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‘CAUSA’ AND RESTITUTORY CONDITIO

ABSTRACT. The difficulties of the civil doctrine in reconstructing the institution of undue payments have projected themselves for a long time also on the interpretation of the roman sources. In particular, the readings about the roman jurisprudential conception of undue payments often turn out to be false, creating numerous problems of coherence and coordination with regard to internal solutions within the individual legal systems.

What is needed is a more attentive study to the text of the sources and to analysis of the case, deleting the interpretative superstructures of the dogmatic theory. And this particularly in relation to the phenomenon of the cause of restitution and its relationship with the cause of attribution.

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1. Introduction

It is interesting to note that the difficulties of the civil doctrine in reconstructing the characters of the institution of undue payments have projected themselves for a long time also on the interpretation of the Roman sources. We frequently see references to Roman law as the historical foundation of civil doctrines, on the basis of readings that often turn out to be false, with respect to the panorama offered by Roman law.

A reconstruction of the Roman jurisprudential conception of undue payments, more attentive to the text of the sources and to their articulated case studies, accompanied by the “descaling” of classical jurisprudential thought from the interpretative superstructures of theory, should allow to better understand the configuration of the institution in its essential structure.

Given the particular perspective of this meeting, the reflection on the structure of the *indebiti solutio* and the relative *condictio* will be limited to the aspects that are considered relevant.

In general, as is well known, the *condictio*, as an *actio in personam*, occupied, in the classical era, a vast field of application, constituted by the various hypotheses identified by the *prudentes* through the casuistic interpretative method.

The *condictio*, then named ‘*indebiti*’, represented the procedural remedy aimed at correcting the transfers made without recourse in the mistaken conviction of the duty of the act of payment.¹

1 Among the most relevant studies on *solutio indebiti* and *condictio*, U. ROBBE, *La ‘condictio’ nel diritto romano classico*, in *Studi Urbinati*, XIV, Milano, 1940, p. 85 *et seq.*; C. SANFILIPPO, ‘*Condictio indebiti*’. I. *Il fondamento dell’obbligazione da indebitum*, Milano, 1943; S. SOLAZZI, *Le ‘condictiones’ e l’errore*, in *Scritti di diritto romano*, V, Napoli, 1972, *passim*; G. DONATUTI, *Le “causae” delle ‘condictiones’*, in *Studi parmensi*, 1951, *passim*; F. SCHWARTZ, *Die Grundlage*, cit., *passim*; G.G. ARCHI, *Variazioni in tema di ‘indebiti solutio’*, in *Studi in onore di Vincenzo Arangio Ruiz nel XLV anno del suo insegnamento*, III, Napoli, 1953, p. 355 *et seq.*; P. DI IORIO, entry *Conditiones*, in *Noviff. dig. it.*, III, Torino, 1959, p. 1062 *et seq.*; R. SANTORO, *Studi sulla ‘condictio’*, in *Aupa*, 32, 1971, p. 181 *et seq.*; D. LIEBS, *The history of the roman ‘Condictio’ up to Justinian*, in *The legal mind. Essays for T. Honoré*, Oxford, 1986, p. 163 *et seq.*; B. KUPISCH, entry *Arricchimento nel diritto romano, medievale, e moderno*, in *Dig. disc. priv.*, sez. civ., Torino, 1987, I, 430 *et seq.*; V. GIUFFRÈ, *Studi sul debito tra esperienza romana e ordinamenti moderni*, Napoli, 1997, p. 10 *et seq.*; L. PELLECCHI, *L’azione in ripetizione e le qualificazioni del ‘dare’ in Paul. 17 ‘ad Plaut.’ D. 12.6.65. Contributo allo studio della ‘condictio’*, in *SDHI*, LXIV, 1998, p. 69 *et seq.*; I. FARGNOLI, ‘*Alius solvit alius repetit*’. *Studi in tema di indebitum condicere*, Milano, 2001, *passim*; A. SACCOCCIO, ‘*Si certum petetur*’. *Dalla condictio dei veteres alle condictiones giustinianee*, Milano, 2002, *passim*; L. VACCA, *Osservazioni in tema di “condictio” e arricchimento*

From this point of view, it is therefore necessary to bear in mind that the *condictio indebiti* did not constitute a “coupled” action to the specific case “payment not due”: the *indebiti solutio* constituted one of the numerous practical applications of the general *condictio*. This is because the *condictio* was an action that, for its structure, lent itself to different uses, all united by the claim to a *certum*, independently of the foundation. What we can define ‘the area of restitution obligations’ was also based on some rules developed by the jurisprudence, related to the problem of unjustified attributions, whose general scope allowed to identify casually the recurrence of the need to return, determining the extension of the application field of *condicere*.

Taking into account an absence of typing of the different *condictiones* (at least up to Justinian), we can try to deepen the concept of *indebiti solutio* as a case of unjustified attribution, placing it with the necessary caution in a perspective of substantive law, since it is an open jurisprudential law, mainly elaborated precisely in relation to the evolution of the scope of the procedural actions.

In particular, what seems appropriate to me to analyze is the profile of the translational mechanism that presupposes the institution of *indebiti solutio*, since it is the profile that has most seriously undermined the reconstruction of the relationship between the restitution of unjustified attributions and the Roman transferring ownership model.

