The Recovery of an Undue Payment by a Manumitted Slave in Ancient Rome: A Reading of Digest 12.4.3.7 in Light of the Theory of Social Acts according to Adolf Reinach

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***Abstract**: In his comment on the Pretorian edict the ancient Roman jurist Ulpian (+228) refers to a case where positive law (ius civile) and natural justice (aequitas naturalis) came into collision. A slave was manumitted in a will under the condition of paying 10 to the heir. Subsequently the owner of the slave made a second informal will (codicillus) where he manumitted the slave without mentioning any condition. After his masters dead the slave being ignorant of the second will paid 10. The question arose whether he could recover the money. The case was decided first by the elder Celsus who hold that the slave could not recover the money. On the contrary, the younger Celsus stated that the recovery of the money was possible. This latter jurist made his decision – as Ulpian stated – influenced by a feeling of natural justice. In the present paper we analyse the case will be also analysed from the perspective of theory of social acts developed by Adolf Reinach, one of the most outstanding members of the realistic branch of phenomenological school. Furthermore, a relationship is established between the present case and the Rescript of the Emperor Hadrian according to which a demand for operae could not be reinforced in case that the patronus was obliged to free the slave through a fideicommissum.*

***Keywords:** Slavery, Manumissio Testamentaria, Naturalis Aequitas, Social Acts, Undue Payment*

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I. Introduction

Slavery had been a generally accepted institution in the entirety of the ancient world. Thomas Wiedemann, the German-British scholar expressed the situation most accurately when saying that Roman people 'were not thinking about slavery so much as using the concept 'slavery' to think with'.[1] Since the 2nd century BC, Roman jurists, influenced by Greek philosophy, refer to the human nature of slaves in several texts. The consequence of abolishing or at least restricting slavery, which would seem logical today, was far from their minds; yet the conscience regarding the human condition of slaves was not bare of practical effects in the Roman legal order.

In this contribution, we will focus on two of the items that Roman jurists drew respective of the human condition of slaves: the employment of slaves in economic life and the institution of *manumissio*. The former might have been in the interest of the owners whereas the latter one benefitted (freed) slaves.[2] Initially we give a brief account of the attitude of the ancient Roman jurists towards slavery. At a further stage, we present a specific case in which the

[1] Herrmann-Otto E, *Grundfragen der antiken Sklaverei: Eine Institution zwischen Theorie und Praxis*, Georg Olms Verlag, Hildesheim-Zürich-New York, 2015, 10.

[2] The Roman jurist Ulpian connects the institution of slavery organically with the possibility of manumission.D. 1.1.4 [Ulp. 1 inst.] (…) *sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis*. (…).

economic aspect and the manumission encounter each other. We will interpret the ancient sources in light of the realistic phenomenology hallmarked by Adolf Reinach. It is broadly accepted by scholars that Roman jurists were influenced by philosophical items, albeit they can hardly be linked to a specific philosophical school. In dealing with cases, jurists on the one hand strove for understanding the essence of things. In their efforts to find legal solutions, Roman jurists were able to combine grasping things through intuition with a systematic and dogmatic appreciation. It seems that this thinking suits quite well the methodological approach of phenomenology. Therefore, this methodology might be a path to guide our intent when scrutinizing the meaning of the ancient texts.

II. The approach of Roman jurists to slavery

An early example for the discussion regarding the human nature of slaves concerns the question of whether a child born of a slave mother could be considered as a *fructus* (produce). Regarding this discussion, the ancient thinker Cicero relates that the three most authoritative jurists of his time, M. Junius Brutus, P. Mucius and Manilius debated the question of whether a slave child born of a mother to whom their owner had established a *usufruct* should belong to the mother's owner or rather to the *usufructuary*.[3] *Ususfructus* was understood as the right to use and to take produce of a thing belonging to another person preserving intact the substance of the same.[4] It is stated in the Digest, the compilation of jurists' opinions edited by emperor Justinian, that Brutus held that the rules of *ususfructus* were not applicable to this case. The reasoning given for this view is the categorical statement that *neque enim in fructu hominis homo esse potest*: a human being cannot be considered as the produce of another.[5] The other two jurists seem to have preferred the solution that the child should be regarded as *fructus*. Over the course of time, Brutus' opinion became the prevailing one.

[3] Cicero De finibus 1.4.12.

[4] D. 7.1.1 pr. [Paul. 3 ad Vitell.]: *Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia.*

[5] D. 7.1.68 pr. [Ulp. 17 ad Sab.]: *Vetus fuit quaestio, an partus ad fructuarium pertineret: sed bruti sententia optinuit fructuarium in eo locum non habere: neque enim in fructu hominis homo esse potest. hac ratione nec usum fructum in eo fructuarius habebit. quid tamen si fuerit etiam partus usus fructus relictus, an habeat in eo usum fructum? et cum possit partus legari, poterit et usus fructus eius*.

