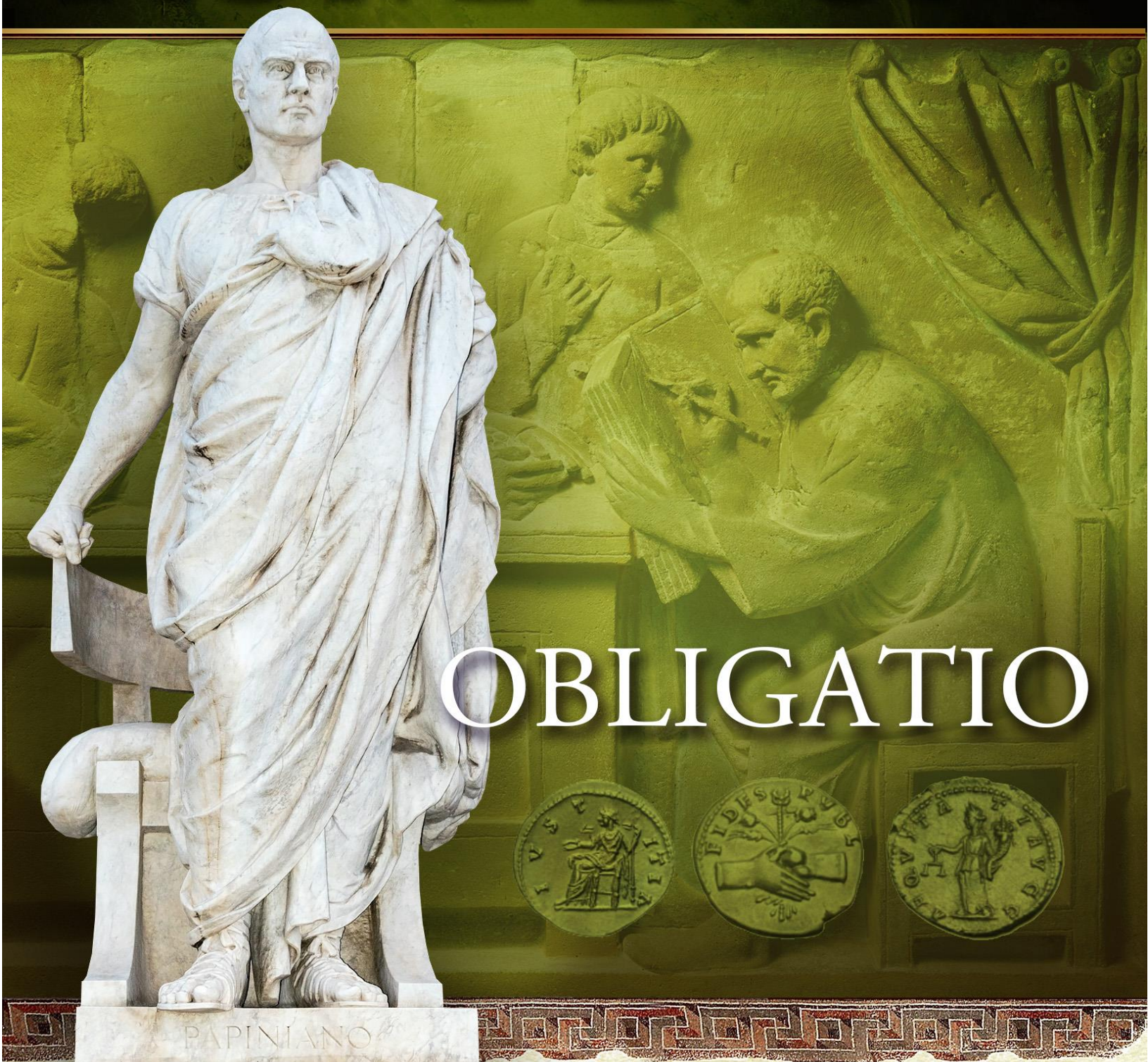
IUS ROMANUM

I/2021



OBLIGATIO

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REFLECTIONS ABOUT CONFUSION AS MEANS OF EXTINCTION OF OBLIGATIONS GUARANTEED BY BOND (ENGLISH LANGUAGE)

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Abstract: The extinguished effects of confusion in civil obligations are verified in agreement with very particular rules in diverse categories of legal relations in which they affect and distinctive as well are the solutions that roman legal sources contribute in this sense, by which always maintaining as base of our study the unity in regards to the definition of the institution, we have projected our interests for the analysis of the confusion in the obligations with guarantee field, most definitely about the guaranteed obligations with the bond in accordance to their manifestation between deserving of and principal debtor, between deserving of and guarantor and lastly, between debtor and guarantor.

Keywords: Extinction of obligations; confusion; guarantee of obligations; personal guarantee; bond.

I. Introductory consideration

The jurist POMPONIUS afirmes in D. 46,3,107 (*Lib.2 Enchiridii*): *<...obligatio ...resolvitur...cum in eadem personam ius stipulantis promittentisque devenit >,* or what is the same, the obligation to extinguish ipso iure by confusion when the same person possesses the qualities of debtor or deserving of. This is the definition that also appears in the art. 1192 of Civil Code: The obligation will be extinguished as long as the same person gathers both concepts of debtor and deserving of. That is to say, being indispensable so that the obligation lingers that the conditions of passive and active subject are represented in different people, we can finally conclude that if this duality disappears, the obligation would obviously be extinguished as well.

This concept of logically-lawful impossibility of term of an obligation in which the debtor and deserving of are the same person, determines the same nullifying effect in all types of obligations (those which are guaranteed with a true pledge right or with a bond, in the solidary obligations, etc.) due to the existence of a fundamental unit in the concept of confusion. Nevertheless, we can affirm that there is not a single norm that gathers, in a singular and unique form such nullifying effect. This, on the contrary, is verified in conformity with very particular rules among the diverse categories of confusion. In this way, we can say that the roman jurists, always maintaining as base, a conceptual unit, proceeded in different ways in the diverse cases in which such institutions project their effects. Concretely, it is interesting to analyze that jurisprudencial answers that were poured over the obligations with guarantee and more specifically, over the guaranteed obligations with a bond to whose study we will dedicate the following pages.