The *indebiti solutio* represented a subspecies of the *solutio*, a formal act, fruit of the pontifical work of interpretation, which constituted the main mode of liberation from a constraint, first of a corporeal nature, such as that deriving from the *nexus*, later of a purely juridical nature, such as that deriving, for example, from *sponsio*.²

senza causa nel diritto romano classico, in *Appartenenza e circolazione dei beni*, Padova, 2006, p. 571 *et seq.*; C.A. CANNATA, ‘*Cum alterius detrimento et iniuria fieri locupletioem*’. *L'arricchimento ingiustificato nel diritto romano*, in *Scritti scelti di diritto romano*, II, edited by Letizia Vacca, Torino, 2012, pp. 533-566; and, if permitted, also B. CORTESE, *Indebiti solutio e arricchimento ingiustificato. Modelli storici, tradizione romanistica e problemi attuali*, Napoli, 2013; EAD., *Quod sine iusta causa est posse condici*, Napoli, 2013; M. VARVARO, *Condictio e causa actionis*, in *AUPA*, LVII, 2014, p. 265 *et seq.*

2 See G. LONGO, entry *Pagamento (dir. rom.)*, in *Noviss. dig. it.*, XII, Torino, 1965, p. 316 *et seq.*; M. SARGENTI, entry *Pagamento (dir. rom.)*, in *Enc. dir.*, XXXI, 1981, p. 532 *et seq.*; PUGLIESE, *Istituzioni*, cit., pp. 622-624. The *solutio* was originally a strictly formal act, characterized by symmetry with respect to the act with which the bond was assumed, such as the need to resort to the ritual book, in case the bond was derived from *nexus*, or as

The evolution of the Roman legal system has gradually led to the abandonment of the formalism of the *solutio*, which has become an ordinary act of fulfillment of a satisfying nature, following which the obligation on the debtor was considered to be definitively settled.³

As regards the specific hypothesis of *indebiti solutio*, as can be seen from the same denomination, this constituted the extinction act of an undue obligation because it did not exist or did not exist on the performer or, although the *solvens* required payment, it was an obligation on a person other than the recipient.

This is clearly stated by Paul, who in a text extracted from his commentary *ad Plautium*, distinguishes the hypothesis of the ‘objective undue’ from those of the undue *ex latere accipientis* and the undue *ex latere solventis*:

D.12.6.65.9 (Paul. 70 *ad Plaut.*): *Indebitum est non tantum, quod omnino non debetur, sed et quod alii debetur, si alii solvatur, aut si id quod alius debebat alius quasi ipse debeat solvat.*

In the hypothesis of payments not due, the *solvens* had the right to recover what was paid:

D. 12.6.7 (Pomp. 7 *ad Sab.*): *Quod indebitum per errorem solvitur, aut ipsum aut tantundem repetitur.*

In the perspective of our investigation, the statement by Cannata assumes

an example, the verbal *acceptilatio*, in the case of a bond contracted by *sponsio*. It was a real act of liberation, functionally aimed at regaining freedom from the debtor, and it remained such even during the historical development of Roman law, when the *solutio per aes et libram* became an imaginary *solutio*, that is, a mode of liberation in solemn form adaptable to every type of *obligatio civilis*, in which more than the aspect of payment (*aes* was no longer the instrument of liberation, payment in the *solutio per aes et libram* is symbolic) prevails the fact of the dissolution of the bond: Gai. 3.173; D. 46.3.54; D. 42.1.4.7. For an analysis of the negotiation forms *per aes et libram*, see CANNATA, *Per un storia*, cit., pp. 62-64.

³ This is how he reconstructs the history of the institute KUPISCH, entry *Arricchimento*, cit., p. 426; see also G. PUGLIESE-F. SITZIA-L.VACCA, *Istituzioni di diritto romano* 3, Torino, 2012, pp. 421 *et seq.*

particular relevance, according to which the persecution, by *condictio*, of the payment of undue is the result of an interpretation work on the attributions made through *dationes*.⁴

It is essential to investigate the transferring mechanism assumed by the *solutio* and which generates the restitutory obligation, as there has often been an overlap of the two problems, confusing the problem of the cause of attribution, inherent in the transferring moment, with the cause of justification of the attribution, pertaining to the restitution case.

Meanwhile, it should immediately be noted that the use of the *condictio*, as a personal action aimed at the recovery of the loan in pecuniary terms, assumed that, despite the non-existence of the obligation, the attribution was not due to have produced its effects anyway.

It should thus be held, just as a function of the *indebiti solutio*, that the acts of attribution, generally the *datio rei*⁵ in which the *solutio* materialized, had a transferring efficacy completely independent of the existence or validity of the obligation in function of which the attribution had taken place.

The attention, therefore, must be turned mainly to the nature of the transfer acts or deeds; and the investigation must be addressed, in particular, to the structure of the *traditio*,⁶ omitting here the *mancipatio* and *in iure cessio*, because their structure does not involve any particular interpretative problem, as acts of an abstract nature and therefore perfectly able to produce effects, even in the absence of an obligation that integrates the 'cause of the transfer'.

4 CANNATA, *Cum alterius detrimento*, cit., p. 548.

5 C. SANFILIPPO, *Condictio indebiti*, p. 76 *et seq.*; A. D'ORS, *Rèplicas panormitanas IV. Sobre la supuesta 'condictio' sin 'datio'*, in *Iura*, XXV, 1974, p. 27; KUPISCH, entry *Arricchimento*, cit., p. 432 *et seq.*; CANNATA, *Cum alterius detrimento*, cit., p. 553. Actually not all doctrine agrees on the identifiability of essential assumptions for the experiment of the action; according to some, in fact, the *condictio* presupposed the data, but it was also possible to experience it in cases of patrimonial attributions *ex iniusta causa* as a result of *delegatio*, *consumptio nummorum*, *commixtio*, *acceptilatio*, *usucapio*: DONATUTI, *Le 'causae'*, cit., pp. 713-717. SANTORO (*Studi*, cit., p. 185 *et seq.*) denied that the *datio* generally constituted the presupposition of the *condictio*; last FARGNOLI, *Alius solvit*, cit., p. 246 *et seq.*, which identifies among other things a wide use of undue *condictio* in triangular relationships.

6 In addition to the various works on the institutions of Roman law, see B. ALBANESE, *Gli atti negoziali nel diritto privato romano*, Padova, 1982, *passim*.

2. *The causality of the traditio*

The interpretative problem that poses the *traditio* is due to the (apparent) contradictory nature of the sources about the necessity of a cause supporting the act:

D. 41.1.31(Paul. 31 *ad ed.*): *Nunquam nuda traditio trasfert dominium, sed ita, si venditionis aut aliqua iusta causa praecesserit propter quam traditio sequeretur.*

Paul states that the “naked” *traditio*, hence the mere delivery, cannot transfer the domain, but it is necessary that there is a “cause”, such as that related to the sale, or to another cause considered “right”.

