Was justa causa necessary for traditio in Roman law?

No legal doctrines are so firmly established as those which we learnt dogmatically as students. We may argue over the precise scope of such a rule, its justification, its relationship with other rules, and its place and function in the legal system; but only rarely do we question the validity of the basic principle itself, or re-examine the texts from which it is supposed to be derived. One clear example of a doctrine that has become established in this way is the rule that for transfer of ownership by traditio in Roman law “there must be a justa causa”.¹ There has been much discussion² of the correct interpretation of this restriction, the reasons for it, its connexion with the rule that ownership of res vendita et tradita does not pass until the price is paid, and the relationship between justa causa here and in the law of usucapio.³ But it is agreed by almost everyone⁴ that a justa causa of some sort was always required, and that is made the starting point of the discussion. The basic texts are rarely cited in full, let alone discussed in any detail.⁵ It is time for a re-examination of those texts, which we hope will shed some light on related topics as well.

G 2 19, 20:

Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. Itaque, si tibi ursum uel aurum uel argentum tradidere, siue ex uenditionis causa siue ex donationis siue quavis alia ex causa, statim tua fit ca res, si modo ego cius dominus sim.

Nowhere in this text does it say that a justa causa was necessary. The causae given are simply practical examples of circumstances in which ownership does pass by traditio, illustrations which are highly suitable for an introductory students’ manual such as Gaius’ Institutes. It is true that Schulz⁶

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¹ Buckland Textbook of Roman Law (3rd ed Cambridge 1963) 228.
² Keest Römisches Privatrecht (2nd ed Munich 1971) 416–7 and literature at n 27.
³ For just one example see Hoetink “Justus titulus usucaptionis et justa causa tradendi” 29 (1961) Tijd 230.
⁴ Including previously the present writer (see 87 LQR 139) who was precisely one of those who had accepted the rule unquestioningly as a student.
⁵ For example, Voci, an opponent of “causal” traditio, completely ignores the texts in 15 SDHI 147–8, and dismisses them without discussion in a footnote in Modi di acquisto della proprietor (Milan 1952) 143 n 2, in a way which makes the reader suspect that he thinks they are against him. Bonfante cites the texts in full but without comment that he thinks they are against him. Ehrhardt Justa causa traditio (Berlin and Leippzig 1930) 125–7 134–5 140 ff.
says that the text “is too vague to be of much help”. If I understand him correctly, he means that Gaius’ failure to mention the principle of abstract traditio might be taken to mean that such a principle did not exist, or that his failure specifically to mention the necessity of a justa causa might be taken to mean that there was no such requirement. But (1) “abstract” traditions are rare and it seems to me undesirable to confuse first-year students with exotic cases; (2) where there was a requirement of justa causa in his time, as in the case of the actio Publiciana, Gaius does not hesitate to mention it, though he does not explain it further and merely gives the example of a sale; (3) Gaius says that full ownership passes ipsa traditio, by virtue of the traditio itself, by mere traditio. The purpose of the emphasis is to contrast res nec mancipi, for which an informal conveyance was sufficient, and res mancipi, for which mancipatio or in jure cessio was required, but Gaius could hardly write that ownership passes ipsa traditio if in fact it does not pass ipsa traditio but requires a justa causa as well.

The reference to ipsa traditio is in fact crucial, for it highlights an ambiguity which is responsible for considerable confusion both here and in other parts of the law of property. Traditio means both transfer of ownership and physical delivery, the two often being closely connected but not co-extensive. The ambiguity has often been pointed out, but its implications still require exhaustive examination. That examination will be important for our knowledge of the classical Roman law of sale, the exepitia rei venditæ et traditæ, the actio Publiciana and many other institutions, but is beyond the scope of the present article which is confined to the question of justa causa. Here Gaius is unconscious of the ambiguity, and has both meanings of traditio in mind without being aware of the inconsistency. First, traditio here must mean physical delivery, for otherwise the proviso restricting it to res corporales is inappropriate. But secondly, traditio here must also mean transfer of ownership, because mere physical delivery (ipsa traditio) will not necessarily make the transferee owner. It will not do so for example, in the contracts of commodatum, depositum, pignus and locatio conductio (rei). Since Gaius adds no proviso to cover those cases, he must have been thinking of traditio as transfer of ownership. The reference to ipsa traditio cannot be justified in any other way. We shall have to return to the ambiguity of traditio again in due course.