II. Confusion in obligations guaranteed by bond

In the guaranteed obligations through bond (*fideiussio)*[1] confusion can be manifested in three differents ways, according to its verification:

[1] The *fideiussio* is the most advanced way to personal guarantee in Roman Right and the only one that survives to date in Justinian Right and that is good to guarantee all types of obligations and not only those birthed out of stipulation, as it occurred with the other more ancient ways of bond: la *sponsio* and the *fideipromissio*). For the citizens and foreigners respectively).

a) Between deserving of and its primary debtor.

b) Between deserving of and guarantor.

c) Lastly, between debtor and guarantor.

a) Confusion between deserving of and its primary debtor

In the first case, this is, when the same persona gathers the qualities of debtor and principal deserving of, at the same time that the principal obligation extinguishes, so does the relation to the bond. En words by SOLAZZI, this is extinguished not by the own concept of logically- lawful impossibility the prevails in confusion with a general character, if not by the accessory character ow the fideiussoria obligation: when there is no obligation to guarantee, there is no reason to keep the guarantee. Confusion extinguished ipso iure the principal relationship and *fideiussio* follows the same fate. In this sente, some of the jurisprudencial decisions appeared inspired contained in the sources,as so, we can mention in the first place the D.46,3,43 de ULPIANUS (lib.2 Regularum)[2] where in its first

Bond constitutes in Rome the most important means of ensuring a credit and itself, by its own rigorous execution forced on the person. It is superior in importance and in technical configuration to the pignoraticia guarantee. See FERNÁNDEZ DE BUJÁN, A. *Derecho Privado Romano*. 10ª ed. Madrid, 2017, p. 275 ss; Id. *Derecho Romano.* 3ª Ed. Madrid, 2019, p. 186 ss.; ALBURQUERQUE, J. M. *De perspectivas exegéticas a perspectivas sistemáticas y dogmáticas: Breves puntualizaciones en torno al siglo caracterizado por el esplendor de la jurisprudencia de la Escuela culta. - RGDR 3*, Madrid, 2004, p. 1 ss; Id. *Scientific consubstancial values to the legal dogmatic and the theory of legal business. – Ius Romanum*, 2021; KASER, M. *Derecho Romano Privado.* Versión directa de la 5ª edición alemana por Santa Cruz Teijeiro, Madrid 1982, p. 250 ss.; D'ORS, A., T. GIMÉNEZ-CANDELA. *Fianza parcial. - RIDA*, 30, 1983, p. 101 ss.; BAUTISTA, DÍAZ. *Notas sobre el aseguramiento de obligaciones en la legislación justinianea. - AHDE*, 50, 1980, p. 683 ss.; LEVY. *Sponsio, fideipromissio , fideiussio*. Berlín 1907, p. 17 ss.

[2] In regards to the interpolations or to the classic character of the fragment, See The difference of opinions from CUGIA. *La confusione dell'obligazione con cenni al nuevo codice civile.* – In: *Corso di Diritto Romano tenuto nella R.Università di Firenze*, Padova 1943, p. 202, p. 206; SOLAZZI. *L'estinzione dell'obligazione nel Diritto Romano*. Vol.I. Nápoles, 1935, p. 310. In this author's opinion, the cited fragment is interpolated and the rule presented in this heading is clearly discredited by other two texts from Digest: D. 36.1.59 (61). pr. (*Paulus, lib. 4 Quaestionum*) and D.46.3.38.5 (*Africanus Lib.7 Quaest.).* SOLAZZI based his reasoning with the literal concept of actio serviana and actio pignoraticia in agreement that the right of pledge is not extinguished by confusion. See also, in the matter, KRETSCHMAR. *Die Theorie der Confusión. Ein Beitrag zur Lehre von der Aufhenbung der Rechte.* Leipzig, 1899, p. 129; CARRELI*. Sulla accesorietà del pegno del Diritto Romano*. 1934. Reimp. 1980, p. 68 ss.; KIESS, P. *Die confusio in Klassischen römischen Recht.* Berlín, 1995, p. 90 believes that the fragment is classis despite recognizing that the second part of the same, is not as it is put to believe, „praeterquam", an exception with regards to the first part, given that the confusion between deserving of and guarantor has nothing to do with the principal extinction of obligation by confusion. Probably, this author affirms, the classical

section, established that the accessory obligations that are extinguished, just as the bond, the mortgage and the rights of pledge, if the principal credit is extinguished. *„In omnibus speciebus liberationum etiam accesiones liberantur, puta adpromissores, hypothecae, pignora; praeterquam quod inter creditorem et adpromissores confusione facta reus non liberatur". In the second part of the text (praeterquam…)* ULPIANUS refers to the case in which both the deserving of and the the guarantor are confused and affirms that the principal debtor will not be absolved[3].

In the fragment 38,1 del D.46,1 (*Lib. 20 Digestorum*) MARCELUS also presents to us the idea of accessory as cause of extinction of the personal guarantee, when pointed out in relation to a case in which the deserving of inherits the debtor, that the guarantor is free because there will no longer be a debtor who will be responsible and answer to the guarantor, nor a debt owed: „... *Respondit, si ei, a quo tibi erat sub conditione legatum, quum ab eo fideiussorem accepisses, heres extiteris, non poteris habere fideiussorem obligatum, quia nec reus est, pro quo debeat, sed nec res ulla, quae possit deberi*"*[4].*

In other countries of the compilation, as fundament of extinction of bond, there also appears the principle *„nemo potest pro eodem apud eundem debere",* or what is the same „Nobody can be a guarantor of a persona with itself", legal formula that sends us to the principle of impossibility that informs about confusion and that also indicates to us with the words "pro eodem" the character accessory of the bond[5]. Firstly outlined the D 46.3.34.8 (*Iulianus, lib. 54 Dig*) [6]*: „Quidam filiumfamilias, a quo fideiussorem acceperat, heredem instituerat; quaesitum est, si iussu patris adiisset hereditatem , an pater cum fideiussore agere posset. Dixi, quotiens reus satisfandi reo satis accipiendi heres existeret, fideiussores ideo liberari, quia pro eodem apud eundem debere non possent".*

compiler added this second part without warning of not having any connection whatsoever with the first one, this makes us believe that surely, that one has also been found elsewhere among the genuine texts by ULPIANO.

