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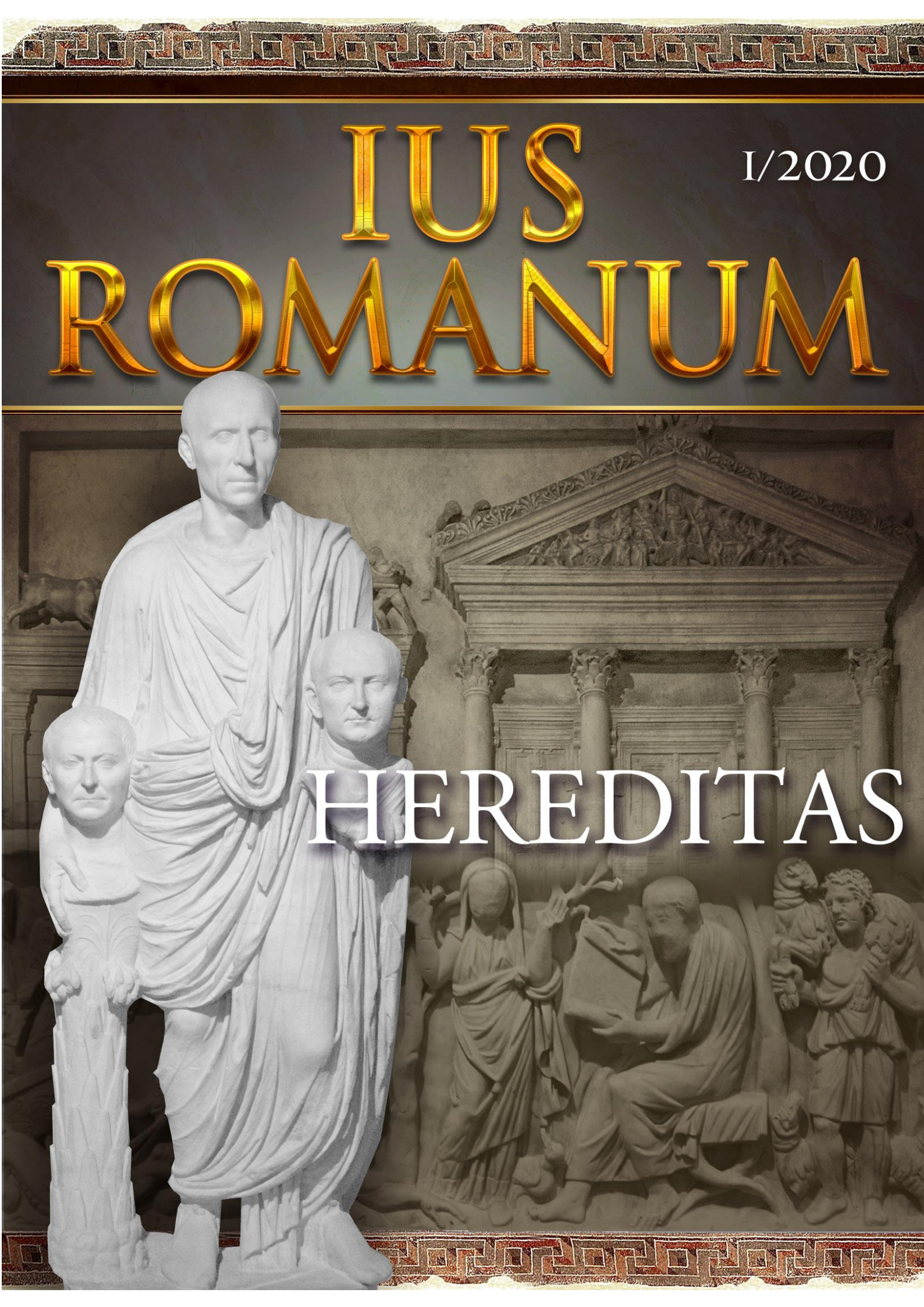

HEREDITAS

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SOME REFLECTIONS REGARDING THE CONSIDERATION OF THE RIGHTS AND OBLIGATIONS EXTINGUISHED BY CONFUSION AFTER THE INCLUSION OF SOLD LEGACY* (ENGLISH LENGUAGE)

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Abstract: The selling of legacy is presented as a private legal business fixed on the general norms of the trade contract, but with clear links to the norms of Law of succession. In this sense our purpose in this article is to analyze the way in which Roman Law tried to resolve and regulate all the situations that manifested once an inheritance has been obtained and at the same time existed credit rights extinguished by confusion (confusio) between the heir and the originator. The Roman jurists had to look for answers to these cases and for that, they differentiated two distinct situations in function of the heir if he/she was worthy of the originator or if, on the contrary, he would have been his debtor. Following this scheme, we will try to examine both hypothesis of confusion in relation with the selling of legacy.

Keywords: Extinguishing of obligations; legacy selling; credits confusion.