7So Ehrhardt op cit 127.
8G 4 36.
9G 2 19.
10Ehrhardt op et loc cit says that the text is concerned with the moment of transfer: ipsa traditio statim. In that case the contrast is between immediate transfer by traditio for res nec mancipi and delayed transfer at the end of the prescription period for res mancipi, cp Arangio-Ruiz Compravendita in diritto romano II (Naples, repr 1963) 303. But G 2 18 talks of a magna differentia between res mancipi and res nec mancipi, and that is certainly not the primary distinction.
12Cp the translation by De Zulueta Institutes of Gaius I (Oxford 1946) 71.
13Note that Gaius is careful to qualify his statements with two restrictions introduced by si modo, both of them quite obvious. His failure to add a third qualification about the possibility of physical delivery without transfer of ownership strongly suggests that he thought it unnecessary to do so because traditio meant transfer of ownership.
Per traditionem quoque iure naturali res nobis adquiruntur: nihil enim tam conveniens est naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi. At ideo cuiuscumque generis sit corporalis res, tradit potest et a domino tradita alienatur.

Again there is no suggestion in the text that a *justa causa* was necessary. The restrictions to *res incorporeales* and transfer by the owner are repeated, but there is no hint that any additional restriction had been introduced. Three further points should be noted: (1) *Traditio*, as a method of acquisition, is attributed to the *jus naturale*: that would be impossible if there were any artificial Roman requirement of *justa causa*. (2) There is heavy emphasis on the intention of the owner to transfer his rights, strongly suggesting that that intention was sufficient and therefore that there was no further prerequisite such as *justa causa*. (3) In the law of usufructio, where Gaius ignores *justa causa* because it was not required in his time, Justinian not only mentions it but makes quite clear the importance of the new requirement. He could easily have done the same for *traditio* if he had wished: but he did not.

The picture that emerges from both sets of Institutes is one in which the requirement of *justa causa* is never mentioned and almost certainly did not exist. That picture is confirmed elsewhere.

The text refers simply to *traditiones*: there is no qualification about *justa causa*.

*D 41 1 9 3* is substantially the same as *J 21 40* with its emphasis on the intention of the owner, and the following fragments give illustrations of that intention, with sale as the main example. Nowhere in that section is said that a *justa causa* is necessary, though in practice there will almost always be one. In particular it is important to note that 9 5, which is concerned with *traditio brevi manu*, only uses sale as an example (*veluti*): the necessity of a *justa causa* is not mentioned.

*D 41 1 21 1* is also concerned with *traditio brevi manu*. It records the intention of the transferor and does not mention any *causa* at all, not even as an example.

What then is the authority for the proposition that “there must be a *justa causa*”? There are two texts: Ulpian’s *Regulae* 19 7; and *D 41 1 31* pr.

Ulpian 19 7:

*Traditio propria est alienatio rerum nec mancipi. Harum rerum dominia ipsa traditione apprehendimus, scilicet si ex *justa causa* traditae sunt nobis.*

The text is explicit in its requirement of *justa causa* for *traditio*. But it is self-
contradictory: either ownership is acquired ipsa traditione, by mere traditio, or it is acquired by traditio plus justa causa: it cannot be both. Further doubt is cast on the proviso by a comparison with Gaius’ Institutes which is followed closely by Ulpian’s Regulæ in many passages.  

