EXCEPTIO REI VENDITAE ET TRADITEA

(By Joe M. Ganado, B.A.)

ONE of the main objects of society at large is peace in the community and this can only be attained through constant conformity with principles of law; hence the enunciation of rules of action is almost indispensable. The Roman mind, endowed with a deep sense of law, responded brilliantly to this necessity and from very early times, it is recorded, rules, remarkable for their expediency, reach on thought and elegant simplicity, were made public in various ways. A student of roman Law cannot help noting the stiff laws relating to the *Dominum Quintariuim* : an absolute and perpetual right of ownership liable to be present only in the sphere of rights of a Roman citizen and from early days also of the Latini *vereres* and *colonaru*.

These strict rules led to the conclusion summarized by Gaius in the words: *ade enim ex jure Quincium unusquisque aominus erat, aut non invenigebatur dominus*. Leaving apart all attacks which are leavened against this sentence, let us now see what is necessary for the creation of the *Dominium Quiritarium* and what circumstances made the introduction of the *exceptio,* which forms the subject of this note, expedient. It is undenied that no other save a Roman or a Latinus could be the subject of Domnium; the object must be a Roman thing and there must have been some *juxta causa* i.e. some act or fact in law creating the right. The *exceptio* now under review comes in when there is flaw in the transfer and the seller claims back the thing for which he has already received the price from the purchaser.

Arbitrary principles are rarely of any utility and this general principle had its direct application with the old Roman Laws on Ownership. Since malicious people have never failed men, the Roman legislators became fully alive to the need of nipping in the bud any abuses consequent upon the stringency of the law; and an abuse which at one time became dangerously frequent was the transfer by simple traditio (which was inadequate *iure civili*} followed by the exercise of the *actio rei vindicatoria* after the price had been paid. In some cases the *rei vindicatoria* achieved its aims and the unfortunate deceived purchaser had no means of defence. A remedy was therefore given and W.W. Buckland describes the operation of this plea in the following terms: "If the vendor, or one claiming under him, brought a *vindication* assert no his *dominium* which would still exist till the time of *usucaplo* had expired, the Edict gave the bonitary owner the defence that the *res* had been sold and delivered to him or to a predecessor in title by the plaintiff or one from whom he derived title (*exceptio rei venditae et traditae*), a defence extended with necessary modifications of form to cases of alienation other than those on sale."

Above all the *exceptio rei venditae et traditae* is an *exceptio*, naturally partaking of the nature of the other Roman *exceptiones*, so that it would be of interest to see what the *exceptio* meant in the Roman Law.

From a rational point of view it is of the essence of an *exception* to be a means of defence granted by the law to the defendant to rebut the plaintiff s claims. It is very natural that the possible methods of defence should be given great importance, because obviously without them Justice cannot be well administered. However, perhaps rather surprisingly, in the days of the *legis actiones* , when the formulary system prevailed, there were no special formulas

playing the part of *exceptiones*. In reality this does not mean that pleas were completely alien to the system; it is true that nothing can be stated with absolute certainty but it seems that it is highly probable that the facts which later became the subject matter of the *exceptiones* were dealt with in *iure,* the *lagis* action being simply granted or dismissed according to the proofs adduced to either contention. If it appeared that the plea was intrinsically connected with the action the magistrate had the power to order a *sponsio* between the parties, thus giving rise to a *condictio* which played the part of a preliminary *actio* .

The old doctrine regarding the nature of the *exceptiones* is than they are a praetorian remedy intended to create a negative factor which, at least potentially, may be of service to the defendant. Savigny offers very strong arguments against this opinion; especially that of the existence of *exceptiones jure civili* like the exception *dominii*, exception *Senatus Consulti Macedoniani* and also *Gaius`* sentence: *exceptiones vel ex legibus vel ex his quae legis vicem optinent substantiam capiunt vel ex jurisdictione praetoris proditae sunt.* Savigny opines that an exception takes shape when the defendant wishes to affirm a right paralyzing the plaintiff's claims. Windscheid takes a view, and to his mind the *exception* is any circumstance of group of circumstances which, without denying the truth of the *intentio,* establishes an impediment to its actual operation.

The question relating to the person who may make use of this *exceptio* and against whom it may be employed is open to doubt. In this matter we may subscribe to Voet`s opinion and say that it may be availed of by:

1. The purchaser to whom the thing has been
   a. sold and delivered,

or b. sold but not delivered, provided he has had possession of the thing without any *vitium.*

2. All those qui *causam habent* from the purchaser, for instance his heirs and also his successors by particular title: so that a second purchaser may avail himself of it to rebut the claim of the first seller, although he is withheld from exercising an action directly against the first seller, before the right of instituting the action is transferred to him by the first purchaser, the reason being that the *exceptio* and actual retention of the thing are given preference to the *actio.* The plea may be put in motion not only against the original seller but also against all those who derive their title from him. However it is bound to succumb when a just motive is shown in claiming the thing back : e.g. if the plaintiff gives orders to his representative to the effect that consignment be made only if the price is paid and the representative deliberately disobeys his orders.

