

# THE CORRELATION BETWEEN THE INHERITED DEBT AND THE RIGHT OF OPTION ON SUCCESSION

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## Abstract

*A natural person's patrimony consists, apart from rights (assets of the succession), of a liabilities side as well related to obligations that the patrimony's holder bequeaths onto the heirs following his/her death. The succession implies that there are two parties, i.e. the assets of the succession and the inherited debt. The inherited debt is mainly made up of the inheritance duties and liabilities. The main components of the inherited debt are the debts the deceased has left, following that the duties shall be the obligations arising out after the succession will be opened.*

*However, without defining the inherited debt concept in the specialized literature, successional liabilities have been considered to mean those patrimonial obligations of the deceased toward a third party or the inheritors existing in the successional patrimony on the opening of succession, regardless of their origin (contractual, tortious or legal). Inheritance duties refer to those obligations which did not exist in the de cuius patrimony, but come into existence devolving upon the heirs on the date of succession's opening or subsequently after that time, either in consequence of the deceased's desire, or independently of it.*

*The main characteristic of the option on succession is that the right of option belongs exclusively to the presumptive heirs. From this point of view, the option on succession seems to have nothing in common with the inherited debt. Nevertheless, I intend to analyse the correlation between the two institutions from the perspective of the place inheritance creditors hold in the totality of rights of option. Their presence is only justified when there is an inherited debt.*

**Keywords:** *inherited debt, duties, liabilities, right of option, inheritance.*

## 1. Determining the liabilities in the probate estate

Determining the inherited debt is absolutely necessary in order to establish the field of application of the rules concerning the succession rights. Establishing the inherited debt is mandatory as it considers both the persons liable to settle them, as well as the rules concerning the settling of the liabilities. These legal procedures are compulsory in the case of liquidation of any succession, when there are debts.

When determining the liabilities, one takes into consideration the link connecting the debts of the deceased, the ones part of the inherited debt and which are uncontested, these debts having in common the person liable for payment. Another common trait of the deceased person's debts is their transmissible character, having at the basis the principle of the "survival of the deceased person's debts". In another train of thoughts, the deceased person's debts don't have an *intuitu persone* character concerning the debtor, having the same legal regime.

We have mentioned in our scientific approach that the inherited debt includes the debts and duties the deceased incurred during his life, followed by an analysis of the categories of debts and duties excluded from the inherited debt.

Therefore, an opinion states that the taxes and duties related to the transmission of the right of property over the successional assets are not included in the inherited debt. The amounts accordingly due to

the fiscal administration do not result from a tight assimilation with the debts of the deceased, but they don't correspond accurately to the rights of a personal creditor of the deceased<sup>1</sup> either.

The taxes and duties that are applied to the transfer procedures of the succession rights are considered a personal duty of the successors and not of the succession, as they benefit from this transfer. Therefore, these taxes cannot be brought at the estimation table of the available share of the estate as they are considered to be owed to the state, following the notary successional procedure of settlement of the estate and are not assimilated to the funeral expenses. Thus, the taxes and charges necessary for the transfer of the succession rights are personal duties of the inheritors.

## 2. Creditors of the legal inheritors. Introduction

According to Article 1107 of the Civil Code, the creditors of the legal inheritors can accept the inheritance by means of a derivative action, within the limit of settling their debt. This article of the law rules out the controversies concerning the possibility of the creditors of the prospective inheritors to exercise the inheritor's right of successional option by means of a derivative action in order to accept the inheritance but only to the extent of settling their debt. The justification given by the doctrine takes into consideration the fact that their derivative acceptance

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<sup>1</sup> See A.L.Banu, *Pasivul succesoral (Successional Liabilities)*, Universul Juridic Publishing House 2011, page 156.

can only consolidate the title of legal inheritor the prospective inheritor has at the opening of the succession, although it was asserted that the option cannot be exercised by means of a derivative action by the creditors of the prospective inheritors as it has a personal character, only the entitled one being able to estimate whether it's the case to accept or not the inheritance and a derivative acceptance made by the creditors of the legal inheritors would violate the principle according to which no one can be forced to accept an inheritance<sup>2</sup>.

