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LEGIS ACTIO IN REM AND ADOLF REINACH'S THEORY ON SOCIAL ACTS*

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Abstract

In an essay published in 2002, Ulrich Manthe analysed the ancient *legis actio sacrament in rem* in the light of the speech act theory shaped, above all, by John L. Austin (1911–1960). Almost half a century before, Austin Adolf Reinach, an outstanding member of the phenomenological school founded by Edmund Husserl, developed a theory of illocutionary acts from the perspective of realistic legal philosophy. One of the essential elements of the model developed by Reinach is the theory of social acts. In the first step, the paper focuses on the opening part of the *legis actio sacramento* in rem. It shows that concerning the activity of the parties during the initial ritual of the law enforcement process, we discover the development from the acts of conviction and assertion, which still do not arrive at the state of social acts, to the social act of informing the other party about the claim. The paper also tries to approach the activity of the praetor and the judge through the theory of social acts. The *"mittite ambo rem"* on behalf of the praetor is qualified technically as the social act of a command. Without arriving at a final result, the paper makes a first attempt to apply the categories of commandment and enactment to the activities of the praetor and the judge. It leaves this item open to further research underlying at the same time that the application of the social acts might contribute to understanding the relationship between the two actors in ancient law.

Keywords: *Legis actio sacramento in rem*, ancient rituals, Adolf Reinach, Phenomenology, Social acts,

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1. Introduction

It is remarkable that a considerable number of provisions in the Law of the Twelve Tables relate to procedural issues. The earliest way of law enforcement was strongly characterized by formalism and ritualism. The ancient regulations still exercise a fascinating impact on current modern scholars; as a result, several new approaches emerged on interpreting ancient rituals.[1]

In an essay published in 2002, Ulrich Manthe approaches from analysing the role of the words in the early roman procedure.[2] Based on Cicero's pro Murena[3], he asks the question whether the use of specific words at the core of the *legis actio* procedure was a consequence of hidden striving for power or an efficient means to disambiguate a statement.

The German scholar argues for the second alternative, and reinforces his view by referring to the theory of speech acts as shaped, above all, by John L. Austin.[4] In his understanding, the phrase *"Hunc ego hominem ex iure Quiritium meuem esse aio"*[5] can be considered as an explicit, performative illocutionary speech act. Manthe corroborates this view through an etymological analysis of the word "aio". According to the German professor, *"aio"* was not connected to *ago* (to put in motion, move, lead, drive, tend, conduct) originally; rather, it might be a derivative from *agjō* which meant "to speak". The conjunction of speech act theory and the etymological approach is strongly based on linguistic items. Almost half a century before Austin Adolf Reinach, an outstanding member of the phenomenological school founded by Edmund Husserl developed a theory of illocutionary acts from

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1 On the fascination with the Law of the Twelve Tables see already Cicero in De Oratore 1,195: „*Fremant omnes licet; dicam quod sentio: bibliothecas mehercule omnium philosophorum unus mihi videtur Duodecim Tabularum libellus, si quis legum fontes et capita viderit, et auctoritatis pondere, et utilitatis ubertate superare*". In regard to the bibliographie cfr. Max Kaser: *Das altrömische ius: Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer.* Vandenhoeck & Ruprecht, 1949.; Max Kaser: *Eigentum und Besitz im älteren römischen Recht*. Göttingen, Vandenhoeck & Ruprecht, 1956, 2. Auflage mit Nachträgen.; Joseph Georg Wolf: Zur legis actio sacramento in rem. In: Okko Behrends – Malte Diesselhorst – Wulf Eckart Voss (ed.): *Römisches Recht in der europäischen Tradition* Ebelsbach, Rolf Gremer, 1985. 1–39. Max Kaser: Über relatives Eigentum' im altrömischen Recht. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 102 (1985); Max Kaser: Zur legis actio sacramento in rem In: (ed.): *Estudio de derecho romano en Honor de Álvaro D'Ors*. Pamplona, Ediciones Universidad de Navarra, 1987.; György Diósdi: *Ownership in ancient and preclassical Roman law*. Budapest, Akadémiai Kiadó, 1970.; János Zlinszky: Gedanken zur legis actio sacramento in rem. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 106 (1989), 106–151. Tamás Notári: Remárks on the origin of ‚Legis Actio Sacramento in Rem". *Antik Tanulmányok (Studia Antiqua)*, 1 (2007), 71–94.

2 Ulrich Manthe: Agere und aio: Sprechakttheorie und Legisaktionen. In: Martin Schermaier – Michael Rainer – Laurens Winkel (ed.): *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Köln Weimar Wien, Böhlau, 2002. 431–444.

