Some remarks concerning the so-called *Condictio Iuventiana* (D. 12.1.32)

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The compilors of the Justinian Digest have provided the first title of the twelfth book with the heading: concerning things due, provided a definite quantity of something or a certain sum of money is claimed and concerning the *condictio*. In this title the thirty-second law takes up a special position. The high classical jurist Celsus draws our attention to a very peculiar situation. Somebody, in this case the you-persona, is apparently rather in want of money since he approaches several persons requesting them to lend him money. Thus, both a man called Titius and the I-persona are confronted with such a request. The attitude of the I-persona is not reluctant. However, he decides not to hand over the money he wants to lend personally but to assign his debtor to promise his debt to the you-persona in order to transfer his claim against the debtor in this way. When settling the debts, the money which is handed over on that occasion can be regarded as lent by the I-persona. No sooner said than done. The debtor calls at the house of the you-persona and promises him a certain amount of money, viz. that which he owed the I-persona. At this point a problem arises. At the time of the stipulation the you-persona was in the supposition that he was dealing with Titius' debtor, which is not the case at all. Therefore, the central question of the text is: is the you-persona obligated towards the I-persona? Celsus' answer is in the affirmative: the money will have to be refunded. Not so much because a loan of money has been effected but for another reason: my money has reached you. In that case it is good and fair that you return it to me. The

most striking words in the text are the *'bonum et aequum'*, 'the good and the fair', which remind us of the well-known adage, with which the first book of the Digest starts. Without identifying 'the good' directly with the good faith of the *bonae fidei iudicia* or 'the fair' directly with the equity of the praetorian law, it can be considered slightly odd that an action in this text is based on 'the good and the fair'; an action which during its long existence has always been characterized outstandingly by the fact that it has its foundations in strict law and in civil law. In a recent study (1) completely dealing with the life and legal method of the high classical jurist Celsus, Hausmaninger justly states that this seems inconceivable. The text takes up an exceptional position by lack of the transfer of ownership by the I-persona to the borrower. Therefore a special name has been lended to the *condictio* here mentioned in later ages, and after the jurist Publius Iuventius Celsus it has been called the *'condictio Iuventiana'*. We have to put in here that the denomination *condictio Iuventiana* is used for the first time only at the end of the eighteenth century (2) and that its extension into an independent doctrine takes place with the nineteenth century German lawyers. Therefore, the question is justified whether it still makes sense to maintain the denomination because it essentially denotes only one occasional decision which has a strong casuistic character. Nevertheless, various authors still like to maintain the name as Behrends recently did in his discussion of the Festschrift für Werner Flume (3). The *condictio Iuventiana* is also presented as an independent doctrine in a modern text-book by Feenstra (4), which is widely used at Dutch universities. In the

(1) HAUSMANINGER, H. *Publius Iuventius Celsus, Persönlichkeit und juristische Argumentation*, in: *Aufstieg und Niedergang der Römischen Welt, Geschichte und Kultur Roms im Spiegel der neueren Forschung*, II, Principat, Bd. 15. Hrsg, von Hildegard TEMPORINI, 1976, pp. 382-407.

(2) CONRADI, J.L. *De Juventiana condictione*, rel. Marb. 1774 (mentioned in MÜHLENBRUCH, C.F. *Doctrina Pandectarum, scholarum in usum*, Bruxellis, 1838, p. 361[8]).

(3) *SZ* 97 (1980), p. 464[26].

(4) FEENSTRA, R. *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht, inleidende hoofdstukken*, Leiden, 1984[4], p. 170. Even SAVIGNY

course of time, Romanists have put forward various solutions to the problem the text presents. Up to some decades ago the text was thought to be highly interpolated, but that conception cannot be maintained nowadays. In the above-mentioned article Hausmaninger has compared this text with some two other texts of Celsus in which the combination of 'the good and the fair' is used and on this basis he tries to reconstruct what special rôle the words play in legal reasoning. On the other hand Kaser holds the opinion in the first part of his classical manual on the Roman Private Law that we can deduct from the words 'the good and the fair' that already in the classical age the *condictio* was available to foreigners too (5). In the second part he tries to find the origin in other places, that is to say in the eastern lawschools (6). There the classical *condictio* is adopted, but moreover the concept of unjustified enrichment is generalized and based on moral philosophy and christian ethics. Although the text is characterized by many interesting aspects such as the effect of the stipulation, the question whether the stipulation would have been abstract, the error of the you-persona, etc. we will have to confine ourselves to one point only, unfortunately. Therefore, we would like to pay attention to some features from the text and ask ourselves whether they point in the direction of civil or praetorian law.