In the second century A.D., Gaius recorded that the child of a female slave was not to be considered as a produce, [6] and therefore belonged to the owner of the slave. The jurist added '*absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit*' i.e. it would seem absurd for a man to be considered a produce because nature created all fruits for the sake of man.[7]

The Austrian scholar Wolfgang Waldstein believes that Gaius in this passage refers to a normative order that people can get to know, involving value judgements and teleological structures.[8] The fact that the subjection of a human being to another man is against nature is, again, clearly expressed by another jurist of the second century A.D.

Florentinus expressed that slavery as an institution of *ius gentium* was the law of nations that subjected a human being contrary to nature to the property (*dominium*) of another human being.[9] In the Digest we find several passages which underline that ancient Romans were aware of the human condition of slaves. Ulpian expressed this clearly when he said that according to *ius civile* (the specific law of the Roman people) *servi pro nullis habentur*; slaves could not be regarded as persons. As far as natural law is concerned, all men are created equal.[10]

Returning to the initial question of whether the child born of a slave mother given as a *ususfructus* could be regarded as a produce or not, the following is worth considering. If we stick to the solution which presents a break with the general rules regarding *ususfructus* and we adopt a solution which, at first sight, seems more humane, we get a result which must be qualified as unsatisfactory right from a humanitarian point of view.

If the newborn child is to be considered as one belonging to the owner of the mother (which, at that time, does not possess the woman), the owner can

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[6] Regarding the meaning of the noun produce in the sense of offspring, especially of a female animal https://www.dictionary.com/browse/produce.

[7] D. 22.1.28.1 [Gai. 2 rer. cott.]: *Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet: absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparaverit.*

[8] Waldstein W, 'Entscheidungsgrundlagen der klassischen römischen Juristen' in Temporini (eds) *Aufstieg und Niedergang der römischen Welt*: (ANRW) Principat,. 2. Bd. 1, De Gruyter W , Berlin-New York, 1976, 51. Erdődy J, 'Rerum natura non patitur. Some remarks in the margin of rerum natura in the sources of Roman law' *Iustum Aequum Salutare*, 2008, 44.

[9] D. 1.5.4.1 [Flor. 9 inst.]: *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.*

[10] D. 50.17.32.[Ulp. 43 ad Sab.] *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*.

demand the child at any moment. As a result of this claim, the child will be separated from his mother and also from his natural father, who might have been in many cases the usufructuary himself, or at least somebody belonging to his sphere. Texts dated at a later time provide evidence that a split of families was not held desirable by Roman jurists.[11] Following a solution that Roman jurists considered to be in accordance with natural law leads to a result that is inconsistent from the point of view of human values. This result is due to the fact that the institution of ownership opposes human nature from an ontological point of view. From a phenomenological point of view, ownership is the most intense relation between a person and a thing. Necessarily, the bearer of this relationship can only be a person, and the born object can only be something which is different from a human person.[12] From an ontological aspect, the opposition mentioned above results from the disregard of these essential elements. This observation does not mean that the statements of the Roman jurists respective of the human nature of slaves were no more than empty declarations. One of the most important consequences of this understanding is the institution of manumission and its application in practical life.

It was through manumission that a slave could become a Roman citizen. Moreover, we can find examples for leading politicians, who were close descendants of freed slaves. Through *manumissio*, slaves could become Roman citizens and they generally did so.[13] As slavery in ancient Rome was never based on race or the colour of the skin, in many cases it was not possible to distinguish whether somebody was a slave or a free Roman citizen. [14] This was also

[11] D. 20.1.8 In the event of insolvency, the concubine and natural children were excluded from pledge. We might deduce a relationship of affection between father and child, one born from a slave woman; this representation appears on a tombstone built for a little boy named Carus. See Herrmann-Otto, Grundfragen der antiken Sklaverei, 20. See also D. 33.7.12.7. [Ulp. 20 ad Sab.].

[12] The differentiation between the bearer in the relation of property and the object of this relation is very well expressed in § 285 of the Austrian Code of Civil Law (ABGB).

[13] Probably, this was true in the early Roman period already. See Waldstein against the thesis of Theodor Mommsen according to which a slave became a res nullius through manusmissio. Waldstein W, *Operae libertorum: Untersuchungen zur Dienstpflicht freigelassener Sklaven*, F. Steiner, Stuttgart, 1986, 48-51.

[14] There was no term in Greek and Latin language for 'racism'. At the same time scholars underline the negative connotation of the term 'barbarian' used by Greeks to designate all non-Greeks. As regards prejudices related to ethnicity or culture in the ancient Greek world see Isaac B, 'Racism' in Ingomar Weiler and Dreißler (eds) *Handwörterbuch der antiken Sklaverei*, Akademie der Wissenschaften und der Literatur, Mainz, 2008, 2378-2382.

significant with regard to the time after the manumission, as there was nothing in the outward appearance to indicate that someone was a former slave. Furthermore, there were no professions or specific skills linked to an unfree condition. Once a slave was manumitted he could be easily integrated into Roman society. Despite or rather because of being aware of slaves' human nature, ancient jurists also expressed that the institution of slavery was harsh. Ulpian even compares slavery to death, anticipating the modern dictum of slavery as social death.[15]

III. Slaves in economic life

Gaius introduces a *summa divisio* within the right of persons. The jurist states: 'The principal division of the law of persons is as follows: all men are either free or slaves.[16] Towards the end of the classical period, Marcianus stated that the condition of slavery is common to all slaves; but of persons who are born free some are born such, and others are manumitted.[17] Despite the common legal condition of slaves, from a social point of view and regarding their working condition, their situation was quite a different one. Slaves worked in private households and in the handicrafts sectors. Some of the craft slaves had a specific training, while others were unskilled labourers. In addition, we find slaves in education, healthcare and entertainment. The most inhuman conditions affected the slaves extracting metallic ore and raw materials in mines. Those slaves were mainly penal slaves (*servi poenae*).