3 Cicero: Pro Murena. 26.

4 A lexical interpretation of the formula in the light of speech act theory had been suggested already by Wolf op. cit. 12 footnote 66.

5 Gaius: Institutiones 1,119.

the perspective of realistic legal philosophy.[6] Through his concept of an act, Reinach follows his teacher, Edmund Husserl, by conceiving an act as the physical expression of an experience.[7] Husserl points out: "In virtue of such acts, the expression is more than a merely sounded word."[8] The ultimate scope of an act is to establish a relation between people. In a lecture held in 1911, Reinach distinguishes between non-social and social acts.[9] Examples for non-social acts are conviction and assertions. Those acts are intentional (i.e. directed towards an object) but they do not go beyond the interior world of the person (where we can differentiate between psyche and soul). On the other hand, according to the philosopher and lawyer Reinach, social acts are intentional, spontaneous and other-directed acts, and they are also in the need of being heard.[10]

In this contribution inspired by the essay of Manthe we intend to apply the theory of social acts to the ancient *legis actio sacramento in rem*. As conceived by Reinach, social acts neither depend on law codes, nor do they belong to a whatever defined natural law. By applying the phenomenological method to legal science we will grasp essential legal realities. We reckon that explaining the most ancient procedure used in the course of law enforcement through social acts might also contribute to a deeper understanding of Roman procedures.

2. The ritualism of the *legis actio sacramento in rem*

In his Institutions, Gaius brings a record of *legis actio sacramento in rem* as a procedure.

The specific characteristic of the *legis actio* resides in its ritualism. Rudolf Jhering stated that ancient legal acts were concentrated in their form. Legal requirements, condition and effects converge in its form.[11] The form reflects aspects of positive

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6 Adolf Reinach: Die apriorischen Grundlagen des bürgerlichen Rechts. [Reinach (1989a)] In: Karl Schuhmann – Barry Smith (ed.): *Werke. Textkritische Ausgabe in 2 Bänden, Band 1.* München, Philosophia Verlag, 1989. Reinach deals with the social acts in Chapter 2 § 3. Cfr. an analysis from a linguistic point of view of the doctrin of social acts: Armin Burkhardt: *Soziale Akte, Sprechakte und Textillokutionen. Adolf Reinachs Rechtsphilosophie und die moderne Linguistik*. Tübingen, Max Miemeyer, 1986. In the present text we use the Englisch translation by John Crosby. Adolf Reinach: *The Apriori Foundations of the Civil Law.* Texas, The International Academy of Philosophy Press, 1983. Cfr. more about Reinach's speech act theory John Crosby In: op. cit. Speech Act Theory and Phenomenology, 62–88. Virgilio Cesarona: Die Grundlagen der apriorischen Lehre Adolf Reinachs über die sozialen Akte. *Perspektiven der Philosoophie*, 2016/42 (2016), 52–69.

7 Edmund Husserl: *Logical Investiogations. Volume 1. Translated by John Niemeyer Findlay* London/ New York, Routledge, 2001. 191–192.

8 Ibid.

9 Adolf Reinach: Nichtsoziale und soziale Akte. [Reinach (1989b)] In: Schuhmann–Smith op. cit. 355–360.

10 Reinach (1983) op. cit. 19.

11 Bruno Schmidlin: Zur Bedeutung der Legis Actio: Gesetzesklage oder Spruchklage? *Tijdschrift voor Rechtsgeschiedenis/Revue d'histoire du droit*, 38 (1970), 376.

law and ontological aspects of a legal act.[12] As for the use of *certa verba* in the procedure of *legis actio,* Dario Mantovani underlines several general characteristics. A complex ritual of gestures and symbols were used for the enforcement of the law. The presence of the parties was necessary but there was no space for an interpretation of the subjective will of the parties. Words and gestures correspond to a mind which was used to move through oral expressions. This ritualism was shaped by a monopolistic tendency of the pontifices regarding the development and adaptation of the law. The Italian scholar draws the attention to the fact that the focus on object orientated solutions, a distinctive feature of later jurists was already present in its germ in this ancient procedure. The very process of elaboration of *certa verba* for specific situations presupposes already a developed sense for the application of law. The words used during the procedure may be considered as an attempt to grasp the state of affairs and to provide a solution through legal reasoning.[13] In very ancient time the ritual might have been strongly connected to a mythical faith, but it is remarkable how the rituals employed were already a manifestation of interpersonal acting within the realm of the enforcement of rights.