1. One of the most interesting aspects we have already mentioned, viz. the lack of a *datio*. The text gives the impression that the debtor has indeed paid the money which was asked for to the you-persona. This is not really stated, only the stipulation is mentioned, but it is very probable because of the words 'to refund the money which reached you'. The corresponding text in the Basilica and the Accursian gloss (7) are completely clear in this respect. First a stipulatory promise was taken and later the

already disapproved of the denomination *condictio Iuventiana*. SAVIGNY, F.C. VON *System des heutigen Römischen Rechts*, 3. Band, Berlin, 1840, p. 271f.

(5) KASER, M. *Das Römische Privatrecht*, I², p. 594⁹.

(6) KASER, *o.c.*, II², p. 422.

(7) B. 23.1.32; the gloss *sis: et tandem habuisti ut infra. Accursius.*

money was paid. These facts cannot possibly be regarded as a *datio*. After all, every *datio* is preceded by agreement as to the object of the transfer of property. Thus a *negotium contractum* is required, a lawful coöperation based on a valid agreement of the will. This *negotium* is denied in case something is erroneously built on another person's land, or in case a pupil would accept a payment not due without authority of his tutor (8). Also in this case we cannot possibly be concerned with such an agreement in view of the fact that the you-persona was in error with respect to his promisor's creditor. As far as the *datio* is concerned, this should suffice. However, this text has regularly been associated with the adage that he too pays, who delegates his debtor. Applied to this case, this would mean that the payment made by the debtor is equal to a direct payment. To our mind one should not jump to this conclusion. The rule can be found in a text of Julian (9), who, differently from Celsus, belongs to the Sabinian school, and in a text of Ulpian (10). This is not surprising. They take a flexible stand by regarding payment by the intermediary as direct payment. Also in this way the obligation resulting from *mutuum* by means of an actual handing over of money by the intermediary is accepted in texts of Paul and Ulpian (11). The latter refers to the opinion of Julian and Aristo. Once more Sabinian and later classical jurists tend to accept the performance of the intermediary both in the making of payments as in the creating of certain obligations. However, one cannot be certain if Celsus had the same opinion in this regard. Added to this, all these cases deal with delegations to pay and not delegations to promise. In Roman law to promise belongs with a total different category than to pay. In order to make this clear we only need point to the *SC Velleianum*. After all, a woman is entitled to pay the debts of others even if this implies her own bankruptcy. However, she is not entitled to render herself liable for the debts of others, not even for one

(8) KASER, *o.c.*, I², p. 595.
(9) D. 46.1.18.
(10) D. 16.1.8.3.
(11) D. 45.1.126.2; D. 12.1.9.8.

penny even if her property resembles that of Croesus. Although Gaius admits in his Institutes to belong to the Sabinian school, very little of the later classical flexibility can be recognized in his work. The causeless payment is mentioned in the same breath with the real contracts (12). Summarizing we can therefore state that the required *datio* is lacking. For this reason one should not really expect a *condictio* in this case.

