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CONSOLIDATION OF THE CREDITOR AND DEBTOR. CONFUSIO IN ROMAN LAW AND IN THE AUSTRIAN CIVIL CODE (ABGB)*

Abstract: *In both Roman law and Austrian civil law, there is a question regarding whether a consolidation between a creditor and his debtor leads to an expiration of the creditor's claim and the debtor's obligation. The following article focuses on legal relationships in which more than two parties are involved, meaning it would still be possible for the creditor (or his heir) to raise a claim against the debtor. Firstly, it is necessary to analyse a case from the Roman jurist Paulus (D. 46, 1, 71 pr.). Following this analysis, the legal situation in Roman law is compared to that in Austrian civil law.*

Keywords: *Roman law; Austrian civil law; confusio; consolidation; mandatum; right of recourse; dolo facit, qui petit quod redditurus est; juristic rules; societas; abuse of rights.*

1. INTRODUCTION

In Roman law, the term *confusio* had different meanings.[1] Firstly, a *confusio* could describe the blending of liquids with different owners.[2] Secondly, Roman

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[1] Peter Kieß, *Die confusio im klassischen römischen Recht*, Berlin 1995, 199-201; Johanna Filip-Fröschl, "Confusio", *Studienwörterbuch Rechtsgeschichte und Römisches Recht* (eds. Thomas Olechowski, Richard Gamauf), Wien 4th edn. 2020, 77.

[2] Nikolaus Benke, Franz-Stefan Meissel, *Roman Law of Property. Origins and Basic Concepts of Civil Law I. Translated by Caterina M. Draschan-Mitwalsky*, Wien 2nd edn. 2024, 80, 141, 178;

jurists used this term to refer to the consolidation (unification) of an owner and a party who had a limited property right.[3] Such a consolidation could occur, for example, if the pledgee became the heir of the pledgor.[4] Thirdly, the word *confusio* was used to characterise the consolidation between the legal position of a creditor and a debtor.[5]

In this article, only the third type of *confusio* is analysed. There are three possible ways in which a consolidation between a creditor and a debtor could occur: firstly, the creditor could be the debtor's successor, secondly, the debtor could be the creditor's successor,[6] and thirdly, a third party could be the successor of the creditor and the debtor.[7]

In textbooks on Roman law, it is emphasised that in case of a *confusio*, the creditor's claim (receivable) and the debtor's obligation have both expired.[8] The reason for this seems simple; specifically, nobody should have a claim against himself or should owe something to himself.[9] This general rule[10] can also be found in the first sentence of section 1445 of the Austrian Civil Code.[11] However, a closer look at this issue highlights that, in some cases, exceptions of this general

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Anna Plisecka, "§ 42 Erwerb durch Sachveränderung (*accessio, specificatio, commixtio, confusio*)", *Handbuch des Römischen Privatrechts I* (eds. Ulrike Babusiaux, Christian Baldus, Wolfgang Ernst, Franz-Stefan Meissel, Johannes Platschek, Thomas Rüfner), Tübingen 2023, 1115-1116; Michael Binder, "Fächerübergreifende Modulprüfung (FÜM) I. Romanistische Fundamente: Musterlösung", *Juristische Ausbildung und Praxisvorbereitung* 01/2024-2025, 6.

[3] J. Filip-Fröschl, 77.

[4] N. Benke, F.-S. Meissel (2024), 202.

[5] N. Benke, F.-S. Meissel (2024), 178; 202; Nikolaus Benke, Franz-Stefan Meissel, *Roman Law of Obligations. Origins and Basic Concepts of Civil Law II. Translated by Caterina Maria Grasl*, Wien 2021, 31.

[6] Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, 759; N. Benke, F.-S. Meissel (2021), 31.

[7] See D. 46, 1, 71 pr. (section "2. Roman law").

[8] R. Zimmermann, 759: "*Confusio brought about the end of an obligation [...]*"; J. Filip-Fröschl, 77; N. Benke, F.-S. Meissel (2021), 31.

[9] See R. Zimmermann, 759; Rudolf Welser, Brigitta Zöchling-Jud, *Grundriss des bürgerlichen Rechts II. Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht*, Wien 14th edn. 2015, 125.

[10] R. Welser, B. Zöchling-Jud, 125; J. Filip-Fröschl, 77; Petra Leupold, "§§ 1431-1450", *ABGB Taschenkommentar mit EheG, EPG, KSchG, ASVG, EKHG und IPRG* (Matthias Neumayr ed.), Wien 6th edn. 2024, 1843 (§ 1445/2); Rudolf Reischauer, "§§ 1445-1450", *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen. §§ 1445-1503 ABGB [Verjährung, Ersitzung]* (eds. Meinhard Lukas, Andreas Geroldinger), Wien 4th edn. 2024, 8 (§ 1445/16).

[11] § 1445 ABGB (Austrian Civil Code): "*So oft auf was immer für eine Art das Recht mit der Verbindlichkeit in Einer Person vereiniget wird, erlöschen beyde; [...]*".

Translation: Peter Andreas Eschig, Erika Pircher-Eschig, *Das österreichische ABGB – The Austrian Civil Code*, Wien 2nd edn. 2021, 515: "*Whenever and in whichever way the right is consolidated with the obligation in one person, both expire [...]*".

rule can be discussed. For example, exceptions could be justified if more than two parties were involved in the case. In the next two sections, possible exceptions are analysed in Roman law as well as in Austrian civil law.

