THE QUAESTIONES DISPUTATAE OF THE GLOSSATORS

BY

HERMANN KANTOROWICZ (Cambridge).


The disputations of the glossators are not as dead as other forms of the medieval teaching of law. They have a modern counterpart in the 'moots' of the present English law schools, and may have been their roots, or at least their models. The 'moots' are a not unimportant educational feature, but they have not given rise to any kind of legal literature; they are therefore scarcely known outside England. The disputations on Roman Law at Bologna and afterwards at every other school of law would also have been forgotten, had they not been recorded by the Quaestiones disputatae. It is with this type of legal literature, as it originated and developed during the epoch of the glossators, i.e. from the beginning of the 12th to the middle of the 13th century, that we are here concerned. Certain readers will not be offended if we remind them that the civilian glossators can be roughly grouped in four generations of masters and pupils: Irnerius (Guarnerius), the founder of the school († c. 1130); his pupils, the Four Doctors: Bulgarus († 1166?), Martinus, Hugo, Jacobus († 1178); Johannes and Azo († 1220), Placentinus († 1192) and Pillius; Hugolinus, Roffredus, Accursius († 1263). The other glossators are less important for the history of the quaestiones disputatae.

What is a quaestio, if we take the term to denote a type of medieval legal literature? Fitting, in editing the Quaestiones
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de iuris subtilitatibus, based his thesis of their pre-Bolognese origin partly on the assertion that from the times of the Four Doctors only the quaestiones disputatae had been termed quaestiones 1). In reality, this term was used by the glossators for so many different types and so very untechnically that it is hardly possible to give an adequate definition. Two characteristics may perhaps be suggested. First, the writings called quaestiones refer always to problems of law, never of fact; of this the glossators were well aware. Rogerius, who first attempted to define and to classify the quaestiones, said in the preface to his Summa Codicis (c. 1170) very clearly:

cum de facto queritur iure, qualiter sit probandum, exponitur 2).

Accursius in discussing the doubtful validity of the Constantinian donation, remarked:

solutio facti ad nos non pertinet 20).

The questions which (afterwards) were technically called de facto were quaestiones iuris which had actually arisen, as opposed to traditional and fictitious cases, the quaestiones scholasticae. Second, the problem is always worded in interrogative form, expressing genuine doubt, uncertainty, or ignorance: where such expressions are omitted they are obvious and meant to be supplied by the reader. Thus, after reading a casus on error ending with Seius solutum repetit, we shall inevitably continue: Quaeritur an possit?

Far more distinct and interesting than the genus are the species. The glossators of the 12th and 13th century and their successors down to the twilight of the Middle Ages, speak, in addition to those types which we have already mentioned, of quaestiones legitimae; insolubiles, and of others they call quare; they distinguish between litterales and vespertine (sabbatinae, dominicales, veneriales, mercuriales); magistralis and scholarium;

1) Questiones de iuris subtilitatibus des Irnerius (1894) 30 n. b.
20) gl. 'generi' ad Nov. 6 pr.