Although the name given by Article 1107 of the Civil Code regards the creditors in general, there is the possibility to make an acceptance of the succession the prospective inheritor is entitled to and acknowledged to him, but not to the creditors of the succession. Therefore, according to Article 1122 paragraph (2) of the Civil Code on the fraudulent consequences of waiving with effect only on the plaintiff creditor and only within the limit of his debt, the acceptance of the inheritance made by the creditors of the prospective inheritor produces effects only in the extent necessary for settling one's debt, and these effects are produced only regarding the plaintiff creditor.

In its turn, Article 1113 of the Civil Code gives the right to any concerned party (thus also to the creditors of the succession) to request the prospective inheritor to opt for the succession sooner than within the one-year time limit provided by the law. This way, the creditor has the legal opportunity to meet the circle of persons against whom one can bring civil procedures in order to recover the debt, as the prospective inheritor either accepts, or waives the inheritance.

Article 1156 paragraph (5) of the Civil Code also gives an advantage to the creditors of a succession by means of the privilege they have against the creditors of the legal inheritors and states that out of the assets attributed with the partition or out of those replacing them, the creditors of the inheritance shall prevail in being paid before the personal creditors of the inheritors.

### 3. Acceptance and forms of acceptance of the inheritance by the creditors

According to the provisions of the Civil Code, the creditors of the prospective inheritor can act by means of a derivative action and accept the inheritance in the place of the inactive holder of the right. The old Civil Code didn't provide this expressly, reason for which two contrary opinions were generated. According to the majority, the personal creditors of the inheritor have the possibility to accept the inheritance

by means of a derivative action, the title of inheritor the prospective inheritor received upon the passing away of the testator being consolidated by means of this acceptance. The logic of this point of view was given by the fact that the right of successional option is of patrimonial instead of personal nature.

A contrary opinion states that the option cannot be exercised by the personal creditors of the prospective inheritor because, despite its patrimonial content, the right of option has potestative character which gives it a strong personal character as well. For this reason, it can be exercised only by the legal inheritors, as only they are summoned for the inheritance according to the law or to the will and only they can be holders of the right of option<sup>3</sup>.

We acquiesce in this last point of view as we consider that the principle of the free right of successional option must be observed, even if the legislator opted for the first point of view, more objective and meant to protect the civil legal circuit. For this we shall analyse of the right of succession right of the creditor of the prospective inheritor, showing the degree in which he can become the holder of this right.

We make a distinction between the creditors of the succession and the creditors of the prospective inheritors. The creditors of the succession shall not be able to take a derivative or revocatory action, as the prospective inheritor who didn't opt doesn't become a successor, remaining alien to the inheritance, and cannot be forced to opt in any way, as a result of the potestative character of the right of option. At most, the prospective inheritor can be forced by the creditors of the succession to express the option within a shorter amount of time than the one provided by Article 1103 of the Civil Code (one year), regardless of the prospective inheritor's form of option. Only after the prospective inheritor expressed his option by becoming successor, one might put the problem of the rights of the creditors of the succession or of the creditors of the successors to act in one way or another function of their interests<sup>4</sup>.

In order to protect his rights, the creditor of the succession has the right:

- to force the successor to opt, not to accept the inheritance, by any mean, even before the end of the one-year term provided for expressing the successional option;
- after the inheritor expresses his option, depending on his decision, the creditor of the succession is a privileged party before the creditor of the prospective inheritor and may act for reclaiming his debts by taking advantage of his advantage;
- if the option expressed is fraudulent, the creditor

<sup>2</sup> See F.A. Baias, E. Chelaru, R. Constantinovici, Ioan Macovei, *Noul Cod civil. Comentariu pe articole, (The New Civil Code. Reflections on amendments)*, C.H. Beck Publishing House, Bucharest, 2012, page 890.

<sup>3</sup> See I. Dogaru, V. Stănescu, M.M. Soreață, *Bazele dreptului civil. Vol V – Succesiuni (Bases of the Civil Law. Volume V – Successions)*, C.H. Beck Publishing House, 2009, page 257.

<sup>4</sup> See I. Popa, *Drept civil. Moșteniri și liberalități (Civil Law. Inheritance and liberalities)*, Universul Juridic Publishing House, Bucharest, 2013, pages 449-450.

of the prospective inheritor may take a revocatory action for annulling a waiving to an active inheritance or an acceptance of a passive inheritance<sup>5</sup>.

