"ACTIO DE IN REM VERSO"

(By E. Mizzi, B.A.)

JURE *naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem* is one of the few rules of natural law which pervade all legislations, notwithstanding that the legislator has not taken the trouble of formulating it expressely. It is, in fact, a fundamental principle of equity and, we may add, of law, that any advantage acquired without a legal title at the expense of others is to be returned by the person receiving it.

As a sanction to this rule of equity the law grants an action against that person whose estate has been increased *cum iniuria et alterius detrimento,* which is called by modern writers *action de in rem verso.*

The theory of unearned profit, as many others which are based on equity and natural justice, derives from Roman Law. Where it was necessary consequence of the *suum cuique tribuere.* The action granted by Roman Law took the special name of *condictio.* The original *condicto* was divided into several branches, each of which had characteristics of its own. There were e.g. the *condictio indebiti,* the *condictio ob turpem causam*, the *condictio ob iniustam causam,* and so on : all of them, however, aimed at the restitution of unearned profit, and were known as *condictiones sine causa.* They were finally classified by Justinian, who, moreover, in order to facilitate such restitution created a *condiction suppletoria* — the *condictio sine cause stricto sensu,* which could be availed of in almost all cases of *locupletatio sine causa et cum aliena iactura* . these facts, show that unearned profit was severely represses by the Romans.

Besides the *condictiones,* Roman Law had several other actions having the same purpose. Among these actions we find one which deserves our attention in view of the fact that we owe to it the name of our modern action. We are referring to the *action de peculio et de in rem verso.* Contrary to what has been said by some writers, this was a single action, though including two headings: "*Eadam formula, et de peculio et de in rem verso agitur*" (Gaius). It referred to the particular case of a *filius familias* who contracted debts without the *jussum patris* : the creditors could sue the father but only up to the amount of the advantage derived by him *(in rem versum)* and within the limits of the assets of the *peculium (de peciulio).*

It results clearly that the modern *action de in rem verso* does not derive from this action, which referred to a special case but from the more general action — the *condictio sine causa.* Modern French authors have arbitrarily taken the second heading of the Roman action in order to give a name to that which aims at the restitution of unearned profit in all cases. It would have been more logical and more historically correct had this action been called *condictio sine causa.*

Unfortunately modern legislations, saving few exceptions, do not grant this action specifically. There is hardly any doubt however that it exists at law. In fact, apart from a few unimportant exceptions (such as Vittorio Mori), all writers agree that the *action de in rem verso* must be admitted as a general remedy for all cases of unearned profit and as a sanction to the rule of equity *nemini licet locupletari cum aliqua iactura.* The majority prefer to proceed cautiously : they hold that the intention of the legislator of admitting this action may be argued from several provisions of the law, which, they say, are nothing else but an application of this

great principle of equity. Thus, in articles 265, 266, 267, 275 and 277, though in conformity with the other principle *accessorium sequitur principale* the law entitles the owner of the thing to "all that it produces or that becomes united to or incorporated with the thing" still it binds him to make good any loss sustained thereby by a third party, notwithstanding that *stricto jure* all the accessories are his. Similarly in art. 731, where the law deals with *indebit solution, the accipiens,* even though the thing be no longer in his possession and even though the thing be no longer in his possession and even though he be in good faith, is bound to restore the value of the thing to the *solvens* up to the amount of the profit he may have derived. In art 860 it is stated that, though payment is null if made to an incapable person, it is, this notwithstanding, valid "if the debtor can show that it was applied to the benefit of the creditor". Several other articles may be quoted; such as arts. 929, 1438, 1665 and 635.

Other authors, finding this method of research dangerous, hold that "equity is in itself one of the objective elements which determine the solutions required by positive law" (Geny); and if we accept this view there would be stronger reasons for acknowledging the admissibility of this action at law.

French and Italian jurisprudence are equally explicit; and the same thing may be said of our jurisprudence. There are, in fact, several judgements delivered by our Courts which go to prove this last assertions. Vide : Grixti vs. Manduca, 8th April 1870; Diacono vs. Mac Kay, 17th October 1888; Scicluna noe vs. Watson noe, 15th July 1901; Tonna vs. Cachia Zammit, 23rd May 1924; Dr. E. Said noe vs. The Most Noble Marquis D Testaferrata Bonnici Axiaq, noe. Et. In the last mentioned judgement the Court was even more explicit and stated that "there is no doubt that this action must be admitted as a general principle and as an ordinary means for preventing unearned profit, whenever the conditions required by the traditional development of this action concur." The Court furthermore hoped that *in jure condendo* the legislator might consider the expedience of formally acknowledging this action in a special provision of the Code, as has been done by the Swiss, German and Japanese legislators.

