LEGAL REMEDIES FOR NON-ROMAN LAW IN MEDIEVAL DOCTRINE

The condictio ex consuetudine and Similar Actions

by

KEES BEZEMER (Leyden)*

Dedicated to Professor Domenico Maffei
on the occasion of his 65th anniversary

1. – Introduction

It is a commonplace to say that the Roman legal system is basically action-oriented. That the Glossators and Postglossators in their interpretation of the Roman law texts have worked in the same vein is hardly surprising. It is, however, anything but common knowledge that these medieval authors extended the action-based Roman system of legal remedies to the various kinds of non-Roman law of their times. We have to think of feudal, customary and statutory law, and, of course, canon law as objects of this creative application of the Roman law texts to contemporary phenomena. In this article I will describe how the medieval jurists incorporated the iura propria in their system of legal remedies. Canon law will play a minor part. To show the importance of the subject I will add a short section on theoretical developments after the Middle Ages and present some observations of a more general character.

It all started with Pillius. At least, I have found no earlier traces of the doctrinal construct soon to be described. The last example found by me dates from the third quarter of the eighteenth century. My introduction to the subject was through the works of Jacques de Révigny, and, looking back, I now understand that otherwise I would not easily have come across it. My original aim was, and still is, to collect all places where Révigny speaks of French customary and statutory law. During this search I came to know the phenomenon of the condictio ex consuetudine and some of its variant expressions. As soon as I realized that it was indeed a condictio and not a conditio, as it is sometimes taken for by mistake, I turned to today's literature for help. To be rather disappointed,

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however¹. But when I started to explore the primary sources, i.e. the commentaries of other medieval jurists, a picture slowly began to unfold that proved to be common to many medieval authors who have dealt with non-Roman law. I am sure that many passages containing this condictio are still to be found in the voluminous commentaries of the late medieval jurists. After all, many instances in Révigny's oeuvre would have remained unknown to me had I not perused his commentaries word for word. In that respect what follows cannot be but provisional. There is, however, enough solid evidence to draw a clear picture of the essence.

2. — Glossators

As soon as the Glossators had completed their rediscovery of Justinian's Roman law and had through elementary exegetical methods mapped the field, they confronted their newly gained knowledge with other kinds of law they saw being practised around them. The first object of their attention was feudal law as it was in use in Northern Italy, soon to be followed by other customary and statutory law. I have found this same order in the doctrinal development concerning actions based upon the iura propria. Significantly, the first traces of this confrontation of Roman and indigenous law are to be found in quaestiones disputatae. This is a confirmation of the idea, expressed e.g. by Bellomo, that the academic disputations were a kind of experimental playground for the application of the learned law to other rules of law².

Pillius († after 1207) takes the lead. In two of his disputations, the action proposed for discussion is a condictio based on feudal law, in both cases called condictio ex moribus³. In a disputation held under the direction of Azo († after 1220), one of the remedies advanced is a 'condictio ex lege, id est consuetudine que hunc contractum approbat'. The question was whether a vassal could be forced to swear an oath of allegiance to the heir of his late lord⁴. The phrasing of the action reveals its origin: the condictio ex lege. We will return to it in due course. A closer look at the feudal customs protected by our condictio need not detain us, as it concerns only a suggested remedy.

Azo's pupil Accursius († 1263) mentions the condictio ex moribus at two places in his Gloss on the Libri feudorum. The first case bears upon the problem which

¹. For the period of the Usus modernus an exception should be made for Klaus-Peter Nanz, Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhunderi [Beiträge zur Neueren Privatrechtsgeschichte, 9], Munich 1985, p. 118-125. See also Helmut Coing, Europäisches Privatrecht, Vol. 1: Älteres Gemeines Recht (1500 bis 1800), Munich 1985, p. 110 and 401. For the Middle Ages I found a clue in Emilio Busi, La formazione dei dogmi di diritto privato nel diritto comune (diritti reali e diritti di obbligazione), Padua 1937, p. 225 n. 2, where a passage of Duranti is quoted.


³. For the casus see AnnaLisa Belloni, Le questioni civilistiche del secolo XII, Da Bulgari a Pillo da Medicina e Azzzone [ius Commune, Sonderhefte 43], Frankfurt/Main 1989, p. 99 (quaestio 18) and p. 101 (quaestio 28).

⁴. See Belloni (n. 3), p. 132 (C 3). With 'contractus' is meant the contract of enfeoffment.