The main difficulties which have to be overcome refer to the praetorian or non-praetorian origin of the plea. It is of interest to note that the *exceptio doli (generalis)* is distinct from the *exceptio doli :* it has nothing to do with the specific malice but it tends to paralyse a suit which, though based strictly speaking on the law, is opposed to equity, *ne cui dolus per occasionem iuris civilis contra naturalem aequitatem prosit and qui aequitate fefensionis infrinaere actionem potest doli exceptione tutus est.* in dealing with these questions we are presented with a dense cloud of uncertainty: indeed a feature very common in the study of Roman Law. In fact in this regard the great Italian jurist Ferrini specifically states that the true theory has not as yet been fully proved and therefore there is no other safe way but to subscribe to the opinion with a less tender basis.

Dr. Krueger has offered a theory diverging from the course generally adopted in relation to its origin but in full agreement with the universal opinion that the *exceptio rei venditae et traditae* is a particular aspect, a mere configuration, of the *exceptio doli.* In short this is his theory: the exception *rei venditae et traditae* is not, as is generally held, praetorian. Originally its functions were carried out by the *exceptio doli* but for some reason or other an *exceptio in factum,* in all probability bearing no relation with the edict, began to be employed. It appears that this *exceptio in factum* kept steadily

Gaining ground because it established a permanent evasion of the difficulties in proving the subjective malice of the plaintiff, although, it is true, in the late Classical Period the exceptio doli could well be based on the plaintiff's demeanor objectively appearing malicious—which however, was no constant practice, later the *exentio in factum*, while gradually gaining more importance received the special appellation of exception *rei venditae et traditae* and this is why mention of it is only made in the works of relatively late jurists: Paulus, Ulpianus and Hermogenianus.

The great jurist Ferrini disagrees and suggest a theory, which in general concurs with the one upheld by the majority of writes. The *exceptio re venditae et traditae* was brought to light in republican days, by a praetorian ed'ct probably before the *exceptio doli* itself, in order to protect the *dominus bonitarius* against the *vindicatio* exercised by the *dominus quiritarius*. It could also be availed of by those purchasers, who for various reasons did not become immediately *domini* after *traditio*, for instance when there was a suspensive clause, but as a general rule not by those who purchased from the non-owner. In this case *the exceptio doli* was exercisable, but it was not applicable to certain cases e.g. when the defendant wished to reply to the plaintiff's answer. It is an established fact that in a *condemnatio* the plea of dolus had to appear last of all: so that, when in the middle of a case a contradiction had to be proved, a congruous formulation in *factum* had to be employed—exactly corresponding with the content of the *exceptio rei venditae et traditae.* Although its functions were denoted by its specific mention in the index of the edicts, the jurists of the age after that of Julianns diverted its application to other cases, and later it became only exercisable in those instances. Thus a phenomenon, not uncommon in Roman Law took place: namely that an institution loses its connection with the cases for which it was originally created and in due course becomes applicable only to the cases which have gradually encroached upon it and subsequently enveloped within its sphere of action.

No mention of its original functions is made in Justinian's codification; its new role is outlined only in comparatively recent writers. However, it may be said that clear and direct references to it may be detected in the works of former writers. In D.19, 1, 50 taken from Labeo we read the words : *utpote cum petenti eam rem petitor ei neque vendidisset neque tradidisset.* The meaning of this sentence has been subjected to severe discussion but it appears that it is referring to the plea under review, even if we merely look at its diction. It is dealt with in a way denoting that it has established formulas and procedure and not as an *exceptio camparanda in factum.* In Julianus' writings themselves we can likewise trace a reference. Finally Pomponius mentions an *exceptio quidem opponitur ei de re empta et tradita*; the fact that there is a slight alteration in the terminology is not an absolute proof to the contrary at all, because we can find many instances in which the Roman jurists adopted a different nomenclature from that of the edict.

A case mentioned by Ulpianus apparently militates against this construction. If a slave buys a thing *peculiariter* and he is manumitted by will with a legacy of the *peculium* before the

thing the has bought passes into the ownership of his master, Ulpianus says : *exceptio in factum loco habebit.* It may be said with comparative certainty that this was the original application of the *exceptio.* Consequently it appears puzzling why Ulpianus says: *exceptio in factum,* an expression seemingly referring to a plea liable to vary and not *exceptio rei venditae et traditae,* of which he is certainly aware. The freeman is now an *alius homo,* so that the *exceptio* in its real form does not apply, since he, as defendant, is unable to allege that the thing has been sold and transferred to *him.* Hence an altered formulation of the *exceptio*—A sort of *exceptio utilis*—is necessary; and as can be ascertained from the Vatican fragments these slightly altered pleas are known as *exceptiones in factum.* This shows that we must not be led astray by the use of the words *exceptio in factum* because the do not denote an *exceptio* distinct from the one under review.