Gaius also expresses himself in the same sense:

Gai. 2.20: *Item si tibi vestem vel aurum vel argentium tradidero sive ex venditionis causa, sive ex donationis, sive quavis alia ex causa statim tua fit ea res, si modo ego eius dominus sim.*⁷

In order for the domain to be transferred («that the thing becomes yours as I am its dominus», says Gaius) it is necessary that the thing be delivered as a sale, donation or other cause.

On the basis of these texts, the theory of the causality of the *traditio*⁸ has been

7 Gaius, unlike Paul in D. 41.1.31 who does not report that the cause must be “iusta”, reports a relationship prior to the *traditio*, to which the requested cause must be traced.

8 The idea of the causal *traditio* was born among the jurists of the intermediate period in part also because of the Justinian compilation of the texts mentioning the *mancipatio*: See C. 2.3.20: *Traditionibus ed usucapionibus dominia rerum, non nudis pactis transferuntur.* In the field of modern Roman doctrinal “architecture”, it was Betti who gave new vigour to the theory of causality, in particular, see *Sul carattere causale della traditio*, in *Studi in onore di Salvatore Riccobono*, IV, Palermo, 1936, especially pp. 113-118. Betti links the translation effect to the relationship that the parties intend to make, that is to say to the typical cause, as an element necessarily intrinsic to the *traditio*. On the necessity of a causal element, see also G. GROSSO, entry *Causa (dir. rom)*, in *Enc. dir.*, VI, Milano, 1960, p. 532 *et seq.*; J.G. FUCHS, *Iusta causa traditionis in der Romanistischen Wissenschaft*, Helbing & Lichtenhastein, 1952, p. 130 *et seq.*; M. KASER, *Zur iusta causa traditionis*, in *BIDR*, LXIV, 1961, p. 61 *et seq.* The *traditio* is also defined as a shop with multiple causes or with alternative causes, PUGLIESE-SITZIA-VACCA, *Istituzioni*, cit., p. 277. See also KUPISCH, entry *Arricchimento*, cit., p. 421 *et seq.* and C.A. CANNATA, «*Traditio*» causale «*traditio*» astratta: una

elaborated, widely shared by most doctrine.

It must immediately be observed that the controversial point, even in the light of the texts cited, is not so much the need for a cause that allows the production of the transferring effect, but the concept of "*causa traditionis*".

In this regard, the major interpretative difficulties were presented: this is because, probably, the Civilians, starting from the Common law, as well as the Romanist doctrine, may have put modern practical questions on the interpretation of classical sources.⁹

The difficulties encountered by modern jurists in reconciling the transferring model based on the principle of causality with the restorative remedy envisaged in the case of undue are considerable; and the same Romanist criticism has clashed with the incompatibility of a remedy such as the *condictio indebiti*, with the configuration of the *traditio* as an intrinsically causal transfer, in which the cause is constituted by purposes recognized by the order as typical, essentially identified with the negotiation agreements.¹⁰

This construction of the causality of the '*traditio*' implies the recognition of a valid transfer of ownership only when the *traditio* had been carried out for the purpose of sale, loan, or due to donation or dowry; the causal agreement could correspond to a contract, as in the case of the sale or the mortgage, just as it could not correspond to it, as in the case of the *donatio* or the *constitutio dotis* that were not considered contracts by the Romans.

This reading would not pose particular problems if it were not for the well-known question about the space occupied by an *actio in personam*, such as the *condictio*, which sanctioned unjustified attributions, in a system in which the 'typical cause' allowed an 'upstream' check on the justification of the transfer of the property: this even

precisazione storico-comparatistica, in *Scritti scelti di diritto romano*, II, edited by Letizia Vacca, Torino, 2012, pp. 141-152: they consider the *traditio* a causal translation shop, but with ideas about the 'cause' different from the traditional ones.

9 L. VACCA, *Condictio e iusta causa traditionis*, in *Studi in memoria di Berthold Kupisch e Paolo Maria Vecchi*, edited by S. Patti e L. Vacca, Napoli, 2019, p. 139 *et seq.*

10 BETTI, *Sul carattere causale*, cit., p. 117.

more evident in the case of undue *solutio* carried out by means of *traditio*, in which the absence of a just cause would have had to prevent the occurrence of the translational effectiveness and render the appeal completely useless to the *condictio*.

Moreover, the figure of the *causa solutionis* is well connected to another historical misunderstanding that is not possible to face, at least not in the in-depth way that the problem would require.

The doctrine of the ‘putative cause’ is referred to.

This is a juridical construction of particular historical importance because it has greatly influenced the legal formulations of property transfer models and it is ideally suited for a parallel with the construction of the figure of the *causa solutionis* and the theoretical consequences produced by it.

The medieval juridical science met first with the apparent contradiction between the structure of the *condictio* and the principle of causality of the *traditio*.¹¹

The answer to this contradiction was given by the invention of the putative cause.

In this regard, let us examine the well-known gloss by Accursio to the fragment of Paul¹² on the *iusta causa traditionis*:

Gl. *Iusta causa ad D. 41.1.31 pr.* “*iusta causa*”: *vera vel putativa, alioquin, id est si dicas ex causa putativa non trasferri dominium, totus titulus de condictione indebiti repugnaret: qui titulus habet locum quando transfertur dominium alicuius rei ex putativa causa...*

The reflection of the glossator is extremely “practical”: Accursio writes, in fact, that the right cause of which Paul speaks can be both true and putative, *i.e.*, only in the intentions of the parties. This is because, otherwise, the entire title (of the Digest) dedicated to *condictio indebiti* («*totus titulus de condictione indebiti repugnaret*») should be eliminated.

This is supposed to avoid running into a macroscopic contradiction with the transfer system built by medieval jurists.