3. The procedure of the *legis actio sacramento in rem (lasir)* in the light of social acts

3.1. The opening part

According to the Law of the Twelve Tables, the legal procedure started with the so-called *"In ius vocatio"*. When the plaintiff called the defendant before the magistrate *(in ius),* the defendant was obliged to go. In the case of moveable things, the procedure began once both parties and the object of litigation arrived in front of the magistrate. Gaius delivers a record of the words spoken during the procedure. We can notice that the jurist does not refer to the parties as plaintiff and defendant. The first party is called "qui *vindicabat*" whereas the second "adversary". According to Gaius, the opening sentence of the *lasir* was as follows:

"Hunc ego hominem ex iure quiritium meum esse aio secundum suam causam." Next the party put the *festuca* on the object and continued: *"Sicut dixi, ecce tibi vindictam imposui."*

Gaius records the words of the *legis actio,* yet he does not present a detailed account on the procedure itself. Therefore, we find different interpretations among scholars. Max Kaser proceeds from the opinion that both parties move on the same level and both of them used the same words *(meum est ex iure Quiritium)* and completed the

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[12] In this sense we might understand the expression *actus legitimus* as it is used for instance by Papinian in D. 50.17.77. The jurist lists a number of acts that are not susceptible to be bound in time or condition. By contrast, social acts in the sense Reinach uses them, these are open to limitations in time and also to conditions as well.

[13] Dario Mantovani: *Le formule del processo privato romano. Per la didattica delle Istituzioni di diritto romano*. Milano, CEDAM, 1999. 17–19.

same gestures (to put the *festuca* on the object). From this point he developed his very famous theory of relative ownership. As both parties asserted the same right and took the same oath, the judge decided on who had the better right (not the best one). Other scholars state that there was no symmetry among the parties during the procedure, and only one of them had to prove the right on the thing.

So the question arises as to which of the two parties has the burden of proof. Some scholars part from the view that the words *"meum est ex iure quiritium"* were spoken first by the plaintiff who, in a further step asks the defendant to prove his right. Those who held this opinion justify the uncommon distribution of the burden of proof with the assumption that the remedy was originally connected with a suspicion of theft.

Allan Watson challenges this opinion, and holds that the opening words were spoken by the defendant. It is also the defendant who should first place his *festuca* on the object, reaffirming his position of power. In accordance with Lévy-Bruhl, Watson draws the attention to the unusual fact that, according to the opinion which seems to be the generally accepted one, the possessor in his role of a defendant should have to prove his right. With the appearance of the parties before the magistrate the procedure will go forward inevitably; therefore it does not seem to be as much against the interest of the defendant to make the opening statement as it might seem at first glance.[14]

The text by Gaius contains a problem of punctuation. Ulrich Manthe reads the text placing a semicolon after *"meum esse aio"*. This choice also emphasizes his idea to connect the procedure with the speech act theory. Max Kaser defends the same opinion when he writes that the words *"secundum suam causam sicut dixit"* form a whole with the subsequent ones *"ecce tibi vindictam imposui"*.[15] Alan Watson connects *meum est* with the following words: *secundum suam causam*. The Scottish author unifies the two statements without any punctuation by putting a full stop after the term *"causa"*. With this decision Watson seems to follow the argument of Zulueta, who does not make a final judgement regarding the punctuation, but concludes that *secundum suam causam* should be linked to *meum esse* stating a good title for ownership, but without specifying it.

The gist regarding the two interpretations is as follows: according to Kaser and Manthe the opening part does not contain any reference to the *causa,* while in Watson's version the *causa* is mentioned already in the very introduction of the procedure. The variance of the two readings might be connected to the difference between speech act and social act. With the speech act theory the accent is mainly put on the words themselves, while a social act assumes a wider approach. We will come back to this item later.

As to the content of the *causa,* Kaser, in accordance with Wolf, states that the term does not refer to any of the modern *causae* which originates ownership. Neither original ways (like occupation, acquisitins of fruits etc.) nor derivative ones (like tradition) or *usucapio* are to be considered as *causae vindicandi*. The same

14 Watson op. cit. 456.

15 Kaser (1996) op. cit. 95.; Kaser (1985) op. cit. 672.

observation applies also to titles of acquisition under the law of obligation (sale, donation, fulfillment of an obligation). Kaser underlines that the *causa* in the context of the *lasir* aims no more than that the acquisition took place *iure* or *iniure*, i.e. by unlawful force.[16]

3.2. Conviction, Assertion, Information: the path from an act to a social act

As mentioned in the introduction, Reinach distinguishes between social acts and non-social acts. He qualifies conviction and assertion as non-social acts.