Slaves were likewise used in ancient Rome to foster economic success for their masters. In numerous cases, slaves acted as managers of small and medium-size enterprises. For this structure, Italian Romanist Andrea Di Porto coined the term lo schiavo-manager, a slave who functioned as a manager.[18] Hungarian scholar András Földi wrote a book in which he derives numerous institutions of

[15] D. 50.17.209: *Servitutem mortalitati fere comparamus*. To a certain extent, we compare slavery with death. See also D. 35.1.59.2. [Ulp. 13 ad leg. Iul. et Pap.].

[16] D. 1.5.3. *Summa itaque de iure personarum divisio haec est, quod omnes homines aut liberi sunt aut servi*.

[17] D. 1.5.5. pr. The Emperor Justinian introduced a differentiation between *servi nati*, born slaves, and *servi facti*, freeborn men who became slaves. Justinian, Institutiones 1.3.4: *Servi autem aut nascuntur aut fiunt, nascuntur ex ancillis nostris, fiunt aut iure gentium, id es ex captivitate, aut iure civili*.

[18] Di Porto A, *Impresa collettiva e schiavo 'manager' in Roma antica: (II sec. a.C.-II sec. d.C.)*, Giuffrè, Milano, 1985.

modern commercial law from this very area of slave commitment.[19] The owner of the slave separated a part of his capital and assigned it to his slave; this amount of money was called *peculium*.[20] Within a radius of action defined by the master through a *praepositio*[21], the slave could develop business activity of any kind. Romans held that a legal tie could come into existence only between the contracting parties; therefore, the master could not be held liable directly for the debts coming from contracts made by slaves. Roman lawyers introduced therefor a special group of remedies. In practical business life, the system of *peculium* lead to a limited liability in business activity.

IV. A manumitted slave in pursuit of what is due to him

A. The context of the fragment

Ulpian reports a case of a manumitted slave that served as a starting point for intense discussions among scholars of Roman law. The text oscillates between the *regula* based on natural *aequitas* recorded in the Digest: no one should enrich himself to the detriment of anotherand the remedy of the *condictio causa data causa non secuta,* which provides context for the present case according to the Digest. [22]

> Where a slave, who was directed under a will to pay the heir ten aurei and become free, received his freedom absolutely under a codicil, but, being ignorant of the fact, paid ten aurei to the heir; can he bring an action for the recovery? He states that Celsus, his father, held that he could not recover them; but Celsus himself, being influenced by a

[19] Földi A, *Kereskedelmi jogintézmények a római jogban*, Akadémiai Kiadó, Budapest, 1997. In English,see Földi A, 'Remarks on the Legal Structure of Enterprises in Roman Law' 43 *Révue internationale des droits de l'antiquité* 1996, 179-211, 188-91.

[20] D. 15.1.4.pr. [Pomp. 7 ad Sab.]: *Peculii est non id, cuius servus seorsum a domino rationem habuerit, sed quod dominus ipse separaverit suam a servi rationem discernens: nam cum servi peculium totum adimere vel augere vel minuere dominus possit, animadvertendum est non quid servus, sed quid dominus constituendi servilis peculii gratia fecerit.*

[21] D. 14.1.1.7 [Ulp. 28 ad ed.]: *Non autem ex omni causa praetor dat in exercitorem actionem, sed eius rei nomine, cuius ibi praepositus fuerit, id est si in eam rem praepositus sit, ut puta si ad onus vehendum locatum sit aut aliquas res emerit utiles naviganti vel si quid reficiendae navis causa contractum vel impensum est vel si quid nautae operarum nomine petent.*

[22] D. 12.6.14 pr. [Pomp. 21 ad Sab.]: *Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletior.*

> feeling of natural justice, thinks that a suit can be brought for the recovery.[23] This opinion is the more correct one, although it is established (as he himself states) that a party who paid money with the expectation that he would be remunerated by the person who received it, or that the latter would be more friendly to him in the future, cannot recover it, because he was deceived by a false opinion'.[24]

A slave was manumitted through a formal last will under the condition that he pays ten *aurei* to the heir. Later, the testator wrote an informal letter (codicil) stating that the slave should be free without paying any amount of money. The slave, ignoring this second letter, paid ten. After becoming aware of this second declaration, the former slave and a free man by then, wanted to recover the money. Ulpianus records two different opinions regarding this case. Celsus the Elder stated that the manumitted slave could not recover while Celsus the Younger was in favour of the recovery of the money.