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I. GENERAL CONSIDERATIONS REGARDING THE SELLING OF LEGACY AND THE CONFUSION OF CREDITS

It is inconsequential to recall that confusion of an obligation, that is to say, the coincidence of the qualities of the debtor and the deserving of by the same person[1] is almost always provoked by the phenomenon of hereditary succession that, by definition, is produced when upon a person's death, other assumes the entirety of the legal relationships (properties, fees, obligations, etc.) that belonged to the deceased[2], with exception to some absolute non-transferable considerations like the obligations *ex delicto*, the *manus*, the guardianship, and those relationships that are based in the trust of the parts like those that arise from mandate or society.[3]

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1 D. 46.3.107 (Pomponio.lib. 2 Enchiridii): *...obligatio ...resolvitur...cum in eadem personam ius stipulantis promittentisque devenit. See too artº1192 del C.C.*

2 In Rome, confusion of an obligation was also possible through succession. It is the case, for example, of the servant that after having committed a crime against someone different then his/her master, he/she would proceed to be under custody of this person. The Social action from this would disappear in accordance to the doctrine of the sabinians because within the same person, the qualities are confused, both plaintiff and the defendant.
See Gayo 4.78. Vid. SOLAZZI, S. Confusione nelle obligazioni (Diritto Romano). – In: NNDI, IV, p. 77.

3 See in that sense FERNÁNDEZ DE BUJÁN, A. Derecho Privado Romano, 10 ª. Madrid, IUSTEL, 2017, p. 235 ss.; FERNÁNDEZ DE BUJÁN, A. Derecho Romano, 3ª ed. Navarra, Tomson Reuters Aranazadi, 2019, p. 343 ss: FERNÁNDEZ DE BUJÁN, A. Derecho Público Romano. Jurisdicción, recepción y arbitraje, 9ª ed. Madrid, 2006, p. 217 ss.; FERNÁNDEZ DE BUJÁN, A. La Jurisdicción Voluntaria. Madrid, IUSTEL, 2016; ALBURQUERQUE, J. M. The obligation of food in Roman Law: Ascendant and descendant. (Bulgarian Language) – In: *IUS ROMANUM*, *Revista de Derecho de la Universidad St. Kliment Ohridski de Sofia* (Bulgaria), http://iusromanum.eu. 1 (2017), p. 1 ss.; ALBURQUERQUE, J. M. Patria potestas in pietate debet, non atrocitate consistere. IURIS TANTUM, 16, Universidad de Anahuac, Mexico 2005; ALBURQUERQUE, J. M. The protection of rights in the framework of roman arbitration: Perspectives of Fernández de Buján, A., on de historical debt of modern arbitration. – In: Rights of Citizens and their protection, New Bulgarian University, 2019, p. 239 ss.; ALBURQUERQUE, J. M. Substantial diferences between "de penu legata" and "alimentis vel cibariis legatis". – In: IUS ROMANUM, 1 (2020) p. 1 ss; ALBURQUERQUE, J. M. The idea of ius, aequitas and iustitia assocciated with the idea of useful and the convenient: common utility. – In: IUS ROMANUM, 2 (2018), p. 97 ss.; ORTEGA CARRILLO DE ALBORNOZ, A. Derecho Privado Romano. Málaga, 2002, p. 324 and 325; BLANCH NOUGUÉS, J. Mª. La intransmisibilidad de las acciones penales en Derecho Romano. Madrid, 1997, p. 19 ss. As it is asserted by the author, the hereditary non-transferable passive rule of the private penal actions constitutes a limit that cannot be transferred through *succession in locum et in ius* of the heir in regards to his/her originator: the principle of personality of penalty impedes it. Regarding the active non-transferability, same as the passive, there exists another principle that explains it

With the term *aditio de adeo* (to accept)[4], the Romans referred to the general character to the express acceptance or tacit of the calling to inherit and to the legal consequences that are derived from such acceptance. If the heir accepts inheritance, he/she sub enters in the legal position of the deceased to which he/she is substituting, playing out with active and passive in all the legal relationships as if both were now the same person. All the real rights, credits and debts of the deceased pass on to the heir, conforming with his own assets, a single patrimony: the heir then turns into the one deserving of all of the debtors from the deceased and a debtor of all of the deceased creditors, which in turn a confusion between the two patrimonies and the consequent extinction of the real rights arises as the obligatory ones between the deceased and the heir, so, as it is known, no one can be a debtor and a creditor of itself.

In consequence, it can happen that the inheritance supposes a patrimonial advantage for the heir or well, serious harm in the case that the inheritance has more debts then credits and assets (*hereditas damnosa).* Even, the hereditary confusion can also be harmful for the deserving of the inheritance from the deceased, since they could be passed onto a person with economic solvency and a solid patrimony, to face an heir that inspires little trust and also that he/she is overburdened with debts.

Considering this, it is logical that the Roman Right mediates protective

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and that also had important consequences in the classic right is of the character eminently personal of the roman obligation. RUIZ PINO, S. Study of the effects of patria potestas on the goods of filiifamilias. – In: *IUS ROMANUM*, *Revista de Derecho de la Universidad St. Kliment Ohridski de Sofia* (Bulgaria), I (2019) (ejemplar dedicado a: Pecunia), p. 349 ss.; RUIZ PINO, S. Around the effects of the patria potestas on the filiifamilias, their persons and their godos. – In: Revista General de Derecho Romano (RGDR), 32 (2019); RUIZ PINO, S. Influencia del Derecho de familia romano en nuestro ordenamiento jurídico: particularidades procesales de la adrogatio romana. – In: SERRANO MOLINA, A., Y LÁZARO GONZÁLEZ, I. Estudios jurídicos en homenaje al profesor don José María Castán Vázquez. Madrid, Editorial Reus, 2019, p. 365 ss. IGLESIAS, J. Derecho Romano. Historia e Instituciones. Barcelona, 1993, Undécima Ed., p. 524 ss.; HANISCH, H. Ius successionis. – In : Rev. Est. Hist.-Jur., 6 (1981), p. 77 ss., D'ORS, A. Elementos de Derecho Privado Romano. Pamplona, 1992, p. 79 ss.; D'ORS, A. Derecho Privado Romano. Pamplona, 1968, p. 240 ss.