[3] See supra p. 6 ss.

[4] About this, CUGIA, *op. cit*., p. 128 affirms that Marcelo finds the reason of extinction of bond and in the logically-lawful impossibility of the bond by its own characteristic of accessory.

[5] According KRETSCHMAR, *Die Theorie..., cit.*, p. 119, this formula expresses that no one can derive a benefit from their own contractual infidelity. In the view of CUGIA. *La confusione..., cit.*, p. 128, this principle further clarifies the impossibility of security in such cases.

[6] About this passage cfr. KRETSCHMAR, *op. cit*., p. 118; LEVY. *Sponsio, fideipromissio, fideiussio*. Berlín, 1907, p. 17.

According to JULIANUS, the bond credit is extinguished because there it is not possible that a person guarantees the obligation of another person in favor of themselves. The same reasoning was also used by PAULUS in D 46.1.71. pr (*Lib.4 Quaestionum*) referring to the guarantor as dominant: *„non potest pro eodem apud eundem quis mandator esse*“[7]. And AFRICANUS in D 46.1,21,3 (*Lib. 7 Quaestionum*): „*quoniam quidem nemo potest apud eundem pro ipso obligatus esse“*. For SOLAZZI, this argumentative formula is postclassic: the classical jurists would have only sent to the accessory of the bond´s credit[8].

Some authors[9] have sustained that the sources offer a third fundament for extinction of personal guarantee as a consequence of the incurred confusion over the principal obligation, this is, by efficacy of the inherent payment to the confusion. Concretely, the paragraphs thereby presented in this way are; *D.46.1.50 (Papinianus, lib. 37 Quaestionum): „Debitori creditor pro parte heres extitit accepto coherede fideiussore; quod ad ipsius, quidem portionem attinet, obligatio ratione confusionis intercidit, aut, quod est verius, solutionis potestate; sed pro parte coheredis obligatio salva est, non fideiussoria, sed hereditaria, quoniam maior tollit minorem*“**.** That is to say, a deserving person comes to be an inheritor of a debtor along with the guarantor. The credit is confused with the fee of the coheir and thus, *solutionis potestate* is extinguished or what is the same, by force of payment, and the guarantor follows the debtor in the other debit`s fee. Nevertheless, bond is extinguished entirely, because the major one extinguished the minor one.

In our opinion, the “*solutionis potestate*” does not refer to the bond but rather to the extinction of the principal credit[10] and in the same line of thought, **S**OLAZZI sustains that the insert is altered by the compilers, the same that occurs in the second fragment that is

[7] PAULUS also uses this formula in D 46.1.56.1 (*Lib.15 Quaesti*.) nevertheless, where no right is extinguished by confusion. Cfr. KIESS, P. *Die confusio..., cit.,* p. 91, n. 31; KRETSCHMAR, *op. cit*., p. 120; SOLAZZI. *L'estinzione...,cit.*, p. 300, n. 1; BUTI. *Studi sulla capacità patrimoniale dei servi.* 1976, p. 118 ss.; BURDESE. *Considerazione in tema di peculio C.D.* Profettizio, Studi in onore di Cesare Sanfilippo I, 1982, p. 92.

[8] SOLAZZI. *L'estinzione ..., cit.*, p. 300, p. 283, n. 2.

[9] CICU. *Estinzione di rapporti giuridici per confusione*. Sassari, 1908, p. 33 ss. and KRETSCHMAR, *op. cit*., p. 118.

[10] Cfr., CUGIA. *La confusione*..., *cit.*, p. 129.

invoked to justify the extinction of bond in the cases of confusion between deserving of and debtor "*veluti solutionis*". It is about he already mentioned D.46.1.71. pr. (*Paulus, lib.4 Quaest*.): *„...ubi successit creditor debitori, veluti solutionis iure sublata obligatione etiam mandator liberatur, vel quia non potest pro eodem apud eundem quis mandator esse*"[11]*.*

b) Confusion between deserving of and guarantor

In the second case of confusion in relation to the bond, we find that the deserving of inherits the guarantor or vice versa, which in consequence, the qualities of guarantor and deserving of are united in the same person and the credit of bond is extinguished by confusion, while the principal credit subsists. Thereby comes to validate it:

D.17.1.11 *(Pomponius, lib. 3 ex Plautio): „Si ei, cui damnatus ex causa fideiussoria fueram, heres postea extitero, habebo mandati actionem".*

POMPONIUS states that if the deserving of had sued the guarantor, he would have defeated him in the litigation and after the deserving of had passed away, the own guarantor would have inherited him, this (Guarantor and heir) would have *actio mandati contraria* at his will to address against the debtor on the way back. Affirmed by SOLAZZI[12], that „so that the comeback action can be carried out, the guarantor being condemned would not suffice, rather, it was necessary that he would have paid out the principal debtor, making him debt free. The cited text comes to admit that hereditary confusion is equal to the payment." Nevertheless, we must maintain that in the classical right the *litis contestatio* between the deserving of and the guarantor frees the principal debtor. The *actio mandati* does not emerge out of the confusion, but rather, it was already existent from the moment of the liberation of the principal debtor, in other words, from the *litis contestatio*.

From that moment, the guarantor can say that *aberat pecunia,* reason for which it can be deduced that this fragment swims in favor of the confusion`s satisfactory nature, at least for the classical Right. In this way, pointed by CUGIA that in justinian Right, the

[11] SOLAZZI, *op. cit*., p. 300.