2. ROMAN LAW

A case in which a consolidation between a creditor and one debtor took place is mentioned by the Roman jurist Paulus[12] in his *quaestiones*. In this case – listed in the chapter *mandati*[13] – five parties, not only two, were involved.

D. 46, 1, 71 pr. (Paulus *libro* 4 *quaestionum*)

Granius Antoninus pro Iulio Pollione et Iulio Rufo pecuniam mutuam accipientibus, ita ut duo rei eiusdem debiti fuerint, apud Aurelium Palmam mandator exstitit: Iulii bona ad fiscum venerunt: similiter et creditori fiscus successerat. Mandator allegabat se liberatum iure confusionis, quia fiscus tam creditori quam debitori successerat. Et quidem si unus debitor fuisset, non dubitabam sicut fideiussorem, ita et mandatorem liberatum esse: quamvis enim iudicio convento principali debitore mandator non liberetur, tamen ubi successit creditor debitori, veluti solutionis iure sublata obligatione etiam mandator liberatur, vel quia non potest pro eodem apud eundem quis mandator esse. Sed cum duo rei promittendi sint et alteri heres extitit creditor, iusta dubitatio est, utrum alter quoque liberatus est, ac si soluta fuisset pecunia, an persona tantum exempta confusa obligatione. Et puto aditione hereditatis confusione obligationis eximi personam: sed et accessiones ex eius persona liberari propter illam rationem, quia non possunt pro eodem apud eundem obligati esse, ut quemadmodum incipere alias non possunt, ita nec remaneant. Igitur alterum reum eiusdem pecuniae non liberari et per hoc nec fideiussorem vel mandatorem eius. Plane quia is mandati iudicio eligere potest vel creditorem, competituram ei exceptionem doli mali, si coeperit conveniri. Cum altero autem reo vel in solidum, si non fuerit societas, vel in partem, si socii fuerunt, posse creditorem agere. Quod si creditor fideiussori heres fuerit vel fideiussor creditori, puto convenire confusione obligationis non liberari reum.

"Granius Antoninus was mandator to Aurelius Palma on behalf of Julius [Junius] Pollio and Julius Rufus in respect of money so lent to them that both were liable for the same thing. The estate of Julius passed to the imperial treasury which also became successor to the creditor. The mandator claimed that he was released by right of merger since the treasury was heir to both creditor and debtor. And if, indeed, there were only one debtor, I would not have doubted that like a surety, the mandator also would be released. For although a mandator is not released

[12] For more information about Paulus, see Wolfgang Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, Graz – Wien – Köln 2nd edn. 1967, 244-245.

[13] Otto Lenel, *Palingenesia iuris civilis I*, Lipsiae 1889, 1193 (1317).

when the principal debtor is brought to court proceedings, nevertheless, when the creditor succeeds to his debtor, a mandator is also released, as though the obligation is extinguished by right of satisfaction or because he cannot be mandator both to and for the same person. But when there are two debtors and the creditor is heir to one of them, there is good ground for doubt whether the other debtor is also released, as though the money has been paid or only a person exempt by the merger of the obligation. In my view, a person becomes exempt on the acceptance of the inheritance by the merger of obligations, and backers of that person are also released because they cannot be under obligation both to and for the same individual; they could not be so from the outset, and they do not remain so. And so one of two debtors of the same sum is not released, nor, through him, is his surety or mandator. Of course, since he can proceed by the action on mandate against even the creditor, he will be given the defense of bad faith if proceedings are initiated against himself; but the creditor can take action against either debtor, in full if they were not partners or for a share if they were partners; I think that it follows that the debtor is not released by the merger of the obligation."[14]

In the case of Paulus, a person named Granius Antoninus (the *mandator*) ordered Aurelius Palma (the *mandatarius*) to give Iulius Pollio and Iulius Rufus a loan (*Granius Antoninus pro Iulio Pollione et Iulio Rufo pecuniam mutuam accipientibus [...] apud Aurelium Palmam mandator exstitit*). Aurelius Palma paid the money to Iulius Pollio and Iulius Rufus, and they both promised to pay back the loan in the form of a *stipulatio* (*ita ut duo rei eiusdem debiti fuerint*).[15] Due to the obligation *in solidum,* Aurelius Palma could demand the loan back either from Iulius Pollio or Iulius Rufus with the *actio ex stipulatu* or the *condictio.* This situation can be demonstrated with the following example:

If Aurelius Palma gave 200 sesterces to Iulius Pollio and Iulius Rufus, how to claim the 200 sesterces back would be up to Aurelius Palma. For instance, he could demand 200 sesterces from Iulius Pollio or sue both debtors for 100 sesterces each. Generally, debtors *in solidum* did not have a right of recourse.[16] If, for example, Aurelius Palma successfully claimed 200 sesterces from Iulius Pollio, Iulius Rufus would be freed from his obligation. Iulius Pollio would have no possibility to claim 100 sesterces from Iulius Rufus.

The risk of having to pay the whole sum could be avoided with a *societas* (a deed of partnership). If the debtors were *socii*, the debtor who made the full pay-

[14] Translation: Ben Beinart, "Book forty-four, book forty-six", *The Digest of Justinian IV* (Alan Watson ed.), Philadelphia 2nd edn. 1998, 211.