11 CANNATA, «*Traditio*» causale, cit., 153; VACCA, *Osservazioni*, cit., pp. 581-583.

12 CANNATA, «*Traditio*» causale, cit., 153; VACCA, *Osservazioni*, cit., pp. 581-583.

This is an interpretation rendered in a state of difficulty in identifying a coherent connection between remedy and structure of the transfer method: the reasoning is independent of any investigation into the phenomenon of the cause of the transfer; Accursio limits himself to attributing validity to the cause that the parties had mistakenly and in good faith considered valid.

This is the impasse generated by the idea of the binomial *causa remota-causa proxima*, typical of the elaborations around the figure of the ‘cause’ in medieval law,¹³ which is made to coincide with the other binomial expressing the functioning of the models of transferring of the property, that of the *titulus* and of the *modus*,¹⁴ characterizing the real rights that the sixteenth-century legal science had accepted, and that followed precisely the interpretation of the sources concerning the cause of the *traditio*.¹⁵ According to this reading, the causal transfer is characterized by the need for a valid juridical foundation that justifies the transfer of property in a definitive way (*causa remota*, that is, the most modern *titulus*)¹⁶ and from an external act that realizes the transfer (*causa proxima* or, in modern key, the *modus*).¹⁷

In this way the *traditio* ends up being identified with the *modus*, the material act of ownership, constituted by the delivery of the good accompanied by the will of the parties to transfer; while the *titulus* is identified with the negotiating cause, on which the *traditio* depends, completely distorting the Roman setting and attributing to the causal agreement made with *traditio* the double value of *titulus* and *modus*, to use the

13 See I. BIROCCHI, *Vendita e trasferimento della proprietà nel diritto comune*, in *Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica*, in *Atti del congresso internazionale Pisa-Viareggio-Lucca (17-21 aprile 1990)*, edited by Letizia Vacca, I, Milano 1991, p. 139 *et seq.*

14 F. HOFMANN, *Die Lehre vom titulus acquirendi und vom der iusta causa traditionis*, Wien, 1873, p. 21 *et seq.* and p. 36 *et seq.*; FUCHS, *Iusta causa*, cit., p. 73 *et seq.*

15 H. COING, *Europäisches Privatrecht, I: Älteres gemeines Recht (1500 bis 1800)*, München, 1985, p. 179 *et seq.*, p. 303 *et seq.*

16 HOFMANN, *Die Lehre*, cit., p. 42.

17 The development of this doctrine will lead to the “pure causal” system adopted by the Prussian Code (ALR §§ 1-2 I, 9; § 1 I, 10) and the Austrian Code (ABGB § 423-426 e § 431) as well as to the transfer system based on the principle of translational consent typical of the civil Code (Art. 1196 of the Civil Code after the reform of 1 October 2016) and of the Italian Civil Code of 1865 (Art. 1125) and of 1942 (Art. 1376). See KUPISCH, *Causalità e astrattezza*, in *Vendita e trasferimento*, cit., p. 433 *et seq.*

same categories.

Since Accursio was not able to justify the occurrence of the transfer of the ownership of the asset in the hypothesis of *indebiti solutio* given the absence of the remote cause – the obligation to be fulfilled originated by a *titulus* – he resorted to the elaboration of the figure of the putative cause, integrating the mere belief of the parties of the existence of the obligation to be extinguished, and that constitutes a valid remote cause, or, if you will, a valid *titulus*.¹⁸

Moreover, the doctrine of the *titulus* and of the *modus* leads to an abstract model of transfer of property going in the opposite direction to the first ideas of the medieval legal science.¹⁹

3. Considerations on the *iusta causa*

The observations to be made are manifold, also because none of the readings of the sources examined so far would seem to accurately reflect the model of transfer of Roman property.

The juxtaposition operated here between the ‘putative cause’ of the glossators

18 On the question of the *cause-condictium* relationship in medieval science, see in particular A. SÖLLNER, *Die Causa im Konditionen und Vertragsrecht des Mittelalters bei den Glossatoren, Kommentatoren und Kanonisten*, in *Z.R.G., Rom. Abt.*, LXXVII, 1960, pp. 182-269.

19 From the putative cause to the abstractness of the transfer by *traditio*, the step was relatively short: Baldo observed that the consent of the parties to the transfer by contract is sufficient to produce the translational effect. (*Opera omnia*, VIII, ed. Venetiis, 1615, *super* C. 4.50.6: *ex consensu propter contractum: ita quod causa immediata id est consensus in traslatione domini est sufficiens ad dominium transferendum*); the commentator also considered that an invalid *titulus acquirendi* was sufficient as an element in support of the act of transfer: BALDUS, *Opera*, cit., *ad* C. 2.3.20: *Consensus tradentis habentis trasferendi dominium potestatem, subsistente causa vera vel putativa, ad traslationis domini ordinata, inducit traslationem domini. Quaelibet ergo traditio ordinatur a sua causa*. The importance for the translational effect of the encounter between the will of the *tradens* and the will of the *accipiens* will be underlined by the Donello, *Commentarii*, cit., XIV, 16 n° 9, and by Pothier, *Traité de l'action condictio indebiti*, n° 178. The latter, however, was not followed by the compilers of the civil code, while his own idea found expression in the German legal science. The abstractness of the *traditio* and, in general, of the transfer of property, in fact, was taken up and affirmed with vigour by F.C. VON SAVIGNY, *Das Obligationenrecht als Teil des heutigen Römischen Rechts* II, Berlin, 1853, pp. 256 *et seq.*, who, criticizing the *titulus+modus* mechanism, claimed, using the example of giving alms to the beggars, that the translational effect is linked only to the will to transfer, while the cause is nothing more than the testimony, the index of that will, so that the delivery with the agreement to the transfer of ownership gives rise to a single act, or rather a contract with real effect, the *dinglicher Vertrag*, what is the *traditio* (ID., *Das Obligationenrecht*, cit., pp. 257 *et seq.*).

and the constructions of the modern romanistic science on the *traditionis causa* (like that of Cannata or of Kupisch) ends up in affirming the impossibility of attributing to the payment, especially to an undue payment, a structure modeled on the typical legal acts, primarily when this typicality takes on the appearance of causality in a “traditional” sense.

