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Comments on the Origin of the Legis Actio Sacramento in Rem

Abstract. The legis actio sacramento in rem belongs to the most debated issues of specialised literature on Roman Law up to the present day. The literature on the subject would fill a whole library, only its approximative treatment would require a separate monography. When explaining the origins of the legis actio sacramento in rem one can distinguish several, more or less clearly isolated trends. The present study will regard the theory of oath and the theory of personal fight as the two most important. The fundamentally sacred character of the legis actio sacramento is emphasised by the theory of oath, according to which the principal aim of communal control could be the expiation of the divinity retaliating the perjury, the sacramentum of the defeated party. This theory is also corroborated by the text of the vindicatio, appearing as the strictly formalised, religious-magical carmen. Although it is much older, the theory of personal fight is traced back to Jhering, and its essence is that in the beginning the parties actually fought against each other for the thing constituting the object of their controversy, but the community (the state), in order to preserve internal peace, brought the fight under its own control. Therefore, the fight, in the form of the legis actio sacramento in rem, as it is known today was enacted only symbolically, by employing the rod (festuca) instead of the spear (hasta). The aim of the present study is merely to highlight a possibility-based mainly on the primary sources and partly on the findings of the literature on the subject—which will not consider the motifs of sacrality and private fight contradictory in the structure of the legis actio sacramento in rem but will mingle them as organically complementing components.

Keywords: legis actio sacramento in rem, vindicatio, hasta, festuca, carmen

The present study wishes to highlight the following aspects of the description of Gaius.¹ The sacred character of the *legis actio* procedure is proved by the

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¹ Gai. *inst.* 4, 16. Cf. Földi, A.–Hamza, G.: *A római jog története és intézményei* (History and institutions of Roman Law). Budapest, 2005¹⁰. 167; Zlinszky, J.: Gedanken zur legis actio sacramento in rem. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 106 (1989) 107. sqq.; Wieacker, F.: Ius. Die Entstehung einer archaischen Rechtsordnung. In: *Rechtswissenschaft und Rechtsentwicklung*. Göttingen, 1980. 33. skk.; Kaser, M.: Über “relatives Eigentum” im altrömischen Recht. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 102 (1985) 1. sqq.; Horvát, M.: Deux phases du procès romain. In: *Mél. H. Lévy-Bruhl*. Paris

almost neurotic adherence to the words to be recited,² the same phenomenon is also exemplified by Pliny's account of the *dedicatio* of Ops Opifera's temple. (I) Traces of private fight and arbitrary action are shown by the origins of the expression of *vindicatio* as well as by the rod, used in the procedure instead of a spear. All the more so, as Gaius also explains this with the fact that the Romans considered truly their own the goods taken from the enemy, i.e. obtained by fight. Besides the connection between the *iudicium centumvirale* and the *hasta*, the close interconnection of the spear and the cult of Mars also deserves special attention, as the *hasta* was also carrying a very important semantic load (II) The structure of the *ius fetiale*, regulating the law of war and of peace in the archaic age, a typical example of the intertwining of peaceful and martial elements, and the *rerum repetitio*. as well as the *clarigatio* show remarkable parallel with the *legis sacramento in rem*. (III) In Plautus's comedy, *Casina*, the right to dispose over the protagonist slave girl is decided by way of actual fight, followed by divine judgement. This procedure also shows remarkable similarities with the *vindicatio* mentioned by Gaius. (IV)

I. It is sufficiently well known that the *legis actio sacramento* is strongly text-centred because—as Gaius himself emphasizes—the one who had mispronounced even one word of the text, lost the case.³ In Roman thinking, the belief in the reality constituting character of the spoken word was of utmost importance.⁴ (It is also very important that for the Romans, the concept of *Fate*, the *fatum*, determining human life, originally meant the (divine) word, the declared divine decision, thus fate came into being by the expression in words of the decision of higher powers.⁵) “*The reason is the firm belief of the Romans in the numinous power of the uttered word, their conviction that being was ultimately identical*

1959. 163. sqq.; Kaser, M.: *Das römische Privatrecht I–II*. München 1971–1975. I. 20. 22; Staszuków, M.: “*Vim dicere*” im altrömischen Prozeß. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 80 (1963) 85. sqq.; Jhering, R.: *Der Geist des römischen Rechts*. Leipzig, 1880–1891. 114. 150. 163; Lévy-Bruhl, H.: Le simulacre combat dans le “*Sacramentum in rem*”. In: *Studi in onore di P. Bonfante*. Milano, 1930. III. 83. sqq.; Kaser 1971–1975. I. 20.

² Köves-Zulau, Th.: *Bevezetés a római vallás és monda történetébe* (Introduction to the history of Roman Religion and Myth). Budapest, 1995. 249.

³ Gai. *inst.* 4, 11. 30.

⁴ The importance of the sacral elements is pointed out by Kaser, M.: *Das altrömische ius*. Göttingen, 1949. 309. sqq.

⁵ See Pötscher, W.: Der römische *fatum*-Begriff und Verwendung. In: *Hellas und Rom*. Hildesheim, 1988. 490. sqq.

with uttered being, complete reality was only reality expressed in words.”⁶ Let us consider an example from the sphere of religious law (the *dedicatio* was part of the *ius publicum*.) for the case when the validity of the sacred-judicial act did not depend only on the precise order of the words to be uttered but also on the exact pronunciation of each sound.

Pliny Maior mentions that Ops Opifera’s temple was consecrated by the *pontifex maximus* Metellus, but because of his impediments of speech he had to struggle for several months until he was able to pronounce the words of the *dedicatio*.⁷ The historical background of the story is succinctly the following: Some time between 123 and 104 BC a new—the fourth—temple was erected for the goddess Ops Opifera,—it cannot be excluded but it seems scarcely probable that her temple on the Capitolium was renovated—and this had to be consecrated by the *pontifex maximus* L. Caecilius Metellus Delmaticus, about whose career it is only known that he occupied the office of *pontifex maximus* in 114 BC.⁸ Pliny’s text mentions Metellus’s articulatory difficulties, which do not seem to bear much relevance from a historical point of view, yet from the religious aspect it highlights a cardinal point in Roman *religio*, namely, the requirement “that the words to be spoken should follow a pre-determined, precisely ordered, accurate pattern.”⁹ Perfect physical integrity was an essential condition for the fulfilment of clerical office in Roman religion,¹⁰ just as in the case of several other religions as well,¹¹ which does not seem striking, as this requirement was observed in the case of sacrificial animals,¹² as well as the official participants of the sacrifices.¹³ The question may arise how it was possible for Metellus to act as *pontifex maximus*, as he is the only *pontifex* whose congenital disability is known.¹⁴ On the one hand, the increasing rationality of the age—as a result of

⁶ Köves-Zulauf: *Reden und Schweigen. op. cit.* 312; Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 207.

⁷ Plin. *nat.* 11, 174. *Metellum pontificem adeo inexplanatae (sc. linguae) fuisse accipimus, ut multis mensibus tortus credatur, dum mediatur in dedicanda aede Opi Opiferae dicere.*

⁸ About the different presumptions of the year of the dedication see Wissowa G.: *Religion und Kultus der Römer*. München, 1912. 203; Latte, K.: *Römische Religionsgeschichte*. München, 1976. 73; Broughton, T. R. S.: *The Magistratures of the Roman Republic*. New York, 1951/1952. 1960. 532.

⁹ Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 71.

¹⁰ Wissowa: *op. cit.* 491.

¹¹ Plat. *leg.* 6, 759c; Lev. 21, 17. sqq.

¹² Sen. *contr.* 4, 2.

¹³ Plin. *nat.* 7, 105.