2. Also the second characteristic has been discussed, viz. 'the good and the fair'. We attach great importance to the earlier mentioned study by Hausmaninger. Here it appears that 'the good and the fair' is opposed to legal science in a different text in which Celsus is quoted by Paul (13), that is to say, the motive of equity as opposed to the established jurisprudence. Celsus noticed the danger of a too formalistic application of positive law without resorting to equity solely. This also applies in our case. It would be unreasonable to withhold the I-persona an action. Substantially 'the good and the fair' is a determining factor to reach a fair solution. The way in which that aim is to be realized is one of complete control of juridical art, the technique, with which one approaches pronounced dogmatic notions of the positive legal order. All this is quite in the spirit of Celsus' own statement that to know the laws does not imply to stick to the words but to the genius and the purpose of it (14). In this way, however, its has not been clarified yet why Celsus should conclude that a *condictio* should be granted. We have the constant tendency to associate 'the good and the fair', particularly in the special meaning Hausmaninger shows us, with the correcting function of the praetorian law or even with rhetorical pleas which the jurists refuse to include in their professional advice. Our text is concerned with a correction of the positive law. Here Celsus does use his own legal methodology and allows himself to be inspired by existing legal notions. In that case one can philosophize about the nature of the action. If the correction of the

(12) Gai. III, 91.
(13) D. 45.1.91.3.
(14) D. 1.3.17.

civil law is attributed to the praetorian law one should locate the correction of positive law rather in the praetorian law without identifying 'the fair' directly with equity.

3. Thirdly we can conclude that the granted action is not really mentioned anywhere in the text. According to us it is very dubious whether putting this text under a heading which partly exists of the words 'concerning the *condictio*' indeed guaranties that also this text originally deals with a *condictio*. Moreover, the inscription mentions the fifth book of Celsus' Digest as a source, but according to Lenel this is a writing error. Therefore, the text is put in the *Palingenesia* in the sixth book. In general we know that Celsus' Digest maintained the order of Hadrian's Edict. Where the fifth book is concerned, there are some doubts however. One finds there among other things the *interrogatio in iure,* parts of the law of procedure, and this should be ranged in the second or the third book. In addition to this Lenel has transferred another text from the fifth to the sixth book, which later has been put under the title *'de re iudicata'* (15) by the compilers. So we have reasons to doubt the systematic of the fifth book of Celsus' Digest and the same time we query the *condictio*.

4. Furthermore Celsus strongly opposes two things in the argumentation: not because I have lent, but... because the money reached you. Is the opposition proposed by the text limited to the motivation, or could one think of some other action? Does Celsus say: there is in any case a *condictio,* only the motivation differs, or does he say: there is no action based on the contract of *mutuum,* a *condictio,* but... We have already pointed out how closely a high classical jurist as Gaius knows how to connect the *condictiones* based on *mutuum* and payment not due. In the Institutes they are mentioned as legal means to fulfil a real obligation and also in the Digest they are greatly compared (16). And if the story is true that Roman jurists think in terms of legal means and not in terms of individual rights and the formula seems to appear immediately in their minds, then one tends

(15) D. 42.1.11.
(16) D. 44.7.5.3.

to conclude that the words 'not because I have lent' not only imply there is no *mutuum*-contract, but more: there is no *condictio* in this case. When one realizes that it holds good for the classical law, in which the formulary procedure is still the common way of instituting legal proceedings, that a *condictio* is a *condictio,* that there is only a formula, and there are no dogmatic differentiations as we know them in the Justinian and medieval extension, this text should strike one as odd. The very idea that Celsus would remark: in this case no *condictio* is granted, but something completely different, that is to say a *condictio,* is inconceivable, unless the granted action proves to be a different one.

5. In the fifth place one can ask oneself what meaning should be attached to the Latin verb *'obligari'*. Does it only refer to the civil obligations? After all, Gaius mentions only the civil contracts and delicts as causes of the obligation in the Institutes ([17]). It is our opinion that the verb *'obligari'* is also applicable to the praetorian obligations. In the Digest Gaius mentions three sources of the obligation, viz. contract, offence and various other causes ([18]). In this third category he includes e.g. the action *'de deiectis vel effusis',* which must definitely be regarded as a praetorian action in view of the words *'praetor ait'* with which the third title of the ninth book starts. Furthermore, the concept of the *obligatio ex iure honorario* has become a common phrase among the later classical jurists.

