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Legal Nature Pauline Action - I

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Abstract. The Pauline action can be seen as a form in which a creditor, injured by the fraudulent acts of one's debtor concluded with or for the benefit of a third party, seeks legal protection from the court competent to pursue forcely the asset belonging to a person other than the debtor. As an institution born in the cradle of Roman law, the Pauline action naturally reappeared in the attention of civil law science in the process of the transposition of Roman law in Western Europe. However, the real rise of the Pauline action was only marked by the development of capitalist relations in the XVII-XIX century, when jurists were asked for remedies in order to fight against vicious debtors. It is not by chance, therefore, that the classical theories attempting to explain the institution of the Pauline action were developed by the German doctrine of the XIX century, marked by the Pandectist current. These theories are characterized by the attempt to frame the Pauline action within the framework of one or other of the traditional institutions of civil law. Among the classical theories, however, we also find theories that recognize the sui generis character of the Pauline action, a theory also supported by us.

Keywords: Pauline action; legal nature; Pauline theory; credit; debtor; fraud

1. Introduction

The research is structured in two parts. Thus, this article, which is the first part, the classical theories are researched, and in the second part, the modern ones of the Pauline action will be researched. The subjects' participation in compulsory civil relations is generally determined by the legitimate expectation of duly executed counter performance. It is known that the moment of conclusion of the contracts and the moment of execution of the obligations arising from these contracts do not coincide even in the case of the so-called instant execution contracts. As a rule, subjects commit themselves to execute in the future. Thus, the manifestation of consent at the conclusion of contracts is animated by trust towards the other contracting party, or it is obvious that the lack of trust towards a certain person excludes cooperation, including legal.

The obligatory relationship implies a personal connection between creditor and debtor. Therefore, the non-performance of the obligation represents first of all an undermining of the trust granted,an offense to the creditor. That is why deadbeat debtors were cruelly punished in antiquity (Koler, 1895).

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In this context, the right of creditors to contest the legal acts concluded by debtors for the purpose of prejudice is as natural and logical as possible. However, determining the legal reason of the said right is one of the most complex and complicated problems of private law (Голмстен, 2019). In accordance with art. 895 paragraph (1) Civil Code, the injured creditor may request the declaration of non-enforceability of the legal act concluded by the debtor with the third contracting party to the detriment of the creditor, manifested by preventing the full satisfaction of the creditor's rights toward the debtor. According to art. 898 paragraph (1) Civil Code, in the case of the admission of the Pauline action, the creditor has the right to be paid from the amounts obtained from the pursuit of the benefit received by the third party contractor or beneficiary. Therefore, the purpose of the Pauline action is to grant the creditor, who can no longer realize (mainly by force) one's right to claim from the debtor's estate due to the fraudulent alienation/encumbrance, a right of access to the third party's estate or, as the case may be, of the beneficiary in order to pursue the service provided by the debtor in favor of the third contracting party or the beneficiary. This establishes the "liability" of the third contracting party or the beneficiary for the debtor's debt to the Pauline creditor, liability limited on the one hand strictly to the benefit received, and on the other hand to the value of the damage suffered by the creditor within the meaning of art. 895 paragraph (1) of Modernized Civil Code. We note that the liability of the third contracting party or, as the case may be, the beneficiary for the debtor's obligation, is incurred in the conditions where there is no pre-existing legal relationship between the creditor and the third party acquirer or beneficiary. At the same time, the Pauline action incurs the liability of the third contracting party or the beneficiary for the debtor's debt and when they are in good faith but acquired free of charge.

As a preliminary note, we note that from the economy of art. 895 paragraph (1) of the modernized Civil Code results in the identification of the Pauline action with the right of the creditor to request the declaration of the non-enforceability of the acts concluded by the debtor in the damage manifested by preventing the full satisfaction of the creditor's rights toward the debtor. The phrase "*may request*" from the cited norm indicates the arbitrary nature of the creditor's right to challenge the debtor's acts, which resonates with the very legal nature of the civil action. We can say that the right to challenge fraudulent acts was built in the form of a civil action. The request can be addressed to the civil court, which is exclusively competent to declare the unenforceability of the fraudulent act. It is not prohibited to send a prior notice, extrajudicially, to the debtor and the contracting third party regarding the voluntary and voluntary satisfaction of the claim whose owner is the creditor, but such a formality is not mandatory, or the law does not expressly provide for such a filter for access to justice of the Pauline creditor.

