformity by way of legislation. English legal history knows of no such watersheds. England escaped from a 'reception' of Roman law because there already was a 'common law' in England long before Roman law was adopted in most countries on the continent. The English speaking peoples have had the added advantage of never having submitted to the radical dogma of legal uniformity, nor to the lure of uniformity for its own sake, which, in the words of the great Montesquieu, 'never fails to entrap little minds'. Accordingly, English constitutional law allows for a legal pluriformity and diversity rarely, if ever, seen on the continent since the end of the nineteenth century. Far more often than continental-European judges are obliged to do, English judicial instances have to base their decisions on Roman law and even ancient customary law. The recent case of *Snell v. Beadle*¹ is a striking example. The facts of the case are relatively simple.

¹ [2001] 2 WLR 1180.

Mr Snell had inherited two pieces of land, separated by a strip of land belonging to Mrs Beadle. Mr Snell had a right of footpath to access his property on the other side of Mrs Beadle's land. In order to develop one of the two properties, Mr Snell sought Mrs Beadle's permission for the grant of vehicular access to his property. On 1 February 1994 Mr Snell and Mrs Beadle came to an agreement on the grant of vehicular access for the price of £ 100. Mrs Beadle signed a written agreement to that purpose on the next day in the office of Mrs Snell's project manager. Shortly thereafter Mr Snell's solicitors were informed by Mrs Beadle's solicitors that she wanted to repudiate the contract as the stipulated price was less than one half of the real value of the right of vehicular access to Mr Snell's property. Consequently, it was contended, the transaction was unenforceable as a 'dol reel' arising from a 'deception d'outré moitié du juste prix'.

The civilian will have recognised the well-known doctrine of *laesio enormis*, as laid down in C 4,44,2.² English common law knows of no such doctrine. It has been settled for well over three centuries that the courts will not inquire into the "adequacy of consideration"³ as "the value of all things contracted for is measured by the Appetite of the Contractors"⁴. The law of England, however, did not apply to this case. It had to be decided by the Privy Council on the basis of ancient Norman customary law and continental-European *ius commune*, because it originated from the island of Jersey.

JERSEY AND THE IUS COMMUNE

The Channel Islands occupy an anomalous position in the English Commonwealth, as they are not parts of the United Kingdom, or colonies. Blackstone has described their peculiar position in a way that still holds today:

"The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, le grand coutumier. The King's writ, or process from the courts of Westminster, is there of no force, but his

² On *laesio enormis* see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Capetown/Johannesburg 1990, 259 ff.

³ C. H. S. Fifoot, *History and Sources of the Common Law (Tort and Contract)*, London 1949, 402; A. W. B. Simpson, *A History of the Common Law of Contract*, Oxford 1987, 445 ff. and P. S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford 1979, 167 ff.

⁴ Thomas Hobbes, *Leviathan* (ed. C. B. Macpherson, Harmondsworth 1968), Part 1, chap. 15 (208). Also cited in Zimmermann, *The Law of Obligations*, 265.

commission is They are not bound by common acts of our Parliaments, unless particularly named All causes are originally determined by their own officers, the bailiffs and jurats of the islands, but an appeal lies from them to the king in council, in the last resort”⁵

The appellate jurisdiction of the Privy Council over the foreign dominions of the crown did, in fact, originate with appeals from the Channel Islands and was later extended by analogy to the Isle of Man and to all other foreign ‘plantations of the crown’⁶ In this particular case, the Privy Council made some important observations on the nature of customary law in general and its place in Jersey law in particular This was necessitated by the fact that the primary source of private law on the island of Jersey, the ‘Grand Coutumier de Normandie’,⁷ did not contain any reference to the doctrine of *laesio enormis*⁸ The question was, therefore, what was the basis of that doctrine in Jersey law?

In describing the nature of customary law, the Privy Council distinguishes between an officially ‘codified coutume’⁹ on the one hand and ‘customs’ on the other It attributed an official status to the former, “so that nothing that they contained could be abrogated except by statute”¹⁰ Customary law, which has *not* been enshrined in an official coutume, however, “can and does change”¹¹ Now this is a highly controversial, if not - at least in as far as France is concerned - erroneous statement¹² The Privy Council rests its opinion on some remarks by the eighteenth-century lawyer Charles Routier, taken from his *Principes*

⁵ W Blackstone, *Commentaries on the Laws of England* (from the facsimile of the first edition (1765), Chicago 1979), I, 104