4 BEDUSCHI, C. Hereditatis aditio, I, L'acettazione dell'eredità nel pensiero della giurisprudenza romana clásica. Milán, 1976, p. 1 ss.

measures in this sense both for the heir, as for the deserving of the deceased. The first of them was the negative initiative towards the acceptance of the legacy by the part of the *heredes extranei* if they want to avoid the existing rights among them and their originator to be extinguished by confusion when this one supposes harmful consequences. In regards to this, it is rather interesting, to our judgment, underline a text from Pomponio that refers to, specifically, to the legacy, in which the jurist evidences the tendency of Romans to admit with normality that the heir *extraneus* could condemn the inheritance with this means.. The fragment can be found in D. 30.38.1 (Book 6 *ad Sabinum*) and establishes that, if the legatee does not want to admit the legacy, he/she would be treated as if though he/she did not inherit anything at all.

Nevertheless, if the heir were *suus heres* it would be impossible to avoid confusion of an existing obligation among both parties, since the heir was not authorized to condemn the inheritance in any case. Let us recall the unequivocal words by GAYO when in his institutions 2.157 he affirms that the necessary heirs are called as such because in any case, whether they want to or not, both by intestate and by will, they become heirs: *"necessarii vero ideo dicuntur quia omni modo sive velint sive nolint, tam ab intestato quam ex testamento heredes fiunt*". Now, the *suus heres* had the possibility of abstaining from succession, this faculty was granted magistrate and receives the name of *ius abstinendi* who´s task consisted in not doing anything in relation to the legacy that would imply its acceptance.[5]. In this case, the magistrate would consider such situation as a true resignation, putting the heir that was abstaining from the legacy as if he/she would not have been the true heir[6].

In any case, the heir *extraneus* could avoid extinction of a right by confusion if he/she did not accept the inheritance and the *suus heres* could obtain the same effect, if *ius abstinendi* was applied as conceded by the magistrate.

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5 GAI. 2.158.160.163; D. 29.2.20 (Ulp.Lib. 61 ad Ed). Cfr. FERNÁNDEZ DE BUJÁN, A. Derecho Romano, p. 182.

6 Vid. D. 30.89 (Jul.Lib.36 Digestorum); D. 11.1.12.pr. (Paulo, lib. 17, ad Edictum).

In that order, we can therefore prove that once a legacy has been granted, we find ourselves in two possible scenarios, depending on whether the foreign heir accepts or condemns it. In the first case and in the alleged own heir heritage right, it transforms into *dominus hereditatis* and as such, finds itself legitimized to dispose of the hereditary patrimony having been able to carry through any of the different legal businesses through which the transmission of rights can be done with. In this way, the heir can transmit the total economical content of the legacy free of charge, that is, through donation; it can also be traded, meaning, it can be exchanged for other things or right of patrimonial character; additionally, it can be relinquished as a counter benefit to the concessions that it could receive from the buyer in means of uniting both (buyer and heir) and finally, one could assume that the heir would give its wealth in exchange of an elevated price, that is, produce what we call as legacy selling.

Our civil code, in its article 1000 makes reference to the selling of legacy in the first section in which it establishes that legacy is understood and accepted tacitly when “the heir sells it, donates it or grants its right to a foreigner, to all its coheirs or to any of them”. Nevertheless, there is no clear regulation regarding selling of legacy or any definition of itself either, having our code be limited to regulate in a general way in this figure in articles 1531 and 1534 within the framework of the transmission of credits and other incorporeal rights. Because of this, it is easy to arrive to the conclusion that, in principle, the selling of legacy is shown as a singular legal business in which contractual factors are mixed with inheritance rights, transforming it in a buying and selling contract with its own peculiarities regarding the selling.

In any case, regardless of the legal roman axiom “*Omnium definition in iure civile periculosa esf”* [7] we can define the selling of legacy as such legal business, in virtue of which the heir alienates the total economical content of a legacy granted to him in exchange of an elevated price with which the buyer frees the seller from all hereditary burden and acquires the patrimonial active

[7] D. 50.17.202 (Lib. XI Epistolarum, Iavolenus).

of it. Therefore, the Selling of legacy imposes an obligation to the heir to surrender all the assets and rights that compose it to the buyer. However, between the originator and the heir there could exist rights and obligations that once the legacy has been accepted they could disappear out of confusion. Because of that, before carrying out the selling, it seemed absolutely essential to determine with clarity what was understood as object of the selling, if the legacy just as the heir had it once accepted or the legacy just as the originator had organized it without having produced the addition as of yet[8]. In the first case, it did not matter that the rights had been extinguished by confusion given that these were not affected by the selling. In any case, all parties considered them when having to set a price. But if the legacy was sold just as if the originator had it before the addition, then the matter of consideration regarding both parties giving the right to extinguished of confusion would take place. Moreover, it could happen that the confusion of the credits could take place after the alienation because, for example, the heir seller would acquire after the selling, a second legacy and among this second legacy and the first alienated beforehand, there would be mandatory relationships that would extinguish due to confusion.