¹⁴ Cf. Köves-Zulauf: *Reden und Schweigen. op. cit.* 76.

which certain religious prescriptions were not taken so seriously, or were somehow evaded—might have played an important role in L. Caecilius Metellus Delmaticus's becoming *pontifex*,¹⁵ on the other hand, the other important reason might have been the fact that the texts that had to be recited by the Roman priesthood were previously-determined, thus even the pontifex afflicted with severe articulatory problems could memorize them with long and troublesome rehearsal.¹⁶ Naturally, this would not have been possible in the case of a religion based on spontaneous religious discourse, free preaching, and prophetic prayer.¹⁷

It is likely that the text of the *dedicatio* contained the name of the goddess Ops Opifera, which probably constituted double challenge for the *pontifex*'s cumbersome tongue (*inexplanata lingua*): the pronunciation of the alliterating name was most likely not an easy task for a person with speech impediments, who was possibly stuttering as well. In addition, the exact naming of the goddess was particularly important in the course of the *dedicatio*, given the fact that Ops Opifera was one of the deities of sowing.¹⁸ (The importance of the goddess Ops was never questionable for the Romans because—as her name also shows¹⁹—was related to richness, more precisely to the richness of the harvest, Ops was the incarnation of the rich yield of land, the helpful feature of Mother Earth.²⁰ Naturally, according to the minutious, hair splitting character of Roman religion, several different divine aspects of the earth's were differentiated: it was generally venerated as Tellus, in its life augmenting aspect as Ceres, and in its harvest yielding effect as Ops.²¹ However, Roman religion distinguished even between different aspects of Ops, as it was usual to connect different so called *Sondergottheiten* to chronologically consecutive elements of different acts and events.²² On August 25 they celebrated Ops Consiva, the goddess who performed *the gathering of the harvest*, two days earlier, on August 23 they celebrated Ops Opifera,²³ from which it can be clearly inferred that by the

¹⁵ Latte: *op. cit.* 276.

¹⁶ Latte: *op. cit.* 198. 392; Wissowa: *op. cit.* 397; Dumézil, G.: *La religion romaine archaïque*. Paris, 1966. 53. sqq.

¹⁷ Köves-Zulauf: *Reden und Schweigen. op. cit.* 77.

¹⁸ *Ibid.* 78.

¹⁹ Cf. Walde, A.–Hofmann, J. B.: *Lateinisches etymologisches Wörterbuch I–II*. Heidelberg, 1954 II. 205. sq.

²⁰ Radke, G.: *Die Götter Altitaliens*. Münster, 1965. 238. sqq.

²¹ Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 76.

²² Latte: *op. cit.* 51. sqq.; Radke: *op. cit.* 23. sqq.

²³ Radke: *op. cit.* 239.

name Ops Opifera—its second particle being related to the *verbum* “*ferre*”—“*the goddess bringing the richness of harvest*” should be understood.²⁴ The Volcanalia was also celebrated on August 23, and its logical connection with the celebration of Ops Opifera becomes clear if one considers that the grain not yet gathered in the granary is the most exposed to the danger of fire and thus it is the most in need of Ops Opifera’s help against Vulcanus.²⁵ Today it is impossible to clarify in every detail why the Romans thought the naming of the deities of sowing to be particularly dangerous, but the importance of the goddess Ops becomes evident from the fact that during the research for Rome’s secret protective deities—the name was kept secret precisely to prevent the *evocatio* by the enemy—she was also a possible candidate to have fulfilled this function.²⁶

What conclusion can be drawn from all these regarding the present inquiry? The words of the *vindicatio* of the *legis actio sacramento in rem*, developed for real estates, are mentioned as *carmen* by Cicero as well.²⁷ Inferring from the various meanings of the word *carmen*, the words of the *legis actio sacramento in rem* qualified as magical, numinous, legal texts.²⁸

II. The *in rem actiones* are called *vindicationes* by Gaius,²⁹ which harmonizes with the terminology of the *legis actio sacramento in rem*, and the *in iure cessio*, as well as the *adoptio*, the *vindicare in libertatem* and the *vindicare hereditatem*.³⁰ From the etymological attempts at defining the origin of the expressions

²⁴ Köves-Zulauf: *Bevezetés a római vallás és monda történetébe. op. cit.* 77; Köves-Zulauf: *Reden und Schweigen. op. cit.* 79.

²⁵ Latte: *op. cit.* 73. 129; Köves-Zulauf: *Reden und Schweigen. op. cit.* 79.

²⁶ Macr. *Sat.* 3, 9, 3–4. *Deum in cuius tutela urbs Roma est ... ignotum alii Iovem crediderunt, alii Lunam, sunt qui Ageronam, ... alii autem quorum fides mihi videtur firmior Opem Consivam esse dixerunt.*

²⁷ Cic. *Mur.* 26. Ehhez lásd Cicero *Négy védőbeszéd.* Szeged, 2004. 85. 122.

²⁸ Szádeczky-Kardoss S.–Tegyey I.: *Szöveggyűjtemény a régi római irodalomból* (Textbook from the ancient Roman Literature). Debrecen, 1998. 19. sqq. (Quoted among others Ov. *trist.* 4, 1, 1–14; Tib. 2, 6, 12–26; Porphy. *ad Hor. epist.* 1, 1, 62; Hor. *ars* 417; Plaut. *Trin.* 349–352; Hor. *epist.* 2, 1, 134–155; Macr. *Sat.* 5, 20, 17–18; Gell. 4, 9, 1–2; Varro *ling.* 6, 21; Plin. *nat.* 27, 12, 131; Quint. *inst.* 1, 6, 40; Varro *ling.* 7, 27; Fest. 325; Cic. *div.* 1, 1, 114–115; Fest. 325; Cic. *div.* 1, 1, 114–115; Paul. Fest. 160; Cic. *Brut.* 19, 75; Liv. 1, 32, 5–14; 10, 38, 2–13.

²⁹ Gai. *inst.* 4, 5.

³⁰ Gai. *inst.* 4, 16–17; 2, 24; 1, 134; Paul. D. 10, 4, 12 pr.; Gai. *inst.* 2, 120. Cf. Düll, R.: Vom vindex zum iudex. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 54 (1934) 105.

“*vindex*”, “*vindicatio*”, “*vindicta*” the one proposed by Varro,³¹ emphasizing the characteristic of force, “*vim dicere*” and relating the *verbum* “*dicere*” to the core **deik* (see also *deiknyó*, *deiknymi*) seems the most plausible, even if this cannot be undoubtedly demonstrated with modern linguistic evidence.³² The word *diké* is traditionally derived from the root **deik* of the verb *deiknymi* (to show, to point at, to explain, to testify); its basic meaning of *direction*, *way*, *custom* is completed with the meanings *customary procedure*, *decision*, *resolution*, *trial*, and *law*.³³ (These two meanings, traditionally derived from each other are approached from a new aspect by Palmer, according to whom the meaning of *signalling*, *custom*, *characteristic*, *particularity* and the meaning *decision*, *resolution*, of the word *diké*, originally the *borderline* drawn between two litigant parties derived from the root **deik*, developed parallelly, independently from each other, so neither of these can be considered secondary, derived from the other.³⁴) When trying to understand the structure of *vindicatio*, Varro’s traditionally Roman etymology is of utmost importance, because it demonstrates the most clearly how the Romans themselves experienced and how they subsequently interpreted the most basic one of all the procedures termed as *vindicatio*, the *legis sacramento in rem*.³⁵

It can be rightly assumed that in the beginning—and probably later on as well—the spear as weapon was nothing else than a long, sharp rod made of hard wood, and hardened in fire.³⁶ If the *hasta* was the weapon with which in the course of the fights they could win loot, recognition, and hence power, it is no wonder that shortly it became the symbol of power.³⁷ This is also shown by Verrius Festus’s definition: “*hasta summa armorum et imperii est*”³⁸ and mentioning the *imperium*, especially in connection with the spear, one must

³¹ Varro *ling.* 6, 60.

³² Cf. Walde–Hofmann: *op. cit.* II. 793. sq.

³³ Gonda, J.: *ΔΕΙΚΝΥΜΙ: Semantische Studie over den Indo-Germanische Wortel DEIK*. Paris, 1929. 224–232; Benveniste, E.: *Le vocabulaire des institutions indo-européennes*. Paris, 1969. II. 107–110; Gagarin, M.: “Dikē” in the “Works and Days”. *Classical Philology* 68 (1973) 82.

³⁴ Palmer, L. R.: *The Indo-European Origins of Greek Justice*. Oxford, 1950. 157. sqq.

³⁵ Nótári, T.: *Festuca autem utebantur quasi hastae loco*. *AUB* 51 (2004) 133. sqq.

³⁶ Cic. *Verr.* 4, 125; Plin. *nat.* 16, 65; Hdt. 7, 71; Tac. *ann.* 2, 14; Prop. 4, 1, 28; Amm. 31, 7, 12.

³⁷ Waele, F. J. M. de: *The Magic Staff or Rod in Graeco-Italian Antiquity*. Gent, 1927. 172.