This incongruity has also strengthened the parallel idea of abstract *traditio*, a construction that is part of the Romanist doctrine²⁰ based on the most significant datum²¹ of an absence of concordance in the same Roman sources about the necessity of the cause in support of the *traditio*.

In a fragment extracted from the *Res cottidianae*, it is stated that, according to the principles of natural law, nothing is more effective for transferring the property than the will of the owner himself, that meets the will of the *accipiens* to buy.

D.41.1.9.3. (Gai. 2 *aur.*): *Haec quoque res quae traditione nostrae fiunt, iure gentium nobis adquiruntur: nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi.*

In a text by Giuliano,²² it is reported that the lack of agreement between the parties on the cause does not invalidate the real effect of the *traditio*, noting for the purposes of transferring essentially only the agreement on the ‘*tradere*’, namely on the transfer.²³

20 We owe to Voci the most important reinterpretation of the theory of the abstractness of the *traditio*: see above all P. VOCI, *Modi d'acquisto della proprietà*, Milano, 1952, p. 138 *et seq.* The *traditio* is configured as an abstract translational shop on the basis of the elaborations of the German pandettism: A. BURDESE, *Manuale di diritto privato romano*, Torino, 1987, p. 307 *et seq.*; M. MARRONE, *Istituzioni di diritto romano*, Palermo, 1989, p. 435 *et seq.* For a consideration of the *iusta causa traditionis* as integration of the will of the parties to the realization of the transfer, see also M. TALAMANCA, *Istituzioni di diritto romano*, Milan, 1990, pp. 436-437.

21 It is an interpretative path followed by a part of the science of *ius commune*, while the School of natural law, like Savigny, comes to the idea of the translational will transcending the cause on the basis of conceptual reflections based on the role of consensus and the role of the force of the will in the context of translational delivery.

22 See C.A. CANNATA, *Iul. D. 41,1,36: una “interpolazione occasionale”*. *Incontro con Giovanni Pugliese (18 aprile 1991)*, Milano, 1992, pp. 67-76, in *Scritti scelti di diritto romano*, II, edited by L. Vacca, Torino, 2012, p. 23, pp. 25-27.

23 See L. VACCA, *'Iusta causa' e 'bona fides' nell'usucapio' romana a proposito del titolo 'pro suo'*, in *Appartenenza e circolazione dei beni*, Padova, 2006, p. 79 *et seq.*

D. 41.1.36.13 (Iul. 13 dig.): *Cum in corpus quidem quod traditur consentiamus, in causis vero dissentiamus, non animadverto cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existemes ex stipulatu tibi eum deberi, nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi accipias, constat proprietatem ad te transire nec impedimento esse quod circa causam dandi atque accipiendi dissenserimus.*

According to the theory formulated on these texts the agreement of the parties would produce the real effect, while the right cause would not be understood in a modern sense as a typical obligatory relationship that underlies the transfer deed, but as an index of the parties' wishes.²⁴ This implies that the cause, whether 'actual' or 'putative', has no practical relevance, being only a mere proof, a sort of index, of the existence of a reciprocal transferring will.

The clear separation – stemming from the construction of the *traditio* – between obligatory and transferring act does not take into account the relevance of the cause in the ways of acquiring property in the Roman order. Such cause is expressed in rather articulated ways and does not certainly exhaust the mere probative function of the will of the parties in the negotiation.

One cannot avoid giving the right relevance, within the framework of real effectiveness, to the transferring agreement.²⁵

4. *The iusta causa as an expression of the qualified translational agreement*

The considerations made on the texts related to the *traditio* support the idea that the cause of the *traditio* would preferably be identified not with the negotiating agreement, but with the transferring agreement: the *traditio*, first of all, would produce the transfer of the goods when the will of the *tradens* and the will of *accipiens* agree on

24 VOGLI, *Modi d'acquisto*, cit., p. 138 *et seq.* according to which the *iusta causa* represents the formal expression of the will of the parties, the only element to which the transferring effectiveness is attributed.

25 VACCA, *Osservazioni*, cit., pp. 588-589. She notes «his reconstructive scheme undoubtedly appears much closer to the conceptualization of Roman jurists than it is the recourse to the distinction between cause of attribution and cause of justification, or the scheme of the putative cause, but it can appear in its whole in a certain sense 'over-structured' with respect to the solutions of classical jurisprudence».

the passage of dominical ownership and the essential cause would be the agreement of the transferring wills.²⁶ This would seem to be the meaning of Giuliano’s statement, which notes that if one agrees to do the transfer but disagrees with its cause, there is no reason why the *traditio* should be considered ineffective («cum in corpus quidem quod traditur consentiamus, in causis vera dissentiamus, not animadverto cur inefficax sit traditio...»); and it would seem to consist of the reference ex D. 41.1.9.3 about the *iure gentium* origin of the *traditio*: «nothing complies with natural law and equity as the will to transfer dominion and the will to acquire it».²⁷

As for the reference to the ‘cause’ of Paul, I believe that the jurist understood the interest in the realization of the goal of the transferring agreement, defined precisely as a just cause: Paul takes as a specific example the *causa venditionis* – whose negotiating order, among other things, presented strong peculiarities with regard to the translation aspect linked to the seller’s obligation²⁸ – referring in a rather vague way to the external cause. One could think that it was not necessarily a question of typical *iustae causae*, for example those of negotiation, but of *causae* which could be reconnected to the *traditio* and be “*iustae*” according to the set of parameters of the order. Furthermore, it does not seem at all negligible that the Severian jurist precisely stated that the good cause must precede the *traditio* of the good, and that it is thus preexistent with respect to the transferring and non-contextual act as is largely deduced from the use of the ‘*praecedere*’ and ‘*sequerere*’.²⁹ In this sense, it seems to refer explicitly to an extrinsic element with respect to the *traditio*, rather than to its constitutive factor, as instead the traditional doctrine on causality wanted.³⁰ The extrinsic element can be related to the wider context of the juridical-patrimonial interest that the parties intend to realize through the transferring agreement.