As a consequence, knowing that the creditors of the succession and those of the prospective inheritor have an equal interest in recovering their debts, the difference between them being given only by the privilege of the creditor of the succession before the creditor of the prospective inheritor, the institution of separation of the estates is no longer available.

To support all the above-mentioned, we may say that the creditor of the succession, without having the right to a derivative or revocatory action by means of the presidential ordinance, may force the prospective inheritor to express an option within a term even shorter than one year time. If the prospective inheritor accepts the inheritance, the creditor of the succession in his capacity of privileged party shall be given preference over any other creditor for the recovery of the debts, but if the inheritor waives the inheritance, the creditor of the succession has no longer the possibility to take a revocatory action and shall redirect his action against the other inheritors accepting the inheritance, if they exist, and if they are not against the territorial and administrative unity in case of vacant succession.

The creditor of the prospective inheritor, although he has the possibility to speed up the prospective inheritor to opt within a shorter time and may take a derivative action which allows him to express the option in the place of the inheritor, and the revocatory action which allows him to revoke a fraudulent action, doesn't benefit however from the privilege of the creditor of the succession, therefore, when competing with the later, the creditor of the prospective inheritor shall comply with the advantage of the creditor of the succession.

#### 4. The derivative action and the inherited debt

Article 1560 from the Civil Code defines the derivative action as the situation in which the creditor whose debts are uncontested and enforceable and who may exercise the debtor's rights and actions when the later refuses or neglects to exercise them to the prejudice of the creditor. The creditor won't be able to exercise the rights and actions closely connected to the person of the debtor.

To be mentioned that only the creditors of that inheritor meeting all the conditions to be called upon the inheritance have the possibility to exercise the right of successional option in his place. Therefore, if the prospective inheritor doesn't have the legal competence or lacks successional vocation, is unworthy or has been exheredated by the deceased,

being unable to take part in the settlement of the estate, his creditors won't be able either to exercise this right in his place.

The derivative action has a range narrowed to merely exercising the rights of the debtor with patrimonial character, case in which there are several limitations nevertheless. Thus, according to an opinion, the following category of rights cannot be exercised by means of a derivative action:

- rights concerning the settling of the debtor's estate or of individually determined assets (loaning an asset, leasing a land, alienating a possession, assigning rights);
- rights and actions connected closely to the person of the debtor and implying a personal consideration from his part (dissolution of marriage, revoking a donation on grounds of ingratitude, cutting back of an allowance);
- intangible patrimony rights that, as they cannot be traced, cannot be exercised by the creditors (right to an allowance, usufruct, right of occupation)<sup>6</sup>;

Therefore, by analysing the law, one may notice that for exercising the rights by means of a derivative action, the debt must be uncontested and enforceable, its existence must be accepted and the creditor must be able to demand the payment from the debtor, the debt must have reached its maturity and not to be barred. On the other hand, the debtor must not exercise personally his right of option, case in which the creditor of the prospective inheritor cannot take a derivative action any more. Ultimately, for exercising a derivative action, a legitimate interest of the creditor must exist, materialized in the prejudice he suffers as a consequence of the debtor's passive behaviour.

The passive debtor is part in the process, as the derivative action produces effects regarding him, regarding different creditors, but the derivative action, although individual by means of its exercise, produces collective effects, in the sense that the situation created is profitable for all the creditors, with no preference for the plaintiff creditor.

For this, acceptance of the inheritance by the creditors of the prospective inheritor is essentially different from the applicable common right of the derivative action. The legislator expressly provided that the inheritance shall be accepted only to the extent of satisfying the respective creditor who proceeded in exercising the right of option in the place of the prospective inheritor. Such an acceptance shall not be profitable but to the creditor who acted in the name of his debtor or to that creditor who, having rights similar to those of the plaintiff, intervened in the process or expressed his own acceptance<sup>7</sup>.

So, by means of the derivative action, the creditor doesn't become the holder of the title he

<sup>5</sup> Idem 452.

<sup>6</sup> See D. Negriță, *Dreptul de opțiune succesorală. Vol.I (Right of successional option, volume I)*, Universul Juridic Publishing House, 2014, page 174.

<sup>7</sup> Idem, page 175.

recovered, but only replaces the inheritor in exercising his right.