[12] SOLAZZI, *op. cit*., p. 293. See also in regards to this fragment, KRETSCHMAR. *Die Theorie der confusio, cit.*, p. 140 ss.; WATSON. *The Roman Law of Mandate.* 1961, p.171 ss.; KIESS, P. *Die confusio*..., *cit.*, p. 88 ss.

litis contestatio does not possess consumptive right and probably, the *actio iudicati* between deserving of and guarantor do not free the principal debtor, regardless, having been produced the confusion between the deserving of and the guarantor, regardless of this having paid or not, the byzantines granted the *actio mandati* that appeared in the classical text. Tough probably, also for the byzantines, the mandate actions emerges at the moment in which the principal debtor has breached the agreement, given that if the deserving of has directed itself against the guarantor, it is presumed that he had directed itself against the debtor beforehand with no success at all[13].

Another classical text[14] that explicitly excludes confusion equal to payment in relation with our hypothesis is the *D. 46.1.21.5 (Africanus, lib.7 Quaestionum):* „*Cum fideiussor reo stipulandiheres exstiterit, quaeritur, an quasi ipse a se exegerit, habeat adversus reum mandati actionem, respondit, cum reus obligatus maneat, non posse intellegi ipsum a se fideiussorem pecuniam exegisse: itaque ex stipulatu potius quam mandati agere debebit".*

In this case, the guarantor inherits the deserving of without having had any place in the proceedings prior to the succession and AFRICANUS rejects *la actio mandati contraria* because in his opinion, one cannot consider the heir to have collected the credit from itself given that the debtor continues to be obliged to it. **(***obligatus manet).* For that, the heir can only direct itself against the debtor with the *actio ex stipulatu*, that is, by the principal credit.

Even though the first vist can appear that between AFRICANUS and POMPONIOUS there exist at controversy of opinions, in fact, it is not like so[15]; rather, both decided on the basis of different cases: in the case of POMPONIUS, the deserving of has lost the principal credit after directing itself against the guarantor and having jammed the *litis contestatio,* so the guarantor, that inherits the deserving of, can no longer validate the principal credit. For this motive, and I add, it can exercise the *actio mandati contraria*

[13] CUGIA, *op. cit*., p. 124. Cfr. Also D.17.1.47. pr. (*Pomponius, lib. 3 Ex Plautio*), D. 3.5.27 (28) (*Iavolenus, lib. 8 Ex Cassio*).

[14] CUGIA, *op. cit*. p. 125; SOLAZZI, *op. cit*., p. 297; KRETSCHMAR. Die theorie..., *cit.*, p. 162; WATSON. *The Roman Law of Mandate.* 1961, p. 177 ss.; BETTI. *Sulla concezione classica della confusio.* - In: *SDHI*, 28, 1962, p. 19 ss.; KIESS, P., *op. cit.*, p. 88 ss.

[15] Cfr. KIESS, P., *op. cit*., p. 88; SOLAZZI, *op. cit*., p. 297; KRETSCHMAR, *op. cit.* p.178 .

against the debtor, if it made itself a guarantor in agreement with whatever was requested in a mandate.

However, in the case of AFRICANUS*,* the requirements do not coincide of *actio mandati contraria*[16]: the guarantor has not been sued by the deserving of before the succession, therefore, at the time of inheriting the deserving of, it cannot be understood as having paid itself for reasons of bond and as the debtor remains in obligation, it can director against him for the principal credit with the *actio ex stipulatu*. Again, it is evident that confusion in the stated hypothesis does not have an equivocal effect to that of the compliance. As indicated by AFRICANUS with else words: *non posse intellegi ipsum a se fideiussorem pecuniam exegisse.*

In this order of ideas, also established by AFRICANUS, in D.46,1,21,3 (*lib. 7 Quaest*.) if the deserving of names an heir, the bond´s credit is extinguished, regardless of the fact that the obligation with the principal debtor is civil or natural given that no one can lend bond to a person upon itself. But if the guarantor inherits the deserving of, then, only the bond´s credit is extinguished: „*Quod si stipulatur reum heredem instituerit, omnimodo fideiussoris obligationem perimit, sive civilis, sive tantum naturalis in reum fuisset, quoniam quidem nemo potest apud eundem pro ipso obligatus esse. Quod si idem stipulator fideiussorem heredem scripserit, proculdubio solam fideiussoreis obligationem perimit. Argumentum rei: quod si possessio rerum debitoris data sit creditori, aeque dicendum est, fideiussorem manere obligatum*“. In accordance to the text that was come to us **(***argumentum rei...),* the jurist bases this position saying that it is this way, the same as then the deserving of acquires the possessions of the assets from the debtor within the framework of an insolvency procedure, the guarantor remains subject to obligation.

Nevertheless, *argumentum rei* is a postclassic addendum[17], given that the title that follows those words can not function as foundation for the two primary cases: the bond´s credit is extinguished in both of them, while in the final part of the fragment, it subsists: besides, in the second case both the deserving´s of patrimony and the guarantor fall back together, whereas, in the last part of the fragment, the deserving of acquires the debtor`s

[16] KIESS, P., *op. cit*., p. 89 notes that AFRICANO only rejected the cumulative exercise of both actions; against, convincingly. KRETSCHMAR, *op. cit*., p. 163; WATSON, *op, cit*., p. 172; CUGIA, *op. cit*., p. 126 .

[17] Cfr. KIESS, P., *op. cit*., p. 87.

patrimony. If we eliminate the words *argumentum rei,* AFRICANUS constructs three independent cases that start with quod respectively, without them all being substantiated. As specifically pointed out by KIESS[18] „A post classic presenter created this false correlation".

In the same way, ULPIANUS in D.46.3.43 in fine (*Lib. 2 Regularum*), underlines that when confusion is produced between the deserving of and the guarantor, the principal debtor remains in obligation: „*praeterquam quod inter creditorem et adpromissores confusione facta reus non liberatur*".

Lastly, it is rather interesting to mention the fragment 8.3 del D. 2.8 by PAULUS (*lib.14 ad Edictum*), just as, in the case where the deserving of and the guarantor are confused, if the bond´s credit is extinguished, a new one would have to be constructed and guaranteed the principal credit: „*Si fideiussor iudicatum solvi, stipulatori heres extiterit, aut stipulator fideiussori, ex integro cavendum erit*".