⁶ Sir William Holdsworth, *A History of English Law* I, London 1966, 520

⁷ On the ‘Grand Coutumier’ see Fr Olivier-Martin, *Histoire du droit français*, Paris 1984, 116, H Regnault, *Manuel d histoire du droit français*, Paris 1945, 87 and H Coing (ed), *Handbuch der Quellen und Literatur der neueren europaischen Privatrechtsgeschichte* II, 2, Munich 1976, 213-214

⁸ *Snell v Beadle* [2001] 2 WLR 1180, 1187 ‘The present action relates to property rights under the law of Jersey, where the customary law has not been codified or enshrined in a coutume’

⁹ The ‘Grand Coutumier de Normandie’ has never been officially sanctioned The only collection of Norman customary law that has indeed officially been approved of is the ‘Coutume de Normandie’, which was ratified by the king of France in 1583 It is unclear to me whether the Privy Council regarded the latter, instead of the former, as having force of law on the Channel Islands In view of the extensive remarks by the Privy Council on the nature of ‘coutumes’ codified by royal authority, it appears that it has

¹⁰ *Snell v Beadle* [2001] 2 WLR 1180, 1187

¹¹ *Snell v Beadle* [2001] 2 WLR 1180, 1187

¹² One has to be careful with general propositions on this subject However, medieval Italian lawyers seem to have had a tendency to equal written and officially ratified ‘coutumes’ to local statutes, in a way much like the Privy Council does see Fr Calasso, *Medio evo del diritto* (I, Le fonti), Milan 1954, 420 On the other side of the Alps there was no such inclination

Generaux du Droit Civil et Coutumier de Normandie,¹³ but his opinion - or, to put it more precisely, his opinion as construed by the Privy Council - may certainly not be regarded as an authoritative restatement of the law on this subject. All a 'codified coutume' brought about was a shift in the burden of proof concerning the existence of a rule of customary law. Ratification did *not* imply that the law on a subject dealt with in a 'codified coutume' could not and did not change by later contrary customs.¹⁴ The 'reformation' of, for example, the 'Coutume de Paris' proves this.

When a 'coutume' was silent on a point at issue, continental-European courts had to resort to the *ius commune* and so did the Privy Council. All the more so, since, in as far as the doctrine of *laesio enormis* was concerned, "it is plain that the original rule of customary law followed the Roman law"¹⁵ This assessment is consistent with the findings of Mr Yver on the influence of Roman law on Norman customary law, especially with his important conclusion that the 'Grand Coutumier de Normandie' contained precious little material on the subject of the law of contracts and the officially ratified 'Coutume de Normandie' of 1583 none at all, so that this part of Norman law was subject to thorough 'romanisation'.¹⁶ And so it came to pass that the Privy Council, in dealing with a subject of Norman law of contract, touched upon the old civilian doctrine of *laesio enormis*.

'DOL REEL' AND 'DOL PERSONEL'

Mr Snell had filed a claim for damages in the Royal Court of Jersey, where Mrs Beadle contended that the price of one hundred pounds upon which the alleged contract is based is a 'vile prix' and is less than one half of the real value of such right and the transaction is accordingly unenforceable as a 'dol reel' arising from a 'deception d'outré moitié du juste prix'. The Court rejected that contention on the basis that something more than the finding that the price was less than half of the 'juste prix' was required, adding that the remedy of rescission on the ground of *laesio enormis* was unavailable in

¹³ Rouen 1742. The book (in H Coing (ed.), *Handbuch II*, 1, 288) was unavailable to me, so I cite from the report (*Snell v Beadle* [2001] 2 WLR 1180, 1187) 'La rédaction par écrit de nos coutumes les a rendues le droit écrit de nos provinces, chacune dans son détroit, elles y derogent au Droit Romain, mais elles y cèdent a l'autorité des Ordonnances de nos rois, qui sont les loix générales du royaume, quand il y a clause expresse de dérogation'.

¹⁴ See J Voet, *Commentarius ad Pandectas* I,3, no 32, ed Geneva 1757, 19. Voet's opinion may be treated as an authoritative restatement of the law on the subject at the time, at least in as far as the Netherlands, the Holy Roman Empire and even France are concerned. For France see, for example, Olivier-Martin, *Histoire du droit français*, no 319 (423-424).

¹⁵ *Snell v Beadle* [2001] 2 WLR 1180, 1188.