[15] See Peter Apathy, "Giuseppina Sacconi, Studi sulle obbligazioni solidali da contratto in diritto romano", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 92/1975, 344.

[16] Max Kaser, *Das Römische Privatrecht I*, München 2nd edn. 1971, 659.

ment to the creditor would have a right of recourse – for the amount that the parties agreed[17] on in the contract (the *societas*) – against the other debtor. Paulus discussed two potential variations of this situation. In the first variation, no *societas* between Iulius Pollio and Iulius Rufus was concluded (*si non fuerit societas*), in the second variation Iulius Pollio and Iulius Rufus were *socii* (*si socii fuerunt*).

However, Aurelius Palma had no opportunity to claim back the money that he lent to Iulius Pollio and Iulius Rufus because he passed away and was succeeded by the *fiscus* (*creditori fiscus successerat*). Furthermore, one debtor (Iulius) died as well and was also succeeded by the *fiscus* (*Iulii bona ad fiscum venerunt*). According to the text, both debtors had the *nomen gentilicium* Iulius. Therefore, it is not clear whether Iulius Pollio or Iulius Rufus passed away. Some modern legal scholars assume that Iulius Rufus died,[18] whereas other legal scholars leave this question open.[19]

There are some arguments that could be made in favour of it being Iulius Rufus who died. Firstly, another reading of the Latin text seems plausible; specifically, the name of the other debtor could have been Iunius Pollio instead of Iulius Pollio.[20] Secondly, a senator with the name Iulius Rufus was assassinated by order of the emperor Septimius Severus in the year 197 AD.[21] Therefore, it is possible that in his case, Paulus referred to the death of this senator.[22] In my opinion, it is more likely that Iulius Rufus died than Iulius Pollio, but a definitive answer is not possible. For instructive purposes, it shall be assumed that, indeed, Iulius Rufus died.

The problem of *confusio* arose in the legal relationship between Aurelius Palma and Iulius Rufus. However, Aurelius Palma (the creditor) did not become the heir of Iulius Rufus (the debtor), and Iulius Rufus (the debtor) did not succeed in the legal position of Aurelius Palma (the creditor). Instead, a third party (the *fiscus*) inherited both the creditor (Aurelius Palma) and one debtor (Iulius Rufus). The question in this case was whether this *confusio* could free the *mandator* (Granius Antoninus) and the remaining debtor (Iulius Pollio).

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[17] If there were no specific agreement between the debtors, the debtors would have to share the loss equally, see N. Benke, F.-S. Meissel (2021), 221.

[18] Theodor Mommsen, "Digesta", *Corpus iuris civilis I* (eds. Paul Krueger, Theodor Mommsen), Berolini 1963 (reprint), 793 n. 11; Paolo Frezza, *Le garanzie delle obbligazioni: corso di diritto romano I. Le garanzie personali*, Padova 1962, 148; Giuseppina Sacconi, *Studi sulle obbligazioni solidali da contratto in diritto romano*, Milano 1973, 78 n. 71; Justus Schmidt-Ott, *Pauli Quaestiones. Eigenart und Textgeschichte einer spätklassischen Juristenschrift*, Berlin 1993, 131; B. Beinart, 211.

[19] P. Kieß, 68; Philipp Schmieder, *Duo rei. Gesamtobligationen im römischen Recht*, Berlin 2007, 189; Thomas Finkenauer, "Zur Inhärenz von Einreden im *bonae fidei iudicium*", *Iura: rivista internazionale di diritto romano e antico* 68/2020, 114.

[20] T. Mommsen, 793 n. 11; P. Frezza, 148; G. Sacconi, 78 n. 71; B. Beinart, 211.

[21] J. Schmidt-Ott, 131 n. 118.

[22] J. Schmidt-Ott, 131 n. 118.

The *fiscus* (the heir of the *mandatarius* [Aurelius Palma]) tried to sue Granius Antoninus (the *mandator*) with the *actio mandati contraria*, but Granius Antoninus argued that he was freed due to the *confusio* (*[...] mandator allegabat se liberatum iure confusionis, quia fiscus tam creditori quam debitori successerat [...]*). After a brief comparison with the *fideiussio*,[23] Paulus mentioned that a *solutio* could free the *mandator* (*[...] veluti solutionis iure sublata obligatione etiam mandator liberator [...]*).

Ultimately, Paulus denied that the *confusio* had the effect of a *solutio*,[24] and thus, the remaining debtor and the *mandator* were not automatically freed from their obligations (*[...] igitur alterum reum eiusdem pecuniae non liberari et per hoc nec fideiussorem vel mandatorem eius [...]*).