In this sense, it is our purpose to analyze in these lines the way in which the Roman Right tried to solve and discipline all these emerging situations as a result of the confusion in the selling of legacy. As manifested by Cugia, the *ius civile* himself contributed the adequate remedies against the nullifying effect of confusion in these cases, precisely, because in his opinion, “Confusion does not satisfactorily extinguish the credit”.[9]

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8 Cfr. Ulpiano en D. 18.4.2.1 (Lib. 49 ad Sabinum). In this regard can be seen KIESS P. Die confusio im Klassischen Römischen Recht. Berlín, 1995, p. 137; FERNANDEZ DE BUJÁN A. El precio como elemento comercial en la compraventa romana. Madrid, 1993, p.70 ss.

9 CUGIA, D. La confusione. Dell’obligazione con cenni al nuevo codice civile. Corso di Diritto Romano tenuto nella R. Università di Firenze, Padova, 1943, p. 147; CUGIA, D. Spunti Storici e dommatici sull’alienazione dell’eredità. – In: Studi Besta, I (1939) e dommatici sull’alienazione dell’eredità. – In: Studi Besta, I (1939), p. 513 ss. On the extinction effect of confusion can be seen PERIÑÁN, B. El principio “Semen heres semper heres” y la confusión de las obligaciones en el Derecho Romano. – In: Revista de Estudios Histórico-Jurídicos, XXVII (2005), p. 123 ss.; JIMENEZ SALCEDO, C. Aspectos de la confusión de las obligaciones como sucesión hereditaria. – In: RGDR, 2 (2004); JIMENEZ SALCEDO, C. Reflexiones sobre la confusión como modo de extinción de las obligaciones garantizadas con fianza. –

In the classic Right, alienation of legacy was carried out through the alleged *stipulatones et restipulationes emptae et venditae hereditatis* that could have as cause both the buying and selling, as a donation, the constitution of a dowry and even an inheritance disposition as a legacy or a trust, etc.[10]

In the Justinian Right, the *stipulationes* disappear and the *emptio venditio* is declared among the medium prototype of alienation of legacies absorbing all stipulations. In spite of this, and even tough among the Justinian sources there are very few evidences of classic stipulations – the compilers and the glossary organizers have previously altered the classical texts – we know that the clauses that contained such stipulations were very diverse, precisely because the compilers in some occasions and probably in an involuntary manner have conserved the classical remembrance that was specifically envisaged in some fragments related to confusion. We even know that the purpose of these stipulations was double: on the one hand, they would establish an obligation to the heir to transfer all of the hereditary assets to the buyer, on the other hand, they would regulate the destination of the rights in favor and against the heir at the time of alienation[11]. Nevertheless, the *stipulations emptae et venditae hereditatis* did not offer solution whatsoever to parties regarding the destination that should be given to the rights extinguished by confusion. The jurist had to look for answers in this sense and for that, they differentiated both different situations in function of the heir being worthy of the originator or in the contrary, its debtor. Following this scheme, we would try to examine the different

In: RGDR, 3 (2004). “Efectos extintivos de la confusión en las relaciones jurídicas en Derecho Romano “, Madrid, 2017. ALVAREZ PÉREZ, M. P., DÍAZ ROMERO, MR., GOÑI RODRIGUEZ DE ALMEIDA, M., MONDEJAR PEÑA, M. I, .Guía de Derecho Civil: Teoría y práctica), Vol. 2, 2013 (Derecho de obligaciones y responsabilidad civil), p. 267–298.

10 ALBURQUERQUE, J. M. La protección jurídica de la palabra dada en Derecho Romano. Contribución al estudio de la evolución y vigencia del principio general romano “Pacta sunt servanda” en el Derecho Europeo actual. Universidad de Córdoba, 1995.

11 See FERNÁNDEZ DE BUJÁN, A. El precio como elemento comercial en la compraventa romana, p. 17 ss.; CUGIA, D. La confusione; CUGIA, D. Spunti Storici e dommatici sull’alienazione dell’eredità. – In: Studi Besta, I (1939), p. 513 ss**.** TORRENT, A. Venditio hereditatis. La venta de herencia en Derecho Romano. Salamanca, 1966, p. 153 ss. On the reconstruction of the stipulations be seen MANTHE, Das S.C. Pegasianum. 1989, p. 27 ss.

hypothesis of confusion in relation to the selling of legacy[12].

II. FIRST CASE: DEBIT CONFUSION OF THE ORIGINATOR WITH THE HEIR´S CREDIT

When the heir, before the phenomenon arising out of succession, he was deserving of the originator and sells the legacy before its addition, the jurists considered the heir not to be legalized to interject a lawsuit in virtue of *la stipulation venditae hereditatis* against the buyer. Nevertheless, it appeared to be that if *ius retentionis* was awarded and in determined cases, the *action venditi* through which he could demand for what he could have entailed the originator in terms of the credit.