The sentence *meum est ex iure* quiritium certainly contains a conviction. According to the doctrine developed by the lawyer-philosopher, conviction is the best example for intentionality without it being an act.[17]

Intentionality within the framework of phenomenology means the necessary directedness towards an object. The conviction refers to a state of affairs which is founded on an apprehension.[18] As of Reinach, conviction is a state of the consciousness of the human being (of myself); it arises in him (Überzeugung ist eine Zuständlichkeit des Ich, sie erwächst ihm 425).[19]

As regards conviction, intentionality is fulfilled alone from the requirements constituting a social act (intentionality, spontaneity, other-directedness, need of being heard). According to Reinach, the distinguishing criterion of spontaneity is "the inner acting of the subject",[20] whereas the subject is the phenomenal originator of the act.

Conviction is not the result of an inner acting; In the very beginning of the process, according to Reinach, an object exercises an impact on the subject and thus develops a relevant conviction. Apprehension is a kind of threshold from presentation (through e.g. seeing or hearing) to conviction.[21]

Adolf Reinach further states that a person can be convinced of a state of affairs and keep this conviction to herself; it must not necessarily go beyond the internal sphere of the person (even a conviction might be expressed verbally without addressing anybody). A conviction is susceptible to various graduations (it might be stronger or weaker) and a conviction has a fundament (einen Grund). The scholar from Göttingen defines a fundament as a fact known by the person; the conviction arises from this knowledge. (Ein Grund ist die Tatsache, die das Subjekt kennt und aus deren Kenntnis die Überzeugung erwächst).[22]

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16 Kaser (1985) op. cit. 687–688.

17 Reinach (1989b) op. cit. 355.

18 Barry Smith: On the Cognition of States of Affairs. In: Kevin Mulligan (ed.): *Speech Act and Sachverhalt Reinach and the Foundations of Realist Phenomenology*. Dordrecht, M. Nijhoff, 1987. 206.

19 Adolf Reinach: Über die Dingfarbe und Dingfärbung. [Reinrach (1989c)] In: Schuhmann–Smith op. cit. 425.

20 Reinach (1983) op. cit. 19.

21 Smith op. cit. 206–207.

22 Reinach (1989b) op. cit. 355.

According to Reinach, the conviction as such is not yet considered as an act, therefore neither is it an object of judgment (Gegenstand von Geboten und Verboten). Evaluation might refer to the understanding beyond the conviction. Object of such a judgement might be an attitude or action behind the conviction. A person might abandon herself or himself to a conviction in a light-minded way or might get cautious through experience. On the other hand, a conviction might also be expressed to others, and there we arrive at the stage of assertion. An assertion, in Reinach's approach, is already and act, insofar as it finds an expression beyond the psychic side. An assertion is intentional and spontaneous. Unlinke the conviction, an assertion is not open to gradation (beim Behaupten gibt es keine Grade von Gewißheit), and the assertion is not yet other-directed. As Reinach states: "I can also express this conviction in an assertion for myself without having any partner to whom it is addressed."[23] Further on the philosopher-lawyer states that an assertion is grounded not in a fundament, but in motive. The motive is the item which determines the decision to act (das was mich zum Entschluß bestimmt 487). On a third level we have the act of informing (Kundgabe) which is already a social act as it is intentional, spontaneous and, in contrast with conviction and assertion, it is other-directed and determined intrinsically by the necessity to be heard.

The distinguishing feature for the qualifying an act as social one rests on the need of being heard. It belongs to the essence of the act of informing that the person to whom the act is directed becomes aware of its content. As Reinach says: "With this becoming aware the goal of the informing is reached. The circuit which is opened with sending out of the social act is here closed."[24]

3.3. Conviction, assertion and information applied to the opening part of the *legis actio sacramento in rem*

Applying these observations to the opening sentence of the *lasir,* we can make the following considerations. The first sentence *meum est* certainly expresses a conviction. Reinach gives a description of the phenomenological origin of consciousness.

> "Imagine that there has risen a question between myself and someone else concerning the colour of a particular object. I step up to the object and I see that it is red. The being red of the object is given to me, and as it comes to be given to me there develops within me the relevant conviction or belief that the object is red."[25]

We may create a similar situation regarding ownership, which, in consequence, leads to a *lasir.*

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[23] Reinach: (1983) op. cit.21.

[24] Ibid.

[25] Smith op. cit. 205.