Much has been said on the nature of this action. We shall however limit ourselves to pointing out, in brief, some of the theories which have been suggested by modern French writers.

According to several jurists this action depends on the quasi-contract *negotiorum gestio.* As Laurent says, it can only be exercised in case there has been an interference in the affairs of another, which, however, owing to the defect of one of the conditions required by law, could not give rise to *negotiorum gestio.* As against this theory, which is known as the theory of abnormal *negotiorum gestio,* it is said that not all cases of unearned profit imply such interference, whilst equity insists that unearned profit be returned in all cases.

According to others the ground for this action is quasi-tort. The ground for civil liability—they say—is fault : now the person who receives unearned profit is bound to return it because he is at fault i.e. because he is not entitled to keep it. However, it is objected that no fault can be imputed to a person whose estate may have been increased at the expense of others without any act on his part and perhaps even without his knowledge.

Planiol's view may be reduced to this simple statement : every quasi-contract resolves itself into a *locuplicatio sine causa,* and the group of quasi-contracts is strengthened by the addition of all cases of unearned profit : these cases have not been classified and named by the law as quasi- contracts, but they are so. They may in fact be called innominate quasi-contracts.

Baudry- Lacantinerie et Barde do not admit that every quasi contract, especially *negotiorum gestio,* is a case of unearned profit. In fact, they say, the liability of the *dominus rei gestae* is not limited to the restitution of the advantage derived by him : article 724 of Ord. VII of 1868 lays down that "if the affair has been well managed, the interested party, even though the management has by accident failed to be of any advantage to him, is bound to fulfil the obligations contracted in his name by the manager; to indemnify him in regard to such obligations as he may have entered into in his own name; and to reimburse him for all necessary or useful expenses, with interest from the day on which they shall have been incurred." So also the obligation of the *gestor* to continue in the management of the affair until the heir of the *dominus* is in a position to do so himself, cannot evidently arise from the theory of unearned profit. But the accept the view that every case of unearned profit is a quasi-contract; and they add that this opinion is shared by the majority of writers.

Ripert et Tesserie have formulated a very original system. They depart from the theory that he who creates risk should bear it, and they argue that he who gives rise to an advantage should enjoy it. "a new benefit has been procured, a useful result has been attained, and two persons claim it : the law must prefer one of the two, and it is natural that it should choose the one who has given rise to it : the other one, who has received it, must consequently return it." However one of the natural consequences of this theory would be that if the advantage derived exceeds the loss incurred, the one who has been its cause would be entitled to the total amount of the profit. This would exclude the condition *cum alterius detrimento,* which exclusion would render the modern action contrary to equity, since the defendant should not be bound to return more than what has been sustained by the plaintiff, and consequently its very ground for existence would vanish.

Whatever be the true nature of this action one thing is certain : the *action de in rem verso* is based on considerations of equity. It is not a sanction to a contractal obligation, but a sanction to an obligation imposed by equity viz. the restitution of any *locupletatio sine causa.*

This traditional principle has been acknowledged in a judgement given by the Court of Appeal in re Scicluna noe vs. Watson noe, 15th July 1921 (Vol. XVIII. P.26) : " Il rimedio sussidiario 'de in rem verso' basato sulle disposizioni contenute nel titolo omonilo del Digesto (Lib XIV. Tir. III) ....fu concession nei casi in cui l'azione ex contractu non e esperibile . tale azione ha il fondamento e ad un tempo il suo limite nel vantaggio recato al terzo, ed ove questo manchi, non puo essere esercitata."

Very important consequences derive from this principle : in the first place consent is not an element; on the contrary the obligation is imposed even against the will of the defendant. In the second place the defendant need not be capable at law : a minor, therefore, or a married woman or an interdicted person is also bound to return any unearned profit, because this obligation arises *ex aequitate* and not *ex contractu* (Vide : Quattromani vs. Buchini Lebrun, 21st May 1923, Vol. XXV).