An opposite situation would be unconceivable, being known that the right to succession is conditioned by the existence of the successional vocation the successor of the deceased must have. His personal creditors, as they don't have this vocation, cannot express the option on these grounds and, in terms of the fact that, for no damage to be incurred, a limited access to the debt is given to them and conditioned by the existence of the debtor among the inheritors of the deceased.

As a result, by means of the procedure of acceptance, the creditors do not become successors and do not acquire their prerogatives, as it's well known that no person can be successor unless called upon an inheritance either according to law, or by means of a will.

In regard to the succession and to its author (the deceased), the creditor's rights are justified only by the existence of a debt against the prospective inheritor and only within the limits of this debt.

One must understand therefore that the creditors of the prospective inheritor must not be analyzed as true holders of the right of successional option, but as substitutes of the inheritor and only with partial character, in the extent necessary for settling their debts. Even if the creditor accepted a succession in the place of the inheriting debtor, the sole holder of this successional right remains the inheritor, being able to exercise it as he pleases, because one cannot speak of the irrevocability of the successional option action as there is no proper acceptance, nor about the inheritor becoming an acceptant for the entire part of the inheritance he is entitled to. The acceptance expressed by the creditor of the prospective inheritor is limited therefore only to the value of the debt, and the irrevocability of the action of option refers only to this value. For the rest of the inheritance the prospective inheritor is entitled to, the later can opt as he pleases. Nevertheless, only his personal acceptance shall make the inheritor a successor. The prospective inheritor's waiver shall retroactively annul his title of inheritor, except for the share needed to pay the debt of the plaintiff creditor.

The waiver shall determine the access to the probate estate of the other inheritors, either from the same category, or from a subsequent category, as beyond the value necessary for the payment of the debt by the creditor, the waiving successor is considered to have waived also the part rightfully his after the payment of the debt, the share being distributed to the other successors whose quotas have either decreased with the prospective inheritor's acceptance, or they would have been removed from inheriting because of his presence.

"If the inactive prospective inheritor has more than one creditor, acceptance may be executed by

either of them, even separately and at different moments, if the term for expressing the option didn't expire. We have showed that the acceptance expressed by the creditors doesn't have an irrevocable character of the acceptance made personally by the prospective inheritor. It makes unavailable only the share necessary for the payment of the debt towards the creditor who exercised the right. Other creditors accepting in their turn the inheritance makes appear a conjunction of creditors, the effects of the acceptance needing to be extended to accepting all the debts"<sup>8</sup>.

For the case in which the inactive inheritor has a share of the inheritance smaller than the total value of the debts of the accepting creditors, the payment of the creditors is made according to their preference, and if they all are unsecured creditors, the payment shall be made proportionally.

We may deduce therefore that for the case in which the creditors of the prospective inheritor didn't settle their debt after retaining the rightful share, part of the uncovered debt remaining unsettled shall pursue the debtor until the debt is covered entirely.

For the acceptance of the succession by the creditors of the inactive prospective inheritor to make the latter an acceptant of the inheritance he is entitled to, it is absolutely mandatory that the prospective inheritor to have exercised his option to this end. For this, his summoning must be made in order for him to manifest his option.

The prospective inheritor's creditor agreement for accepting shall be concluded afterwards without regard to the inheritor's presence at the settlement of the estate or to his option.

In order to draw up this document, the respective creditor must make available the title stating his uncontested and enforceable debt. The fact that the prospective inheritor is inactive must be proved by means of a notary or of a court, in the sense that if the term for expressing the option allows it, the summoning for at least a term of the settling of the estate is necessary. The fact that he doesn't shows up is a sufficient proof that will determine the successor's inactivity. The creditor's interest and the damage he may suffer are easy to prove by means of the mere existence of the debt<sup>9</sup>.

Within the notary successional procedure of settlement of the estate, the creditor settles his debt by executing the assets to which the debtor is entitled. If the later is present to the notary successional procedure and agrees, one may conclude a voluntary division of property and draw up a certificate of payment towards the creditor, but if the prospective inheritor either doesn't show up for the debate, or is not willing to conclude this division, the creditor can benefit from these right only by means of an action in court. He will not be able to conclude a voluntary division if the prospective inheritor debtor is not present, except for

<sup>8</sup> D.Negrilă, *op.cit.*, page 176.

