

CHAPTER 72

Plurality of Succession

I. THE PROBLEM

(a) *Occurrence.* As appeared from the survey of conflicts systems relating to inheritance, immovables are separately treated and submitted to the law of the situation in the Anglo-American and at least thirteen more jurisdictions. In other states, *lex situs* extends to movables, or to domestic immovables, alongside another law controlling the rest of the estate. In addition to these primary rules, public policy, or *renvoi*, or deference to foreign conflict rules may produce a scission into segregated estates.

Another source of a split arises in the positive conflict of conflicts rules, such as at the death of an Italian domiciled in Massachusetts, a Frenchman domiciled in Brazil, or a German domiciled in Switzerland. The laws of both states involved claim his inheritance, and what happens usually is that each state distributes the assets it can get hold of according to its own law, with no small confusion, especially in the liability for debts. Suppose that a testator was formerly domiciled in Maryland and at his death in New Jersey, and that he leaves his widow domiciled in California, and movables in California, Mississippi, and Maryland, as well as land in Illinois. There are five laws of succession—not only of administration—within the one country of the United States.

The United States, of course, is the largest proving-ground for trying these problems. The only (meager)

legislative attempt to cope with them has been made in the Treaty of Montevideo, in which consequences had to be drawn from its complete dismemberment of estates by unlimited application of *lex situs* to all assets. Again, some scientific exploration solely occurs in France, and there mainly in the case of French immovables in an otherwise foreign-governed inheritance. The Parliament of Paris had urged the unitary application of the last domicil to liability for debts.¹ Under the influence of the Romanistic universal succession of the heirs to the deceased's position, this view was popular around the turn of the century, often in favor of the national law of the deceased.² More recently, a veering toward territorialism has reanimated the customary principle of *tot hereditates quot territoria*, enforcing the plurality in most respects.³

(b) *Scope*. The cleavage operated in an estate by the two-fold conflicts rule of a state or the opposite conflicts rules of two states goes to the very bottom of all incidents. It affects the limits and order of intestate succession, especially of the extremely varied benefits of a surviving spouse or collateral relatives; the form and intrinsic validity of wills; their construction; the forced shares; adjustment of shares by election and advancements; acquisition; partition; and liability for claims.

Accordingly, the Montevideo Treaty enumerates as pertaining to the laws of the situation of each asset: capacity to inherit, validity and effect of the will, rights in the inheritance, existence and shares of intestate heirs, existence and amount of the "assets available," and everything relating to forced portions and testamentary inheritance.

¹ LAINÉ, 2 Introduction 307.

² 2 ROLIN § 766; LAURENT, 7 Dr. civ. int. § 42 p. 71 ff.

³ BOUHIER, Obs. Bourgogne Ch. 21 n. 212-215; 2 DE VAREILLES-SOMMIÈRES *passim*; LEREBOURS-PIGEONNIÈRE (ed. 6) § 363; *cf.*, ARMINJON, 3 Précis 122 § 114.

From the beginning, it is unfortunately evident that enormous incongruities and hardships are involved and the present legal situation in the world offers but scanty remedies. There is some help when federal principles step in; creditors of a divided estate enjoy equality in the United States, provided they are American citizens. But the generally avowed principle that all, domestic and foreign creditors, should enjoy equality, is riddled with exceptions.

Uniformity either of the substantive or of the conflicts rules or of their effect on a plurality of succession is a goal of the future. The following pages shall merely describe the *status controversiae*. In this sorry corner, clearly no theory helps when action is missing.

The position of the creditors of the decedent is deferred (chapter 72) until some account of the Anglo-American system of administration can be furnished (chapter 71).

II. DISTRIBUTION

I. Intestate Rules

Each law governing a part of the estate designates the order of intestate succession with all its conditions and effects.⁴ Thus Spanish law governing movables allowed heirs only up to the sixth degree, while French law for the immovables went to the twelfth degree.⁵ A widow has dower rights⁶ or usufruct⁷ in one succession but not in the other.