*Ulpiano en D. 18.4.2.15 (Book. 49 ad Sabinum), informed of a decision from Julian in which the jurist awarded the heir the actio venditi in the following terms:: **"**Si Titius Maevi hereditatem Seio vendiderit et a Seio heres institutus eam hereditatem Attio vendiderit, ¿an ex priore venditione hereditatis cum Attio agi possit? Et ait Iulianus: quod venditor hereditatis petere a quolibet extraneo herede potuisset, id ab hereditatis emptore consequatur; et certe, si Seio alius heres extitisset, quidquid venditor Maevianae hereditatis nomine praestitisset, id ex vendito actione actione consequi ab eo potuisset; nam et si duplam hominis a Seio stipulatus fuissem, et ei heres extitissem, eamque hereditatem Titio vendidissem, evicto homine rem a Titio servarem".*[13]

If Ticio sells the legacy from Mevio and Seyo and subsequently having the heir also been introduced by Sevo, sells his legacy to Accio[14], Ulpiano askes himself if Ticio could exercise against Accio an action for the first selling of legacy. Just as this text is transmitted, Juliano explained his answer that the seller of a legacy could claim everything he could have claimed in the presence of a third stranger in front of the buyer. This is if instead of Ticio, a third party would have been the heir of Seyo, through the exercise of *action venditi*, Ticio could have demanded from Accio everything that he could have ask from

12 The same scheme follows in his presentation, KIESS P. Die confusio im Klassischen Römischen Recht, p. 138 y ss.; CUGIA, D. La confusione, p. 147 ss.

13 See CUGIA, D. La confusione, p. 159 ss.

14 The literal text shows that Titius would sell to Attius the legacy of Seius and not to that of Maevius: eam refers to, if both alternatives are previously named in the previous phrase, always linguistically to the second alternative; with *ex priore venditione* the first mentioned legacy in the text can only be nominated. See CUGIA, D. La confusione.

Mevio´s legacy. As an explanation, *Juliano* cited another case: Seyo would sell a slave and would give it to the buyer promising, through the *stipulation duplae,* the *duplum* in case of eviction. Well then, if Seyo would have passed away and he would have been an heir by the buyer of the slave and he, at the same time, would have sold the legacy to Ticio, assuming that the real slave owner would successfully claim him, according to *Juliano*, the slave´s purchaser and heir of Seyo could demand from Ticio, buyer of the legacy, the responsibility for eviction.

When in the first case, Ticio sold Mevio´s legacy to Seyo, he agreed with the buyer the *stipulationes emptae et venditae hereditatis,* by which Seyo was obligated to face the obligations and credits that Ticio could have pertaining to the Mevio´s legacy. But when later, Ticio becomes an heir of Seyo, the emerging obligations from the stipulations would disappear by effect of confusion. Nevertheless, After, Ticio sells Seyo´s legacy to Accio once again and then among all parties, the pertaining *stipulationes* are concluded in which it is agreed in favor of the alienating heir "*quod testator debuerit"*, clause that comes to reconstruct the heir´s credits towards the originator (Seyo) extinguished by confusion. By that the law specialist Juliano points out for us that the efficacy of the clause *"quod testator debuerit"* is, by effects of the acquired responsibility by Seyo in regards to Ticio for the Mevianan legacy that is now part of the deceased legacy from Seyo, just as it would have been if Seyo would not have awarded Ticio but rather a stranger. Therefore, Ticio would have on his favor the action of *ex stipulatu* against the new acquirer Accio each time he would make a payment from the derived from the mevianan legacy[15]. Nevertheless, in the fragment, *la actio venditi* appears as a competent action to demand what Ticio would have had to comply with by reason of the mevianan legacy, which evidences that perhaps this answer from Juliano could have been retouched in the postclassic era.[16]

The explanation of the decisions by Ulpiano and Juliano is clarified with

[15] See CUGIA, D. La confusione, p. 160.
[16] Cfr. KIESS P. Die confusio im Klassischen Römischen Recht, p. 144.; CUGIA, D. La confusione, p. 161.

the second case suggested by the jurists: if Seyo and his heir would have agreed to *stipulation duplae* with regards to the selling of a slave and then Seyo passing away, the legacy's heir, the alleged stipulation is extinguished by confusion. But then, if later, the heir sells his legacy, the alleged stipulation is extinguished by confusion. But if after, the heir sells the legacy to Ticio and later an eviction is produced, Juliano and Ulpiano awarded the heir the *action venditi* to claim from the buyer Ticio the double value of the slave, because the legacy would have been sold just as if it was in the hands of the originator and according to the jurists, it would be contrary to good faith that the buyer of the legacy would invoke confusion of the *stipulation duplae* in front of the heir seller.

In the same sense as the last passage by Ulpiano, the same jurist in another text equally retouched by the compilers, obligated by the action of selling to the purchaser of a legacy against the awarding heir of an extinguished credit by confusion at the moment of accepting the legacy or un a subsequent moment upon verifying the conditions or the terms[17] by which the originator owed. The statement is as follows:

D. 18.4.2.18 (Ulpiano, Book. 49 ad Sabinum): "Cum quis debitori suo heres exstitit, confusione creditor esse desinit; sed si venditit hereditatem, aequissimum videtur, emptorem hereditatis vicem heredis obtinere; et idcirco teneri venditori hereditatis, sive quum moritur testator, debuit, quamvis post mortem debere desiit adita a venditore hereditate, sive quid in diem debeatur, sive sub conditione, si eius debiti adversus heredem actio esse poterat, ne forte etiam ex his causis, ex quibus cum herede actio non est, cum emptore agatur". [18]

Nevertheless, the oldest decision known in the matter is from Javoleno who in 8.4.24 (Book.4 *Posteriorum a Iavoleno Epitomatorum*) suggests the following[19]:

"Hereditatem Cornelii vendidisti, deinde Attius, cui a te herede Cornelius

[17] Probably, as signalled by KIES, S. cit., p. 147, the term goes referred to a *diez incertum*, by which the credit was considered conditional.