A quarrel arose whether a thing belongs to one person or to another one. Each of them approaches the thing. From a phenomenological point of view, a colour is considered to be the quality of a thing. Humans have the capacity to grasp the colour qualities.[26] Based on the categories established by classical philosophy, since Aristotle a thing is related to a person.[27] According to Reinach, ownership or property is the most powerful relation between a person and a thing. From a phenomenological perspective, ownership is an ultimate, irreducible relation, which cannot be further resolved into elements.

When a person sees a thing and apprehends that it belongs to him, the relationship is given to him in the same way as the colour of an object, and out of this apprehension arises the conviction that this thing belongs to him as his property.[28] In the first sentence of the formula of the *lasir* – *"hunc ego hominem ex iure Quiritium meum esse aio"* we can trace an arc from the mere conviction to the uttering of the same, and the information given to the other party and the praetor.

As mentioned, every conviction must be rooted in a fundament. The fundament of the conviction *"meum est"* lies in the causa. For that reason, we may prefer the hypothesis proposed by Watson that *"secundum suam causam"* belongs to *"meum esse aio"* and a punctuation mark should be used only after the reference to the *causa*.

When the sentence is uttered, it enters the stage of an assertion (Behauptung). Here we notice also consistency with the expression "Eigentumsbehauptung" generally used when referring to this part of the formula. Strictly speaking, such an assertion might happen also without an interlocutor.[29] At this stage, although the assertion is uttered – *in ius* – and the magistrate and the other party are present, it is still not directed to them. While a conviction is connected with a fundament, an assertion is made out of a motive. A motive gives an answer to the question "why" which has to be distinguished from the source of an act.

On ethical level, Reinach brings the example of acting to benefit of others. While the source is the virtue of piety, the purpose might be helping the poor, and the motive is the law of God. In regard to the assertion of ownership we can state that the source is the conviction, the purpose is the reinforcement of law and the motive is the prescribed ritualism.

Conviction and assertion are not yet social acts. The receiver was not expected to respond or to correspond. The social act comes into the play with the next sentence, which is directed explicitly to the other party *"sicut dixi ecce tibi vindictam imposui"*. "See! in accordance with what I have stated, I have placed my staff upon him." In this part of the formula the other party is addressed directly, and the words are reinforced

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[26] „[…] we have the grasping of the colour-qualities as such, which is certainly more than a plain staring at the colours; which rather means and underlining and drawing out of the qualities, an immersion in them." Vgl. auch über die Reinrach (1989c) op. cit. 365.

[27] Paul Studtmann: "Aristotle's Categories". In: Edward N. Zalta (ed.): *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), https://plato.stanford.edu/archives/spr2021/entries/aristotle-categories/

[28] Ibid.

[29] Ibid.

by the staff a symbol of power which might remind of a physical fight. It seems to be generally accepted that the staff comes to represent a weapon as an expression of ritualized force (*vindicata* probably derives from *vim dicere*) accompanied by a formula.[30] *"Ecce tibi"* aim at the opponent and *"sixut dixi"* refer to the point when ownership was simply asserted. At this stage the act is converted into the social act of informing (Kundgabe). Now addressing is intrinsic to the social act. "It belongs to its essence to address another to become aware of its content. By becoming aware, the goal of the informing is reached.

In the light of Adolf Reinach's social act doctrine, the ritualism of the *lasir* formula shows in an admirable way the logical path: from a conviction through an assertion to informing the parties, i.e. the communication of the ancient parties *in iure*.

3.4. *Manum conserere*

Besides the report from Gaius, we have two more testimonies about the *legis actio sacramento in rem*. Cicero refers to the ancient procedure in his speech in defense of Lucius Murena against his friend Servius Suplicius Rufus who accused the elected consul of ambitus.

In the part of the speech, which is of interest in the context of the *lasir,* Cicero ridicules the formalism used in the ancient procedure. Other than in Gaius's texts, the object of the *legis actio* is a *fundus*, therefore his account centers in *manus conserere*. A further text is provided by Gellius whose interest in the text might come from his experience as judge. He gives a more balanced description of the formalism used, which he learned from jurists and their writings (*quod ex iurisconsultis quodque ex libris eorum didici*) and focusses to the procedure regarding pieces of land, and the *manu conserere is* connected to litigations of immovable.