Being a sui generis civil action, it is necessary to identify its legal characteristics. In the specialized literature, it has been stated with value of principle that the civil action always borrows the nature of the right whose realization or valorization is sought[1]. Under this aspect, most authors opine in favor of the personal nature of the Pauline action. Indeed, if we leave aside the well-known fragment of Justinian's Institutions[2], practically this controversy is fueled by nothing else. The personal nature of the Pauline action represents the consequence of the relative subjective right that is protected through this action, namely the right to the enforcement of the obligation (the right of access). The personal nature of the Pauline action is clearly evident from the provisions of art. 898 paragraph (2) of the modernized Civil Code which grants the creditor a compensatory action based on the rules of unjust enrichment if the restitution (pursuit) of the benefit is not possible. It is understood that this rule also circumscribes the situation of subsequent alienation to a bona fide sub acquirer against whom the Pauline action can no longer be exercised according to the rules of art. 899 Civil Code. The cited legal provisions indicate

[1] I'm glad D., The action in the process civil. Iasi: June 1974, p. 49.
[2] Institutions of Justiniana. Translation by Rassnera, D., under ed. Kofanova, JI.JI. & Tomsinova, V.A. Moscow: mirror 1998, pp. 321-322.

with sufficient clarity the lack of a real right of the creditor in relation to the provision executed by the debtor in favor of the third contracting party, which implies the impossibility of pursuing the estate in the hands of a sub-acquirer only on the condition of admitting the Pauline action against one and against the previous acquirers.

Determination of the personal character of the Pauline action however, does not exhaust the problem of legal nature of this action, which is not a pure theoretical matter. The lapidary regulation (Kotsiol, 2017) of this legal institution, related to the increased applicative complexity, necessarily requires at least the verification of the possibility of overcoming the narrow positive normative framework in the search of practical solutions. It is precisely in this context that it is to be clarified a number of conceptual issues such as the *sui generis* character of the Pauline action, its place in the system of civil regulations, the possibility of subsidiary application of other civil norms to complete the rules of Paulien action etc.

Next, we reiterate the provisions of art. 895 paragraph (1) of the modernized Civil Code which provide that, "*the creditor may demand the legal documents be declared unenforceable against one...*". So, first of all, *actio Paulinea* is a civil action, just like any other action based on a certain method of defending subjective civil law. Hence the question: what is the right, the legitimate interest or the freedom defended by Pauline action, or in other words what is the object of legal protection? It is certain that it cannot be a question of the right of claim whose realization is fraudulently obstructed. This right was the object of protection in the process that resulted in the issuance of the writ of execution for the benefit of the creditor, which one cannot enforce due to the fraudulent legal acts concluded by the debtor, and it is for this reason that recourse to the Pauline action is required. The debt right cannot (repeatedly) be the object of judicial protection in the Pauline action at least because of the distinct methods of defense of the rights used by the creditor. In this context, we are forced to recognize that the object of judicial protection in the case of the Pauline action is the right to the enforcement of the obligation or, as it is also called in doctrine, the right of access to the debtor's patrimony (the unsecured creditors' guarantee fund) (Kotsiol, 2017).

The legal nature of the right to request a declaration of unenforceability, which is identified with the Pauline action and is the subject of this scientific research. Thus, a clear distinction must be made between the very legal nature of the Pauline action and that of non-enforceability, which is the main effect of its admission (Poalelungi & Fală, 2022).

Simple speaking, the Pauline action maybe be perceived as the form in which the creditor prejudiced by the fraudulent acts of debtor entered into with or for the benefit of a third party, requests the court's permission to forcibly pursue the estate belonging to a person other than the debtor, namely the asset that constitutes the object of the provision executed by the debtor for the benefit of the third contracting party or, as the case may be, to the beneficiary under the fraudulent legal act.

In the context of all the particular matters, but which carry a principled character for the correct understanding and application of the Pauline action, the need for an articulated approach to the entire researched legal institution is naturally imposed. This scientific mission is, however, an extremely difficult one, evidenced by the lack of a complex theory of Pauline action up to now that would be able to explain the entire range of Pauline regulations and the practical consequences they entail. In this chapter, we note over the last centuries the development of a series of theories that tend to "explain" the Pauline rules, but until now there is no theory unanimously accepted by the doctrine, and judicial practice often finds itself forced to and assumes the praetorian role to be able to settle particular cases brought to judgment.

However, the study of the main theories regarding the Pauline action is not at all meaningless, or each

of these contributed to the development of the legal institutionof the Pauline action, also marking the evolution of the theory and practice in this matter. Therefore, the point of startingin evolutionary chronological order represent the classical theories related to the Pauline action.

Classical "Pauline" Theories. Being a "heritage" of Roman law, the Pauline action naturally reappeared in the attention of the science of civil law in the process of the acceptance of Roman law in Western Europe. However, the real rise of the Pauline action was only marked by the development of capitalist relations in the XVII-XIX centuries, when lawyers were asked for remedies in order to fight against cunning debtors, who otherwise always existed as a nefarious "accessory" of the civil circuit.