One of the main problems regarding the fragment is that the text seems to have been subject to alterations during the compilation process by Justinian's jurists. This is what makes it difficult to reconstruct the legal issue grounding the report by Ulpian. Several scholars of Roman law have paid considerable effort to approach the facts behind the lines and to carry out an exegetical analysis of the fragment, yet without reaching a final common opinion.[25] Ulpian places the account in the context of similar situations (D. 12.4.3.5-8).

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[23] We follow the translation proposed of Scott. Alan Watson translates the sentence: '*sed ipse celsus naturali aequitate motus putat repeti posse*' in different manner understanding *aequitas* as equity (but Celsus himself, influenced by considerations of natural equity) which might be close to the Greek terminus *epikeia*.

[24] '*Sed si servus, qui testamento heredi iussus erat decem dare et liber esse, codicillis pure libertatem accepit et id ignorans dederit heredi decem, an repetere possit? et refert patrem suum celsum existimasse repetere eum non posse: sed ipse celsus naturali aequitate motus putat repeti posse. quae sententia verior est, quamquam constet, ut et ipse ait, eum qui dedit ea spe, quod se ab eo qui acceperit remunerari existimaret vel amiciorem sibi esse eum futurum, repetere non posse opinione falsa deceptum*.' D. 12.4.3.4 [Ulpianus 26 ad ed.].

[25] Talamanca M, 'L'aequitas naturalis e Celso in Ulp. 26 ad ed. D. 12.4.3.7' XXXV-XXXVI *Buellettino dell'Istituto di Diritto Romano '<u>V</u>ittorio Scialoja*', 1993-94, 1-81. Harke J, *Argumenta Iuventiana. Entscheidungsbegründungen eines hochklassischen Juristen*, Duncker & Humblot, Berlin, 1999, 123. Hausmaninger H, 'Celsus filius gegen Celsus pater' in Martin Josef Schermaier, J. Michael Rainer and Winkel (eds) *Iurisprudentia universalis*, Böhlau, Wien, 2002, 271-285. Babusiaux U, 'Celsus und Julian zum Edikt si certum petetur - Bemerkungen zu Prozess und "Aktionendenken"' in Baldus (eds) *Dogmengeschichte und historische Individualität der römischen Juristen*. Storia dei dogmi e individualità, Università degli Studi di Trento, Trento, 2011, 395-398. Kleiter T, *Entscheidungskorrekturen mit unbestimmter Wertung durch die klassische römische Jurisprudenz,* C.H.Beck, München, 2010, 169-175.

In § 5 the jurist mentioned the case of a *homo liber bona fide serviens* (a free man who in good faith supposed that he was a slave) who paid money on the condition that he would be manumitted. Only after being manumitted did it appear that he had always and all the while been free. In this case, Ulpian drew on the opinion of Julian and Neratius, who decided that the money could be recovered.[26] In § 6, the case of a slave is mentioned, who paid ten aurei thinking that he fulfils a condition for being freed by paying; yet it turned out that no condition existed. The jurist refers to the opinion of Celsus that the former slave should be able to bring in a *condictio* in order to recover the money.

The case in § 8 approaches the question from the perspective of the law of things. Ulpian qualified the exposition of Celsus as *suptilius* (sagacious.)[27] In this fragment, Celsus raises the question whether a slave may end up transferring the ownership of the coins to the transferee upon considering himself to have been subject to testamentary manumission under an inexistent condition. Celsus answered that in this case ownership would not pass. He refers to a case in which the slave paid to a third person, who was no heir, believing that he should do so. In this case, ownership did not pass on condition that the money came from a *peculium*. If someone else had paid on his behalf or he himself paid after becoming free, ownership would have passed. The reasoning behind the decision of the jurist seems to have been as follows.

If the slave thought that he was still a slave, he would not have been able to transfer ownership on the coins to the heir because the heir was the owner. If, on the other hand, he had paid the money from his *peculium*, Celsus held that

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[26] The case recounted by Neratius was of special interest from the point of view of public opinion. A dancer named Paris paid ten *aurei* to Domitia, an aunt of Nero, in order to obtain freedom. See Tacitus, *Annales* 13, 27. After being manumitted, he obtained through his influence on the emperor a verdict of ingenuous birth (*nec multo post ereptus amitae libertus Paris quasi iure civili, non sine infamia principis, cuius iussu perpetratum ingenuitatis iudicium erat*). With this *iudicium* he brought a lawsuit claiming for the 10 aurei he paid for attaining freedom. The account of Tacitus is placed in the context of a debate in the Senate on the means granting a former master to apply against unappreciative freedmen. In this regard Tacitus stated that the former master and the freedman could access law courts on equal terms. Tacitus, *Annales*, 13, 26. Hausmaninger, 'Celsus filius gegen Celsus pater', 273.