However, if Granius Antoninus (the *mandator*) were sued (*si coeperit conveniri*) by the *fiscus* (the heir of the *mandatarius* [Aurelius Palma]) with an *actio mandati contraria*, he could defend himself with an *exceptio doli* (*competituram ei exceptionem doli mali*). Firstly, it is interesting to explore why the *praetor* granted an *exceptio doli* in the context of a *bonae fidei iudicium* (*mandatum*).[25] According to Finkenauer, such an *exceptio* could have been a precautionary measure with which the *praetor* could raise the *iudex*'s awareness of the legal question of the case.[26]

The reason for the *exceptio doli* was that Granius Antoninus could himself sue the *fiscus* with an *actio mandati contraria* due to another *mandatum*.[27] Iulius Pollio and Iulius Rufus were *mandatores* to Granius Antoninus (*mandatarius*),[28] as they ordered him to provide them with a loan. After being successfully sued by the *fiscus*, Granius Antoninus would have expenses that he could reclaim from Iulius Pollio or Iulius Rufus – who were debtors *in solidum* due to their joint order[29] – with the *actio mandati contraria*. It was important for Granius Antoninus to claim these expenses not from Iulius Pollio but from the *fiscus* (the heir of Iulius Rufus),[30] as emphasised by Paulus (*plane quia is mandati iudicio eligere potest vel creditorem*).

Therefore, the *fiscus* would claim from Granius Antoninus what Granius Antoninus could reclaim from the *fiscus*. In this case, according to the juristic

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[23] Giovanni Bortolucci, "Il mandato di credito", *Bullettino dell'Istituto di diritto romano* 28/1915, 245 assumes that this comparison is the result of an interpolation. Critical: J. Schmidt-Ott, 132; P. Kieß, 69.

[24] See J. Schmidt-Ott, 132-133; P. Kieß, 69.

[25] See T. Finkenauer (2020), 115-116.

[26] See T. Finkenauer (2020), 136.

[27] J. Schmidt-Ott, 134.

[28] J. Schmidt-Ott, 134; P. Kieß, 68; T. Finkenauer (2020), 116.
Different: P. Schmieder, 189 denies such a *mandatum*.

[29] P. Kieß, 68.

[30] J. Schmidt-Ott, 134.

rule *dolo facit, qui petit quod redditurus est*,[31] the *fiscus* would have acted fraudulently, as illustrated by the following example.

If Iulius Pollio and Iulius Rufus ordered Granius Antoninus to provide them with a loan of the amount of 200 sesterces (the first *mandatum*), and thus, Granius Antoninus ordered Aurelius Palma to give Iulius Pollio and Iulius Rufus 200 sesterces (the second *mandatum*), the *fiscus* (the heir of Aurelius Palma) could claim 200 sesterces from Granius Antoninus with the *actio mandati contraria* due to the second *mandatum*. Conversely, Granius Antoninus could claim 200 sesterces from the *fiscus* (the heir of Iulius Rufus) with the *actio mandati contraria* due to the first *mandatum*. In order to prevent two unnecessary payments, Granius Antoninus could immediately defend himself against the *actio mandati contraria* of the *fiscus* with an *exceptio doli*.

In this case, the *fiscus* could not successfully claim money from Granius Antoninus. However, the *fiscus* could sue the debtor, who was still alive (Iulius Pollio). In this context, Paulus made a distinction; in particular, if the debtors did not conclude a *societas*, the *fiscus* could demand the whole sum (*cum altero autem reo vel in solidum, si non fuerit societas*), whereas if the debtors were *socii*, the *fiscus* could only receive part of the money owed by the debtor (*vel in partem, si socii fuerunt*).

The reason for this distinction is that a *socius* would have a right of recourse against another *socius*, and thus, Iulius Pollio would be able to reclaim from the *fiscus* (the heir of Iulius Rufus) part of what he paid to the *fiscus*.[32] To avoid two unnecessary payments, Iulius Pollio could defend himself against the *actio ex stipulatu* or the *condictio* of the *fiscus* with an *exceptio doli* due to the juristic rule *dolo facit, qui petit quod redditurus* est,[33] as can be demonstrated with the following example.

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[31] Emilio Costa, *L'exceptio doli*, Roma 1970 (reprint), 211; J. Schmidt-Ott, 134; T. Finkenauer (2020), 116.

Different: P. Schmieder, 189 assumes that the *fiscus* acted fraudulently because he claimed too much from Granius Antoninus. According to P. Schmieder, 189, Granius Antoninus was an accessory debtor who was only liable for the amount that Iulius Pollio owed the *fiscus*.

D. 44.4.8 pr. (= D. 50.17.173.3)-1 (Paulus *libro* 6 *ad Plautium*): *Dolo facit, qui petit quod redditurus est. 1. Sic, si heres damnatus sit non petere a debitore, potest uti exceptione doli mali debitor et agere ex testamento.*

Translation: B. Beinart, 150: *"A person who claims what he will have to return acts fraudulently. 1. Thus, if an heir has been condemned not to claim from a debtor, the debtor can employ the defense of fraud, as well as bring an action based on the will.*"

For more information about the juristic rule *dolo facit, qui petit quod redditurus est,* see Paola Lambrini, *Dolo generale e regole di correttezza*, Padova 2010, 47-48; Michael Binder, "Zur optionalen *exceptio doli* bei wechselseitigen Klagemöglichkeiten", *Revue Internationale des Droits de l'Antiquité* 70/2023, 226-229.

[32] J. Schmidt-Ott, 134-135; Thomas Finkenauer, "Duo rei – Neues von der Gesamtobligation?", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 130/2013, 191.

[33] J. Schmidt-Ott, 134-135; P. Schmieder, 189.