Gellius points out two elements which lead to a solution adopted by tacit agreement, contrary to the Twelve Tables (*contra Duodecim Tabulas tacito consensus*). The fact that there were objects which couldn't be brought physically before the praetor and the circumstance that the boundaries of the city were extended, which made it impossible for the *praetores* to travel in order to attend all the emerging issues. The solution adopted consisted in that the parties had to go to the object of the litigation, and both of them had to put their hands on it. According to Gellius, afterwards the parties went back with a lump of earth (*gleba*) to the praetor where the vindication took place. The author of the Noctes Atticae gives a relatively detailed record of the modified procedure. The text states that "*institutum est* (…), *ut litigantes non in iure apud praetorem manum consererent, sed* "*ex iure manum consertum" vocarent, id est alter alterum ex iure ad conserendam manum in rem de qua ageretur vocaret atque profecti simul in agrum de quo litigabatur, terrae aliquid ex eo, uti unam glebam, in ius in urbem ad praetorem defferent et in ea gleba, tamquam in toto agro,*

[30] Francis de Zulueta: *The Institutes of Gaius. Part II Commentary*. Oxford, Clarendon Press, 1958. 234.

vindicarent".[31] The main problem of the text is how to understand the opposition between "*ex iure manum consertum vocarent*" and "*in ius vindicarent*." In the opinion of Wolf, *manum conserere* (with the related words *manu prendere* and *correptio manus*) took place after the *ius vocatio*. He follows Gellius's description who said that the parties and the praetor originally went to the estate where the *manum conserere* was performed. In later times, the parties went without the praetor, accompanied by witnesses. At this point the text of Cicero's pro Murena mentions that the parties called upon each other: "*tu me ex iure manum consertum vocasti, inde ibi ego te revoco*" and they set off. A wise man showed them the way (*praesto aderat sapiens ille qui inire viam doceret*).[32] On the plot the parties uttered the solemn words and carried out the gesture.[33]

Kaser put this procedure at a preliminary stage, which he assumes was developed already by the pontifices (Wir stellen deshalb die Formeln in ein von den *iuris consulti*, wohl schon den priesterlichen, ersonnenes Vorverfahren, (…)).[34] Johannes Platschek presents another understanding of the account of Gellius. In his opinion the "*vocatio ex iure*" is not to be understood in a territorial sense but "*ex iure*" should be read as of the law. *Manum conserere* is seen as a part of the regular procedure, a ritual expression of *potestas* over the thing, *vis ex conventu*. Both parties enunciated *potestas*, but only one of them was able to do that in accordance with the law. The praetor decided which of the parties has the right to use ritual force and to expel the other one from the fundus. This decision was already an indirect verdict regarding the ownership. Platschek accepts from Gellius only the terms, the wording of the law and formulae and the elements of the procedure. He does not want to follow the ancient writ in his explanations and descriptions of the different stages of the development of the procedure.[35]

Analyzing the wordings through the doctrine of social acts, we might start with a comparison of the text of Gaius on the one hand, and those of Cicero and Gellius on the other hand. From Cicero's text we pick out the legally relevant statements and omit the ridiculing comments. The style of Gellius differs from Gaius and Cicero as he does not focus on transmitting the formula and he focusses on the *manum conserere*. However we think that a parallelism can be discovered, and there is no contradiction between the three texts.

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31 Gellius: *Noctes Atticae*, 20,10,9.

32 The English version of the text in the Loeb edition: „Our learned friend was on hand to show them the road".

33 Wolf op. cit. 9–10.

34 Kaser (1987) op cit. 682.

35 Johannes Platschek: Ex iure manum conserere: Zur symbolischen Gewalt im frühen römischen Eigentumsprozess. *Tijdschrift voor Rechtsgeschiedenis*, Issues 3 and 4 (2006), 259.

Gaius 4,16:	Cicero pro Murena 26:	Gell. 20,10,7-9:
Hunc ego hominem ex iure Quiritium meum esse aio secundum suam causam,	*Eum (fundum Sabinum) ego ex iure Quiritium meum esse aio.*	*"Manum conserere"...Nam de qua re disceptatur in iure in re praesenti, sive ager sive quid aliud est,* ***cum adversario simul manu prendere et in ea re sollemnibus verbis vindicare, id est "vindicia."***
sicut dixi, ecce tibi, vindictam inposui, et simul homini festucam inponembat. *Adversarius eadem similiter dicebat et faciebat.*	*[...] Inde ibi ego te ex iure manum consertum voco. [...]* *"Unde tu me" inquit ex iure manum consertum vocasti, inde ibi ego te revoco. [...]* *Praesto aderat sapiens ille qui inire viam doceret. "Redite viam". Eodem duce redibant. [...]*	*Correptio manu in re atque in loco praesenti apud praetorem ex Duodecim Tabulis fiebat, in quibus ita scriptum est: "Si in qui in iure manum conserunt" [...] institutum est contra Duodecim Tabulus tacito consensus, ut litigantes non in iure apud praetorem manum consererent, sed "ex iure manum consertum" vocarent,* ***id est alter alterum ex iure ad conserendam manum in rem de qua ageretur vocaret atque profecti simul in agrum de quo litigabatur, terrae aliquid ex eo,***
	"Quando te in iure conspico" et haec: "Anne tu dicas qua ex causa vindicaveris?"	*uti unam glebam, in ius in urbem ad praetorem defferent in ea gleba, tamquam in toto agro, vindicarent.*