Nevertheless, it is about a special case from which conclusions can not be extracted for all the confusion cases in general. In it PAULO decides over the obligation of the defendant to take part in *cautio iudicatum* solvi in a process in favor of the plaintiff. As established by the edict, cautio was guaranteed by the bond if the guarantor inherited the plaintiff or if the plaintiff inherits the guarantor, the defendant must take part in *cautio iudicatum solvi*[19].

c) Confusion between debtor and guarantor

Even more complex, the third confusion case is presented between the principal debit and that of the bond. The majority doctrine has admitted that in these cases, there is no comparison of legal qualities within the same person, for that, since the XIX century, the pandectists rated this type of confusion as improper[20]. KRETSCHMAR believed otherwise that the incompatibility between the qualities of debtor and guarantor was confirmed by AFRICANO in D.46.1.21.2 when „*non enim intelligi potest ut quis pro se*

[18] *Op.cit*., *loc. cit*.
[19] See KIESS, P., *op. cit*., p. 90.
[20] See CICU. *Estinzione di rapporti..., cit.*, p..34, KIESS, *op. cit.*, p. 94.

fideiubendo obligetur“ was established, that is to say, that not one person can be a guarantor of itself[21].

It is true that for the case in which the guarantor inherits the debtor or the debtor the guarantor, the classical jurists adopted diverse solutions (always keeping into consideration the interests of the deserving of that in last instance would lose the principal credit or the guarantee), though by general rule, it is commonly said that the bond´s credit is extinguished in a way that the heir has obligations only with the principal debtor. As signaled by VENULEIUS and ULPIANUS who relate this hypothesis with the confusion of the solidary obligations:

D. 45.2.13 (*Venuleius Lib. 3 Stipulationum*): „*Si reus promittendi alteri reo heres extiterit, duas obligationes eum sustinere dicendum est; nam ubi quidem altera differentia obligationum esse possit, ut in fideiussore et reo principali, constitit, alteram ab altera perimi; quum vero eiusdem duae potestatis sint, non potest reperiri, alteram potius, quam alteram consummari; ideoque etsi reus stipulandi heres extiterit, duas species obligationis eum sustinere.*“

D. 46.1.5 (*Ulpianus, Lib.46 ad Sabinum*): „*Generaliter Iulianus ait, eum, qui heres extitit ei, pro intervenerat, liberari ex causa accessionis, et solummodo quasi heredem rei teneri. Denique scripsit, si fideiussor heres extiterit ei, pro quo fideiussit, quasi reum esse obligatum, ex causa fideiussionis liberari; reum vero reo succedentem ex duabus causis esse obligatum. Nec enim potest reperiri quae obligatio, quam perimat, at in fideiussore et reo reperitur, quia rei obligatio plenior est. Nam ubi aliqua differentia est obligattionum,*

[21] KRETSCHMAR. *Theorie der confusio..., cit.*, p. 35 ss. Besides, as manifested by KIESS, P. *op. cit.*, p.107 ss., we have received fragments from AFRICANO, MARCELO and ESCÉVOLA in which the process of virtue from which the positions of debtor and guarantor fall within the same person have also been qualified as „confusio“. These fragments are: D.46,1,21,4 (Africanus lib. 7 Quaestionum), D.46,1,24 (Marcellus, lib. Singulari responsorum), D.46.3.93.2.3 (*Scaevola, Lib. Sing. queaestionum publice tractatarum*). Although according to this author, the so-called confusion unlike the bond was only qualified as confusion in the high classic era. Nevertheless, beyond this common qualification, there was no common ground among the classical jurists between self confusion and the bond´s own confusion. For that, it is impossible at its own judgement, to extract conclusions of the inappropriate confusion to apply to the own confusion as it has always been done in the modern romanistic era.

potest constitui, alteram per alteram perimi; quum vero duae eiusdem sint potestatis, non potest reperiri cur altera potius, quam altera consumeretur. Refert autem haec ad speciem, in qua vult ostendere, non esse novum, ut duae obligationes in unius persona concurrant; est autem species talis: si reus promittendi reo promittendi heres extiterit, duas obligationes sustinet; item si reus stipulandi extiterit heres rei stipulandi, duas species obligationis sustinebit; plane si ex altera earum egerit, utramque consumet, videlicet quia natura obligationum duarum, quas haberet, ea esset, ut, quum altera earum in iudicium deduceretur, altera consumeretur"[22].

VENULEYUS and ULPIANUS confirm the bond´s credit is extinguished if the debtor inherits the guarantor or if the guarantor inherits the debto[23]. As a justification they point out that the principal credit is stronger than the bond´ts credit and thus voids it. This solution would be an exception to the current starting point in the solidary debt in which both credits subsists without a solitary debtor inheriting the other[24].

Both fragments are alike much in the sense that in regards to the construction of its reasonings and to the election of the terms. As these similarities can not confer casualty, we can entail with KIESS that both paragraphs overcome a common source, perhaps to JULIANUS cited by ULPIANUS[25]. For that, he affirms this author that it is improbable that both texts had been redone in the post classic period; rather, complying with its content and its literal content, both fragments would be classic[26].

[22] Regarding these fragments, one can see: SOLAZZI, *op. cit*. p. 307 ss.; BETTI. *Sulla concezione classica..., cit.*, p. 24; JOHNSTON. *On a singular book of Cervidius Scaevola.* 1987, p. 66 ss.**;** BERNASCONI. *Il legato di debito nel Diritto Romano. – SDHI*, 42, 1976, p. 93 ss.; CUGIA, *op. cit.,* p. 131 ss.; CICU. *Estinzioni di rapporti..., cit.,* p. 35; KIESS, P., *op. cit*., p. 95 ss.

[23] See KIESS, *op. cit*., p. 95. Cfr. También D.42.6.3. pr. (*Papiniano, lib. 27 Quaestionum*); D.46.3.38.5 (*Africano, lib.7 Quaestionum*).

[24] BERNASCONI, *op. cit., loc. cit*., points out that this starting point constitutes in turn an exception to the rule that a debtor can not owe the same thing two times.

[25] KIESS, *op. cit*., *loc. cit*. Así lo afirma también JOHNSTON, *op. cit*., p. 67 at the moment of commenting that the compilers had eliminated in VENULEYO the reference to JULIANO.