[18] Ver: CUGIA, D. Spunti Storici e dommatici sull'alienazione dell'eredità. – In: Studi Besta, I (1939), p. 543; CUGIA, D. La confusione, p. 156 y ss.

[19] The oldest decision is put as a manifest, KIESS P. Die confusio im Klassischen Römischen Recht

legaverat, priusquam legatum ab emptore perciperet, te fecit heredem; recte puto ex vendito te acturum, ut tibi praestetur, quia ideo eo minus hereditas venierit, ut id legatum praestaret emptor, nec quidquam intersit, utrum Attio, qui te heredem fecerit, pecunia debita sit, an-legatario".

Cornelio's heir sells the legacy and after, also becomes the Accio's heir by which in favor, legacies were foreseen in the Cornelianan legacy that he had not been able to receive before his death. Well then, the credits derived from these legacies that encumber the Cornelio's legacy in favor of Accio are extinguished by confusion now that the same person becomes heir of both legacies. But now given that the heir had sold the cornelianan legacy to a third party prior to Accio's death, confusion is produced at the moment of addition of Accio's legacy in part of the heir, but after the alienation of the first legacy. The legacy's debit in charge of the Cornelio's legacy in favor of Accio still exists at the time of the selling of Cornelio's legacy, for this, according to Labeón, the heir could demand, through the *action venditi* what Accio in virtue of the legacy, could have received, because Corneliu's legacy was sold precisely cheaper s the buyer would comply with such legacy. And as affirmed by the jurist, it does not matter if the money was owned to Accio or to another legatee.

Even though the heir had sold Cornelio's legacy, he was still the debtor of Accio's legacy. But because of *stipulatio venditae hereditatis*, the buyer was obligated to free the heir from this obligation. Moreover, in virtue of this stipulation, if the heir would have been sued by Accio, the buyer would have had to defend him in the process ad if the heir would have complied with the legacy, he would have been able to claim to the buyer a compensation for his expenses. But if then, on the contrary, Accio passed away and the heir accepted its inheritance, the legacy would be extinguished by confusion. This means that of *stipulation venditae hereditatis*, the heir now would not be able to demand the buyer of the legacy, and instead he would not have to fear and process demanding his compliance with it. For this, Labeón did not award the heir the *action ex stipulate*, but instead the *action venditi*, because in the buying and selling contract, the buyer was obligated to accept the whole inheritance, including the obligations of the legacy, aspect that was kept under consideration by all parties when setting of price. For this, the jurist affirms that in the interest

and good faith to the buyer, he had to comply with the legacy, even if it was extinguished by confusion. He had to award the heir, everything that Accio, through the *action ex testamento,* could have claimed against the heir that, despite the selling, would continue to formally be Cornelio's heir. In virtue of the *stipulatio venditae hereditatis*, the heir would have received a compensation of expenses value of the legacy by the legacy's buyer. For that, he had *la action venditi* directed towards the compliance of the legacy directly against the buyer.[20] In this sense, the confusion of the obligation to the legacy would benefit undeservedly the buyer of legacy would be avoided.

Finally, Labeón points out that it is indifferent to these effects that the heir would have owed the money to Accio or to another legatee. If the legatee were other, the legacy would not have extinguished by confusion when the heir acquired the inheritance. In this case, there would not be a doubt of the responsibility of the buyer by obligation of the legacy in virtue of the *stipulation venditae hereditatis.*

Another case in the same sense comes laid out by Javoleno in D. *12.6.45 (Lib.2 ex Plautio): "Si is, qui hereditatem vendidit et emptori tradidit, id, quod sibi mortuus debuerat, non retinuit, repetere poterit, quia plus debito solutum per condictionem recte recipietur"*[21]*.*

That is to say, if previous to the hereditary succession, the heir was deserving of the originator and after the addition of the inheritance, he would sell it and transfer it without retaining that which because of the extinguished right by confusion, would have claimed to the originator, he would have under disposition a *condictio* to claim whatever else would have been given to the buyer. As underlined by Solazzi, the heir's payment to himself would have been

[20] See KIESS P. Die confusio im Klassischen Römischen Recht, p. 140; CUGIA, D. La confusione, p. 163.

[21] About the exegesis of that text and its interpolations see SOLAZZI, S. L'estinzione dell'obligazione nel Diritto Romano. Vol. I. Nápoles, 1935, p. 294; CUGIA, D. La confusion, p. 168 ss.; NARDI, E. Studi sulla ritenzione in diritto romano, I. 1947, p. 198; LEVY, E. VerKauf und Übereignung. – In: Iura, 14 (1963), p. 4; TORRENT, A. Venditio hereditatis, p. 191 ss.; CICU, A. Estinzione di rapporti giuridici per confusione. Sassari, 1908, p .27; PERIÑÁN, B. Pomponio y los modos de extinción de las obligaciones. – In: Iura, 53 (2004).

impossible, but if we truly want for the creditor to be satisfied, it would be necessary that for this ends, a part of the assets acquired by the heir were destined. Because of this, the heir at the time of restitution of the inheritance could retain what was owed by the originator. And if by any means, he would not have exercised the right of retention, *la condictio* indebiti would correspond him because he would have awarded things to the buyer that are not part of the legacy, and whose function would have been that of satisfying his right to credit.