Conversely, the naked *traditio* that, according to Paolo, does not allow the

26 See VACCA, *Osservazioni*, cit., p. 589, who speaks about “*causa minima necessaria*”.

27 D. 44.7.55 (Iav. 12 *epist.*) Undoubtedly, there are “oscillations” in the Roman jurisprudence: VACCA, *Annotazioni*, cit., 181 nt. 23, ID., *Osservazioni*, cit., pp. 589-590.

28 VACCA, *Annotazioni*, cit., 173, nt. 11.

29 For Cannata this precedence is merely logical: CANNATA, «*Traditio*» *causale*, cit., p. 143.

30 BETTI, *Sul carattere causale*, cit., p. 114.

domain to be transmitted from the *tradens* to the *accipiens* shall be identified with the mere material delivery, unqualified by the “transferring will” of both parties.

Therefore, the statements contained in the texts can be coherently related to each other: while Giuliano, in D. 41.1.36.13, addresses the question from the point of view of the transferring effect of the *traditio*, whose real effectiveness is linked to the agreement (*consentiamus*) to transfer (*quod traditur*); Paul, in D. 41.1.31, deals with the aspect of completeness and finality of attribution carried out by *traditio*, for which the good cause is necessary. Paul emphasizes that the absence of a valid justification is going to affect not the realization of the real situation (which is only affected by the completion of a naked *traditio* in the sense explained above) but rather the justification of the purchase that, I would add, becomes susceptible to potential removal by *condictio*.

In this sense, the *traditio* would have to be constructed as a causal transfer act, where, however, the transferring cause consists not of the obligation or of the underlying negotiating relationship or of the purpose recognized as typical, but of the agreement of the parties to the production of the translational effect. This does not make the *traditio* a purely abstract store, separated from the juridical foundation of the transfer: the cause identified with the agreement of the *tradens* and *accipiens* aims at realizing, through a real transfer, a specific set of interests, which in some cases is concluded in a negotiation context (for example sale, mortgage, dowry or donation promise), but which can also be detached from such context and be constituted by the purpose that the parties intend to achieve, absorbed directly by the act of delivery (as donation or dowry). This interest determines the “destiny” of the transfer with respect to its consolidation; in this sense, the just cause coinciding with the interest pursued by the parties, which can be identified with a typical negotiating cause or not, is absolutely necessary: precisely its possible absence justifies the presence of the *condictio* as remedial measure.

However, this does not affect the immediate transferring purpose. I believe that the same Giuliano endorses this critical reading when referring to the disagreement over the cause, it seems he distinguishes between the transfer plan and the general cause of the transfer, or it seems he separates the ‘cause of the attribution’ from the ‘cause of justification’.³¹ This leads us to consider as confirmed and further reinforced the idea

31 In the opposite sense VACCA, *Osservazioni*, cit., p. 586.

that the Roman *prudentes* clearly distinguished the plan of patrimonial attributions from the plan of causal justifications, and that they would take appropriate remedial measures according to the scope of realization of the attribution, whether the cause of justification be real or invalid.

5. *The restitutory obligation*

The idea that the justification of attribution is dependent on a mechanism different from the one governing the transferring event and the idea that the foundation of the restorative obligation is to be found outside the attribution is not shared in doctrine.³²

The foundation of the restoring obligation, which must be isolated from the level of the rights *in rem*, is connected to an assessment of the justification of the act of attribution,³³ an evaluation stemming from, and I agree with Cannata, criteria of substantial justice.

In this sense, substantive justice operates as a complement to the strict law: the failure to achieve the interests of the subjects of the patrimonial juridical relationship (the just cause) represents a deficiency relative to an element of the case, a deficiency that affects the entire affair of the attribution, preventing the crystallization of the patrimonial consequences from the arising attribution.

32 BETTI, *Sul carattere causale*, cit., p. 117. Among those who consider the *traditio causale* in the typical sense, the obligation of *restitutoria* of the *solutio undbiti* derives from the absence of the cause, and the need to resort to the *condictio* would be dictated by the purchase *ex alia causa* of the goods object of the *traditio*, being mainly money that enters the assets of the *accipiens* for confusion. GROSSO, voce *Causa*, cit., p. 532 *et seq.*; FUCHS, *Iusta causa traditionis*, cit., p. 138 *et seq.*; KASER, *Zur iusta causa*, cit., p. 69. Differently SANFILIPPO, ‘*Condictio indebiti*’, cit., pp. 41-42, who considers the cause of the *traditio* to be identified with the *causa adquirendi*, whereas the basis of the obligation to *restitutoria* resides in the absence of the *causa retinendi*. Contrary to the idea of Sanfilippo, Talamanca observes that speaking of a lack of the *causa retinendi* presupposes an evaluation in positive terms of a phenomenon that would be more appropriate to evaluate in negative terms: in the sense that the perspective of the jurists is that of the *solvens*, so that it is preferable to speak of *causa condicendi* with regard to the lack of cause of attribution, rather than of lack of cause of retention of the purchase by the *accipiens*: TALAMANCA, *Rec. a Schwarz*, in *AG*, 1953, 172 f.

33 The interest that the *solvens* intends to pursue consists in the extinction of the obligation, but this is not relevant at the time of assignment, in which only the translational agreement is relevant; the interest, on the other hand, is relevant in the second instance, that is, in the cause justifying the restitution. Also VACCA, *Osservazioni*, cit., p. 587 *et seq.*

Clearly, even these parameters of substantive justice merge into principles that jurisprudence establishes through practical interpretation: the articulation of these principles revolving around the concept of *sine causa* constitutes the application area of the *condictio* in function of the so-called non-contractual restitution.