If the debtors received 200 sesterces from Aurelius Palma as a loan, the *fiscus* (the heir of Aurelius Palma) could claim 200 sesterces from Iulius Pollio with the *actio ex stipulatu* or the *condictio*. If Iulius Pollio and Iulius Rufus did not conclude a *societas*, the *fiscus* could keep 200 sesterces. However, if Iulius Pollio and Iulius Rufus concluded a *societas*, in which they agreed that they should equally share their losses, Iulius Pollio could reclaim 100 sesterces from the *fiscus* (the heir of Iulius Rufus) with the *actio pro socio*. In order to avoid unnecessary payments, the *fiscus* could only successfully sue Iulius Pollio for 100 sesterces. If the *fiscus* claimed more than 100 sesterces, Iulius Pollio could defend himself with an *exceptio doli*.

The source D. 46, 1, 71 pr. shows that Paulus did not follow the general rule suggesting that both the claim of the creditor and the obligation of the debtor expire in the case of a *confusio*. Paulus' case deals with a five-party legal relationship in which the consolidation between a creditor and one debtor led to a situation in which another debtor was still physically present. Paulus assumed that the *confusio* could not free this debtor.

However, the solution of Paulus seems debatable. Indeed, Paulus carefully introduced his solution with the words *et puto*, but it appears possible that other jurists shared a different opinion, according to which the other debtor and the *mandato*r would be both freed through the *confusio* (*iusta dubitatio est, utrum alter quoque liberatus est*). This other solution could be justified by treating the *confusio* as a *solutio* (*ac si soluta fuisset pecunia*).[34]

In Roman law, different solutions can be found in the context of a *confusio*. As is correctly highlighted by relevant textbooks,[35] generally, the claim of the creditor and the obligation of the debtor both expired in such cases. However, a different solution was also possible, especially if more than two parties were involved, and this solution was favourable towards the creditors. In such a case, the obligation between the creditor and the debtor who was not part of the consolidation was not affected by the *confusio*. In the next section, the effect of a *confusio* in Austrian civil law is examined.

3. AUSTRIAN CIVIL LAW

3.1 Introduction

Some sections of the Austrian Civil Code are based on Roman foundations. Therefore, comparisons between Roman law and Austrian civil law are not unusual and can sometimes help to better understand certain sections of the Austrian

[34] See J. Schmidt-Ott, 132-133.

[35] See section "1. Introduction"; R. Zimmermann, 759; J. Filip-Fröschl, 77; N. Benke, F.-S. Meissel (2021), 31.

Civil Code. In the Austrian Civil Code, the consolidation of a creditor with a debtor is explicitly addressed in section 1445.

§ 1445 ABGB (Austrian Civil Code)

"*So oft auf was immer für eine Art das Recht mit der Verbindlichkeit in Einer Person vereiniget wird, erlöschen beyde; außer, wenn es dem Gläubiger noch frey steht, eine Absonderung seiner Rechte zu verlangen, (§§. 802 und 812), oder wenn Verhältnisse von ganz verschiedener Art eintreten. Daher wird durch die Nachfolge des Schuldners in die Verlassenschaft seines Gläubigers in den Rechten der Erbschaftsgläubiger, der Miterben oder Vermächtnisnehmer, und durch die Beerbung des Schuldners und Bürgen in den Rechten des Gläubigers nichts geändert.*"

"*Whenever and in whichever way the right is consolidated with the obligation in one person, both expire unless the creditor is still entitled to request a separation of his rights (sections 802 and 812) or if circumstances of a completely different nature arise. Hence, the rights of the creditor of the estate, the co-heirs, or legatees are not modified by the succession of the debtor in the estate of his creditor and the rights of the creditor are not modified by inheriting from the debtor and surety guarantor.*"[36]

The first sentence of section 1445 of the Austrian Civil Code states a general rule that was already established by Roman jurists;[37] specifically, this rule suggests that in case of a *confusio*, the claim of the creditor and the obligation of the debtor both expire. However, similar to the legal situation in Roman law, certain exceptions can also be found in Austrian civil law, two of which are introduced below.

According to section 1445 of the Austrian Civil Code, the claim of the creditor and the obligation of the debtor do not expire if the creditor requests a separation of rights. Section 1445 refers to section 802[38] and section 812[39] of the Austrian Civil Code.

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[36] Translation: P. A. Eschig, E. Pircher-Eschig, 515-516.

[37] See section "1. Introduction".

[38] § 802 ABGB (Austrian Civil Code): "*Wird die Erbschaft mit Vorbehalt des Inventars angetreten, so hat das Gericht auf Kosten der Verlassenschaft ein Inventar zu errichten. Ein solcher Erbe haftet den Gläubigern und Vermächtnisnehmern nur so weit, als die Verlassenschaft für ihre und auch seine eigenen Forderungen, das Erbrecht ausgenommen, hinreicht.*"

Translation: P. A. Eschig, E. Pircher-Eschig, 288: "*If the inheritance is accepted subject to an inventory, the court has to promptly prepare the inventory at the cost of the estate. Such an heir is liable to the creditors and legatees only to the extent the estate is sufficient to satisfy their as well as his claims excluding his right to an inheritance.*"