³⁸ Fest. 55, 3.

not forget about its magico-religious character, belonging to the sacred sphere.³⁹ It is not by chance that the expression *subhastatio* means—and this is also mentioned by Gaius⁴⁰—the selling of loot, especially the selling of captives,⁴¹ obtained from the enemy by way of armed fight, and later meaning any kind of auction in general.⁴² When presenting the institution of *decemvri stlitibus iudicandis*, Pomponius uses the term *hastae praeesse*,⁴³ which could not mean anything else but the leading of *iudicium centumvirale*. However, the *iudicium centumvirale* came into being only one hundred years after the date assumed by Pomponius (242-227 BC),⁴⁴ thus the historical credibility of Pomponius's report becomes doubtful, but it can be safely stated that only a *magistratus cum imperio* was entitled to decide in the question of *legitimum dominium*.⁴⁵ The insignia of the *iudicium centumvirale*,⁴⁶ founded in the 2nd century BC was the so-called *hasta centumvralis*. By the end of the republic the presidency of this court of law was fulfilled by a *proquestor*, due to the engagement of *praetors*.⁴⁷ Augustus appointed again a *praetor* as supervisor at the head of the *iudicium centumvirale*.⁴⁸ Novellius Torquatus Atticus was the first *praetor hastarius* or *praetor ad hastam* known by name. With this disposition, Augustus probably did not instaurate a new rule but revived an older one.⁴⁹ If the court was sitting in different parts, the man, chosen by the *praetor hastarius* from among the *decemvirii* to preside the court *ad hoc*, was using his own spear in the *iudicium*,⁵⁰ this fact being corroborated by Quintilian's report of *duae*

³⁹ See Pötscher, W.: 'Numen' und 'numen Augusti'. In: *Hellas und Rom*. Hildesheim, Olms, 1988. 462; Wagenvoort, H.: Wesenszüge altrömischer Religion. In: *Aufstieg und Niedergang der römischen Welt*. Berlin–New York, 1972. I. 2. 371. sq.; Nótári, T.: On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica* 2005. 95. sqq.

⁴⁰ Gai. *inst.* 4, 16. *quod maxime sua esse credebant quae ex hostibus cepissent*.

⁴¹ Fest. 55, 9. *Et captivi sub eadem veneunt.*; 90, 19. *Hastae subicebant ea, quae publice venundabant, quia signum praecipuum est hasta*.

⁴² C. 10, 3, 1. 2. 5. 6; Liv. 2, 14, 1–4; Dion. Hal. 5, 34, 4; Val. Max. 3, 2, 2; Cic. *off.* 2, 27. 83; *Phil.* 2, 64. 103; Varro *rust.* 2, 10, 4; Sen. *suas.* 6, 3. Vö. Alföldi, A.: Hasta–Summa Imperii. The Spear as Embodiment of Sovereignty in Rome. *American Journal of Archeology* 63 (1959) 3. 8; Waele: *op. cit.* 172.

⁴³ Pomp. D. 1, 2, 2, 29.

⁴⁴ Mommsen, Th.: *Römisches Staatsrecht I–III*. Berlin 1887–1888. I. 275.

⁴⁵ Alföldi: *op. cit.* 9.

⁴⁶ Cf. Mommsen: *op. cit.* II. 225.

⁴⁷ Suet. *Aug.* 36, 1; Stat. 4, 4, 41.

⁴⁸ Mommsen: *op. cit.* II. 225; Alföldi: *op. cit.* 9.

⁴⁹ CIL 6, 1365, 13; 8, 22721, 5; ILS 950; Mon. Ancyr. 8, 5.

⁵⁰ Alföldi: *op. cit.* 10.

hastae in the case when the *iudicium centumvirale* was functioning divided into two parts.⁵¹ The *iudicium centumvirale*, judging cases of inheritance under the supervision of the *praetor hastarius* was usually sitting in four sections in the *basilica Iulia*.⁵²

In Servius's commentary of Vergil's Aeneid the description of the following ceremony can be found: "Is qui belli susceperat curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens: 'Mars vigila!'"⁵³ The picture of the deity could not be too old, because the Romans did not represent the image of their gods in the beginning,⁵⁴ and Servius's explanation goes back to Varro, just as Plutarch's similar remark:⁵⁵ "en de té régia dory kathidrymenon Area prosagoeyen."⁵⁶ Seemingly, Varro gets into contradiction with the tradition, which has knowledge of several spears in Mars's sacrarium. These must have been the spears of the *salius* priests, which were kept in the sacrarium Martis, together with the shields.⁵⁷ The plural of shields is not surprising because—as it becomes evident from the Aitolgian myth explaining the institution of the *salii*—Numa Pompilius ordered the manufacturing of another eleven copies of the ancile descending from the sky, in order to prevent the stealing of the original one. During their processions the *salii* were carrying the ancile in their left and were beating it with a spear-like rod.⁵⁸ The form of these spears was not identical with the form of those that were generally known and actually used for fighting in the Classical Age but they preserved—just like the shields of the *salii*—their archaic shape: They were so-called *hasta pura*, made exclusively of wood without any iron, and their prodigium was shown by their movement without any human agency in the sacrarium.⁵⁹

⁵¹ Quint. *inst.* 5, 2, 1; 11, 1, 78.

⁵² Plin. *epist.* 5, 9, 1–2. 5; 6, 33, 2–5; Quint. *inst.* 12, 5, 6.

⁵³ Serv. *ad Verg. Aen.* 8, 3.

⁵⁴ August. *civ.* 4, 31; Plut. *Numa* 8; Latte: *op. cit.* 150; Herter, H.: Zum bildlosen Kultus der Alten. *Rheinisches Museum für Philologie* 74 (1925) 164. sqq.

⁵⁵ Norden, E.: *Aus altrömischen Priesterbüchern*. Leipzig 1939. 173. sqq.

⁵⁶ Plut. *Rom.* 29, 1.

⁵⁷ Gell. 4, 6, 1–2; Wissowa: *op. cit.* 556.

⁵⁸ Plut. *Numa* 13, 7; Dion. Hal. 2, 70.

⁵⁹ Serv. *ad Verg. Aen.* 6, 760; Liv. 40, 19, 2. *pontifices hastas motas nuntiare*; *Obseq.* 6. (60.) *hasta Martis motae*; *Obseq.* 19. (78.) *vasto incendio Romae cum regia quoque ureretur sacrarium et ex duabus altera laurus ex mediis ignibus inviolatae steterunt*; *Obseq.* 36. (96.) *hastae Martis in regia motae*; *Obseq.* 44. (104.) *hastae Martiae in regia sua sponte motae*; *Obseq.* 50. (110.) *hastae Martis regia motae*.

Nevertheless, the spears of the *salii* must be distinguished from Mars's spear, which was—as they were venerating Mars's presence in it⁶⁰—surrounded by a cult that was due to a deity,⁶¹ as the veneration of gods (e.g. Iuppiter, Lapis, Terminus) in some material form was usual for the Romans, which can be explained by the concept of the unity of person-authority.⁶² (The *Person-Bereichdenken*, the *person-authority* way of thinking was a special way of experiencing the world for the man of antiquity, in the course of which he experienced the material reality, object, process, or state as such, and, at the same time, he experienced it as divinity as well. The thing and the divinity is often designated with the same word, and sometimes it is considerably difficult to decide whether in a particular case *themis* or *Themis*, *fortuna* or *Fortuna*, *terminus* or *Terminus* should be written. Naturally, either solution is chosen, the other component is tacitly part of the concept and should be taken into account as well.⁶³ Designation with the same word seems to suggest juxtaposition but in fact it means the unity of the person and his/her function, the sphere of authority represented by him/her, in which alternatively one or the other aspect comes to the fore.⁶⁴) Iustinus in his *Epitoma Historiarum Pompei Trogi* mentions that, in the beginning, the spear was surrounded by a divine cult.⁶⁵ Servius, based on Varro, reports that at the beginning of war, after the moving of the ancilia, the celebrating priest also moved the hasta, as the image of the deity (*simulacrum ipsius*) and in the course of this he awoke Mars with the appeal “*Mars vigilia!*” and by this, if we conceive Mars as a *unity of person-authority*, he awoke War itself.⁶⁶ There is no need of further explication to see the manaistic, numinous aspect recognized by Wagenvoort in this religious act.⁶⁷ The derivation of Quirinus's name, meaning “*spear*” from the word of

⁶⁰ Dumézil, G.: *L'héritage indo-européen à Rome*. Paris, 1949. 60.