[27] The German translation uses the word 'scharfsinning' which fits the sentence better than the English 'nice' as employed by Scott and Watson. Cicero uses the term in order to describe the ability of jurists in Brutus 154. The Loeb edition translates the word with penetration. The expression can be connected to the effort of jurists to overcome the strict *ius civile*. Hausmaninger H, 'Subtilitas iuris' in Hans-Peter Benöhr, Karl Hackl, Rolf Knütel and Wacke (eds) *Iuris Professio: Festgabe für Max Kaser zum 80 Geburtstag*, Böhlau, Wien, 1986, 70-71.

the slave would not transfer ownership. If someone else paid on his behalf or he himself did so after becoming free, ownership on the coins would have passed.

The case variations provide useful information regarding the fragment that is in the centre of our attention. In § 5 it is stated that if a slaves errs with regard to his *status* and pays in order to be set free, he could recover the money. He could also recover it when the error referred to the existence of a condition (§ 6). The question mentioned in § 8 records that a *peculium* granted to a slave passes to the heir in case of inheritance.[28] In view of the diverse situations presented here, we might ask what the specific feature of fragment §7 is.

B. Celsus *filius* versus Celsus *pater*

Fragment §7 is characterized by the controversy between the Celsus *filius* and his father. Ulpian relates that Celsus the Younger made his decision contrary to the solution suggested by his father *naturale aequitate motus* (influenced by natural justice). Celsus *filius*, most probably, was introduced into the *scientia iuris* by his father. He served as praetor, twice as consul, as legatus pro praetor, proconsul and was a member of the council of the emperor Hadrian. Celsus is the author of the only definition for the terminus *ius* in the Digest. The jurist describes *ius* as *ars boni et aequi*, a formula that Ulpian called elegant. Although there is no consensus within Roman law scholarship regarding the precise meaning of the definition, we might state that it regards somehow the combination of dogmatic aspects in striving for justice. Celsus stands also for the effort to overcome a formalistic approach through invoking what *bonum et aequum* is.[29]

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[28] Wacke A, 'Die libera administratio peculii. Zur Verfügungsmacht von Hauskindern und Sklaven über ihr Sondergut' in Finkenauser (eds) *Sklaverei und Freilassung im römischen Recht*, Springer, Berlin-Heidelberg-New York, 2006, 253. See also Framenta Vaticana 294. Talamanca provides an extensive discussion of the fragment mainly from the perspective of the dogmatic valuation of the different forms of error. Talamanca M, L'aequitas naturalis e Celso, 57-67. Hausmaninger holds that the fragment has not substantial influence on the discussion of fragment7. Hausmaninger, Celsus filius gegen Celsus pater, 275. While § 8 just introduces the *peculium* in the discussion, the following, § 9 focuses on this item.

[29] On jurist Celsus see. Hausmaninger H, 'Publius Iuventius Celsus. The profile of a classical Roman jurist' in Werner Krawietz and Cormick (eds) *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S. Summers*, Duncker & Humblot, Berlin, 1994, 245-264. Among the more recent scholars Harke takes a more restrained position. For this author the dogmatic approach dominates in the decisions of Celsus. Harke, 'Argumenta Iuventiana', 144.

Herbert Hausmaninger gives a summary of opinions expressed by scholars. Some authors think that Celsus *pater* might have refused any modification of a formal last will through a codicil (informal expression of the last will). Others defend that Celsus the Elder stuck to a strict interpretation of the last will. According to those authors, the provision in the codicil that the slave 'should be free' without mentioning the condition, was not a proper amendment of the first sentence. Some authors place the case in the dichotomy between *voluntas testatoris* and *verba testatoris*.[30] The motivation of Celsus *filius* might have also been grounded by a general preference of the slave and his rights. When in doubt, law should give preference to the interest of the slave. Hausmaninger himself proposes the expression of *favor servi*[31].

Following this version, there would be no real legal discrepancy between *pater* and *filius*. Celsus the Elder might have been of the very formalistic opinion that the desired result, manumission, has been achieved. Therefore Celsus *pater* refused the recovery of the money or he might have argued that the money paid by the slave belonged to the heir in a legal approach; therefore, it could not be recovered by the slave.[32]

Ulrike Babusiaux approaches the case from a procedural point of view, qualifying the codicil as a *fideicommisium*. She argues that the freed slave should have chosen the path of the *cognitio extraordinaria* to reinforce his right. In this case, the refusal of the Celsus the Elder might have originated in the fact that the plaintiff chose the wrong procedural means.[33]

The Italian Romanist Mario Talamanca chooses a different path in an extensive essay. He focuses on the situation of the giver of the money (the slave), the receiver (the heir), and the will of the giver. Within these coordinates, he conducts a highly dogmatic analysis of the passages regarding the case. A first and foremost problem is a fact. Namely, that the slave was not in a position to perform legally relevant acts when he handed over the money to the heir. Therefore, in that very moment he was not able to acquire active legitimation (the right to sue) either. Talamanca resolves this problem through the construction of ''logische Sekunde', the logical second. On delivering the money

[30] Hausmaninger, 'Celsus filius gegen Celsus pater', 277-278.

[31] Hausmaninger, 'Celsus filius gegen Celsus pater', 279. Waldstein, *Operae libertorum*, 363.