<sup>9</sup> *Idem*, page 177.

the case in which he is empowered by the later with a special certified power-of-attorney.

According to Article 1156 from the Civil Code, the personal creditors of the inheritor may request in court the division of the inherited assets and demand the presence of notaries upon the conclusion of the document of voluntary division of property.

If the inheriting debtor is the only one in his category and with his degree and waives the inheritance after the creditors accepted it or chooses to remain inactive, with the possibility to be precluded from exercising the right of option, the option expressed by the prospective inheritors of subsequent degrees and categories shall be taken into consideration, until the field of inheritors of the deceased shall be accurately determined. For example, if the respective inheritor is the only son of the deceased and waives the inheritance subsequent to its acceptance by a creditor, the relatives next in line shall be called upon, descendants from sons, daughters or relatives belonging to different categories of legal inheritors.

### 5. The revocatory action and the inherited debt

By way of the provisions of article 1122 of the Civil Code, the legislator allows the creditors of the prospective inheritor to revoke by means of the revocatory action the waiving of the debtor if this action is fraudulent. So, according to law, the creditors of the prospective inheritor that unlawfully waived the inheritance can request the court the revoking of the waiving in what concerns them, but only within a three-month time as of the date when they expressed the waiving. Admitting the revoking action produces the effects of accepting the inheritance by the prospective inheritor debtor only regarding the plaintiff creditor and only within the limits of his debt.

According to Article 1562 from the Civil Code, if the creditor proves that damage was brought to him, he may request that the legal document concluded by the debtor in prejudice of his rights, as those by means of which the debtor creates or amplifies a state of insolvency, be declared not enforceable. An onerous agreement or a payment for executing such an agreement may be declared not binding only when the third contracting party or the one receiving the payment knew that the debtor creates or amplifies a state of insolvency.

As in the case of the derivative action, the legislator grants to the revocatory action (or Paulian action, named from its creator, the roman praetor Paulus) several legal provisions shaping a complete and coherent judicial regime of this action.

According to an opinion, the revocatory action is that action by means of which the creditor may obtain in court that the legal documents concluded by the debtor in the prejudice of his right not be enforceable<sup>10</sup>.

The revocatory action has the legal nature of a mean of protection of the creditor's rights, but also a special judicial nature due to its characteristic of having an autonomous legal configuration, as the creditor may exercise a personal right.

The following conditions must be met in order to exercise the revocatory action:

a) a prejudice that the creditor suffered as a consequence of concluding the legal document by the debtor must exist. This requirement implies a personal and effective prejudice of the creditor because of the fact that the debtor created or amplified the state of insolvency by concluding the legal act. The text of the law validates the difference between an act of depletion of the debtor, insufficient for promoting the action and an act of depletion by means of which the state of insolvency is created or aggravated. There are excluded the legal documents by means of which the debtor pays a debt, refuses an enrichment or makes new debts<sup>11</sup>. The plaintiff creditor may use any means of evidence in order to prove the insolvency of the debtor.

b) a fraud to exist, made by the debtor. The fraud shall be determined by means of simply knowing that, by waiving, a prejudice is caused, not being necessary the intention to bring a prejudice. As it is a unilateral legal act, the prejudice must exist only in connection with the prospective inheritor debtor and not in connection to other prospective inheritors or inheritors of the deceased<sup>12</sup>.

c) the debt to be uncontested upon the introduction the action and also liquid and enforceable, but only at the date when the decision is ruled. Consequently, the plaintiff creditor must make the proof upon introducing the action only in what concerns the existence of the debt, because, as he prepares an execution of the assets in the probate estate, he must prove that the debt he refers to will become liquid and enforceable in a near future, until the decision is ruled.

d) a third party accomplice to the fraud must exist. The legal requirement for a third party to have taken part in the fraud is specified exclusively in case of onerous agreements or of the payment for the execution of such a contract. In case of documents made on a free basis, the law considers that the fraud made by the debtor is sufficient, as the third party must protect a free patrimonial advantage, as opposed to the creditor who must avoid a prejudice. The fraud made by a third party exists when the later was aware that

<sup>10</sup> See C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor (Civil Law. The general theory of debts)*, IX<sup>th</sup> edition, revised and completed, Hamangiu Publishing House, Bucharest, 2008, page 355.

