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# Cause and Consideration

*Exploring the Foundations of Contract Law*

Edited by  
Bruno Rodríguez-Rosado  
Rocío Caro Gándara  
and  
Antonio Legerén-Molina

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In classical Latin, our term covers all the uses that 'cause' has in English.<sup>6</sup> It is used profusely in legal language,<sup>7</sup> normally without a dogmatic meaning, as it has rather an argumentative or topical use<sup>8</sup> that can sometimes confuse us, when we read Roman texts 'prejudiced' by our training in civil law. For example, a text by Ulpianus speaks of cause in the sense of final cause and might make us think that the Romans used the term in question as a French, Italian or Spanish jurist would:

Ulpianus/Labeo D. 17,1,8 pr. (31 *ad ed.*): If I appoint a procurator and he does not return the documents relating to the case to me, under which action may he be liable to me? Labeo takes the view that he is liable on mandate and that the opinion of those who hold that an action on deposit can be raised on these grounds is not sustainable; for one must look to the origins of each and every contract and the factors lying behind it.<sup>9</sup>

There is an apparent coincidence between one of the senses in which we use the concept of cause today, the socio-economic purpose of the contract, related to the type of contract, and the use made by the jurist Ulpianus of our term, which allows him to qualify the contract and consequently choose the appropriate action to claim the return of the documents. We might therefore think that the Romans used a dogmatic concept of cause similar to that found in Italian doctrine. However, Ulpianus' course of thought is simpler. He asks what is the relationship that binds the parties and examines what they have done. It turns out that the plaintiff had given some documents to the procurator to litigate on his behalf. The handing over of the documents alone would constitute a deposit, but the jurist recalls that the act makes sense if it serves the purpose of creating a procedural representation. He thus expresses a truth of the world of interpretation: that human actions are understood when their purpose is understood. Nothing more.

## II. Just Cause for the Delivery of the Thing and Acquisition without Cause

There is an area in which the term *causa* is used with a technical meaning that survives in modern law, that of the *iusta causa traditionis*. It is sufficient to recall the text of Justinian's *Institutes*, 2,1,41: '[corporeal things] are undoubtedly transferred if they are delivered by reason of gift or dowry or by virtue of any other cause'.<sup>10</sup>

In this use of the term 'cause', the idea of purpose is present, eg the seller delivers because he wants to fulfil the obligation incumbent on him, in exchange for which he receives or will receive the price, but when delivering 'by way of sale', the idea of efficient

<sup>6</sup> See n 2 above.

<sup>7</sup> H Heumann and E Seckel, *Handlexikon zu den Quellen des römischen Rechts*, 10th edn (Graz, Akademische Druck, 1958) 59–61 distinguishes up to eight meanings for the term in the sources.

<sup>8</sup> About the use of *causa* in Roman legal language, see VA Georgesco, 'Le mot *causa* dans le latin juridique. Introduction à la théorie générale de la cause en droit romain' in *Études de philologie juridique et de droit romain*, I, *Les rapports de la philologie classique et du droit romain* (Bucharest, Revista Clasică, 1940) 129ff (cf the review by EH Kaden (1938) 58 *Zeitschrift für Rechtsgeschichte. Romanistische Abteilung* 307).

<sup>9</sup> *Si procuratorem dederō nec instrumenta mihi causae reddat, qua actione mihi teneatur? Et Labeo putat mandati eum teneri nec esse probabilem sententiam existimantium ex hac causa agi posse depositi: uniuscuiusque enim contractus initium spectandum et causam.*

<sup>10</sup> *Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferentur.*



# Cause in Ancient Roman Law of Contract

FRANCISCO J ANDRÉS SANTOS\*

## I. Introduction

The concept of cause of the contract stems from a certain circle of problems in Roman law. Nevertheless, it must be said from the very beginning that the Romans never thought of 'the cause of the contract', and only belatedly did they think of the contract as a general concept.<sup>1</sup> The use of the term '*causa*' was extensive and it had a very broad meaning in Latin: the *Thesaurus Linguae Latinae* lists hundreds of occurrences in the transmitted sources (occupying up to 22 folio pages)<sup>2</sup> and the *Oxford Latin Dictionary* distinguishes as many as 20 different meanings of the term.<sup>3</sup> In Ernout and Meillet's etymological dictionary,<sup>4</sup> we are told that the first meaning of the term was possibly that of motive. *Causa* must have been understood initially in the sense of efficient cause. *Causa* also very soon came to be known as the subject of each of the parties in a trial, and from there it came to mean the trial itself and then subject in general, as *res*, 'thing'. It is often associated with *ratio*, but, although *ratio* is a cause, there is no *ratio* in every cause. This is well expressed by a Latin grammarian of the third century:

Between cause and reason it turns out that in reason there is always a cause, but in cause there is not always reason, and that in reason there is a plan, but in cause not always. There is a cause for Juno's anger against Aeneas, but no reason. The learned man has reason for being learned and also cause.<sup>5</sup>

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<sup>1</sup> See generally, more recently, R Fiori, 'The Roman Conception of Contract' in TAJ McGinn (ed), *Obligations in Roman Law: Past, Present, and Future* (Ann Arbor, University of Michigan Press, 2017) 40–75.

<sup>2</sup> *Thesaurus Linguae Latinae*, vol 3 (Leipzig, Teubner, 1906–12) 659–701.

<sup>3</sup> *Oxford Latin Dictionary*, fasc 2 (Oxford, Clarendon Press, 1969) 289–90.

<sup>4</sup> A Ernout and A Meillet, *Dictionnaire étymologique de la langue latine. Histoire des mots* (Paris, Klincksieck, 1985) 108.

<sup>5</sup> *Inter causam autem et rationem hoc est ut in ratione semper causa est, in causa vero non semper est ratio, et quod in ratione semper consilium continetur, in causa vero non semper. Causas habet Iuno ut irascatur Aeneae, non rationem; habet rationem doctus ut sit litteratus, habet et causam.* The text was written by Marius Plotius Sacerdos, a grammarian of the 3rd century, author of the work *Artium grammaticorum libri tres*, edited by H Keil, *Grammatici Latini*, vol 6, fasc 2 (Leipzig, Teubner, 1874) 446.



the expectation]. This means that either the stipulator makes or has made a performance or there is an expectation that he will do so: eg Titius is promised a sum of money to do a work.

In any case, it was a puzzle for medieval jurists to explain in a logically coherent way the whole problem of bare covenants, their relation to cause and the different meaning of cause in *stipulation*.<sup>36</sup>

<sup>36</sup> See ch 2 in this volume, by João de Oliveira Geraides.