6. A sixth question remains whether the Latin verb *'reddere'* which is mentioned and in which the verb *'dare'* can be recognized would point to the word *'dare'* in the formula of the *condictio*. After all Celsus himself has alleged in another text that *'reddere'* also implies *'dare'* although he makes this statement in a practical sense, we think ([19]). This argument, too, does not necessarily lead us in the direction of a civil action of strict law. The verb *'dare'* appears in the formula of actions of good faith

(17) Gai. III, 88.
(18) D. 44.7.1.pr.
(19) D. 50, 16, 94.

and in the *formula in factum concepta* of the *actio depositi*. *'Reddere'* need not always be that technical, a praetorian action such as the *actio rerum amotarum* has as purpose restitution of the removed things.

7. A seventh and last point is that we have been looking for traces of pre-Justinianic law. In a *scholium* ascribed to Cyrillus referring to the corresponding text in the Basilica, the action is laid down as a *condictio*. We can ask ourselves whether pre-Justinianic law actually accepted the *condictio* without any *datio*. Another *scholium* referring to the same text and ascribed to Stephanus states the following: « If the you-persona thought he had spoken with my debtor, which is indeed true, one must assume that there is in any case (δηλαδή) a *mutuum*-contract of the money which had been paid to him earlier ». In this case it is not obvious if *mutuum* is possible of the money, which has not been handed over yet by my debtor. The only conclusion one can draw on basis of these *scholia* is that in eastern lawschools the application of the *condictio* has been extended. In case of unjustified enrichment a *datio* is no longer required, in case of *mutuum* the real aspect may no longer be required. If Kaser is in the right and the eastern lawschools have generalized the *condictio,* then the difference between praetorian and civil actions vanishes, in that sense, that one can make use of the *condictio* in all cases and that texts by classical jurists, which originally did not deal with the *condictio* could be placed by the compilers under a title: concerning the *condictio*. In view of all these considerations we can conclude that in our opinion it is not a hard and fast truth that the action granted by Celsus is a *condictio* as has generally been assumed in scholarly literature up to the present day. No *datio* has taken place, the action is founded in 'the good and the fair' and the action is not mentioned by name. Actually there is another possibility. In the text itself there are words which give us an indication of this alternative. We are referring here to the argument that 'my money reached you' and the action we have in mind is not the civil *condictio* but a praetorian action for the recovery of the enrichment, called the *actio in id quod pervenit*. In scholarly literature there is still

disagreement at which point of time these actions penetrated in private law. They originate from the criminal trials for *repetundae*. However, in the texts of a number of high classical jurists such as Gaius, Julian and Marcellus we can come upon traces of them ([20]). As a great point of difference, it can be observed that these texts are concerned with an action to sue the heir of the imposter and the extortioner. However, there is also a point of agreement. Why should one resort to this particular action? This can be accounted for in various ways. In case of the *actio quod metus causa* only the amount of the enrichment can be obtained at the time of the *litis contestatio,* which will probably be much smaller than at the time of the delict. Not all actions are passively transmissible and many of them are subject to a limitation period. As a consequence, the victim comes off a loser. In order to prevent this, the praetorian action may serve as a solution. The same can be said for our text: a transfer of property occurs without any legal justification. But a civil *condictio* requires a *datio,* which certainly did not take place in this case. Therefore it is by no means out of the question that Celsus too, is alluding to it. The text leaves us in the dark with respect to the art, the technique, Celsus uses. What is conveyed by the words of the Digest is the genius and the purpose of the law, that is to say, that he who is unjustified enriched can be sued. The premise is fixed. It is 'the good and the fair', which serves to correct positive law. The final inference is also fixed viz. that an action should be granted. What takes place in between the premise and the inference is concealed in obscurity. Doubts can remain whether Celsus' mode of thought is inspired either by civil or by praetorian law. Traditionally legal science has always been in favour of the former. We hope we have succeeded in throwing a new light on this view and in pointing out that it is by no means impossible that the action granted by Celsus is not the civil *condictio* but a praetorian action for the recovery of the enrichment.

(20) D. 4.2.19 ; D.4.2.18 ; D.40.13.2.