G 2 19

Nam res nec mancipi ipsa traditione pleno jure alterius sunt, 20: si modo ego eiusmodi dominus sim. 43: Ceterum etiam earum rerum usucapius nobis competit quae non a domino nobis traditae fuerint, sive mancipi sint eae res sive nec mancipi, si modo eas bona fide acceperimus.

U 19 7

Harum rerum dominia ipsa traditione adprehendimus, silecet si ex justa causa traditae sunt nobis. 8: Usucapio dominium adipiscitur tam mancipi rerum quam nec mancipi.

It is the provisos which concern us here. Gaius has a proviso of ownership for traditio and a proviso of good faith for usucapius. Ulpian has a proviso of justa causa for traditio and no proviso at all for usucapius. This is most surprising. Even if justa causa is necessary for traditio the proviso as to ownership still applies and is most important. The transferee will not acquire ownership even if there is a justa causa if the transferor was not owner. And the benefits of usucapius are not unrestricted: we should expect some mention of the requirement of bona fide, or else of justa causa. And there perhaps lies the clue. Justa causa seems not to have been required for ordinary usucapius in the time of Gaius, but it was required at least from the time of Diocletian onwards, Ulpian’s Regulæ date from about 300 AD. Hence in a work that is heavily based on Gaius we should expect to find a proviso as to ownership for traditio and a proviso as to justa causa for usucapius. What we do find is a proviso as to justa causa for traditio and no proviso at all for usucapius. That looks like a simple error on the part of the editor of Ulpian’s Regulæ, copying the second proviso instead of the first and then leaving a blank in the second place. The text is therefore very poor authority for the requirement of justa causa for traditio.

D 41 1 31 pr. (Paul 31 ad editum):

Numquam nuda traditio transfert dominium, sed ita, si uenditio aut aliqua iusta causa praecesserit, propter quam traditio sequeretur.

This is the central text and the one which is relied on by the elementary manuals on Roman law. It has been heavily criticised, but also has its defenders. Its original classical context was in Paul’s discussion of fiducia.

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18 See Buckland 38 LQR 38, 40 LQR 185, 53 LQR 508, “Did Ulpian use Gaius?”
19 Though it was required for the actio Publiciana and for usucapius pro emptore etc: see Pugsley The Roman law of Property and Obligations (Cape Town 1972) 51-63. That appears to be the position already at the end of the republic: see Watson The Law of Property in the Later Roman Republic (Oxford 1968) 48-54.
20 Mayer-Maly Das Putativtitelproblem bei der Usucapius (Graz-Cologne 1962) 22ff.
21 And it is pure coincidence that in D 12 1 18 Ulpian says that ownership does not pass where the parties have different causes in mind.
22 E.g Lee Elements of Roman Law (4th ed London 1956) 137.
23 cp Index Interpolationum ad loc.
24 Kaser op cit 416 n 27, okter Kern.
25 Lenel Palingenesia.
and it must have been considerably altered to reach its present form.\textsuperscript{27} What have the compilers done and why have they produced a text so out of line with what we are led to expect by the other sources? The simplest solution is to suppose that the ambiguity of \textit{traditio} is the root of the problem. For the compilers it usually means physical delivery.\textsuperscript{28} But physical delivery is not in itself sufficient to transfer ownership. Delivery under contracts such as \textit{commodatum} must be excluded. And that was probably the intention of this text. The compilers have borrowed the terminology of \textit{justa causa} from the law of \textit{usucapio}. Superficially the parallel is attractive: in cases of acquisition from a non-owner a \textit{justa causa} is necessary for \textit{usucapio}; in cases of acquisition from an owner a \textit{justa causa} should be necessary for \textit{traditio}. But beyond that the compilers have not thought out the implications of their text. They did not intend the requirement of \textit{justa causa} to be applied as strictly here as it was in the law of \textit{usucapio}; but, as so often, a hasty alteration has been the cause of perennial controversy.