Lastly, the *responsa* of Pomponio and Ulpiano are also meaningful in this sense, according by which the alienating heir could exercise *action venditi* **against** the buyer of the legacy so it could establish servants once again who were extinguished by confusion at accepting the inheritance and above which the right of *ius retentionis* was not exercised:

D. 8.4.9: (Pomponius, Book. 10 ad Sabinum): "Si ei, cuius praedium mihi serviebat, heres exstiti et eam hereditatem tibi vendidi, restitui in pristinum statum servitus debet, quia id agitur, ut quasi tu heres videaris exstitisse".

D. 18.4.2.19. (Ulpianus Book. 49 ad Sabinum): "Et si servitutes amisit heres institutus adita hereditate, ex vendito poterit experiri adversus emptorem ut servitutes ei restituantur".[22]

In conclusion, we could sum up the exposed by saying that if an heir's right of credit upon its originator, it would be extinguished by confusion at the moment of accepting the inheritance and following with the selling of it to a third party, at the time of awarding it to the buyer, it could retain what by the credit, corresponded to it. If the heir were to not exercise this right, he would have *condictio indebiti* in his favor to claim from the buyer what is his by right. And for the cases that not *ius retentionis* nor *la condictio* corresponded to it because at the moment of the awarding the legacy, the buyer had not verified the condition by which he could demand the credit (for example, that eviction is verified in the case of D. 18.4.2.15 FROM Ulpiano), the jurists granted *action venditi* with the same ends meet, even though, as it has been shown, surely, the concession of

[22] About the interpolations of such fragments, vid. CUGIA, D. La confusione, p. 199 ss. KISS, P., "Die confusion" cit., p. 47 ss.

this action could have been postclassic, *action ex stipulatu* being the real foreseen action in classical Right, derived from the *stipulaciones emptae et venditae hereditatis* that legalized all parts for alienation of legacy. Furthermore, the jurists Pomponio and Ulpiano also granted the action of the selling to claim an extinguished servant right by confusion over which the retention right would not have been exercised in the awarding of the sold legacy to its buyer.

III. SECOND CASE: ORIGINATOR'S CREDIT CONFUSION WITH HEIR'S DEBIT

When a person purchases a legacy in which the originator had a right of credit upon the alienating heir before his death, in accordance with the jurist's opinion, there would fall an action against it for the extinguished credit's value by confusion. Concretely, three are the passages in which we can find answers in this matter. Two of them are referred to situations in which the deserving of the credit could have exercises the action of assets against the originator (*paterfamilias* responsible for the debts of those succumbed to his will). That is to say, the following situations is set out on them: A *paterfamilias* would grand to a succumbed to wills in assets. Having obligated the succumbed to will in front of a creditor, the *paterfamilias* had to answer by Assets Rights of such obligations by the *actio de peculio in rem verso*. But in this case, the creditor had introduced an heir to *paterfamilias* that once the legacy had been accepted it would turn into a deserving of the *obligation naturalis* upon the succumbed to his will, but at the same time, he would be freed of the responsibility because the asset action is extinguished by confusion. Nevertheless, this on later on sells the legacy to a third party and according to *opinion* from Juliano and from Ulpiano, in virtue of the clause *"quanta pecunia ex hereditate ad te perveniret"* (How much money would have come out of the legacy under your power) from the stipulation celebrated in favor of the legacy's buyer, the father would be obligated in virtue of an *action ex stipulatu* until the limit of assets.[23]:

D. 15.1.37.pr. (Iulianus, Book.12 Digestorum): "Si creditor filii heredem te

[23] See GAIUS, 4.73 Opinion of TORRENT. A. Venditio hereditatis, p. 172 ss. The buyer of legacy would be originally deserving of the action of assets.

instituerit et tu hereditatem eius vendideris, illa parte stipulationis `quanta pecunia ex hereditate ad te pervenerit' teneberis de peculio".

D. 18.4.2.6 (Ulpianus, Book. 49 ad Sabinum):
Illud quaesitum est, an venditor hereditatis ob debitum a filio suo, qui in potestate eius esset, servove ei, cuius hereditatem vendidisset, praestare debeat emptori? Et visum est, quidquid duntaxat de peculio filii servive, aut in suam rem versum inveniatur, praestare eum debere". [24]

In the same line of thought, Africano decided a case in which a credit right of the originator against the heir that was not required through the asset action, it would be extinguished by confusion. If the heir sold the legacy, the buyer would be credited with *action empty* to revendicate the value of the confused credit:

D. 18.4.20.pr. (Africanus Book. 7 Quaestionum): "Si hereditatem mihi Lucii Titii vendideris, ac post debitori eiusdem heres existas, actione empto teneberis"
&1.- "Quod simplicius etiam in illa propositione procedit, quum quis ipse creditori suo heres exstitit, et hereditatem venditit" [25]

Lucio Ticio institutes you as an heir and once the legacy has been added, you sell it to me. From this inheritance, a credit right against the debtor X was part of it, that also named you as heir. Even though the mentioned inheritance would be given to you after the selling of the legacy from Lucio Ticio, the right of credit extinguishes by confusion, as long as a single person becomes the title holder of the crediting and debiting legacy. At this point in agreement with the liking of Africano, you would answer in front of me, where I am the buyer of the first legacy through *action empti*. This responsibility would clearly be seen, added the jurist in paragraph 1, if a debtor would inherit to his creditor and would sell its legacy.