¹⁶ J Yver, *Le droit romain en Normandie* (Ius Romanum Medi Aevi V,4,a), Milan 1976, 15 and 21 ff.

the absence of ‘dol’¹⁷ The Court of Appeal of Jersey, however, held “that the Royal Court had confused ‘dol reel’ with ‘dol personel’ and that the additional requirement of a ‘dol personel’ did not apply where property was sold at such an undervalue as to fall within the rule as to ‘deception d’outre moitié du prix’”¹⁸ The decision of the Royal Court was reversed and Mr Snell appealed to the Privy Council The main issue concerned the part which ‘dol’ had to play in the doctrine of *laesio enormis*

The concepts of ‘dol reel’ and ‘dol personel’ originate in D 45,1,36¹⁹ The Accursian gloss made a distinction between ‘proper’ and ‘improper’ fraud (*qui proprie non potest dici dolus, sed ipsa res iniqua est*), as, for example, when a thing has been sold for less than half its price²⁰ The latter form of ‘fraud’ was sometimes called *fraus absque dolo*,²¹ but it was in France that the distinction between ‘dol personel’ (‘fraud proper’) and ‘dol reel’, or ‘dol *re ipsa*’, became current The concept of ‘dol reel’ was defined by Domat as ‘la lesion qui arrive sans le fait des contractans C’est cette lesion, sans dol de personne, qu’on appelle dolus *re ipsa*, parce que l’un des contractans se trouve trompe par la chose même, sans le dol de l’autre’²² The distinction was criticised by one of the famous Dutch masters of Roman law from the seventeenth century²³ and has since disappeared from the common vocabulary of continental civil lawyers²⁴ It is clear, however, that it is still a part of the concepts of the law of Jersey so the Privy Council may be excused to have employed it

The Privy Council deals with the principle at issue “as an example of the reception of a principle of Roman law through the *ius commune* into Jersey law by way of the customary law of Normandy”²⁵ It establishes correctly that, in as far as Roman law was concerned, fraud by one of the contracting

¹⁷ *Snell v Beadle* [2001] 2 WLR 1180, 1184-1185

¹⁸ *Snell v Beadle* [2001] 2 WLR 1180, 1186

¹⁹ Ulpianus, *libro quadragensimo octavo ad Sabinum* Si quis, cum aliter eum convenisset obligari, aliter per machinationem obligatus est, erit quidem supilitate iuris obstrictus sed doli exceptione uti potest quia enim per dolum obligatus est, competit ei exceptio Idem est et si nullus dolus intercessit stipulantis, sed ipsa res in se dolum habet cum enim quis petat ex ea stipulatione, hoc ipso dolo facit, quod petit

²⁰ Gl ‘dolum habere’ ad D 45,1,36

²¹ See, for example, M Wesenbeck, *In Codicis Iustiniani Libros Commentarius* (ed Frankfurt 1612) II,21 (col 104)

²² Jean Domat, *Les loix civiles dans leur ordre naturel* (ed Paris 1713) Livre I, titre XVII, sect III § 4 (Difference entre dol personel et ce qu’on appelle dol *re ipsa*)

²³ Ulric Huber *Praelectiones Iuris Romani et Hodierni* (ed Leipzig 1725) Pars II, ad D 4,3 (De dolo malo) no 3, who deals with ‘dol réel’ as a special case of *dolus praesens*

²⁴ Pothier refrains from using it, but traces of the ancient distinction are still to be found in his *Traite des Obligations*, where the action for rescission of a contract on the ground of *laesio enormis* is discussed immediately following an exposition on fraudulent misrepresentation (no’s 28-32 and 33-39)

²⁵ *Snell v Beadle* [2001] 2 WLR 1180, 1187

parties was not an essential element in a case of *laesio enormis*.²⁶ The issue was, whether Jersey customary law had departed from the principles of Roman law underlying it by introducing an element of fraud, or ‘dol personnel’, into the action (or the exception based on the principle of *laesio enormis*). After a survey of the works of the writers on the customary laws of Normandy,²⁷ the Privy Council concluded that, where the requirement of a shortfall of more than one half of the ‘juste prix’ has been demonstrated, there is no need to establish any additional requirement such as some kind of fraud or deceit. However, it was contended that the customary law of Jersey had changed in the mean time and that an accurate account of the present state of the law was to be found in a book by Charles Sydney Le Gros, entitled *Le Droit Coustumier de l’Isle de Jersey*.²⁸ The relevant passage from this book had been at issue before the Court of Appeal of Jersey as well. In concluding his exposé on the law of *laesio enormis*, Le Gros makes the following statement:

‘Ce n’est pas à dire que le préjudice qu’éprouve le vendeur par suite de l’insuffisance du prix suffit pour rescinder le contrat. D’autres circonstances doivent concourir à l’annulation du contrat, tel que le dol. En l’absence de toute allégation, autre que celle de la déception, le défendeur peut être reçu à son offre de suppléer ce qui manque au juste prix.’²⁹

Of course, Mr Snell had relied heavily on this passage to counter Mrs Beadle’s contention that a mere assessment of a shortfall of more than one half of the ‘juste prix’ enabled her to repudiate the contract. But was it a correct statement on the law of Jersey? The Court of Appeal of Jersey had dismissed Le Gros’s remarks as erroneous, but the Privy Council did not do so.