[32] Kleiter, *Entscheidungskorrekturen*, 170-172.

[33] Babusiaux, 'Celsus und Julian zum Edikt si certum petetur', 397.

to the heir, the slave achieves liberty in a second step; assuming a logical second, he also acquires active legitimation. Thus Celsus *filius* appears as a proposer of the logical second theory.[34]

Further on, Talamanca asks the question whether the delivery of the money transferred ownership to the receiver, the heir. With regard to the decision of this item, he refers to the last paragraph of fragment 7. In this part, Ulpian introduces a new aspect which clarifies this situation. If somebody paid money with the expectation that he would be remunerated by the receiver, or that the latter would be friendlier to him, and that person was deceived in his expectation, he cannot recover the money.

Talamanca underlines the distinction between the motive and the scope of the delivery. He arrives at the conclusion that hope is a motive to, but not the scope of a donation; thus, deceived hope is not a motive for the recovery of the money. At the same time, this hope justifies the delivery of the coins so that the heir acquires ownership and the money cannot be recovered. The hope that the receiver (and heir) will prove grateful or will be at least friendlier, represents a second intention.[35] In the end, the Italian scholar comes to the conclusion that the foundation of the manumission of the slave is the will of the testator even if this will has been pronounced without taking into account the formal requirements. Therefore, it was necessary to invoke the *naturalis aequitas*. With reference to the donation, Celsus *filius* wanted to anticipate possible objections.[36] The delivery of ownership on the money, finally, depends on two items. First, that the money comes from the *peculium* of the slave and second, that he had a legally protected intention to transfer ownership. If, at the moment of handing over the money, the slave was convinced that he delivered in fulfilment of a condition, this error might have excluded his will to transfer ownership. Talamanca states that this error was no impediment for the transfer of ownership. This solution is valid only when the receiver of the money is the heir. In the case that the slave had to carry out payment to a third person, ownership will not pass.[37]

[34] Talamanca M, 'L'aequitas naturalis e Celso', 48.

[35] Talamanca M, 'L'aequitas naturalis e Celso', 53.

[36] Talamanca M, 'L'aequitas naturalis e Celso', 56.

[37] Talamanca M, 'L'aequitas naturalis e Celso', 62-64.

V. Analysis of the text in the perspective of realistic phenomenology

A. The theory of social acts

Taking into account the different case-related views of secondary authors, in this section we would like to read the text from a phenomenological point of view. The actuation of the parties involved in the case is to be considered via the theory of social acts developed by Adolf Reinach.

An act must be understood as an intentional experience that goes beyond the psychical side. In the understanding of Reinach, an act is always more than mere wording.[38] Reinach makes a distinction between non-social and social acts. Non-social acts do not go beyond the interior world of a person. Examples for such non-social acts are conviction and assertion. Somebody might be convinced of a state of affairs without communicating this conviction to anybody. An assertion might be made without necessarily addressing another person. In order for an act to constitute a social act, it has to be intentional (object-directed), spontaneous (being the person the originator of the act), other-directed and in need of being heard.[39]

Reinach deals with the following social acts: informing, which somehow forms the starting point of his theory. To inform means to express verbally a state of affairs that addresses another person. Once heard, the addressee must become aware of its content. Afterwards the jurist-philosopher mentions the social act of requesting and commanding. These two acts are very close to each other. In both cases, the act reclaims a responding activity. Questioning is also a social act that requires a responding activity, which must be an answer that corresponds to the question that had been posed. In the realm of positive law, Reinach enumerates the social act of enactment that 'posits states of affairs which ought to be in order precisely thereby to transform them into states of

[38] One of the main differences between the theory of social acts and the speech act theory elaborated by J.L. Austin is that, according to the understanding of Reinach, social acts are not to be understood as a result of conventions.

[39] Reinach A, *The Apriori Foundations of the Civil Law: Along with the lecture '*Concerning Phenomenology*'*, The International Academy of Philosophy Press, Texas, 2013, 19.

affairs which objectively exist'. An enactment presupposes a submission on the part of the addressee.[40]

B. Reading Digest 12.4.3.7 in the light of the social acts

Regarding the legal situation of slaves in Ancient Rome, Reinach writes as follows:

> The slaves in ancient Rome were, according to their general legal incapacity, incapable of taking on obligations through their own promises or of acquiring claims in their own persons through the promises of others. Roman jurists have said that this legal incapacity was invalid according to the 'natural principles of right'. From our point of view, this thesis receives a good foundation. We can of course not agree with the explanation of it given in terms of natural law. It is not because the slaves were human beings just as much as freemen were and because 'nature has created men equal', that they can acquire claims through promises, it is rather because they can promise and be promised to, that they thereby acquire, by essential necessity, claims and obligations.

With this statement Reinach, of course, does not argue against equal condition of all men; rather, he pays attention to the ability of slaves to perform social acts also recognized by Roman jurists. From the point of view of Roman law, we might also find it necessary to make some specification in conjunction with the text. Roman jurists did not declare the legal incapacity of slaves as being 'invalid'. Much rather, they searched for ways to make use of those faculties which were united with their human nature. The differentiation was made on the legal level, the one of the positive law, and not on the factual one. Even the Roman jurists realised that this procedure was anything but congruent.