[26] KIESS, *op. cit*., p. 96; with the same opinion See also JOHNSTON, *op. cit*., p. 67; BETTI. *Sulla concezione..., cit.*, p. 24. Against, SOLAZZI, *op. cit*., p. 308.

In any case, both jurists despite not explicitly expressing why the bond´s credit is extinguished in this case[27], they base their answers in that the principal credit is stronger than that of guarantee *(quia rei obligatio plenior est).* In this sense, part of the doctrine[28] has believed that in the classical jurist terminology one can appreciate signs of formation of a theory in which the bond´s credit will extinguish when the principal credit were *plenior or maior* or when the bond´s credit and the principal credit have different values[29].

Nevertheless, it is true that the jurisprudence almost always refer the mayor weight of the principal credit to justify the extinction of the bond using the term plenior and/or other similar ones, we find KIESS´s opinion very coherent, according to which, with it, they would not be contributing an explanation for the extinction of the bond´s credit, but rather, that they would be describing the bond´s credit as means of accessory of guarantee that depends on the contents of the principal credit, and that in no case can it be more extensive than the principal credit[30].

In effect, no theory should have been formed accordingly, whilst there was no unanimous opinion among the jurists in regards to the extinction of bond in the case of confusion between debtor and guarantor. Various fragments that evidence division of opinions with this sense, when in them it is decided that the bond´s credit subsists despite the obligations being compiled into a single person:

D.46.3.93.3 (*Scaevola, lib.singulari Quaestionum publice tractatarum*): „*Quid ergo si fideiussor reum heredem scripserit? Confundetur obligatio secumdum Sabini sententiam, licet Proculus dissentiat*“.

[27] It`s True that in D.46.1.14 (*Iulianus, lib.47 Digestorum*); D.46.3.93.2 (*Scaevola Lib.Singulari Quaestionum Publice Tractatarum*) , the jurists do not contribute reasons that support their answers.

[28] See SOLAZZI, *op. cit*., p. 303 ss.; KRETSCHMAR. *Die Theorie...,* p. 72 ss.; KIESS, *op. cit*., p. 103.

[29] See in this sense, D.46.3.95.3 (*Papinianus, lib. 28 Quaestionum*): „fideiussorem, qui debitori heres extitit, ex causa fideiussionis liberari, totiens verum est, quotiens rei plenior promittendi obligatio invenitur“; D.46.1.5 (*Ulpianus, lib. 46 ad Sabinum*): „at in fideiussore et reo repperitur, quia rei obligatio plenior est“; D.42.6.3, pr. (*Papinianus lib.27 Quaestionum*): „obligatio quae maior fuit“; D.46.1.50 (*Pap.lib.37 Quaestionum*): „Quoiam maior tollit minorem“; D.45.2.13 (*Venuleius, Lib.3 Stipulationum*): „nam ubi quidem altera differentia obligationum esse possit, ut in fideiussore et reo principali ,constitit alteram ab altera perimi“.

[30] KIESS, *op. cit*., p. 103-104.

According to SABINUS the bond´s credit will extinguish by confusion, according to PRÓCULO, no. Regardless, it ended up imposing the first opinion, so it detaches from an imperial constitution from DIOCLETIANUS that is found in C.8,41,24. And the fact that it would have arrived without a single fragment from a jurist that would follow PRÓCULUS´s opinion[31].

In D 46.1.21.2 (*lib.7 Quaestionum*), AFRICANUS sets out the following case: „*Servo tuo pecuniam credidi, eum tu manumisisti, deinde eundem fideiussorem accepi; si quidem in eam obligationem fideiubeat, quae adversus te intra annum sit, obligari eum ait; sin vero in naturalem suam, potius, ut nihil agatur; non enim intelligi posse, ut quis pro se fideiubendo obligetur. Quodsi hic servus manumissus fideiussori suo heres existat, durare causam fideiussionis putavit; et tamen nihilominus naturalem obligationem mansuram, ut, si obligatio civilis pereat, solutum repetere non possit; nec his contrarium esse, quod quum reus fideiussori heres existat, fideiussoria obligatio tollatur, quia tunc duplex obligatio civilis cum eodem esse non potest. Retro quoque si fideiussor servo manumisso heres extiterit, eadem adversus eum obligatio manet, quamvis et naturaliter teneatur, nec pro se quis fideiubere possit*“.

Someone grants a loan of money to a slave that is later emancipated by its owner and thus becomes the guarantor of debt. Right, AFRICANUS who reproduces the responsa from JULIANUS, distinguished two situations according to the guarantee being given by the feasible adyeticial action against the dominus within the year following the emancipation (*actio de peculio annalis)* or by *obligatio naturalis* directed against itself. In the first case, the bond is valid, while in the second it would be invalid because it can not be admitted that a debtor can authentically offer a bond for itself. (*ut quis pro se fideiubendo obligetur*). JULIANUS compares with this legal situation the cases of confusion in which the freed slave (debtor) inherits the guarantor or the guarantor inherits the freed slave if the bond guarantees a natural obligation. As much in one case as in the

[31] Cfr. BETTI. *Sulla concezione classica*..., *cit.*, p. 23 24; KIESS, *op. cit*., p. 96, p. 101 ss.; CICU. *Estinzione...,* p. 36.

other both obligations still remain, that is to say, the bond´s credit survives alongside the principal natural obligation. The motive is evident: the bond´s credit does not extinguish by confusion due to the fact that the principal natural obligation is not demanded, and as such, the hereditary succession would leave the deserving of the loan without any further action to make his credit right be valid. That is, if the relation of bond was to be extinguished, the deserving would lose all possibility of directing itself against the heir. Furthermore, the principal obligation can not extinguish because the bond´s credit, as a means of guarantee accessory, it needs the principal obligation[32].