Similar to the texts of Gaius and Cicero, the record of Gellius also mentions that the vindication is made by *verba solemna*. But after mentioning that, he proceeds to the *manum conserere,* which, he said, was introduced against the Law of the Twelve Tables. As the attention of Gellius focuses on the exceptions, i.e. the object which could not have been brought before the praetor, and the magistrate himself could not go to the place where the object was, he refers only in a very general way to a *vindicare* through *verba solemna*.

If we follow the account of Cicero, the parties appeared before the praetor and expressed their conviction that the fundus Sabinus belonged to them: "*fundum Sabinum ego ex iure Quiritium meum esse aio*." From the point of view of social acts, that might be qualified as the assertion of a conviction. As we mentioned above, this assertion is not to be considered a social act yet. In the case the object was present *in ius,* the social act was performed through the imposition of the *festuca*. In the case that was not possible, one party called the other one to the *manum consertum*.

We consider that in *ius vocatio* was meant in territorial sense, following Wolf and Kaser, rejecting the hypothesis of Platschek. Furthermore, the *vocatio* can also be seen as a specific social act, which is essentially different from the social act of informing. This act can be situated beside the social acts of requesting and commanding as mentioned by Reinach. The scholar from Göttingen states that those acts are "fairly closely related acts". The question is whether a sentence might be considered as a request or a command, often depends only on the way of speaking, emphasis, sharpness etc.

Considering the context, *vocatio* is closer to a command than to a request. Command and request differ from the social act of informing in the characteristic that in both cases it is not enough that the addressee should become aware of the content; he is also expected to perform a corresponding activity.

Reinach writes: "Every command and every request aim at an action on the part of the addressee which is prescribed by the act. Only the performance of this action definitively closes the circuit opened by these social acts.[36] When we look at the comparative listing of the texts, we might state that the first act that can be qualified as a social act is mutual command to go to the place where the object was situated. Here we see a difference regarding the procedure described by Gaius for cases of moveable things. The" Kundgebung der Herrschaft über die Sache", the information about the power over the thing did not take place through the *vindicatio* but through *manum conserere.* This part of the ritual occurred without the presence of the magistrate yet before the witnesses who accompanied the parties to the location of the *fundus*. In this understanding, *manum conserere* replaces the imposition of the *festuca*. After having fulfilled this act of mutual information, the parties took a handful of the lot and brought it before the praetor where the *vindicatio* was carried out.

It can be easily noticed that this way of acting was against the procedure describes in the Law of the Twelve Tables. We mentioned that the use of the *festuca* was somehow connected to the idea of a physical fight; through the *manus* the declaration of *potestas* is even more emphasized. Rudolf von Jhering gave a detailed description of the *manus* as a symbol of power. He underlined that the hand is the symbol of power. He depicts that *manus* is the actual seat of active physical power. The hand is the tool, the symbol and expression of legal power understanding the action as an extrajudicial one. He maintains this vision even for the period when the parties didn't have to go far for the act of the *manum conserere.* Instead they could perform it in a rather symbolic way (by using a plot of land they brought from the fundus in

[36] Reinach (1983) op. cit. 21.

question, or later, on a plot of land which does not necessarily have to originate from the *fundus,* the object of the litigation.)[37]

3.5. *Mittite ambo rem*

As a next step in the procedure, the magistrate commanded both parties to release the thing. At this stage the procedure moves into the decision phase. The analysis of the role played by the magistrate and the judge might require a more detailed reflexion on a further occasion. In this occasion, it might be also necessary to take position regarding the nature of ownership in ancient Rome. In the present context, we just distinguish the social acts performed by the magistrate from those carried out by the judge.

Technically, the order of the magistrate to release can be qualified as the social act of commanding. The *imperium* conferred through his election give him power to act on the level of facts. It might be worth recording the classical dictum *ius facere non potest*. Indeed, the magistrate is not able to decide at the level of law; from his position, he can only convey possession. János Zlinszky following, at least partly, earlier scholars, defends the opinion that after the opening ceremony the magistrate transfers the possession of the object to one of the parties by a provisional decision.[38] The commandment of the magistrate is the answer to the assertion made by the parties during the opening part of the *lasir*. According to Zlinszky, this commandment already contains a preliminary decision which will be completed by the verdict of the judge. The Hungarian scholar understands the assertion "meum est ex iure Quiritium" as manifestation of a power position protected by the early community. Through his commandment the magistrate decides which party should benefit from the protection of the community. According to Zlinszky, the magistrate takes a decision through a legal evaluation, the assessment of a question of law. It remains to answer the question in which moment the sacrament is be deposited.