Another case worthy of note is that mentioned by Julianus: *a Titiu fundum emeris, qui Semoronii erat* and later Titius, inherits Sepronius' property. In this instance if Titius, as Sempronius' heir claims the thing back, *exceptione in factum comparata vel doli mali summoveretur.* The difficulty lies in determining whether the *exceptio in factum comparata* is the *exceptio rei venditae et traditae* or not. If we turn our gaze to the early days of the latter *exceptio,* we find that it is intended to protect the purchaser who by *tradito* has received *a res mancipi* from the owner. Even in the writings of jurists, when mention is made of the plea, delivery is considered as having been made by the owner himself or by his agent with a special mandate — never by a *non- dominus* . However, the abovementioned case possesses special features of its own namely that Titius i.e. the actual vendor is now the heir of Sempronius, *who was and remained* the owner, on account of the insufficiency of *traditio* according to civil law. In this regard a sentence written by Ulpianus is of great bearing : *alienatum non proprie dicitur quod adhuc in dominio venditoris manet ; venditum tamen rectedicetur.* Hence the term *venditum* could be used even in this case, although the ownership *stricto jure* remained with the original owner and this is in full agreement with the general law of Sale.

Admittedly there are very powerful arguments militating against the assertion that this case comes within the sphere of operation of our *exceptio.* First of all the *exceptio in factum comparata* is evidently of an uncertain character without any clear formulation, which decidedly makes it appear distinct from the *exceptio rei venditae et traditae.* Secondly, there is not any clear reference in any of the jurists' writings to a case of a transfer a *non domino.* In spite of these arguments Ferrini subscribes to the opposite opinion i.e. that the case under review is no other than an extension and a particular application of the same plea. On the authority of Marcellus, Ulpianus says: *arcellus scribit, si alienum fundum vendideres et tuum postea factum petas, hac exceptione recte repellendum* and while commenting the edictal index he clearly states what may be rightly called *venditum.* In this manner the case of transfer *a non domino* is included within the orbit of *hac ezceptione* and thus Ferrini accepts this opinion and says that it is impossible to forego the conclusion that the case mentioned by Ulpianus indicates an extension of the *exceptio rei venditae et traditae.*

If we look at this *exceptio* from a wide point of view, we cannot but perceive that it functions in the Roman legal System in a way which gives it the character of a particular application of the principle: *malitiis hominum non est indulaendum :* and bence it is bound to be in constant relation with the general plea, consequent upon the acceptance of the abovementioned undeniable maxim: the *exceptio doli (generalis).* The praetor took upon himself the task of putting a halt to the injustices and the very ingenious devices to defraud unsuspicious people which came in the wake of arbitrary principles of law. This plea is one of

the weapons adopted to beat down these fraudulent devices and in some cases, especially when there is an explicit or implicit declaration on the part of the plaintiff, with which his actual conduct can be put in contrast, the two *exceptiones* are concurrent. However it is interesting to note that no concurrence has ever been recorded when the *exceptio rei venditae et traditae* safeguards any person who has purchased from the owner himself or from his authorized agent.

The *exceptio rei venditae et traditae* is interesting not only in its nature, but also in its significance from a wide point of view, because it can throw much light on matters beyond itself and on the circumstances which brought it to existence. In the Republican era, in which it probably arose, there was a substantial decadence in Roman manners. The effects of this decadence are easily discernible in all branches of Roman Law, especially in Family Law. Divorce became a common resort of irate husbands and wives, perhaps due to the *lex maenia* itself; this law greatly diminished the ancient authority of the family council and fixed specific cases in which divorce was admissible, thus rendering the people familiar with these cases and tacitly encouraged them to ask for a divorce at the first occasion. In other branches of law the *Querela Inofficiosi Testamenti* became an institution frequently availed of, because members of the family became somewhat estranged, on account of the laxity in customs which pervaded the whole population. In the patrimonial relations between men the old, renowed *fides Romana* absolutely lost its vigour, and everybody helped in the search for *cautiones* and the Gentleman's promise was held in universal contumely. The dispositions of Rutilius regarding bankruptcy and the *action Pauliana,* in defence of creditors—all tend to show the far reaching decadence in the economic relations; everything went from bad to worse and the decadence grew more accentuated with the increase of commerce. These were the circumstances giving rise the *exception rei venditae et traditae* and even at first sight the simple observer can perceive that it was a national necessity, in order to check malicious people from taking advantage of the rigour of the law and perhaps bringing ruin upon innocent, unsuspicious people. Villains have always played their part in life and the Roman legislators with their world-wide fame in legal affairs stood up for Justice's sake by presenting to their citizens wise provisions of law, among which the *exceptio et vendite et traditae,* at a time when the *graeca fides* had largely smothered the ancient Roman probity.