⁶¹ Arnob. 6, 11. (*coluisse*) *pro Marte Romanos hastam, Varronis ut indicant Musae*.

⁶² Wissowa: *op. cit.* 144; Latte: *op. cit.* 114. sqq.; Scholz, U. W.: *Studien zum altitalischen und altrömischen Marskult und Marsmythos*. Heidelberg, 1970. 29; Pötscher: 457. sq.

⁶³ Cf. Pötscher, W.: *Ares. Gymnasium* 66 (1959) 4. sqq.

⁶⁴ Pötscher, W.: *Das Person-Bereichdenken in der frühgriechischen Periode. Wiener Studien* 72 (1959) 24.

⁶⁵ Justin. 43, 3, 3. *Nam ab origine rerum pro diis immortalibus veteres hastas coluere*.

⁶⁶ Serv. *ad Verg. Aen.* 8, 3. *Est autem sacrorum: nam is qui belli suscepit curam, sacrarium Martis ingressus primo ancilia commovebat, post hastam simulacri ipsius, dicens “Mars vigila”*.

⁶⁷ Wagenvoort: 352. sqq.

Sabin origin *quiris-curis* can be found in several *auctores*,⁶⁸ and Iuno's name, Quiritis is also explained this way.⁶⁹ It is not by chance that Thormann appositely translates the name "*Quirites*" of the Roman citizens with the expression "*Speermänner*".⁷⁰

Hence it becomes clear that Roman thinking connected somehow the concept of the force inherent in the spear, the *numen* both with Mars and with Quirinus, but the exact definition of this connection is encumbered by the fact that the existing sources expound on this numinous force only in the case of *hasta Martis*.⁷¹ The question arises why they were using a rod, the *festuca* instead of the spear meaning the *iustum dominium*, in the course of the symbolic fight of the *legis actio sacramento in rem*. According to Van der Brink the *festuca* and the *hasta* are parts of two completely different symbolic systems.⁷² He considers the spear to be an Indo-European symbol of power,⁷³ whereas he regards the rod as part of the Mediterranean culture.⁷⁴ At the same time, he disregards the fact that at the time when these symbols were formed, the differences between the spear and the rod most probably had not occurred yet, as both were made of wood, the only minor differences could appear in size or as the result of the fact that the rod used as a weapon had been hardened in fire.⁷⁵ The fact that in the ceremony of the *vindicatio* the *festuca* stood for, i.e. represented the *hasta* can be explained by the disposition which from the beginning attempted to restrict the use of the spear within the *pomerium* and to confine it to the sphere of the most necessary rites.⁷⁶

III. Comparing the *ius fetiale* and the *ius privatum* several valuable parallels can be drawn with regard to the structure of the *clarigatio*, the *rerum repetitio*,

⁶⁸ Ov. *fast.* 2, 475. sqq.; Marc. *Sat.* 1, 9, 16; Dion. Hal. 2, 48, 2–4; Plut. *Rom.* 29, 1.

⁶⁹ Fest. 43, 5. *Curitim Iunonem appellabant, quia eandem ferre hastam putabant.*; 55, 6. *Iunonis Curitis ... quae ita appellabatur a ferenda hasta, quae lingua Sabinorum curis dicitur.*

⁷⁰ Thormann, K. F.: *Der doppelte Ursprung der mancipatio, ein Beitrag zur Erforschung des frühromischen Rechtes unter Mitberücksichtigung des Nexum*. München, 1943. 32. 80. sqq.

⁷¹ Alföldi: *op. cit.* 19.

⁷² Brink, H. v. d.: Staff laying. In: *The Charm of Legal History*. Amsterdam, 1974. 68.

⁷³ Cf. Neufeld, E.: *The Hittite Laws*. London, 1951.

⁷⁴ Brink: *op. cit.* 70. sqq.; 77.

⁷⁵ Waele: *op. cit.* 172.

⁷⁶ Alföldi: *op. cit.* 4.

and the *legis actio sacramento*.⁷⁷ The norms with a powerfully religious character of the *ius fetiale* show close connection with several other Roman legal institutions, all the more so because for the man of the age it is difficult to imagine a bond with more binding power than the oath, including self malediction as well.⁷⁸ (According to Dahlheim, due to its strong superstitious-religious determination the *ius fetiale* lacks any kind of moral background.⁷⁹ However, his view can be contested because legal formalism and legal ethics are not mutually exclusive components.⁸⁰) In the archaic age, the interstate relationships of Rome were governed by a body of twenty priests, called the *fetiales*.⁸¹ Their tasks included the contracting of alliances, the *foedus*, the establishment of the conditions of armistices, and the declaration of war, given the fact that the war could only qualify as *bellum pium ac iustum* if it was declared and started according to the rules of the *ius fetiale*.⁸² (It is interesting that for the Romans the basic principle of the invulnerability of the envoys was indisputable. Whereas in the case of the Greeks the division of the institution of the *keryx*, enjoying sacred protection and the *presbeis*, invulnerable as a result of a political agreement took place very early, in Rome the *fetialis* and later the other envoys—even if they did not belong to the *fetiales*⁸³—enjoyed sacred protection, even in time of war.⁸⁴)

The *foedus*,—etymologically related to the expression *fides*⁸⁵—the Roman statal contract implemented observing the required formalities,⁸⁶ as opposed to

⁷⁷ Donatuti, G.: La “clarigatio” o “rerum repetitio” e l’istituto parallelo dell’ antica procedura civile romana. *Iura* 6 (1955) 31. sqq.; Volterra, E.: L’istituto della “clarigatio” e l’antica procedura delle “legis actiones”. In: *Scritti Carnelutti*. Padova, 1950. 251. sqq.

⁷⁸ Ziegler, K.-H.: Das Völkerrecht der römischen Republik. In: *Aufstieg und Niedergang der römischen Welt* I. 2. 78; Pólay, E.: *Differenzierung der Gesellschaftsnormen im antiken Rom*. Budapest, 1964. 100. sqq.

⁷⁹ Dahlheim, W.: *Struktur und Entwicklung des römischen Völkerrechts im dritten und zweiten Jahrhundert v. Chr.* München, 1968. 173.

⁸⁰ Ziegler: *op. cit.* 79.

⁸¹ Földi-Hamza: *op. cit.* 65; Mommsen: *op. cit.* II. 675; Samter: Fetiales. *RE* VII. 2. 2260. sqq.; Wissowa: *op. cit.* 551; Latte: *op. cit.* 121. sqq.

⁸² Cic. *leg.* 2, 21; Dion. Hal. 2, 72, 4; Cic. *off.* 1, 36; rep. 2, 31; 3, 35; Varro *ling.* 5, 86. Ziegler: *op. cit.* 100. sqq.

⁸³ Cf. Marci. D. 1, 8, 8, 1. *Sanctum autem dictum est a sagminibus: sunt autem sagmina quaedam herba, quas legati populi Romani ferre solent, ne quis eos violaret, sicut legati Graecorum ferunt ea quae vocantur cerycia.*

⁸⁴ Liv. 38, 42, 7; Pomp. D. 50, 7, 18.

⁸⁵ Walde-Hofmann: *op. cit.* I. 494; Latte: *op. cit.* 126. sqq.

the *hospitium*,⁸⁷ the *amicitia*,⁸⁸ the *societas*,⁸⁹ and the *pax* does not signify the content of the contract but its form, and its most important element is the ceremonial oath made by the representative of the *populus Romanus*.⁹⁰ The ceremony of the *foedus* is presented by Livy. According to him the priest, chosen from among the *fetiales*, who is consecrated *pater patratus* by reciting the texts selected for the occasion and being touched with a bunch of sacred grass (*sagmina*) takes the oath after reading out the text of the contract.⁹¹ In the oath he calls Iuppiter, the *pater patratus* of the people making contract with him, and the people themselves to witness that the contract that has been read does not contain any falsity, and that the Roman people will not deviate from this first, and if they did—and here follows the self malediction—then he asks Iuppiter to come down on the Roman people the way he is just knocking down the sacrificial pig. Moreover, he should strike even more severely, as he is more powerful than the priest. Then he stabbed the sacrificial animal.⁹² Festus recounts a somewhat different formula, according to which the *pater patratus*, after knocking down the pig with a stone, asks Iuppiter to throw him out of his wealth as he is throwing away the stone if he proceeded falsely, but he entreats the god to spare his city.⁹³ Polybos calls Rome's first contract with Carthago an agreement *per Iovem lapidem*,⁹⁴ Cicero ranks the *per Iovem lapidem* oath formula to the *ius civile*.⁹⁵

Discussing the *ius fetiale* it should be pointed out that the Romans were the first to interpret war as a legal fact and they created the concept of *bellum*

⁸⁶ Mommsen: *op. cit.* I. 246. sqq.; K. Neumann: *Foedus. RE VI. 2. 2818. sqq.*; Heuss, A.: *Abschluß und Beurkundung des griechischen und römischen Staatsvertrages. Klio 27 (1934) 166. skk.*; Frezza, P.: *Le forme federative e la struttura dei rapporti internazionali nell'antico diritto romano. Studia et documenta historiae et iuris 4 (1938) 363. sqq.*

⁸⁷ About the *hospitium* see Leonhard, P.: *Hospitium. RE VIII. 2. 2493. sqq.*; Frezza: *op. cit.* 397. sqq.