We have dealt, in brief, with the historical origin, admissibility at law and nature of this action. But certainly the most important matter refers to the conditions which are necessary for the exercise of the *action de in rem verso.*

It is important to repeat before going any further, that this action has not been regulated by Law and therefore, as a judgement of the French Court de lrequests (15th June 1892) has stated does not mean that no conditions are required, or that they cannot be determined : it simply means that, as the law does not specify any, only those conditions required by equity and

admitted by tradition should be regarded as necessary, and that it is not lawful to apply here rules proper to other institutes of law.

It seems that no serious questions have been raised as to what conditions are required. However it is not an easy matter to decide what is to be regarded as necessary. But the difficulty bas been, to a large extent, reduced by a judgement delivered by the Civil Court, First Hall, 16th June 1936 in re Said noe vs. Marquis Testaferrata Bonnici noe. Et., which accepted completely Baudry-Lacanterie's opinion that "in definittiva, le condizioni dell'azione de in rem verso sont rte : 1. l'arricchimento; 2. il vincolo di casualita; 3. il carattere ingiustodell'arricchimento." In view of this pronouncement of our Courts we can accept Baudry-Lacantinerie's opinion as being the state of things under our law.

There must therefore be, in the first place, an advantage or an enrichment. In ascertaining whether this condition concurs or not only those advantages consisting in an increase in the value of the estate are to be taken into account : a mere moral advantage is not sufficient. Quid if instead of carrying out improvements the plaintiff incurs necessary expensed which prevent the defendant's property from perishing or from deteriorating? Baudry-Lacantinerie is of opinion that such expenses would also be covered by this action, because they may also be considered as an advantage, provided they be necessary. In fact the value of the estate would be increased because it would be prevented from decreasing. The advantage would in this case amount to the expenses incurred viz. that sum which the defendant would have to pay for the preservation of his property.

A very important principle, in connection with this requisite, has been established by our Courts : an advantage can only be regarded as such whenever it is derived on a gratuitous title; otherwise it would not be an advantage. If a person receives something which is due to him, or gives some other thing in return for that which he receives, it can never be said that he has enriched himself.

"Si dice che una persona sia devenuta piu ricca col denaro e colle cose altui quando essa l'abbia avuto a titolo lucrative, e non a titolo oneroso" (Diacono vs. Mc.Kay). The same principle was confirmed in re Grixti vs. Manduca : "L'azione equitativa de in rem verso non e esercibile contro un creditore con titolo oneroso, il quale abbia in buona fede esatto e consumato la cosa a lui dovuta, sebbene l'estinzione del debito sia seguito con denaro o con alter sostanze somministrate da un terzo al debitore."

The second requisite is the relation of causality. In other words the relation between the act of the plaintiff and the advantage derived by the defendant must be that existing between cause and effect. The plaintiff must show that he has procured an advantage to the defendant by means of an act of his or a sacrifice on his part. This is a question of the Court to decide whether such relation of causality exists or not

A difficulty has been raised with reference to this second condition, which it is very useful to examine. It is quite certain that this condition concurs when the act or sacrifice of the plaintiff gives rise directly to an advantage which is acquired by the defendant. Now what happens in case the advantage is not derived directly but only through the intervention of a third party?

This difficulty arose in two judgements which we have already mentioned viz. that given by the French cour de requetes on June 15th, 1892 and in re Said vs. Testaferrata Bonnici (June 16th, 1936). The facts of the case decided upon by our Court were the following :Said had supplied Pace with wood, beams and paint for improving a tenement belonging to Testaferrata Bonnici, which Pace had on lease. These materials were actually made use of for this purpose.

Pace was subsequently declared insolvent and Said consequently sued Testaferrata Bonnici for the restitution of the profit derived therefrom. Very similar were the facts of the French case : a trader had sold manure to the tenant of a field; the contract of lease ended before the crops were gathered, and the trader sued the landlord on the ground that the manure sold by him to the tenant had procured an advantage to the defendant, because it was he who gathered the crops.

Both Courts gave judgement for the plaintiff.