The main characteristic allowing the *condictio*³⁴ to cover the vast range of the obligations to a *certum* has already been mentioned: the high degree of abstractness of the formula.³⁵ Such abstractness allowed the jurisprudence to foresee the use of the *actio* every time the solution of a case in point required it. It is certain that the original field of application of the action was that of protecting debts deriving from certain types of contracts (mortgage, stipulation, literal contracts).³⁶

However, the use of the *condictio* as a sanction for unjustified attributions was common at a fairly early date, as reported by Ulpiano in his book XVII of the commentary *ad Sabinum*:

D. 12.5.6: *Perpetuo Sabinus probavit veterum opinionem existimantim id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.*

The text is a clear example of the opinion of the *veteres* (the *fundatores* of the *ius civile* up to and including Quinto Mucio)³⁷ according to which what is found in

34 The protection of the obligation in the technical sense is mainly linked to the birth of the process *per formulas* and its evolution (CANNATA, *Per una storia*, cit., pp. 180-182). The formula was composed of several parts, including mainly *intentio* and *condemnatio*: see D. MANTOVANI, *Le formule del processo privato romano. Per la didattica delle Istituzioni di diritto romano*, 2, Padova, 1999.

35 The intention, part of the formula in which the claim of the actor is reproduced, was characterized by abstractness. It affirmed the existence of a debt of certain pecuniary or certain *res* without mentioning the cause, or the constitutive source of giving work. Thus, it has been reconstructed the structure of the formulation of the *condictio certae pecuniae*: «Si paret N. Negidium A. Agerio sestertium X mila dare oportere». For the *condictio certae rei*: «Si paret N. Negidium AAA. Agerio tritici Africi optimi modios centum dare oportere».

36 Cic. *Pro Roscio com.* 5.14; Gai.4.4; D. 12.1.9pr.-3. See for example DONATUTI, *Le 'causae'*, cit., p. 706; B. ALBANESE, *Per la storia del'credito'*, in *AUPA*, XXXII, 1971, p. 5 *et seq.*; CANNATA, *La classificazione*, cit., pp. 272-273.

37 R. VON MAYR, *Die 'condictio' des römischen Privatrecht*, Leipzig, 1900, p. 124; O. BEHREND, *Les 'veteres' et la nouvelle jurisprudence à la fin de la république*, in *RHDFE*, LVI, 1977, p. 8 *et seq.*; M. TALAMANCA, *Pubblicazioni pervenute alla direzione*, in *BIDR*, XCVI-XCVII, 1983-1984, p. 916; M. HORAK, *Wer wassen die veteres? Zur*

someone’s property for an unjust cause can be recovered by *condictio*; the opinion was shared by Sabino and Celso. Therefore, Ulpiano not only refers us to the conceptual data but also tells us that it is an opinion shared by much of classical jurisprudence.

The principle condensed in the *opinio* refers to the hypotheses of patrimonial attributions which, albeit valid and effective on a real level, are devoid of a cause (*iusta*) and therefore subject to removal by *condictio*; *actio* that allowed the recovery, in pecuniary terms, of the *certum* unjustly attributed. Considering that the statement of the *veteres* is very general, this has inevitably given rise to different interpretations both on the meaning to be attributed to the ‘*quod apud aliquem est*’,³⁸ and on the meaning of the ‘unjust cause’. As far as concerns the first aspect, over time the jurisprudence has shown different oscillations, which make it possible to identify *dationes* as privileged context, even if with openings towards forms of attribution, even indirect, that is to say attributions that are not directly related to behaviors implemented by the subjects involved in the unjustified attribution.³⁹

As for the general meaning of the unfair cause, it is also specified with time by the overlapping of the casuistic solutions.⁴⁰

This is what I believe needs to be highlighted, especially from the perspective of this study: starting from a consolidated opinion in the first “creative” jurisprudence, a system of protection based on the condition that developed through the concepts of ‘*ex iniusta causa*’ or ‘*sine (iusta) causa*’ and of ‘*quod est apud aliquem*’, whose scope has

Terminologie der klassischen römischen Juristen, in *Vestigia Iuris Romani. Festschrift für G. Wesener zum 60. Geburtstag am 3. Juni 1992*, edited by Klingeberg-Rainer-Stiegler, Graz, 1992, p. 201 *et seq.*; VACCA, *Osservazioni*, cit., p. 576 *et seq.*; see also CANNATA, *Cum alterius detrimento*, cit., p. 559.

38 The remedy covered a rather wide field of application, that of transfers of goods, mainly occupied by the *dationes*. Nevertheless, the translational data did not exhaust the cases of attributions for which the *condictio* was operational; among the first to dismantle this assumption in doctrine see R. SANTORO, *Studi sulla condictio*, cit., p. 185 *et seq.*; recently SACCOCCIO, *Si certum petetur*, cit., p. 98; p. 103.

39 On the oscillations, evidence of this can be found in the texts: D. 12.1.32 (Cels. 5 *dig.*) D. 12.6.33 (Iul. 39 *digest.*) D. 12.1.23 (Afr. 2 *quaest.*) in which the concession of the *condictio* is alternated only for the recovery of the *certum* deriving from a shop between the parties and the overcoming of the assumption of the *negotium contractum*: S. PEROZZI, *Le obbligazioni romane*, cit., p. 102 *et seq.*; SANFILIPPO, *Condictio indebiti*, cit., p. 54; KASER, *Das römische Privatrecht*, I, cit., p. 497; L. PELLECCHI, *Lazione in ripetizione*, cit., 80; CANNATA, *Cum alterius detrimento*, cit., p. 563 *et seq.*; SACCOCCIO, *Si certum petetur*, cit., p. 378 e p. 390.

40 D. 12.7.2; D. 12.1.32; D. 19.1.30pr.; D. 12.6.23pr.

been specified by the stratification of practical solutions.

This is confirmed by Papiniano in

D.12.6.66 (Pap. 8 *quaest.*): *Haec conditio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit.*

«This condition is an action created according to what is right: allowing to recover what someone, without cause, has taken from others».

Papiniano says ‘introduced,’ which I think gives the idea of a use of the *conditio* in a negotiating context different from what was originally foreseen, and this new interpretation follows the way paved by the previous jurists.