⁸⁸ About the *amicitia* see Heuss, A.: *Die völkerrechtlichen Grundlagen der römischen Außenpolitik in republikanischer Zeit. Klio Beiheft 31. Leipzig, 1933. 12. sqq.*

⁸⁹ See Dahlheim: *op. cit.* 163. sqq.; Kienast, D.: *Entstehung und Aufbau des römischen Reiches. Zeitschrift der Savigny Stiftung für Rechtsgeschichte 85 (1968) 334. sqq.*

⁹⁰ Ziegler: *op. cit.* 90.

⁹¹ Liv. 1, 24, 4–7.

⁹² Liv. 1, 24, 7–9.

⁹³ Fest. 239.

⁹⁴ Polyb. 3, 25, 6. sqq.

⁹⁵ Cic. *fam.* 7, 12, 2. Cf. Latte: *op. cit.* 122. sq.

iustum, influential up to the present day.⁹⁶ Not all armed conflicts counted as war, *bellum* could only take place between peoples (*populi*), only the enemy possessing an organized state counted as *hostis*. In accordance with this, Cicero can state that only the oath given to the enemy obliges, the one given to robbers does not.⁹⁷ We can depart from Livy's description in the case of the declaration of war as well. On the border of that people's land from which he demands satisfaction (*rerum repetitio*, or *clarigatio*⁹⁸) the *pater patratus* declares that he presents his demands as an envoy of the Roman people, observing the divine law, and he calls Iuppiter, the borders (*finis*) and the divine law (*fas*) to witness that if he demanded the delivery of the mentioned people or things unrightfully, then Jupiter should not allow him to return to his country. He recites this at the crossing of the border, and with slight alterations to the first person he encounters, and again, when he enters the town, and finally on the main square.⁹⁹ If they do not deliver the things asked by him within thirty-three days—Dionysius Halicarnassensis mentions an interval of thirty days¹⁰⁰—, after calling Iuppiter, Ianus Quirinius, and all the gods witness, he declares that he did not receive what he demanded, and that on returning to Rome, he wishes to deliberate about how they could take revenge. This means that he declares the possibility of war (*testatio*, or *denuntiatio belli*).¹⁰¹ Arriving in Rome, the envoy presented the case to the Fathers and if the majority decided for *purum piumque duellum*, the *pater patratus* took an iron tipped or fire-hardened spear (*hastam ferratam aut praeustam sanguineam*) to the enemy's border, and there, making reference to the unrightfulness of the refusal of his demand, he declared war and threw the spear onto the enemy's territory.¹⁰² (Thus the direct *causa* of the war was the enemy people's unlawful behaviour, the fact that they did not

⁹⁶ Cf. Cic. *leg.* 3, 9. *duella iusta iuste gerunto*; Liv. 1, 32, 12. *purum piumque duellum*; Lammert, F.: *Kriegsrecht. RE Suppl.* VI. 1351. sqq.; Ziegler: *op. cit.* 101.

⁹⁷ Cic. *Phil.* 4, 14; *off.* 3, 107. sq.; Ulp. D. 49, 15, 24.

⁹⁸ Plin. *nat.* 22, 3, 5; Serv. *ad Verg. Aen.* 9, 52; 10, 14; Quint. *inst.* 7, 3, 13.

⁹⁹ Liv. 1, 32, 6–8.

¹⁰⁰ Dion. Hal. 2, 72, 8.

¹⁰¹ Liv. 1, 32, 9–10; Cf. Ogilvie, R. M.: *A Commentary on Livy*. Oxford 1965. 131; Bernhöft, F.: *Staat und Recht in der römischen Königszeit im Verhältnis zu verwandten Rechten*. Amsterdam, 1968. 221. sq.; Kaser: *Das altrömische ius. op. cit.* 22; Haffter, H.: *Geistige Grundlagen römischer Kriegführung und Außenpolitik*. In: *Römische Politik und Römische Politiker*. Heidelberg, 1967. 23.

¹⁰² Liv. 1, 32, 11–14.

deliver the things or people demanded by the Romans.¹⁰³) Naturally, there was no need of such declaration of war if the enemy invaded Roman territory, in this case they could immediately and unconditionally begin the counter attack, so the declaration of war implemented by the *fetiales* had any significance only in the case of offensive warfare, initiated by the Romans. The archaic age certainly knew the institution of personal revenge, but the official declaration of war was only employed if the war was waged by the entire community, the *populus*, against another people, which was clearly distinguished from armed conflict between different groups of the aristocracy.¹⁰⁴ In the course of its expansion Rome did not always have the opportunity to keep this ritual, therefore, the characteristically Roman formal conservatism chose the following fiction: The *pater patratus* threw the spear onto a plot of land declared enemy territory near Bellona's temple and the entire ceremony was performed with relation to this, but the demands towards the enemy were presented by the *legati* of the *senatus*, and they were the ones to declare war.¹⁰⁵ (Sometimes they sent the spear to the people on whom they wanted to declare war.¹⁰⁶) However, the *fetiales*'s ritual of the declaration of war considerably contributed to the observation of the requirement that the war had to possess some kind of *iusta causa*, and it is not by chance that Cicero, formulating the theory of the just war under the influence of Stoic philosophy, connects the *aequitas belli* with the *ius fetiale*.¹⁰⁷

The *hasta ferrata aut praeusta sanguinea*, meaning iron tipped or fire hardened spear, mentioned by Livy,¹⁰⁸ also deserves attention. At the same time, it is not known when the iron-tipped spear was substituted for, or when it accompanied the wooden spear hardened in fire, as The Iron Age goes back to the turn of the 8th and 9th century BC. in Italy. It can be assumed though, that in ritual usage the iron-tipped spear could only take the place of the wooden one when it came to be exclusively used in everyday life.¹⁰⁹ The expression *sanguinea*

¹⁰³ Albert, S.: De vetere iure Romano, de lege duodecim tabularum atque de iure fetiali. *Vox Latina* 34 (1998) 218.

¹⁰⁴ Ziegler: *op. cit.* 103.

¹⁰⁵ Francusci, P. de: Appunti e considerazioni intorno alla "columna bellica". *Atti della Pontificia academia romana di archeologia. Ser. III. Rendiconti* 27. 1951–1954. 1899. sqq.; Dahlheim: *op. cit.* 175. sqq.

¹⁰⁶ Cf. Fest. 90. *Carthaginienses cum bellum vellent, Romam hastam miserunt.*

¹⁰⁷ Cic. *off.* 1, 36; Hausmaninger, H.: "Bellum iustum" und "iusta causa belli" im älteren römischen Recht. *Österreichische Zeitschrift für öffentliches Recht* 11 (1961) 341. sqq.

¹⁰⁸ Liv. 1, 32, 12.