Baudry-Lacantinerie comments favourably on the decision of the French Court. He adopts the distinction proposed by Ripert et Tesserie : if all that the third party does is simply that of causing the plaintiff to do an act which procures an advantage to the defendant, then the plaintiff would always be entitled to this action. An example would be different if the third party has to intervene again, after the performance of the original act of the plaintiff. In order to solve this delicate question Ripert et Tesserie have suggested another distinction :if from the very outset i.e. when the original act is performed, the advantage is destined to be derived by the defendant, especially if such destination results from the very nature of the act or from the purpose which the plaintiff has in mind or from the fact that he believes to be dealing with an agent of the defendant, there would be a sufficient relation of causality between the act of the plaintiff and the advantage acquired by the defendant. Otherwise i.e. if the advantage has no specified destination the *action de in rem verso* would not be admissible.

A further objection was raised by the defendants in both cases : is the fact that a contractual relation exists between the plaintiff and the third party an obstacle to the exercise of this action? The defendants pleaded that were the *action de in rem verso* admissible, notwithstanding the existence of such a contract, its exercise would violate the rule *res inter alios acta tertio neque prodest neque nocet,* since such contract would affect parties extraneous to it. To this objection Baudry-Lacantinerie gives the following answer : "La risposta e facile. Come ha fatto osservare la corte di cassazione, il proprietario e obbligato verso il negoziante non per le somministrazioni di concimi fatte all'affittuale, mia a causa del vantaggio che ha ricavato dall'uso di questi concimi sulle proprie terre. La regola 'res inter alios acta e dunque rispettata." In other words this action is not a consequence of the contract intervening between the plaintiff and the third party, nor is it in any way related to it : its only cause is the advantage derived by the defendant.

This principle was expressly accepted by our Courts in the judgement mentioned above; and it was also implicitly admitted by the Court of Appeal in re Tonna vs. Cachia Zammit, which allowed the exercise of this action on the part of a contractor who had been charged with carrying out works in a tenement by several co-owners, against the other co-owners, not withstanding the contractual relation existing between the contractor and his employers.

It may be finally pointed out that an actual and material transfer of property from the plaintiff to the defendant is not essential : otherwise this would imply the exclusion of the *action de in rem verso* in all those cases in which the defendant obtains unearned profit directly from the activities of the plaintiff.

The third requisite is the unjust character of the advantage : it is necessary that it be *sine causa,* or as the Romans used to say *cum iniuria.* This means that if the defendant can avail himself of some juridicial fact which entitles him to keep the advantage derived, he cannot be deprived of it by means of this action.

The words *sine causa* may lead to misunderstandings. Though, as Ripert et Tesserie observe, from a certain point of view the enrichment must be without cause, it necessarily has

for its cause an act or a sacrifice on the part of the plaintiff. It would be better, therefore, to talk of an unjust advantage.

Baudry-Lacantinerie gives us a case where this condition is wanting : a tenant improves or repairs a tenement which he has on lease; but in virtue of a clause in the deed of lease any repairs or improvements carried out by the tenant or by his order are to benefit the landlord on the termination of the contract, without the payment of any compensation. The tenement is actually improved, and the tenant fails to pay the contractor, who, therefore, on the termination of the contract of lease, sues the landlord. Can the latter plead the right to which he is entitled in virtue of the said clause? Jurisprudence answers the question in the affirmative, and we may even include our Courts (Judgement, June 16th, 1936). In fact the inclusion of such a clause in the deed of lease means that the advantages arising therefrom are taken into account in establishing the rent; so that the landlord is only entitled to them because of an equivalent sacrifice on his part. It cannot, therefore, be said that the advantage is unjustly derived; on the contrary there is no advantage in this case, since what is acquired is acquired on an onerous title.

We may finally examine, in brief, the effects of the *action de in rem verso.*

The purpose of this action is the restitution of unearned profit : consequently the plaintiff cannot obtain more than the amount of the loss sustained. On the other hand it would not be fair for the defendant if he were to return more than what he has derived; and we have seen that this action is a consequence of a principle of equity. We may therefore conclude that the defendant is bound to return the loss sustained by the plaintiff if the profit derived exceeds the loss; and inversely he is bound to return the profit if it amounts to less than the loss incurred.

In conformity with the principle that the parties to a lawsuit are to be placed in that position in which they would have been had justice been administered immediately, the advantage is valued according to the state of things existing at the time of the demand. It follows that if the advantage acquired by the defendant has, through a fortuitous event, ceased to exist, this action cannot he brought.