Not even Papiniano defines the concept of *sine causa*, on which the granting of the *conditio* depends, as well as the generic anchor is the *quod alterius apud alterum deprehenditur*. I believe this is due to the fact that it is intended to express the expansive force of a rule which, at the time of Severian, provides a unique way to offer solutions regarding refunds.⁴¹

A general picture of the ‘*sine causa*’ that seems to summarize the results of the previous jurisprudential reflections is the one proposed in the opening fragment of title D.12.7.1 which contains a text of the XLIII book of the commentary *ad Sabinum* by Ulpiano:

Est et haec species condictionis, si quis sine causa promiserit vel si solverit quis indebitum. qui autem promisit sine causa, condicere quantitatem non potest quam non dedit, sed ipsam obligationem. 1: Sed et si ob causam promisit, causa tamen secuta non est, dicendum est condictionem locum habere. 2: Sive ab initio sine causa promissu est, sive fuit causa

⁴¹ This has not prevented a reflection in terms of substantial application with regard to the ‘*repetere*’ as shown by the long fragment of Paul. 12.6.65pr.-9 (17 *ad Plaut.*) which at the beginning states: *In summa, ut generaliter de repetitione tractemus, sciendum est dari aut ob transactionem aut ob causam aut propter condicionem aut ob rem aut indebitum: in quibus omnibus quaeritur de repetitione.* The Pauline treatment of the *datioes* that gives rise to the *repetitio* offers a glimpse of the large space occupied by unjustified translational data in the area of unjustified attributions sanctioned by *conditio*: on this point, see above all PELLECCHI, *L'azione di ripetizione*, cit., *passim*, p. 158 *et seq.*

promittendi finita est vel secuta non est, dicendum est condictioni locum fore. 3: Constat id demum posse condici alicui, quod vel non ex iusta causa ad eum pervenit, vel redit ad non iustam causam.

In the text the jurist states that the condition applies to the *stipulatio* without a cause, as well as to the debtor. Even the one who promised without cause, who cannot recover what he did not give, can act to be released from the obligation. Ulpiano then, in point 2, goes on to clarify that the action finds application even when there was a *stipulatio*, furnished with cause, to which the cause then did not follow up; the *condictio* therefore will be had both when it has been promised without cause, and when there has been a cause that then has not been realized. The passage ends at point 3, when he affirms that all the assets included in the patrimony of a subject not because of a just cause can be object of *condictio*.

The text of Ulpiano presents the different articulations posed by the *sine causa*, so not necessarily a lack of justification *ab origine* of the attribution, but also its disappearance or its subsequent exhaustion.

The theorizing of the '*sine causa*' of Ulpiano must be placed in connection with the general statements concerning unjustified attributions, as well as with the solutions that the jurisprudence has formulated throughout the classical period. The overlap of the solutions underlying the reflections of the jurists allows to grasp a conceptual identity between the *sine causa* of Papiniano and Ulpiano and the unfair cause the *veteres* referred to, as well as Sabino and Celso.

On the matrix of the principle that provides for the removal of unjustified attributions, a specific in-depth analysis is needed.⁴² For the purpose of the present paper, I will limit myself to observing that the evaluation of the existence of a suitable justification for attributions occurs according to parameters of the *bonum et aequum*.

As we have tried to highlight, this sketching of the restorative duty has its roots in a rule elaborated by Republican jurisprudence that remains constant throughout the

⁴² KUPISCH, entry *Arricchimento*, cit., p. 427 et seq. CANNATA, *Cum alterius detrimento*, cit., p. 544; VACCA, *Osservazioni*, cit., p. 576 et seq.; CORTESE, *Quod sine iusta causa*, cit., p. 29 et seq.; p. 83 et seq.

long phase of the so-called classic creative jurisprudence:

D. 12.5.6: *Perpetuo Sabinus probavit veterum opinionem existimantim id, quod ex iniusta causa apud aliquem sit, posse condici: in qua sententia etiam Celsus est.*

The progressive design of the individual cases has led the Roman criticism to the identification of the necessary preconditions for the possibility of the *condictio*: *the datio and the sine causa*. However, although the texts report the frequent recurrence of some substantial elements in the context of granting the *condictio*, it is more appropriate not to become rigid in the formulation of specific application requirements. It was not a matter of jurisprudence to elaborate a restorative system of the *condictio* based on fixed presuppositions; on the contrary the malleability of the *actio* allowed the named progressive delineation of its applicative sphere, in relation to the resolution of the single cases.

As for the specific profile of the *sine (iusta) causa*, I wanted to highlight here the necessary separation, although not conceptually formalized in the context of the *prudentes*, between the cause of the transfer and the cause of the restitution.

We have tried to demonstrate, precisely through the example of *indebiti solutio*, that the aspect of the case supporting the attributions was articulated in a complex way: on the one hand, relevance was attributed to the cause of the transfer, with the elaboration of substantial mechanisms or of procedural tools that allowed a purchase of the property perfectly legitimate and valid for the sorting; on the other hand recourse was made to corrective tools of translational events which, although permitted by the real order, were not justified according to the more strictly equitable instances, also parts of the complex Roman order.

The interpretative problem that has arisen in both Roman and civil law doctrine is due to the rigid overlap of the two causal levels, an overlap that has led to serious problems of compatibility between the construction of substantial cases and the procedural action of repetition.

In some cases, the cause of the transfer and the cause of the justification certainly converge: this is the typical example of the legal acts imposing obligations to give; here, however, the control of the justification cause is absorbed upstream by the cause of the transfer recognized as typical by the law and therefore valid, “fair”.

But in various hypotheses the coincidence between causes does not exist and while the transfer story “lives” of its own rules on the basis of preordained mechanisms (as in the case of *indebiti solutio*), the aspect of the justification of the attribution assumes relevance in the general context of the balances an order is called to protect, and that here determines the need to return.

This is the field in which the Roman jurisprudence has undertaken that work of tracing of the discussed *condictio restitutoria* guided by the well represented common thread in the principle of *quod sine iusta causa apud aliquem est, potest condici*.