²⁶ *Snell v Beadle* [2001] 2 WLR 1180, 1188

²⁷ Writings considered in the judgement are. Guillaume Le Rouillé, *Le Grant Coustumier du pays et duché de Normandie*, ed Rouen 1539, Guilelmus Terrien, *Commentaires de Droit Civil tant public que privé, observé au pays et duché de Normandie*, ed Paris 1574 and David Houard, *Dictionnaire analytique historique, étymologique, critique et interprétatif de la Coutume de Normandie*, ed Rouen 1780 (all in Coing II,1, 287-289) Only referred to are Josias Bérault, *La Coutume reformée du Pays et Duché de Normandie*, ed Rouen 1614, Pesnelle, *Coutume de Normandie*, ed Rouen 1771 and Henri Basnage, *La Coutume reformée du pays et duché de Normandie* in *Oeuvres de Henry Basnage I*, ed Rouen 1778 (all in Coing, see footnote 7) The only ‘recent’ writer referred to is Philippe Le Geyt, *Les manuscrits de Philippe Le Geyt, écuyer, lieutenant-bailli de l’île de Jersey, sur la constitution, les lois et les usages de cette île*, Jersey 1846-1847

²⁸ Jersey 1943

²⁹ Cited from the report *Snell v Beadle* [2001] 2 WLR 1180, 1191

A NEW DOCTRINE ON *LAESIO ENORMIS*

It is clear from its decision, that the Privy Council was not pleased with the doctrine of *laesio enormis*, a doctrine as alien to the spirit of the common law as any civilian doctrine can be, "an ancient doctrine", moreover, "which few legal systems of our time have accepted"³⁰ The fact was that Mr Snell had acted in good faith, but that Mrs Beadle - who had dealt with Mr Snell in a way strongly suggesting that the price was intended to be a specially reduced price - now wanted to get out of that bargain, simply by referring to the fact that the price was not a 'juste prix' The Privy Council, therefore, had recourse to a remarkable example of purposive construction

It was held by a majority of the Privy Council that the doctrine of *laesio enormis* was based on the principle of good faith, so that the basis for its application is that something must have occurred which is different from that which would have occurred if the parties had been transacting with each other in good faith Where they transact with each other with full knowledge of the fact that the price which they have agreed upon is a bargain or a specially reduced price as compared with the market price, the principle *pacta sunt servanda* applies "La convention fait la loi des parties"³¹ Consequently, the doctrine of 'deception d'outre moitié du prix' did not apply to the case at all and Mr Snell was entitled to enforce the contract

There were two more reasons for convincing the majority of the Privy Council that Mrs Beadle was to be denied a right to repudiate the contract The first was that there was no yardstick by which the price of a right of vehicular access could be determined and the second was that the agreement between Mrs Beadle and Mr Snell was about the grant of a right of vehicular access, not about a sale of land The Privy Council held (erroneously, as I believe) that the doctrine only applied to the sale of land, not to the grant of servitude I will not go into these arguments and refer the reader to the dissenting opinions of Lord Cooke of Thorndon and Lord Hutton, with which I would have concurred

The doctrine of *laesio enormis* has always been regarded as an oddity There is no mention of it in the Digests and only twice in the Codex Justinianus (C 4,44,2 and 8) In the long course of its history after the reception of Roman law³² it has seen a considerable expansion, followed by a slow but steady decline It has been abolished in most continental-European codes³³ and even where it still obtains (as, for example, in France art 1118 *jus* 1674 ff Cc), it

³⁰ *Snell v Beadle* [2001] 2 WLR 1180, 1198

³¹ *Snell v Beadle* [2001] 2 WLR 1180, 1195

³² On the history of the doctrine of 'déception d'outre moitié du prix' see especially R Dekkers, *La lésion enorme*, Paris 1937

³³ The doctrine has never been applied in Scotland Stair, *The Institutions of the Law of Scotland* (ed Edinburgh 1981) I, 10,14

has been much criticised. The rationale of the doctrine is better served by incorporating it in the general doctrines of mistake, innocent misrepresentation and (economic) duress. As it seems to me, the law of Jersey is going that way. It is thus joining the general trend of the continental-European *ius commune*, a tradition to which the legal profession of that island so proudly adheres.