¹⁰⁹ Waele: *op. cit.* 173. sq.

is particularly problematic: The word itself can be translated as *consecrated in blood* or *coloured with blood*. However, if it is taken for the denomination of the wooden material, it can mean the branch of the cornel tree, the *sanguineae virgae*, which, being hard wood, constituted a perfectly suitable raw material for the spear.¹¹⁰ Ammianus Marcellinus mentions in connection with the *fetiales's* spear that besmearing it with blood played an important role in the course of its manufacturing.¹¹¹ The spear of the *ius sacrum* made of cornel wood counted as *arbor felix*,¹¹² but the spear used for the declaration of war was *hasta impura*, i.e. *arbor infelix*, dedicated to the forces of the underworld.¹¹³ Thus, whether the *fetiales's* spear was coloured with real blood, or made of blood coloured cornel wood, the original *hasta praeusta sanguinea* was later changed for *hasta ferrata sanguine infecta*.¹¹⁴ The *fetialis* ritually predicts the outcome of war at its very beginning because by symbolically taking the enemy territory into possession with the *hasta impura*, dedicated to the gods of the underworld, he delivers the enemy, the *hostis impius*, bereft of the reason for its existence, to the forces of destruction.¹¹⁵ (In the light of this, the role of the *evocatio*, performed by the Romans before the attack, by which they intended to lure to Rome the gods of the enemy doomed to destruction becomes perfectly clear.¹¹⁶)

The strongly text-centered nature of the *ius fetiale* and the *legis actio sacramento* is sufficiently well-known, we know that whoever missed even one word of the text, lost the case.¹¹⁷ Although in the case of the *ius fetiale* we have no *expressis verbis* knowledge of such consequences, it can be rightly assumed that the Romans did not tolerate even the slightest deviation from the text because this would have destroyed the effect of the *carmen*, hence it would have endangered the result of the *bellum iustum*, fought with divine help.¹¹⁸ The oath is an indispensable part of the *ius fetiale*. On the one hand the self malediction of the *pater patratus* on the occasion that he presented unrightful demands in the name of the Roman people, on the other hand the calling the gods to witness the lawful procedure of the Romans and the unlawful

¹¹⁰ Macr. *Sat.* 3, 20, 3; Plin. *nat.* 16, 176; 19, 180; 24, 73. Cf. Waele: *op. cit.* 174.

¹¹¹ Amm. 19, 2, 6.

¹¹² Macr. *Sat.* 3, 20, 2.

¹¹³ Scholz: *op. cit.* 32.

¹¹⁴ Scholz: *op. cit.* 32.

¹¹⁵ Latte: *op. cit.* 122; Scholz: *op. cit.* 32.

¹¹⁶ Latte: *op. cit.* 125. About this ritual act see Basanoff, V.: *Evocatio*. Paris 1947.

¹¹⁷ Gai. *inst.* 4, 11. 30.

¹¹⁸ Albert: *op. cit.* 220.

procedure of the enemy. In the case of the *legis actio* the *sacramentum* corresponds to this oath.¹¹⁹ The oath-like character of the *sacramentum* is clearly shown by the original meaning of the word itself,¹²⁰ at the same time, it also incorporates the circumstance that the statement of the party taking the oath—e.g. the plaintiff—is true, and accordingly, the statement of his opponent is false. However, if in the end it were proved that the claim of the plaintiff does not stand, then it becomes evident that he committed perjury, i.e. he was performed his own *devotio*.¹²¹ (Kaser also suspects that in the beginning the *sacramentum* was connected to the divine judgement, but in his view this cannot be sufficiently documented for the period from which written sources exist.¹²² It is still a fact that the character of divine judgement can be traced—by way of analogy—also in this part of the *legis actio sacramento*. References to the role played by the oath in the trial can be found not only in literary sources, but in traces, in later legal documents as well.¹²³) It seems a further parallel that both the *rerum repetitio* and the *legis actio sacramento* is originally aimed at regaining the things unlawfully possessed by the opposing party in a peaceful manner, placing arbitrariness and fight under the control of the state, thus limiting their scope and intensity.¹²⁴ At the same time it is a clear difference that whereas in the case of the *legis actio sacramento* the parties accept the control and decision of a judge recognized by both of them, in the case of the *ius fetiale*, this institution is absent. This is demonstrated by the fact that in the so-called international affairs they could not agree on the competence of legal court—this might be the cause of the absence of the *apud iudicem* stage of the *ius fetiale* procedure—, it can be rightly assumed though that the Romans found the instance entitled to decide in the conflict of two nations exactly in the higher powers, who were so often called to witness.¹²⁵

The *ius fetiale* is a clearly religious system of norms and procedures, as this is shown by the constant mentioning of the persons and gods acting in it. Nevertheless, the *legis actio sacramento*, considered to be an institution of the *ius privatum* shows close connection with the *ius sacrum*: In the beginning the *legis actio* was performed in front of the *rex*, who was present, both in his

¹¹⁹ Kaser: *Das altrömische ius. op. cit.* 21.

¹²⁰ Walde–Hofmann: *op. cit. II.* 459. sqq.; Kaser: *Das altrömische ius. op. cit.* 18.

¹²¹ Albert: *op. cit.* 220.

¹²² Kaser, M.: *Das römische Zivilprozeßrecht.* München, 1966. 62.

¹²³ Verg. *Aen.* 8, 262. sqq.; Ulp. D. 4, 3, 21.; Ulp. D. 47, 52, 27.

¹²⁴ Kaser: *Das altrömische ius. op. cit.* 22.

¹²⁵ Albert: *op. cit.* 222.

person and his legitimacy, as a representative of the sphere of the sacred. Then the *in iure* stage of the trial took place in front of the *magistratus*, then, *in concreto*, it took place in front of the *praetor*, who from the point of his jurisdictional responsibilities, was an inheritor of the *rex*.¹²⁶ The oath, strictly observing the words of the text, was also addressed to the gods, which substantiates the assumption that the *legis actio* was closely connected to the *ius sacrum*.¹²⁷ (Certain parallels can be detected between the *ius fetiale* and the Twelve Table Law,¹²⁸ for example the debtor had thirty days to satisfy the demand of the creditor if he admitted his indebtedness, or if the case was settled by legal decision, just like the *pater patratus* had to wait with the *denuntiatio belli* for thirty days after he had announced his demands, according to Dionysius Halicarnassesensis.¹²⁹ The reason of both decrees was to facilitate the finding of a peaceful solution of the conflict within this interval. Just like the relevant loci of the Twelve Table Law order the giving into *nox*a of the person causing damage,¹³⁰ the demands of the *ius fetiale* also contain the extradition of the person committing a deed injurious to Rome.¹³¹) The same intention, meant to restrict the uncontrollable arbitrary enforcement of private demands between the citizens of a state, or between different nations and states, trying to prevent the state of *bellum omnium contra omnes* by placing the solving of the conflict under some kind of commonly accepted higher instance, might have stood at the origins of both the *ius fetiale* and the *legis actio sacramento*.¹³²

IV. It is sufficiently well known that in Homer Zeus decides certain armed conflicts with the help of his scales¹³³ by way of the so-called *psykhostasia*,

¹²⁶ Földi–Hamza: *op. cit.* 18; Meyer, E.: *Römischer Staat und Staatsgedanke*. Zürich–Stuttgart, 1964. 38. 117; Bleicken, J.: *Die Verfassung der römischen Republik*. Paderborn 1975. 76. sq.

¹²⁷ Cf. Noailles, P.: *Du Droit sacré au Droit civil*. Paris, 1949. 18. sqq.

¹²⁸ Donatuti: *op. cit.* 31. sqq.; Hausmaninger: *op. cit.* 338; Bernhöft: *op. cit.* 221. sqq.; Albert: *op. cit.* 224.

¹²⁹ *XII tab.* 3, 1; Dion. Hal. 2, 72, 8.

¹³⁰ *XII tab.* 8, 6. (Ulp. D. 9, 1, 1 pr.); 12, 2b (Gai. *inst.* 4, 75–76.) About these loci see Földi: *op. cit.* 103. sqq.

¹³¹ *Das altrömische ius. op. cit.* 185. Cf. Liv. 8, 39, 14; 9, 8, 6; 9, 10, 2. sqq.; Cic. *Caecin.* 98; *De orat.* 1, 181; 2, 137; *off.* 3, 108.

¹³² Kaser: *Das römische Zivilprozeßrecht*. 19; Kaser: *Das altrömische ius. op. cit.* 15.