To give an example for this, here the case could be cited in which slaves had been acknowledged to purchase their own freedom. Ancient jurists stated that a slave cannot have money of his own: *cum suos nummos servus habere non possit*. Nevertheless, it was clear that, according to positive law, a slave could not be the owner of money. At the same time, ancient jurists accepted that, in this specific case, he must be held to have bought his freedom with his own money. To bridge this incongruence, they asserted that one simply has to squint one's eyes. [41]

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[40] Reinach A, *The Apriori Foundations*, 111-116.

[41] D. 40.1.4.1 [Ulp. 6 disp.]: *verum coniventibus oculis credendum est suis nummis eum redemptum, cum non nummis eius, qui eum redemit*, (…).

The level of the facts is also the one where Roman law meets with the phenomenological approach. The second point is this: when Reinach says that slaves acquire claims and obligations (Ansprüche und Verbindlichkeiten in the original German version), he does not refer necessarily to enforceable rights from the perspective of positive law.

In the fragment that is in the focus of our attention, we can identify the following social acts. The starting point is the last will of the testator. The formal last will within the pattern of social acts can be qualified as an enactment. From a very early stage, Roman legal texts point out expressly that the testator creates a new legal situation as soon as they make a testament. The Law of the Twelve Tables stated that *uti legassit suae rei, ita ius esto*. We also find this sentence being quoted by a jurist contemporary to Celsus in the Digest.[42] In case of a last will, there is a slot of time between the utterance of the last will and the moment to reach the addressees. It is only after the death of the testator that his will becomes effective. The last will is directed to all persons affected by the provisions. The act reaches its goal by being heard, hence the circuit opened with the composition of the will is closed.

In order to transfer efficiency to an enactment, a submission on the part of the addressees is needed. An heir who, during the life of the testator has not been under the power of the *defunctus*, gains his position only after the acceptance of the heritage. This seems to be the case in the present fragment;[43] the act of acceptance can be assessed as submission to the enactments contained in the will.

In general, every social act can be subject to a condition. Reinach makes a sharp distinction between the condition referring to the social act and the condition of the content.[44] In the present case, there are two modifications of the social act of enactment. First, the last will as a whole is an act whose efficacy depends on a future event: the death of the testator. Within the testament, the act of manumission depends on the fulfillment of the condition whether the slave pays ten *aurei*. With the payment, the slave immediately becomes a free man. The problem of the case arises from the fact that the testator, without removing expressly the condition, wrote an informal letter (codicil) that set the

[42] See D. 50.16.120 [Pomp. 5 ad Q. Muc.].

[43] This conjecture can be corroborated by the discussion below related to the *manumissio fiduciaria*. In case the heir would be a *heres necessarius* he would also have entered in the right of the *defunctus* to claim *operae*.

[44] Reinach, *Die apriorischen Grundlagen*, 23-27.

slave free unconditionally. The character of the codicil as an informal last will is essentially different from the formal last will. In this case, manumission is to be regarded as a *manumissio fideicommisaria* that does not enact the condition of a free man immediately.[45] Regarding social acts, the latter case is to be qualified as a request from the testator to the heir to set the slave free.[46] The heir was supposed to fulfil the request by manumitting the slave; since the reign of Emperor Augustus, this request could also be reinforced within a *cognitio extraordinum*.

There is still another important difference between a *manumissio* effectuated through a *testamentum* and one through a *fideicommissum*. In the first case, the slave became a *libertus* of the testator–he was technically denominated as an *orcinus*.[47] This means that his *patronus* is considered to be in the realm of the dead and therefore the slave has no obligation to perform further services.

In the second case, he technically became *libertus* of the heir. Talamanca argued that if the slave had knowledge of the existence of the codicil, he would have been able to choose whether he wanted to be a *libertus* of the *defunctus* or of the heir. The 'damage' suffered by the *libertus*, therefore, consists primarily in the fact that he has been deprived of his right to choose. As the slave has already received freedom, the only way of compensation is to refund the money paid.[48] In this context, we might focus on an aspect that scholars have not given much attention to. Emperor Hadrian, precisely in times of Celsus, stated in a Rescript that a demand for *operae* (services that a manumitted slave had to perform for his former master) could not be reinforced in case that the patronus was obliged to free the slave through a *fideicommissum*. It seems that this provision had already existed before the Rescript reinforced by the enactment of the emperor. A text by Valens, a jurist more or less contemporary to Celsus, states that the praetor should not tolerate the imposition of services in the case a slave was manumitted through a *fideicommissum*. The reasoning behind the rule was that only those who

[45] In general on the topic of manumissio fideicommissaria Knütel R, 'Rechtsfragen zu den Freilassungsfideikommissen' in Finkenauer (eds) *Sklaverei und Freilassung im römischen Recht*, Springer, Berlin-Heidelberg-New York, 2006, 131-151.