Therefore, it is no coincidence that the classical theories trying to explain the institution of Pauline action were elaborated by the German doctrine of the XIX century marked by the pandectist current. These theories, as we will see in the following, are characterized by the attempt to frame the Pauline action in the coordinates of one or another of the traditional institutions of civil law. Among the classical theories, however, we also find theories that recognize the *sui generis* character of the Pauline action, a position that we also support, but at that stage the templates of traditional legal thinking could not be fully overcome. Nevertheless, the classical theories are a starting point and a valuable contribution to the development of the theory and practice of applying Pauline action. In the following, we propose the exposition of the mentioned theories, which, by the way, have not lost their scientific relevance even to this day.

Tort Theory. This theory was developed mainly by German and Austrian jurists in the XIX century, namely Otto, Schultze, Kohler, Schönemann and Korn (Fedorov, 1913, pp. 16-21), but followers of this theory were also other jurists such as Hartzfeld, Franke, Zürcher, Grützman, Hartmann, Jaeckel (Holmsten, 1893, pp. 2-41). In the specialized literature (Holmsten, 1893), it is stated that the starting point of the tort theory is the qualification of the actions of the debtor and the third contracting party according to the rules of tortious civil liability. The conclusion of the legal act to the detriment of the creditor is regarded as an illegal conduct, since as a consequence the creditor is prejudiced by depriving one of the guarantee fund from which one could realize one's claim by force. The participation of the third contracting party in the conclusion and enforcement of the fraudulent legal act represents the source of one's obligation towards the Pauline creditor, the object of which is the reparation, within the limit of the damage, of the caused prejudice. From this point, the tort theory loses its unitary character, various approaches being promoted by its followers: some subsequently develop the tortious qualification, and others resort to the additional qualification of some particular cases according to the rules of unjust enrichment. The different approaches were conditioned by the admissibility of the Pauline action and against *bona fide* third contracting party in the case of gratuitous legal acts. Indeed, the *bona fide* acquirer cannot be considered as acting illegally, or by virtue of not imputing knowledge of the debtor's patrimonial status, one does not participate in the fraud. For these reasons, some authors resort to the institution of unjust enrichment to justify the genesis of the restitution obligation of the third contracting party of good faith. Thus, the Pauline action was founded on two distinct principles, which denotes internal inconsistencies of the delictual theory in this form. Intending to preserve the pure tortious qualification of the Paulinne action, some authors tried to preserve the tortious liability of the third contracting party of good faith, considering one a participant in the fraud from the moment one learns about the damage suffered by the creditor as a result of the filing of the Pauline action by one and does not reimburse voluntarily the benefit received from the debtor. It should be noted that the tort theory was also largely promoted in French law, but with the affirmation of the special legal nature of the

Pauline action, included between the actions to repair the damage and the nullity of the legal act[1].

The tort theory has rightly been criticized (Holmsten, 1893). First of all, it is criticized for the dualism of the principles on which the whole theory is based, namely tort liability and unjust enrichment. Subsequently, a series of obvious inconsistencies follows, namely:

a) If the creditor's right was based on an alleged tort committed by the debtor together with the third contracting party, then the effect of admitting the Pauline action should have been to compel the third party to repair the damage suffered by the creditor. Such effects are not peculiar to Pauline action. In the regulation of the modernized Civil Code, the admission of the Pauline action results in the unenforceability of the fraudulent act and the right of the creditor to be paid from the sums obtained from the pursuit of the benefit received by the third contracting party or beneficiary. In other words, the Pauline creditor is issued a writ of execution for the forced enforcement of the object of the service provided by the debtor for the benefit of the third contracting party or the beneficiary. Subsequently, art. 898 para. (3) of the modernized Civil Code provides that the third contracting party or the beneficiary can exclude the pursuit of the benefit by paying the creditor an amount equal to the damage suffered by one resulting from the conclusion and enforcement of the fraudulent legal act. Thus, the contracting third party is liable within the limit of the damage suffered by the creditor, defined in art. 895 paragraph (1) of the modernized Civil Code as preventing the full satisfaction of the creditor's rights toward the debtor. So, the third contracting party or, as the case may be, the beneficiary, is not liable for *damnum emergens* and/or *lucrum cessans*, which would have been natural in the case of tortious civil liability. It should be noted that the assimilation of the Pauline action to tortious civil liability would also generate difficulties of a practical nature. In the doctrine, matters regarding the evaluation of the damage, the influence of the creditor's own fault, the distribution of compensation among several creditors, etc. were noted (Holmsten, 1893).