<sup>11</sup> See L. Pop, *Tratat de drept civil. Obligațiile (Civil Law treaty. Debts)*, volume I, General legal regime. C.H.Beck Publishing House, Bucharest, 2006, page 392-395.

<sup>12</sup> See D. Negrilă, *op.cit.*, page 181.

the debtor was creating or amplifying a state of insolvency<sup>13</sup>.

Apart from these conditions, the waiving must not have become irrevocable because the succession was accepted by other inheritors or because the right of option was prescribed.

The main effect of admitting a revocatory action is the unenforceable character of the waiving in regard to the plaintiff creditor and shall determine the inefficiency of waiving to the extent necessary for settling the creditor's debt. The revocatory action introduced by a creditor cannot produce effects towards other creditors unless they have intervened in the process and requested in their turn the revoking of the waiving.

The revocatory action does not make the inheriting debtor an acceptant of the inheritance, but produces effects of partial acceptance and limited to the value of the debt. Concerning other legal connections and persons, the waiver remains as such and no title of inheritor is granted to him. Nevertheless, if no there are no other prospective inheritors to have accepted the inheritance within the time limit available for expressing the successional option, the prospective inheritor debtor, if he decides to revoke by himself the waiving, shall become inheritor acceptant, although not as a consequence of the revocatory action, but of his own revocation on the waiving. The share of the party waiving the inheritance, remaining after the settlement of the debt shall be divided between the other inheritors in equal parts. In case the share to which the debtor is entitled is not satisfactory for settling the debts of all the plaintiff creditors, they shall be paid in the order established by law, in compliance with the degree of preference of their debts.

Revoking of the fraudulent waiving doesn't turn the creditors into inheritors even if they will receive a share of the probate estate to settle their debt; this assignation takes place only because of their capacity of creditors of the inheritor and not by virtue of a right to the inheritance. Therefore, the revocatory action on the waiving doesn't make the creditors holders of the right of option; the action is personal, belonging to the creditors and, if we didn't consider that the creditor may become holder of the right of option neither in the case of the derivative action, where he was replacing the prospective inheritor, more of the less one cannot grant the creditor this capacity within the revocatory action<sup>14</sup>.

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## Conclusions

Upon establishing the liabilities, one must consider the correlation between the debts of the deceased and which is uncontested, having in common their creditor; these debts have as common trait their transmissible character, according to the principle of continued existence of the debts of the deceased.

In conclusion, the universal inheritor that paid a common debt, debt exceeding his share of the inheritance, has the right to sue for compensation the other inheritors, but only for the share from the debts of the succession devolving upon each of them.

By analysing the institution related to the acceptance of the inheritance, an opinion of the majority, expressed in the literature in the domain, states that the personal creditors of the inheritors, having the possibility to accept the inheritance by means of a derivative action and consolidating therefore the title of inheritor the prospective inheritor obtained upon the passing away of the testator, exercise in the place of the inheritor the right of successional option violating as a result the principle of the right of free successional option in order to protect the principle of the natural circuit of assets. However, in our opinion, the personal creditors of the prospective inheritors can accept the succession in their place, by means of a derivative action, only if the prospective inheritor didn't exercise his right of successional option out of bad faith, in order to prejudice his creditors. This legislative approach may seem advantageous in order to protect the interests of the creditors of the prospective inheritor, but also as an exception from the principle of the freedom of right of successional option.

Concerning the institution of successional waiving, the law states that the inheritor that waived his right is not bound to pay the liabilities of the succession. The provisions of the law state that the waiver can be bound neither concerning the duties, nor the debts. Hence, even if the liability to support these expenses is more of a moral nature, the prospective inheritor owing respect to the deceased, in virtue of these rules, if a third party alien to the inheritance made expenses related to the funerals, one cannot recover his debt but in regard to the inheritors that have accepted the inheritance and not the ones that waived it, the later category having no kind of debt towards these parties, as a consequence of their waving\*\*.

<sup>13</sup> See F.A. Baias, E. Chelaru, R. Constantinovici, Ioan Macovei, *op.cit.*, page 1278.

<sup>14</sup> See D. Negrilă, *op.cit.*, page 182.

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