[46] Jusitinian, Institutiones 2,4,2 and Tituli ex coropore Ulpiani 24, 1: *Nam ea, quae precativo modo relinquuntur, fideicommissa vocantur*. A fideicommissium is a disposition in the form of an entreaty, it is a trust.

[47] The word *orcus* refered to the abode of the death. The topic of the *libertus orcinus* is not very often discussed by scholars of Roman law. The *libertus orcinus* seems to belong to the family of the testator; thus all the rights connected with the status of a patronus pass onto him.

[48] Talamanca M, 'L'aequitas naturalis e Celso', 43.

performed a *manumissio* without *necessitas* (i.e. without being obliged to do so) could demand services from the manumitted slave. Those who gave freedom to slaves because they were compelled to do so, could not expect *operae*. The heir in the present case was bound to free the slave by the obligation stemming from piety towards the testator. As a result of the settlement of the *fideicommissum,* on legal grounds, the slave could reinforce his provision made in a *fideicommissum* to receive freedom. On the other hand, an heir, who was asked in a *fideicommissum* to free the slave, could not enforce a demand for services.

In the case the slave promised despite knowing that he could refuse to promise service, it was held that *non inhibendam operarum petitionem, quia donasse videtur*–a suit should not be denied because the slave is held to have donated them.[49] A parallel reading of the case in D. 12.4.3.7 and the text of Valens shows that both texts follow the same structure. The first part could be understood as a case behind the Rescript. As the Rescript is not mentioned in the context of the controversy between Celsus *pater* and Celsus *filius*, we even suggest that the case in question might have contributed to issuing the Rescript.

The testator in the present case effectuated two different social acts: an enactment and a request to the heir. While the first was directed to create an objective situation, that is to set the slave free on the condition he pays ten *aurei*, the latter was essentially different. The request required a corresponding actuation on the side of the heir that did not take place. The difference between an objective '*ought to be'* expressed as an enactment in the formal last will and '*the request* of the *fideicommissum'* is an essential one. While the objective 'ought to be' creates new rights and obligations, the request, by its very nature, depends on the personal response of the addressee.

The enactment necessarily establishes a new legal situation, whereas the request does not create any new reality. Thus, from a legal point of view, enforceability depends on the decision of the law-making organs. In fact, the decision of Celsus the younger generates a new legal situation; one which was also supported by the emperor. In this context, the recourse to *naturalis aequitas* (whether it stems from Celsus himself or from Ulpian) might be in accordance

[49] D. 38.1.47 pr. [Valens 6 fideicomm.]: *Campanus scribit non debere praetorem pati donum munus operas imponi ei, qui ex fideicommissi causa manumittatur. sed si, cum sciret posse se id recusare, obligari se passus sit, non inhibendam operarum petitionem, quia donasse videtur*.

with the general principal mentioned in the introduction of the paper: that all men are created equal.

In the last sentence of § 7 of the present fragment, Ulpian raises a new question. He asks what is to be done if somebody makes a donation hoping that he will receive something in return, or at least the receiver of the gift will behave in a more friendly way towards him, yet he is deceived in this expectation. The jurist answers that in this case the slave cannot recover. From the point of view of the social acts, the expectation does not reach the stage of an act. The objective act, the donation performed in this case is to transfer ownership without expecting anything in return. The gift received might generate a moral obligation of being grateful; the possibility of a legal reinforcement needs a special enactment.[50]

From the point of view of the case dealt with in fragment 7, this insertion by the jurist initially appears to be rather surprising and one might be tempted to approach it exclusively from a dogmatic point of view. In doing so, one would have to distinguish between objective and subjective motives of a legal transaction. The objective aspect of the gift would be the transfer of ownership while the subjective element being the hope of gratitude for the gift.

If we take into consideration the preference given to slaves manumitted by a *fideicommissum* discussed above, we might identify in this last sentence the hermeneutical clue of the case. On one hand, a slave who received freedom through a *fideicommissum* was able to reinforce it via a *cognition extra ordinum*. On the other hand, the heir, who in a *fideicommissum* was required to free a slave, was no longer entitled to be granted any further service by the slave.

In case of a *fideicommissum*, the heir had no right to claim anything from the *libertus* according to legal provisions (first issued by the jurists and reinforced by the rescript of the emperor). Hence the payment made by the slave can be qualified clearly as an undue payment; as a result the money could be recovered. As to the reference to the *aequitas naturalis*, we could state that it refers first to the valuation of the *fideicommissum* in the time of Celsus the Younger, and second, to a reproval owing to the conduct of the heir.

[50] Regarding thankfulness from a legal point of view cf. Waldstein W, 'Juridische, psychologische und allgemeine Aspekte der Dankbarkeit' in Seifert (eds) *Danken und Dankbarkeit. Eine universale Dimension des Menschseins*, Universitätsverlag Carl Winter, Heidelberg, 1992, 135-147.

In form of a conclusion, we can state that the present case is an example for technical abilities of Roman jurists; at the same time, it is an example of the consequences they drew from being aware of the discrepancy between the understanding that all men are created equal and the institution of slavery recognised by *ius civile* and *ius gentium*.