[39] § 812 ABGB (Austrian Civil Code): "*(1) Wenn die Forderung eines Gläubigers der Verlassenschaft durch Vermengung der Verlassenschaft mit dem Vermögen des Erben gefährdet wäre, kann der Gläubiger vor der Einantwortung beantragen, dass ein seiner Forderung entsprechender Teil der Verlassenschaft vom Vermögen des Erben abgesondert, vom Gericht verwahrt oder von einem Kurator verwaltet wird, bis sein Anspruch berichtigt ist. (2) In einem solchen Fall haftet der Erbe den Separationsgläubigern auch nach Abgabe einer unbedingten Erbantrittserklärung nur mit der abgesonderten Verlassenschaft, den übrigen Gläubigern aber wie ein bedingt erban-*

In the case of a separation of rights, a special asset body (Sondervermögen) arises, and thus, the claim of the creditor and the obligation of the debtor cannot, due to their different natures, expire through a *confusio*.[40] The reference to section 802 of the Austrian Civil Code is criticised in the literature, because a conditional declaration of the heir, with which he accepts the inheritance, only leads to a *pro viribus* liability rather than a separation of rights.[41] Nevertheless, the wording of section 1445 of the Austrian Civil Code must be taken seriously, and thus, the claim of the creditor and the obligation of the debtor cannot expire if a conditional declaration has taken place.[42]

In developing section 1445, Austrian legislators could have had a similar situation in mind as Paulus (D. 46, 1, 71 pr.). Specifically, a creditor of the deceased, who is a co-heir, can demand a separation of rights (section 812 of the Austrian Civil Code) and, thus, enforce his claim.[43] According to section 820 of the Austrian Civil Code,[44] multiple heirs are debtors *in solidum*. Without a separation of rights, the claim of the creditor (co-heir) could[45] expire due to a *confusio*.

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trittserklärter Erbe. (3) Die Absonderung kann durch eine angemessene Sicherheitsleistung des Erben, die auch der Verlassenschaft entnommen werden kann, abgewendet oder aufgehoben werden. Die Absonderung ist weiters von Amts wegen oder auf Antrag aufzuheben, wenn sie zu Unrecht bewilligt wurde, ihre Voraussetzungen weggefallen sind oder die Separationsgläubiger ihre Ansprüche nicht ohne Verzug gehörig betreiben."

Translation: P. A. Eschig, E. Pircher-Eschig, 291-292: "*(1) If the claim of a creditor of the estate might be impaired as a result of the combination of the estate with the assets of the heir, he can request prior to the devolution, that a part of the inheritance equalling his claim is separated from the assets of the heir, kept by court, or administered by a trustee until his claim is satisfied. (2) In this case, the heir is liable to the creditors entitled to separation also after making an unconditional declaration of acceptance of inheritance only with the separated estate, to the other creditors, however, as an heir, who has made a conditional declaration of acceptance of inheritance. (3) The separation can be avoided or reversed by an appropriate security provided by the heir, which can also be part of the estate. The separation furthermore has to be revoked ex officio or upon request if it has been unlawfully approved, its conditions are no longer satisfied, or the creditors entitled to separation do not enforce their claims without undue delay.*"

[40] Peter Bydlinski, "§§ 1438-1450", *Kommentar zum ABGB. Allgemeines bürgerliches Gesetzbuch, EheG, KSchG, VGG, IPRG, Rom I-, Rom II- und Rom III-VO* (eds. Peter Bydlinski, Stefan Perner, Martin Spitzer), Wien 7th edn. 2023, 2028-2029 (§ 1445/2).

[41] P. Bydlinski, 2029 (§ 1445/2); R. Reischauer, 8 (§ 1445/16).

[42] Albert Heidinger, "§§ 1438-1450", *ABGB Praxiskommentar VI, §§ 1293-1503 ABGB* (eds. Michael Schwimann, Georg Kodek), Wien 4th edn. 2016, 1395 (§ 1445/4); P. Bydlinski, 2029 (§ 1445/2); P. Leupold, 1843 (§ 1445/2).

[43] P. Bydlinski, 2029 (§ 1445/2).

[44] § 820 ABGB (Austrian Civil Code): "*Mehrere Erben, die eine Erbschaft unbedingt angetreten haben, haften Erbschaftsgläubigern und Vermächtnisnehmern zur ungeteilten Hand. Im Verhältnis zueinander haften sie nach dem Verhältnis ihrer Erbteile.*"

Translation: P. A. Eschig, E. Pircher-Eschig, 294: "*Multiple heirs who accepted the inheritance unconditionally are jointly and severally liable to all creditors of the estate and legatees. Among themselves they are liable in proportion to their shares.*"

[45] See section "3.2 Consolidation between a debtor *in solidum* and the creditor".

The second exception in section 1445 of the Austrian Civil Code refers to circumstances of a different nature, such as if a consolidation has taken place between the trustee (the surety guarantor) and the trustor (the creditor).[46] Furthermore, in cases where the claim or obligation is part of a special asset body, the claim and obligation cannot expire through a *confusio*.[47]

3.2 Consolidation between a debtor *in solidum* and the creditor

Section 1445 of the Austrian Civil Code does not mention the situation that can be found in D. 46, 1, 71 pr. However, among Austrian legal scholars, it is fiercely debated whether the obligation of the second debtor *in solidum* should expire in the case of a consolidation between the first debtor *in solidum* and his creditor.[48]

According to Perner,[49] Gamerith/Wendehorst,[50] and Reischauer[51] the obligation of the second debtor *in solidum* does not expire if the creditor succeeds the first debtor *in solidum*. Perner argues that the creditor should not lose his right to choose a debtor and can, thus, choose the second debtor *in solidum* – and not himself (heir of the first debtor *in solidum*) – to fulfil the obligation.[52]

However, following the payment from the second debtor *in solidum* to the creditor, the second debtor *in solidum* would have a right of recourse[53] against the

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[46] R. Reischauer, 20 (§ 1445/64-65).