PAPINIANUS in the fragment 95.3 of D.46.3 (*lib. 28 Quaestionum*) also decides that both bond´s credit as well as the principal obligation survive if the guarantor inherits the debtor: „*quod vulgo iactatur, fideiussorem, qui debitori heres extitit ,ex causa fideiussionis liberari toties verum est, quoties rei plenior promittendi obligatio invenitur. Nam si reus duntaxat fuit obligatus, fideiussor liberabitur; e contrario non potest dici, non tolli fideiussoris obligationem, si debitor propiam et personalem habuit defensionem; nam si minori vigintiquinque annis bonae fidei pecuniam credidit, isque numos acceptos perdidit , et intra tempora in integrum restitutionis decessit herede fideiussore, dificile est dicere, causam iuris honorarii, quae potuit auxilio minori esse, retinere fideiussoris obligationem, quae principalis fuit, et cui fideiussoris accessit sine contemplatione iuris praetorii. Auxilium igitur restitutionis fideiussori, qui adolescenti heres extitit, intra constitutum tempus salvum erit*“.

PAPINIANUS underlines in the first phrase of this passage that the bond´s credit is extinguished if the guarantor inherits the debtor as long as the principal debt were plenior. On the contrary, if the debtor is only an obligated *naturaliter,* the debt´s bond is not extinguished. In consequence, the principal debt can not be considered plenior in regards to the bond´s debt if it is a *naturalis obligatio.*

On the other hand, the bond´s credit were to extinguish and therefore, the principal debt were plenior, if the principal debtor had means of own defense that did not concern the guarantor. To explain further, PAPINIANUS constructs the following case: A person

[32] About the interpretation of the text and its interpolations See KIESS, *op. cit*., p. 97 ss.; KRETSCHMAR, *op. cit*., p .72; BETTI. *Sulla concezione classica*..., *cit.*, p. 22 - 23; CUGIA, *op. cit*., p. 132 ss.; SOLAZZI, *op. cit*., p.301; LABRUNA. Recensión a CORNIOLEY, P. *Naturalis obligatio. Essai sur l'origine e l'evolution de la notion en droit romain. – Iura*, 2, 1965, p. 417.

grants a loan of money to a minor of twenty five years believing in good faith that he was of older age. The minor loses the money and before passing the deadline of the restitutio in integrum he were to die and the guarantor takes his place. In consequence, affirms the jurist that the bond´s obligation is extinguished by improper confusion (debtor and guarantor are now the same person), as a result, the heir guarantor would have *restitutio in integrum* at his disposal as the causing debtor would have had.

According to SOLAZZI, the text is interpolated from *nam si reus* and thinks that the example of the loan to the minor does not intertwine well with the rest of the fragment which surely, it is about an addendum from the justinian compilers. In his opinion, PAPINIANO seems to respect the deserving right to choose if he wants to sue the principal debtor or the guarantor. In the Justinian Right despite the free will of the deserving, he has led way to a more logical order of the execution benefit, one can not be fully certain if, excluding the case of natural obligation, the bizantine emperor followed the liking of PAPINIANUS or he had arranged for the bond not to ever be able to survive the principal obligation[33].

From the exegesis of all these fragments, one can infer with clarity that for the classical jurists (despite the majority of the texts being in greater or lesser measure, interpolated) the idea that must preside in these cases is that of where the heir can not be a guarantor of itself. In this way, if only one of the credits must survive, then it can only be the principal credit, because the bond´s credit entails by its accessory nature the existence of a principal credit. As such, the bond´s credit is extinguished if the guarantor inherits the debtor or if the debtor inherits the guarantor. This does not limit the possibilities of the deserving that maintains the principal credit against the heir, having at his will as patrimonial mass subject to responsibility both from the the debtor´s patrimony as well as the guarantor that after the succession, are the same person. But in the cases where this general rule diminishes the deserving position leading to evident damage, the jurists understand they must do without applying it: this way, for example, in the cases in which the principal credit is natural.

[33] SOLAZZI, *op. cit*., p. 303 and *Confusione nelle obligazioni (Diritto Romano*). – *NNDI*, vol. IV, p.78; CUGIA, *op. cit*., p. 134-135; BETTI, *op. cit*., p. 25.

In this sense, JULIANUS demonstrates that the deserving can not be harmed in its rights in any case, when in D.46.1.14 (*lib.47 Digestorum***)** the following is established: „*Quum reus promittendi fideiussori suo heres extitit, obligatio fideiussoria perimitur; quid ergo est? Tanquam a reo debitum petatur; et si exceptione fideiussori competente usus fuerit, in factum replicatio dari debebit, aut doli mali proderit*“[34]*.*

The debtor succeeds its guarantor and as a consequence the relation of bond is extinguished, but, continues JULIANO, if the deserving tries to execute an appropriate action against the debtor and this opposes a *exceptio* that is in favor of the guarantor, the deserving must be granted a *replicatio* in factum or allow him to serve himself from *exceptio doli*. This second part of the text is understood based on the original context that LENEL has reconstructed[35]. In JULIANUS´s compilation, the text was found under the title of the addendum “*Quemadmodum a bonorum emptore vel contra eum agatur”*. In its own addendum, an executable action was also foreseen under such title in favor and against the *bonorum* emptor if it had acquired the patrimony in a rupture of the hereditary flow. With this action, the *bonorum* emptor pretended to be the heir of the insolvent deceased debtor[36]. This explains to use in a clear manner what was it that JULIANO meant in his answer, that is, if the debtor inherits the guarantor, the bond´s credit is extinguished without a doubt; but what happens if the debtor has acquired the inheritance in the guarantor inheritance contest.

The selling of the inheritance to the *bonorum emptor* did not directly affect the position of the heir that continued to be so in conformity with ius civile. For that, the credits belonging to the deservings continued to be against it. The *bonorum* emptor only happened in the legal position to the heir in the *praetorium* right. Consequently, in our case, the heir was still obligated to in agreement to ius civile by the originator´s bond, given that when the debtor acquires the inheritance in the guarantor´s succession contest, no confusion is produced. On the other hand, Now the magistrate does not grant the action for the bond against the heir that continues to be in obligation in conformity with ius civile,

[34] Believes the fragment is interpolated, CUGIA, *op. cit*., p. 130.

[35] LENEL cited by KIESS, P., *op.cit*., p. 105, By KRETSCHMAR, *op. cit.*, p. 94 and by CUGIA, *op. cit*., p. 130.