¹³³ *Il.* 8, 69. sqq.; 16, 657. sqq.; 19, 223. sqq.; 22, 209–213.

and *kerostasia*¹³⁴—this scene can be found with minor modifications in Virgil as well¹³⁵—and it is also known that in certain cases the combatants decide by lot who should start the fight, thus asking for the help of the gods.¹³⁶ Naturally, the drawing of lots by *oraculum* was known by the Romans as well.¹³⁷ Most often they practiced the version in which the wooden tickets of the persons taking part in the draw were placed in an urn, filled with water, the *sitella*, which was bellied but had a narrow neck, and after reciting certain magic words and shaking the urn, they drew conclusions regarding the divine will from the sinking or the floating on the surface of the *sortes*, of which only one could remain above due to the narrow neck of the urn.¹³⁸ A similar procedure can be found in Plautus's comedy, entitled *Casina*, this being all the more significant as Plautus, though he often worked with Greek samples, had to adapt the scenes of his comedies to Roman thinking and everyday life, otherwise he could not have expected to be successful. In *Casina* not merely a common *oraculum* is presented but the decision by single combat—leading to the employment of actual violence—of a legal conflict with the help of *oraculum*. This procedure shows a special mixture of the *oraculum* based on divine decision and the archaic *vindicatio*, requiring the employment of *vis*, in that it makes steps towards the repression of violence by way of the *oraculum*, based on the decision of divine forces.¹³⁹

The situation in *Casina* is the following: The Athenian Cleostrata, wife of Lysidamus acquired and brought up the slave girl Casina out of her own fortune. Contradiction arises in connection with the right to dispose over Casina. On the one hand, Lysidamus wants to acquire her for himself and his slave, Olympio, on the other hand, Cleostrata also claims the girl for herself and her slave, Chalinus. On behalf of the husband the *vilicus*, Olympio, on behalf of the wife, the *armiger* Chalinus take part in the actual dispute.¹⁴⁰ In

¹³⁴ See Wüst, E.: Die Seelenwägung in Ägypten und Griechenland. *Archiv für Religionswissenschaft* 36 (1939) 166. sqq.; Dietrich, B. C.: The Judgement of Zeus. *Rheinisches Museum* (1964) 103. sqq.; Pötscher, W.: Schicksalswägungen. *Kairos* 15 (1973) 61. sqq.; Pötscher, W.: Moira, Themis und timé im homerischen Denken. *Wiener Studien* 73 (1960) 15. sqq.

¹³⁵ Verg. *Aen.* 12, 725–727.

¹³⁶ *Il.* 316. sqq.; 7, 170. sqq.

¹³⁷ Cf. Cic. *inv.* 1, 18.

¹³⁸ Cf. Cic. *nat.* 1, 106; *Corn. fr.* 1, 13. 14; Liv. 25, 3. 1. sqq.

¹³⁹ Düll, R.: Zur Frage des Gottesurteils im vorgeschichtlichen römischen Zivilstreit. *Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 58 (1938) 19. sqq.

¹⁴⁰ Plaut. *Cas.* 47. sqq.

the course of the dispute physical violence takes place between the slaves representing the opposing husband and wife, at the same time, the *oraculum* preceding actual fight also begins. The two *sortes* are placed into the *sitella* and the actual fight is simultaneous with the ceremony. Chalinus is defeated in the *oraculum*, Olympio and his master are the winners, and the dispute is decided in favour of Cleostrata by the employment of a trick only in the second part of the play.¹⁴¹

At the beginning of the procedure Cleostrata complains that her husband restricts her in her freedom to dispose over her slave, constituting her own property,¹⁴² to which her neighbour, Myrrhina reminds her of the rule of Roman matrimonial law, according to which the husband has the right to dispose over his wife's entire property.¹⁴³ In the dispute Lysidamus tries to convince his wife to yield to him, but Cleostrata sticks to her claim that she is entitled to provide for and dispose over her slave.¹⁴⁴ The married couple agree to entrust two slaves with the fight over Casina, but both do this, hoping in secret that they can force each other's slaves to renounce at Casina.¹⁴⁵ The two slaves appear, and Lysidamus tells Chalinus that he promised Cassina to his slave, Olympio, to which Chalinus responds that Cleostrata promised the girl to him.¹⁴⁶ Lysidamus offers to liberate Chalinus if he renounces at Casina, but the slave does not accept.¹⁴⁷ Lysidamus calls his wife and orders Chalinus to bring a *sitella* full of water and the *sortes* belonging to it, and announces that if the negotiations do not yield any result he will entrust the *oraculum* with the decision.¹⁴⁸ Meanwhile Cleostrata tries to dissuade Olympio from clinging to Cassina, but he says that he would not change his mind even at Iuppiter's request.¹⁴⁹ There is nothing left to do but turning to the *sortio*, but the *oraculum*, in which the will of the gods concerning the issue is manifested cannot dispense with *vis*, the actual fight.¹⁵⁰ When Chalinus appears with the *sitella* and the *sortes*, Lysidamus announces that the fight must be fought observing the formal requirements of

¹⁴¹ Düll: *op. cit.* 20. sq.

¹⁴² Plaut. *Cas.* 149. 189. sq. 193. sqq.

¹⁴³ Cf. Földi-Hamza: *op. cit.* 256. sqq.

¹⁴⁴ Plaut. *Cas.* 248. sqq. 260. sq.

¹⁴⁵ Plaut. *Cas.* 269. sqq.

¹⁴⁶ Plaut. *Cas.* 288. 289.

¹⁴⁷ Plaut. *Cas.* 289. sqq. 293. sqq.

¹⁴⁸ Plaut. *Cas.* 295. 298.

¹⁴⁹ Plaut. *Cas.* 323.

¹⁵⁰ Plaut. *Cas.* 342. sqq. 346.

the procedure, and that he himself, wants to supervise it.¹⁵¹ However, he makes a final attempt at persuading Cleostrata, but she categorically refuses.¹⁵² So the ceremony begins, and the fact that everything is performed strictly in accordance with the rules receives special emphasis.¹⁵³ The *sortes* are marked with inscriptions and they check that there is no other *sors* already in the urn, as well as the fact that the two balls are made of the same wood, as the winner of the *oraculum* will be the one whose *sors* will remain above in the urn.¹⁵⁴ Then the urn is placed in front of Cleostrata, her task being to shake it and to draw out the *sors*.¹⁵⁵ The two participants of the *oraculum*, Olympio and Chalinus pray to the gods to help their case and they accurse the adversary.¹⁵⁶ After the prayers Lysidamus calls on the parties to begin the actual combat, he wishes Olympio good luck, and so does his wife to Chalinus. Olympio asks Lysidamus whether he should hit Chalinus with his fist or with his open palm, to which his master replies that he should proceed the way he wants. Then Olympio, calling in help Iuppiter slaps Chalinus in the face, while Chalinus, calling in help Iuno, hits Olympio with his fist.¹⁵⁷ After the outright violence, Cleostrata has to draw the *sors* remaining above in the urn, and the parties are asked to cease fighting.¹⁵⁸ Cleostrata draws out Olympio's *sors* because that one was above, and announces that Chalinus is the loser, and Lysidamus announces

¹⁵¹ Plaut. *Cas.* 352. 357. 363.

¹⁵² Plaut. *Cas.* 364. sq. 370. sqq. 373.

¹⁵³ Plaut. *Cas.* 375. (Lys.) *Optimum atque aequissimum istud esse iure iudico.*

¹⁵⁴ Plaut. *Cas.* 378. 380. 384. sqq.

¹⁵⁵ Plaut. *Cas.* 387. 395.

¹⁵⁶ Plaut. *Cas.* 389. sqq. (Ol.) *Taceo: deos quaeso*—(Chal.) *Ut quidem tu hodie canem et furcam feras.* / (Ol.) *Mihi ut sortio eveniat*—(Chal.) *Ut quidem hercle pedibus pendeas.* / (Ol.) *At tu ut oculos emungare ex capite per nasum tuos.* (Chal.) *Quid times? Paratum oportet esse iam laqueum tibi.* / (Ol.) *Periisti.* 396. (Chal.) *Deos quaeso, ut tua sors ex sitella effugerit.*

¹⁵⁷ Plaut. *Cas.* 401. sqq. (Lys.) *Hoc age sis, Olympio.* (Ol.) *Si hic litteratus me sinat.* / (Lys.) *Quod bonum atque fortunatum mihi sit.* (Ol.) *Ita vero, et mihi.* / (Chal.) *non.* (Ol.) *Immo hercle.* (Chal.) *Immo me hercle.* (Cleost.) *Hic. vincet, tu vives miser.* / (Lys.) *Percide os tu illi hodie. Age, equid fit? Ne obiexis manum.* / (Ol.) *Compressan palma an porrecta ferio?* (Lys.) *Age ut vis.* (Ol.) *Em tibi.* / (Cleost.) *Quid tibi istunc tactio est?* (Ol.) *Quia Iuppiter iussit meus.* / (Cleost.) *Feri palma, ut ille, rursum.* (Ol.) *Perii, pugnis caedor, Iuppiter.* / (Lys.) *Quid tibi tactio hunc fuit?* (Chal.) *Quia iussit haec Iuno mea.* / (Lys.) *Patiundum est, siquidem me vivo mea uxor imperium exhibet.* / (Cleost.) *Tam huic loqui licere oportet quam isti.* (Ol.) *Cur omen mihi / vituperat?* (Lys.) *Malo, Chaline, tibi cavendum censeo.* / (Chal.) *Temperi, postquam oppugnatum est os.*