b) If the basis of the Pauline action was the tort committed jointly by the debtor and the third contracting party, then the admission of the action would have had the effect of annihilating the legal relationship between these two - the finding of the delict committed by means of a legal act has the effect of invalidating such a legal act. In this case, the effects of the nullity of the civil legal act provided for in art. 331 of the modernized Civil Code will b applied, benefiting all creditors. The Pauline action, however, fundamentally involves the validity of the fraudulent act, both in the context of legal relations between creditors and the defaulting debtor, as well as in the relations between the debtor and the third contracting party. This results unequivocally from the regulation of the Pauline action which involves the unenforceability of the fraudulent legal act against the plaintiff creditor and other main intervening creditors, the restitution of the amount remaining after the prosecution to the third contracting party or, as the case may be, the beneficiary, the possibility of excluding the prosecution by paying an amount of money equal with the damage, the transfer of the property of the object of the benefit (the effectiveness of the real effects of the harmful legal act), etc. All the named legal indications denote the validity and effectiveness of the fraudulent legal act, which excludes the qualification of the actions of the parties to its conclusion and enforcement as a civil tort. In other words, it is inadmissible to qualify the licit conduct of the debtor and the third contracting party as simultaneously illicit in relation to defrauded creditors. We hold that the validity and effectiveness of the fraudulent act rests on the essence of the construction of the Pauline action.

[1] I'm engaged E. Общая theory obligations. Translation c French I.B. Новицкого. Moscow: Юридическое publisher Ministries Justice ussr 1948, p. 416; Planiol M.F. Course French civil law. Part 1: Theory of Obligations / Composition Marseille Planiola, the professor civil right Парижского juridical the faculty; Translation c French and preface, B.Ю. Hartman, member Petrokovsky district sudah Petrokov: Edition printing houses C. Pansky, 1911, pp. 73-74.

c) The tort theory cannot explain the right of the contracting third party toward the creditor to compensate the expenses for the maintenance of the estate pursued by the latter. From the same point of view, the problem can be raised in the case of the improvement of the estate.

d) Another problem that cannot be settled by the tort theory is the so-called anticipated fraud. In accordance with art. 895 paragraph (1) of the modernized Civil Code, the legal act concluded by the debtor before the appearance of the creditor's right, with the intention of harming the creditors in general, can be challenged through the Pauline action. In the absence of creditors' rights, the debtor's actions cannot meet the conditions for qualifying as a civil offense established in art. 1998 paragraph (1) Civil Code and, even more, the actions of the third contracting party cannot be classified as an offense.

e) Even the procedural side of the Pauline action is not satisfactorily elaborated by the followers of the tort theory, although in the opinion of the particular doctrine this represents the center of gravity of the analyzed institution (Holmsten, 1893). Thus, the possession of an enforceable title by the creditor is considered to be one of the elements of the alleged offense. But in this way the concept of delict is totally distorted, which can be qualified as such by referring strictly to the conduct of the author and in no way to external factors, such as preventing the full satisfaction of the creditor's rights - i.e. failure of forced enforcement.

In conclusion, the tort theory cannot be accepted as being satisfactory for explaining the legal nature of the Pauline action. Moreover, this obviously is foreign to the conception of the legislator of the modernized Civil Code on action Pauline.

References

Koler, J. (1895). *Shakespeare from the point of view of law: Shylock and Hamlet*. Перевод с German Saint Petersburg: Edition Я. Kantorovich, pp. 6-29.

Голмстен, А. Х. (2019). *Учение о праве кредитора опровергать июридикие acts, committed by the debtor to his detriment, in modern law literature*. Floor ed. A.G. Humble. Moscow: Edition books home, pp. 19-20.

*** (1974). *I'm glad D. The action in the process civil*. Iasi, p. 49.

*** (1998). Institutions of Justiniana. Translation by Rassnera, D. Under ed. Л.Л. Kofanova, V.A. Tomsinova. Moscow, pp. 321-322.

Kotsiol, H. (2017). Fundamentals and controversial issues of contesting the debtor's actions,совечных во вред его кредиторам (начало). *Civil notice right*, No. 3, pp. 215- 258.

Mihail, Poalelungi & Nicolae, Fală (2022). *Revista Institutului national of justice*. Preservation Pauline, p. 30.

Fedorov, B. Г (1913). *Damage кледиторов*. Saint Petersburg, Warehouse editions при legal by book warehouse Right, pp. 16-21.

Holmsten, A. H. (1893). *Учение o rights the creditor refute legal acts,perfect debtor c ego damage c modern juridicalliterature*. Saint Petersburg: Typography Stasyulevicha, M. M., pp. 2-41.

*** (1911). *Общая theory obligations*. Translation c French I. B. Новицкого. Moscow: Юридическое publisher Ministries Justice ussr 1948, p. 416; Planiol M. F. Course Frenchcivil law. Part 1: Theory of Obligations/Composition Marseille Planiola, the professor civil right Парижского juridical the faculty; Translation c French and preface. B. Ю. Hartman, member Petrokovsky district sudah Petrokov: Editionprinting houses Pansky C., pp. 73-74.