[47] P. Bydlinski, 2028 (§ 1445/2); R. Reischauer, 4 (§ 1445/3).

[48] A similar discussion can be found in the context of creditors *in solidum*. It is also unclear whether the rights of the other creditors expire if a consolidation between a creditor *in solidum* and the debtor occurs; see Helmut Gamerith, Christiane Wendehorst, "§§ 888-896", *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen, §§ 859-916 ABGB [Vertragsrecht]* (eds. Peter Rummel, Meinhard Lukas), Wien 4th edn. 2014, 374 (§ 894/13); R. Reischauer, 18 (§ 1445/56).

[49] Stefan Perner, "§§ 888 bis 896", *ABGB §§ 888 bis 896. Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch [Klang]* (eds. Attila Fenyves, Ferdinand Kerschner, Andreas Vonkilch), Wien 3rd edn. 2008, 131-132 (§§ 893, 894/7).

[50] H. Gamerith, C. Wendehorst, 374 (§ 894/11).

[51] R. Reischauer, 18 (§ 1445/56).

[52] S. Perner, 131-132 (§§ 893, 894/7).

[53] See § 896 ABGB (Austrian Civil Code): "*Ein Mitschuldner zur ungetheilten Hand, welcher die ganze Schuld aus dem Seinigen abgetragen hat, ist berechtiget, auch ohne geschehene Rechtsabtretung, von den übrigen den Ersatz, und zwar, wenn kein anderes besonderes Verhältniß unter ihnen besteht, zu gleichen Theilen zu fordern. War einer aus ihnen unfähig, sich zu verpflichten, oder ist er unvermögend, seiner Verpflichtung Genüge zu leisten; so muß ein solcher ausfallender Antheil ebenfalls von allen Mitverpflichteten übernommen werden. Die erhaltene Befreyung eines Mitverpflichteten kann den übrigen bey der Forderung des Ersatzes nicht nachtheilig seyn. (§. 894).*"

Translation: P. A. Eschig, E. Pircher-Eschig, 322: "*A joint and several co-debtor who satisfied the entire obligation by his own means is entitled, also without assignment, to request reimbursement from the others in equal shares provided that there is no other specific agreement between them. If one of them was not able to oblige himself or he is incapable of performing his obligation, such*

creditor (the heir of the first debtor *in solidum*).[54] Moreover, Perner holds the opinion that second debtor *in solidum* could counter[55] the claim of the creditor with his own claim against the creditor due to a *compensatio*.[56]

In my opinion, a *compensatio*[57] is not possible in this case, because the second debtor *in solidum* has no claim against the creditor at the time when the creditor sues second debtor *in solidum*. Nevertheless, second debtor *in solidum* could counter the claim of the creditor with an objection due to the juristic rule[58] *dolo facit, qui petit quod redditurus est*.[59] Indeed, a creditor who claims something that he would have to return immediately abuses his right.[60]

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outstanding share also has to be taken over by all co-debtors. The release of one co-debtor cannot be detrimental to the others when requesting reimbursement (section 894)."

[54] H. Gamerith, C. Wendehorst, 374 (§ 894/11).

[55] The second debtor *in solidum* could counter the claim of the creditor only for the amount of his own claim; for more information about this problem, see section "2. Roman law".

[56] S. Perner, 132 (§§ 893, 894/7).

[57] See § 1438 ABGB (Austrian Civil Code): "*Wenn Forderungen gegenseitig zusammentreffen, die richtig, gleichartig, und so beschaffen sind, daß eine Sache, die dem Einen als Gläubiger gebührt, von diesem auch als Schuldner dem Andern entrichtet werden kann; so entsteht, in so weit die Forderungen sich gegen einander ausgleichen, eine gegenseitige Aufhebung der Verbindlichkeiten (Compensation), welche schon für sich die gegenseitige Zahlung bewirket.*"

Translation: P. A. Eschig, E. Pircher-Eschig, 513-514: "*In the case of mutual claims which are valid, equal, and of a nature that an asset to which one is entitled as creditor can also be given by him as debtor to the other, a set-off of the mutual obligations takes place to the extent the amounts of the claims equal each other (set-off), which effects mutual payment as such.*"

[58] See § 7 ABGB (Austrian Civil Code): "*Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.*"

Translation: P. A. Eschig, E. Pircher-Eschig, 2: "*If a matter can neither be determined by the wording nor by the natural meaning of a law, similar matters which have been regulated by law and the purpose of other related laws must be considered. If the matter still remains ambiguous, it must be decided based on the diligently gathered and thoroughly considered facts in line with the natural legal principles.*"

[59] For more information about this rule in the context of Austrian civil law, see Peter Mader, "Dolo facit qui petit quod redditurus est", *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag* (eds. Martin J. Schermaier, J. Michael Rainer, Laurens C. Winkel), Köln – Weimar – Wien 2002, 420-430; Georg E. Kodek, "§§ 1-14", *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch: mit wichtigen Nebengesetzen und EU-Verordnungen, §§ 1-43 ABGB [Einleitung, Personenrechte]* (eds. Peter Rummel, Meinhard Lukas), Wien 4th edn. 2015, 138 (§ 7/85); Michael Binder, "Defective Cover and Underlying Debt Relationship in the Context of delegatio obligandi: A Comparison of D. 44.4.7.1 and § 1402 ABGB (Austrian Civil Code)", *Journal on European History of Law* 15(2)/2024, 199-200.