¹⁵⁸ Plaut. *Cas.* 412.

that the gods supported Olympio, fighting on his behalf. Olympio considers his victory to be a reward for his own, and for his ancestors' *pietas*.¹⁵⁹ Thus the case was settled with Casina having to marry Olympio, while Cleostrata has to make preparations for the ceremonial feast, which she begins, having accepted the decision of the *oraculum*.¹⁶⁰

As it becomes evident from the prologue of the play, Plautus modelled his comedy on Diphilus's play, *Kleroumenoi*, and—as it is clearly shown by its title—the Greek play is also centred around a kind of sortio, a drawing or casting of lots, which is not in the least surprising taking into account that the oracula involving drawing of lots constituted an integral part of Greek religious thinking and religious practice.¹⁶¹ Plautus is anyway a master of intermingling Greek elements with Roman everyday life, customs, religion and law, and he explains in the prologue those elements of his play which could be strange for the Roman audience. So he does with the motif of the slaves' "marriage",¹⁶² yet he does not consider it necessary to add any explanations to the settling the contradiction arising about the right to dispose over a slave by oraculum and fight, he is content to mention the perfect righteousness and legality of the procedure.¹⁶³ (The typically Roman character is corroborated by the reference to the decree of the Twelve Table Law, the *repudium*.¹⁶⁴) The fight of the Horatii and the Curiatii, described by Livy can be mentioned as a parallel to the single combat fought under ceremonial circumstances, as well as the form of the interstatal contracts, in the course of which they call Iuppiter in help and also as witness, the actual fight being signified by the expression *manum conserere*.¹⁶⁵ The act of *manum conserere* can also be encountered in Cicero's and Gellius's descriptions of the *vindicatio* of plots of land. From the comparison of these sources it becomes evident that the employment of the *vis*,

¹⁵⁹ Plaut. *Cas.* 417. sq. (Cleost.) *Victus es, Chaline.* (Lys.) *Cum nos di iuvere, Olympio, / gaudeo.* (Ol.) *Pietate factum est mea atque maiorum meum.*

¹⁶⁰ Plaut. *Cas.* 427. sq. 419.

¹⁶¹ Plaut. *Cas.* 31. sqq. Cf. Düll: *op. cit.* 27.

¹⁶² Plaut. *Cas.* 68. sqq. About this topic see Pólay, E.: Rabszolgák "házassága" az ókori Rómában ("Marriage" of Slaves in Ancient Rome). *Acta Universitatis Szegediensis* 34 (1984) 9. sqq.

¹⁶³ Plaut. *Cas.* 375. *Optimum atque aequissimum istud esse iure iudico.* Cf. Hägerström, A.: *Der römische Obligationsbegriff I.* Uppsala, 1927. 572.

¹⁶⁴ Plaut. *Cas.* 207. sq. Cf. *XII tab.* 4, 3; Földi-Hamza: *op. cit.* 255.

¹⁶⁵ Liv. 1, 24, 7. 25, 5. *Consertis deinde manibus, cum iam non motus tantum corporum agitatioque anceps telorum armorumque, sed volnera quoque et sanguis spectaculo essent ...*

the actual–later symbolic–violence constituted a substantial part of the *legis actio sacramento*.¹⁶⁶

The ritual described by Plautus must have constituted a certain intermediary stage between the personal fight and the *vindicatio*, as it is known today because in this case the parties agree on the rules of the settlement of the conflict, and they accept the control of a third person. The rules to be observed are mainly religious in character, and seem to be suitable to impede boundless and unrestricted violence. Nevertheless, the *vis* is unquestionably part of the procedure, but the winner in the actual fight is decided by a higher, transcendental power, thus the fight receives the character of ordeal.¹⁶⁷ The conditions of the *vindicatio* in *Casina* are given: The right to dispose over the slave girl can be regarded as a kind of property issue, yet the opposing parties—as taking into account the rules of comedy it would not be advisable to put on stage the man and wife, Lysidamus and Cleostrata using violence against each other—are substituted by their slaves in the procedure. However, the fight is always concerning the rights and interests of their owners.¹⁶⁸ First the husband announces his claim for the right to dispose over Casina, then, in response the wife does the same.¹⁶⁹ Then—after trying in vain to persuade the opponent’s slave to renounce at their plans concerning Casina—the couple agree that the decision in the dispute over the right of disposal should be reached in a procedure acceptable for both of them, and they agree to accept the decision as obligatory even if it happened to be unfavourable for them.¹⁷⁰ The accepted procedure is the *oraculum*, calling in help the *sortio* as well, which also included actual fight, as it is clearly shown by the expressions “*necessumst vorsis gladiis*”,¹⁷¹ “*conlatis signis depugnariet*”¹⁷² and “*ire obviam*”.¹⁷³ To this extent the procedure is analogous with the *vindicatio* described by Gaius, as the employment of *vis*—in the beginning actual, later symbolic—played an important role in this procedure as well.¹⁷⁴ The command

¹⁶⁶ Cic. *Mur.* 26; Gell. 20,10, 7–9. Cf. Thür, G.: *Vindicatio und deductio im früh-römischen Grundstückstreit. Zeitschrift der Savigny Stiftung für Rechtsgeschichte* 94 (1977) 296. sqq.

¹⁶⁷ Düll: *op. cit.* 29.

¹⁶⁸ Düll: *op. cit.* 30.

¹⁶⁹ Plaut. *Cas.* 193. 252. sq. 190. 193. sqq. 261.

¹⁷⁰ Plaut. *Cas.* 269. sqq.

¹⁷¹ Plaut. *Cas.* 344.

¹⁷² Plaut. *Cas.* 352.

¹⁷³ Plaut. *Cas.* 357.

¹⁷⁴ Düll: *op. cit.* 31.

“*age*” calls for the beginning of the fight,¹⁷⁵ which ends with the victory of one of the parties, the defeated one is regarded *victus*, or even *mortuus*.¹⁷⁶ The actual fight—armed, as mentioned by the sources but bare handed in practice¹⁷⁷—is an essential part of the *vindicatio*, but the dispute is not decided by the fight itself, but by the divine judgement, the *oraculum*, serving as the frame or background of the fight, somehow involving it into the mechanism of decision. Numerous parallels can be observed between the *vindicatio* in Plautus and the *legis actio sacramento in rem*, known from Gaius’s *Institutiones*. The parties fight with the same weapons, and they recite the *verba sollemnia* which calls the divinity in help including an oath as well, together with the symbolic enactment of violence with the help of the *festuca*.¹⁷⁸

At the end of this—considering the significance of the issue—brief study, not intended to be exhaustive, only wishing to highlight some aspects and associations, the following conclusions can be drawn: In our view, the opposing theories searching for the origin of the *legis actio sacramento in rem* either in personal fight or in the religious sphere can be made to augment each other concluding in the same direction, thus being integrated into unified theory. The sacred element (by which not only the religious world picture naming divinities is understood, but also the magic thinking operating with numinous forces) can be clearly traced both in the requirement of the verbatim recital of the oath, the *sacramentum* and the *carmen*. The motif of the fight appears both in the etymology of the word *vindicatio* and in the employment of the spear. However, it is precisely the *hasta* that carries an religious extra semantic load in Roman imagination, (this becomes evident both from its role played in Mars’s cult as well as in the declaration of war constituting part of the *ius sacrum*) which cannot be disregarded in the case of archaic civil law trial. Adapting to the rules of the genre, Plautus presents a quasi-property trial, the result of which is decided by restricted and controlled personal fight, employing the drawing of lots, thus calling for divine judgement. Based on all these it can be rightly assumed that originally the *ordalium*, fought with weapons, conducted the *legis actio sacramento in rem* to its form known today.

¹⁷⁵ Plaut. *Cas.* 401. 405. 412.

¹⁷⁶ Plaut. *Cas.* 407. 427.

¹⁷⁷ Plaut. *Cas.* 344. 352. 405.

¹⁷⁸ Düll: *op. cit.* 33. sq.