Zlinszky holds that the parties had to deposit the *sacramentum* only after the provisional decision of the magistrate. The explanation lies in a social response as perceived by the Hungarian scholar. As a result it would have been easier for people with fewer resources to find someone prepared to provide them with the necessary 500 As.[39]

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[37] Rudolf von Jhering: *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Teil 2 Bd. 2*. Leipzig, Breitkopf und Härtel, 1858. 598–600.

[38] Zlinszky op cit. 134. Egon Weiss: Die Verteilung der Vindizien und der Eigentumsschutz bei der legis actio sacramento in rem. In: Franz Laufka (ed.): *Festschrift für Otto Peterka*. Brünn, Rudolf M. Rohrer, 1936.

[39] Zlinszky formulates his opinion based on the story of the poor war veteran constructed by Jhering. János Zlinszky: *Állam és jog az ősi Rómában* [*Recht und Staat im archaischen Rom*]. Budapest, Akademia kiadó, 1997. Rudolf Jhering: *Scherz und Ernst in der Jurisprudenz*. Leipzig, Breitkopf & Härtel, 1884. 187.

3.6. Decision of the iudex

It was the Austrian professor of Roman Law, Walter Selb, who pointed out with determination that when studying the *iudex* of the *legis actio* procedure, we should be careful not to be influenced by the figure of a modern judge. Unlike him, the ancient judge did not make a final decision that referred to the legal consequences.

He underlines that in the early procedure it was not the judge but the magistrate who finalized the procedure.[40] In the context of social acts we ask how to qualify the action of the judge. Selb stated that, on one hand, the task of the judge consisted in advising the magistrate. On the other hand, the *iudex* made a decision regarding the question if the *sacramentum* given by the parties was *iustum* or *iniustum*. According to Selb, the decision refers not to the assertion of the parties "*meum esse aio*" but to the one where they stated "*ius feci sicut vindictam imposui*". Following this interpretation, the decision *in iure* and *apud iudicem* refers to two different items. The magistrate decides with regard to the possession of the thing, and the judge with reference to the statement of the rightfulness of the *vindicatio.*

If the judgement was in favor of the one who possessed, he simply remained in the possession of the object. If, on the contrary, the decision was to the advantage of the party who did not possess, the other possessing part was interested in handing over the object of litigation in order to avoid that the owed amount grew to the double (*lis infitiando crescit in duplum*). From a legal point of view, the magistrate provided ownership through an *addictio* or proceeded to an *arbitrium liti aestimandae* referring to the sum necessary for the *solutio* (Haftungslösung). It was therefore the *magistratus* who decided the litigation in the name of the community.[41]

The history and the character of the interaction between the magistrate and the judge is still open to further research. In this context, the sharp distinction between commanding and enactment made by Reinach may lead to new insights. The act of commanding is necessarily an other-directed act that presupposes the intention that some action should be realized by a different person. On the contrary, an enactment does not imply such an expectation. Whereas commanding presupposes the intention that some action should be realized by a different person, the intention which underlies enacting refers quite generally to the fact that something ought to be.[42] Commanding is necessarily an other-directed act, yet enacting does not necessarily have a relation to other persons. The intention related to an enactment in the most general sense of the word is that something ought to be.[43] Another important characteristic of an enactment is that it does not have to adequate to something given beforehand, but through the enactment something is posited: "it ought to exist". In this sense, Reinach places the enactment clearly within the realm of positive law. It is important to emphasise that the power of producing legal effect through an enactment on other

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40 Selb op cit. 393.

41 Max Kaser – Karl Hackl: *Das römische Zivilprozessrecht*. München, Beck 1996. 40.

42 Reinach (1983) op. cit. 105.

43 Reinach (1983) op. cit. 106.

persons must be first conferred by these persons.[44] The realisation of these aspects in the context of Roman procedure seems to be a promising but difficult topic for further research.

With the present contribution we wanted to introduce the idea of reading the ancient procedure in the light of the social acts theory as developed by Adolf Reinach. The tool of social acts helps to describe the different stages of the ritual and to better grasp its deep meaning in ancient society.

[44] Reinach (1983) op. cit. 110.