[60] See § 1295 (2) ABGB (Austrian Civil Code): "*Auch wer in einer gegen die guten Sitten verstoßenden Weise absichtlich Schaden zufügt, ist dafür verantwortlich, jedoch falls dies in Ausübung eines Rechtes geschah, nur dann, wenn die Ausübung des Rechtes offenbar den Zweck hatte, den anderen zu schädigen.*"

Conversely, Rieder assumes that a consolidation between the creditor and the first debtor *in solidum* has the effect of a *solutio*.[61] Therefore, the obligation of the second debtor *in solidum* would expire if a consolidation between the creditor and the first debtor *in solidum* occurred.

4. CONCLUSION

In Roman law, the *confusio* generally led to the expiration of the creditor's claim and the debtor's obligation. However, in legal relationships with more than two parties, the effect of a *confusio* is less clear. In this article, the problem of a *confusio* between a creditor and one of his debtors *in solidum* was analysed.

According to the Roman jurist Paulus, the claim of the creditor and the obligation of the remaining debtor *in solidum* would not expire. However, it seems possible that the opinion of Paulus was not shared by all other jurists, and Paulus was aware that his solution was debatable (*iusta dubitatio est, utrum alter quoque liberatus est [...] et puto [...]*).

The approach of Paulus meant that, generally, the creditor could successfully sue the remaining debtor *in solidum*, but if the remaining debtor *in solidum* had a right of recourse against the creditor, this had to be immediately taken into consideration. Therefore, the creditor could not claim from the remaining debtor *in solidum* a sum that he would have to give back to him.[62] However, if the *confusio* were treated as a *solutio*, the creditor would have no claim against the remaining debtor *in solidum*.

In Austrian civil law, the same problem could arise. The main doctrine shares the opinion of Paulus. Therefore, the creditor would still have a claim against the remaining debtor *in solidum*. According to another doctrine, a *confusio* could have the effect of a *solutio*, which would mean that the creditor would not be able to sue the remaining debtor *in solidum*.[63]

Perner convincingly asserts that the creditor must have the option to choose his debtor. There is no reason why the creditor should lose this option in case of a *confusio*, and thus, the creditor should still be able to choose the remaining debtor *in solidum*.[64]

Translation: P. A. Eschig, E. Pircher-Eschig, 465: "*Whoever causes damages with malicious intent in a way which violates public policy is liable as well, however, if this happened when exercising a right, only if the exercise of the right obviously had the purpose of harming the other party.*"

[61] Andreas Riedler, "§§ 859-901", *ABGB Praxiskommentar V, §§ 859-937 ABGB, WucherG, Allgemeines Vertragsrecht* (eds. Michael Schwimann, Georg Kodek), Wien 5th edn. 2021, 1017-1018 (§ 894/4).

Critical: R. Reischauer, 18 (§ 1445/56).

[62] See section "2. Roman law".

[63] See section "3.2 Consolidation between a debtor *in solidum* and the creditor".

[64] S. Perner, 131-132 (§§ 893, 894/7).

If the obligation of the remaining debtor *in solidum* does not expire, it is questionable how much the creditor can claim from him. In Roman law and Austrian civil law, the answer to this question depends on the agreement between the debtors *in solidum* regarding the recourse. After a payment from the remaining debtor *in solidum* to the creditor, the remaining debtor *in solidum* could then direct his claim of recourse against the creditor (the heir of deceased debtor *in solidum*).

In Roman law (Paulus)[65] as well as in Austrian civil law (main doctrine)[66] it seems that the remaining debtor *in solidum* did not have to bear the insolvency risk of the creditor. If the creditor did not subtract from his claim what the remaining debtor *in solidum* would be able to claim back, the remaining debtor *in solidum* could accuse the creditor of an abuse of rights. Therefore, the remaining debtor *in solidum* could successfully defend himself with an objection due to the juristic rule *dolo facit, qui petit quod redditurus est*.[67]

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[65] See section "2. Roman law".

[66] See section "3.2 Consolidation between a debtor *in solidum* and the creditor".

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Сједињење повериоца и дужника. Конфузија у римском праву и у Аустријском грађанском законику (ABGB)

Сажетак: *И у римском и у аустријском грађанском праву поставља се питање да ли сједињење повериоца и његовог дужника доводи до гашења повериочевог потраживања и дужникове обавезе. Следећи члан се фокусира на правне односе у којима је укључено више од две стране, што значи да би и даље било могуће да поверилац (или његов наследник) покрене поступак против дужника. Најпре је потребно анализирати један случај који обрађује римски правник Павле (D. 46, 1, 71 pr.). Након ове анализе, спроводи се поређење ове правне ситуације у римском праву са оном у аустријском грађанском праву.*

Кључне речи: *римско право; аустријско грађанско право; confusio; сједињење; мандатум; право на регрес; dolo facit, qui petit quod redditurus est; правна правила; societas; злоупотреба права.*

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