By the acquisition of the legacy from Lucio Ticio, the heir would turn into a creditor from which used to be the debtor from Lucio Ticio and would continue being also after the legacy would have been sold. Having said that, in virtue of

[24] On both fragments, we can see: CUGIA, D. La confusione, p. 151 ss. ; KIESS P. Die confusio im Klassischen Römischen Recht, p. 152–153.

[25] See CUGIA, D. La confusione, p. 154 ss.; CUGIA, D. Spunti Storici e dommatici sull'alienazione dell'eredità. – In: Studi Besta, I (1939), p. 530 ss.; KIESS P. Die confusio im Klassischen Römischen Recht, p. 149 ss.

the *stipulation emptae hereditatis* the alienating heir would be subjected to rectitude the buyer everything he would receive in virtue of his position of succession. Actually, the buyer would have been deserving to make the bought legacy's credit effective, the *action ex stipulatu*; nevertheless, Africano concedes *action empti* because, as Kiess has set out in importance, he considered that stipulation should not be applied in this case, given that what the selling heir had received from the debtor Lucio Ticio had not been acquired as worthy of the same, but as heir. It is the buying and selling contract and not the concluded stipulation among both parties what legitimizes the buyer to demand Lucio Ticio's credit to the seller of legacy from itself. It would be different if the debtor would have paid its debt before his death, in which case, the buyer could have exercises the *action ex stipulate* against the seller of the legacy, for the matter of the paid credit.[26].

In Cugia's opinion, the means to claim the confused credit awarded to the buyer was a classical Right, the *action ex stipulatu*. The reference of *action empti* in a fragment by Africano is nothing more than the result of an interpolation. In byzantine right, the stipulations *empt*ae hereditatis are absorbed by the ***emptio venditio*** from there that the granted action would have been the action of purchasing.[27].

In any case and to conclude, we could affirm that, in the confusion of hereditary credit with the heir's debit, whether it be with the classical right, or in its Justinian right, the fact is that a procedural means to acquire the economical value of the extinguished credit by confusion was granted to a third acquiring party from the hereditary patrimony with profit to the alienating heir., in other words, a single answer contrary to fairness was acquired.

IV. FINAL CONCLUSION

From everything that was presented, it is evident that the legal roman sources, considering the more than evident interpolation of the texts, offer us

[26] KIESS P. Die confusio im Klassischen Römischen Recht, p. 150 ss.

[27] CUGIA, D. La confusione, p. 154 ss.; CUGIA, D. Spunti Storici e dommatici sull'alienazione dell'eredità. – In: Studi Besta, I (1939), p. 530 ss.;

the conclusive thesis in virtue of the cases of selling of legacy, if the heir, before producing the phenomenon of succession, were the creditor of the origination and he would sell the inheritance before its addition or later, and if on the contrary, it were the originator the creditor of the heir, the roman jurists foresaw the concession of the timely procedural remedies for each specific situation, so that the interested could claim what he could have demanded by right of his credit. In effect, the fragments like D. *18.4.2.15 (Ulpianus Book. 49 ad Sabinum); D. 18.4.2.18 (Ulpianus, Book. 49 ad Sabinum); D. 18.4.24 (Book.4 Posteriorum a Iavoleno Epitomatorum); D. 8.4.9: (Pomponius, Book. 10 ad Sabinum); D. 18.4.2.19 (Ulpianus Book. 49 ad Sabinum)* it is gathered that if a credit's right of an heir upon its originator would be extinguished by confusion when accepting the inheritance and followed by him selling it to a third party, upon the buyer receiving it, he could retain by which the credit, corresponded to him. But if the heir would not exercise this right, he could have the *condictio indebiti* to claim the to the buyer what was his. For those situations in which neither the *ius rentionis* nor the *condictio* would not correspond to him, because at the moment of the delivery of the inheritance to the buyer, the condition by which he could demand the credit had not been verified, the jurists granted the *action venditi* for the same means, although, as it has been shown, surely the concession of this action was post classic, being the true foreseen action in the classic Right the *action ex stipulate* derived from the *stipulaciones emptae et venditae hereditatis* that for formalized the parts for alienation of the legacy.

On the contrary, when a person purchases a legacy in which the originator, prior to his death, he was a deserving of the alienating heir, based on jurists opinion, it would imply for him from such inheritance an action against the heir for the value of the extinguished credit by confusion to acquire its economic value when such confusion is produced with profit for the alienating heir and that is because if it were any other way, the only result would be contrary to fairness. The procedural remedy granted varies in accordance to the cases that lay out the law specialist and evidently, if it were referred to the classic era or to the byzantine era. To this conclusion, we have arrive at this point through the exegesis of the following fragments: *D. 15.1.37.pr. (Iulianus, Book.12*

Digestorum); D. 18.4.2.6 (Ulpianus, Book. 49 ad Sabinum); D. 18.4.20.pr. (Africanus Book. 7 Quaestionum).