[36] Cfr. IG 4,35: *bonorum emptor ficto se herede agit.* See in this sense PÉREZ ÁLVAREZ, P. *La bonorum venditio. Studied about the deserving contest in classical Roman Right*. Madrid, 2000, p.78 ss.

but rather, against the *bonorum emptor*. That is to say, that in definite, the deserving could act against our debtor heir and *bonorum emptor* both for the principal debt as for the bond if demanded as *bonorum emptor.*

The lawsuit derived from the principal debt did not present any problems as it can not be extinguished when the debtor inherits the guarantor. If the deserving were to sue the heir for the bond as *bonorum emptor, „quid ergo est? tamquam a reo debitum petatur",* that is to say, that the debt would be asked as owed by the principal debtor. And if he, in this case were to interpose the *exceptio* that corresponded the guarantor. He would fail in his attempt before *replicatio in factum or before the exceptio doli mali.*

If the deserving of the originator can direct their lawsuits against the *bonorum emptor*, then this can also have the means of defense from the originator. Nevertheless, in this case, JULIANO wants to weaken them through the *replicatio* granted to the deserving of. This decision can only have its justification in the fact that the *bonorum emptor* is sued for the originator´s bond is also the principal debtor and must not extract any advantage from the fact that the deserving was directed against him for the bond and not for the principal debt[37].

All in all, we can conclude saying that if the debtor inherits the guarantor, the bond´s credit is extinguished; in any case, one can only go against the debtor for the principal debt. But if the debtor acquires the inheritance from the guarantor in the contest of succession, the bond´s credit is not extinguished because no concussion is produced. The deserving then, has the possibility to choose if he directs himself against the debtor for the principal obligation or for the bond. But if he sues him for the bond, the debtor cannot make himself valid from the exceptions derived from the guarantee connection, because in no case, can the deserving be diminished in his rights. This must have been the motive from JULIANO´s decision.

III. Final conclusion: the position of the deserving of is always preserved in the cases of confusion of obligations guaranteed by bond:

[37] See KIESS, P., *op. cit.*, p. 106.

As a kind of summary of all of our analysis we can conclude that confusion of obligations is an institution whose historical evolution, despite the social and economic changes occurred throughout the centuries, it has not represented great differences in relation to casuistry, observing that many of the problems that take place in relation to this figure, were already present during the Roman Rights time. On the other hand, the doctrine to our judgement is wrong to resort to the comment about the relative stall of the confusion legal regime probably due to the lack of economic relevance of its consequences. We believe that we could grade this approach as distant from reality as once studied, the different hypothesis in which confusion operates, we have discovered that any matter that is underlined in its problematic can generate conflicts of great reach, from the economical point of view as well as in regards as those called to inherit as well, and specially of the thirds directly or indirectly interested in the hereditary succession (deserving of heirs, legatees, guarantors, guarantee right title holders or of usufructs, etc. about the confused credits). For that, the study of the different solutions contributed by the roman legal consultants result in great interest to shed light to the conflicts that can be laid out in the development and application of our current valid regulation.

In our opinion and in consonance with the majority doctrinal thinking, we consider that in the guaranteed obligations through bond (*fideiussio*), the position of deserving of will always be preserved without prejudice in any case, whether it be on the confusion cases between deserving of and principal debtor, between deserving of and guarantor or lastly, in the third case analyzed, between debtor and guarantor.

As already stated, in the first case, this is, when within the same individual, both qualities of deserving of and principal debtor are gathered, at the same time when the principal obligation is extinguished, the relation of bond according to the sources for three reasons: the accessory of the bond in regards to the extinguished credit, (D. 46.3.43 de ULPIANUS y D.46.1.38.1 de MARCELUS), the material impossibility that one person can be guarantor for itself or what is the same „*nemo potest pro eodem apud eundem debere*“ (D. 46.3.34.8 from JULIANUS; D. 46.1.71. pr. from PAULUS; D. 46.1.21.3 from AFRICANUS) and according to some authors, by the efficacy of the inherent payment to the confusion „*solutione potestate*“ or „*velutis solutione*“ (D.46.1.50 from PAPINIANUS, D. 46.1.71. pr. from PAULUS).

In the second case of confusion in relation to the bond, we find that the deserving of inherits the guarantor or vice versa, which in consequence, both qualities of guarantor and deserving of are gathered in the same person and the bond´s credit is extinguished by confusion, while the principal credit survives. Thereby testified by POMPONIUS in D.17.1.11 ULPIANUS in D.46.3.43 in fine (*Lib. 2 Regularum*), among others.

Lastly, and much more complex is the third presented case of confusion between the principal debit and that of the bond. The majority doctrine has admitted that in these cases there is no contrast of legal qualities within the same person, for this, since the XIX century, the pandectists graded these type of confusions as improper. Nevertheless, KRETSCHMAR sustained against that incompatibility among the qualities of debtor and guarantor are confirmed by AFRICANUS en D.46.1.21.2 when it establishes the rule of „*non enim intelligi potest ut quis pro se fideiubendo obligetur*“, that is to say, that no person can be a guarantor of itself.

It is true that for the case in which the guarantor inherits the debtor or the debtor the guarantor, the classical jurists adopt diverse solutions (always keeping into consideration the interests of the deserving of that ultimately would lose or the principal credit or the guarantee), despite the fact that as a general rule, they are used to deciding that the bond´s credit is extinguished, in a way that the heir is only obligated as principal debtor. Thereby pointed specifically by VENULEIUS in D. 45.2.13 and ULPIANUS in D. 46.1.5. Both jurists base their answers in that the principal credit is stronger than that of the deserving of the guarantee (*quia rei obligatio plenior est).* This does not limit the possibilities of the deserving that maintains the principal credit against the heir, having at his disposal as patrimonial mass subject to responsibility both the debtor of the patrimony as well as the guarantor that past the succession, are the same person. But in the cases that this general rule diminishes the position of the deserving leading to evident damage, the jurists understand that they must do without applying it: thus, for example, in the cases in which the principal credit is natural.