⁴ E.g., England: *Brown v. Gregson* [1920] A.C. 860.

Turkey: BERKI 49: the return of *paterna paternis (ila fente)* applies to movables left by a Frenchman domiciled in Turkey, but not to his Turkish land.

⁵ Trib. Bayonne (March 31, 1904) *Revue* 1905, 745: C.C. art. 705 (old).

⁶ FALCONBRIDGE 458.

⁷ Trib. civ. Seine (April 26, 1907) *Clunet* 1907, 1132; Trib. Nice (July 9, 1917) *Clunet* 1917, 1792.

2. Requirements of Wills

The formal⁸ and substantive⁹ requirements of wills, agreements on expectancies or containing last disposals, and their construction¹⁰ are governed by each law separately. The options left for the formal validity of wills have a moderating influence, as also references to the law of the last domicile in matters of construction¹¹ and election¹² act against the rigor of total consequences.

Another remarkable correction has been attained where a gift was valid under the law of the domicile and invalid at the situs of land; the domiciliary court adjusts the portions, increasing the impaired shares at the cost of the enriched ones.¹³ In conformity, the Restatement states a compensation in the inverse case where land and movables in X and land in Y are left to B, C, D, each a third, but the will is invalid in Y and the land in Y falls entirely to B: C and D should receive in X as much as their shares in Y were worth, before the rest is distributed in three equal parts.¹⁴ This amounts to a noteworthy though unusual construction of a unitary will. No such helpful idea was discussed when in a French court a residuary legatee was charged with gifts of money to uncertainly described beneficiaries and the clause was considered valid as to movables in Italy but invalid as to immovables in France.¹⁵

Forced shares are due from each fragment of the succes-

⁸ Germany: KG. (May 15, 1912) JKG. 42A: 141, 145; OLG. Karlsruhe (Dec. 12, 1919) 40 ROLG. 159 (German land of a New Yorker).

⁹ France: Trib. civ. Seine (July 7, 1899) Clunet 1900, 148; LEWALD, Questions 117 speaks of a special kind of nullity.

¹⁰ OLG. Karlsruhe (Jan. 31, 1930) Recht 1930 No. 587: appointment of heir for the German immovable part of a foreign succession is not an appointment to a *pars pro indiviso* of the total estate.

¹¹ *Supra* 334 ff.

¹² *Supra* 349 ff.

¹³ In re Lawrence's will (1919) 93 Vt. 424, 108 Atl. 387.

¹⁴ Restatement § 252, illustration; GOODRICH 513 n. 52.

¹⁵ Trib. Seine (July 7, 1899) Clunet 1906, 148.

sion according to its own law.¹⁶ Hence, under the law of the domicile governing only succession to movables, foreign immovables are not included in the estate.¹⁷ The testator, hence, may avoid leaving assets in the state where his disposing power is restricted; on the other hand, he may have amply provided for the *legitime* portions in one country and legacies in another must be sharply reduced for their sake.

III. ACQUISITION

I. Option

Choice between acceptance and repudiation is separate in the several successions. In the United States, this leads to a considerable extension of the doctrine of election.¹⁸ A release of expectancy may operate partially.¹⁹

In France, a problem concerns the provision that a minor heir may only accept under the benefice of the inventory, i.e., with restriction of his liability for debts. With two different calls his age may be differently considered, and there may be no restriction in the foreign succession.²⁰

¹⁶ *Johns Hopkins University v. Uhrig* (1924) 145 Md. 114, 125 Atl. 616: Maryland law applies to assets in the forum, California restrictions on charitable bequests are left "to determination by the California courts."

The principle was ignored by Trib. civ. Nice (May 3, 1905) Clunet 1911, 278.

¹⁷ England: Wills Act, 1861, 24 & 25 Vict., c. 114.

France: Cass. (April 4, 1857) D. 1857.1.102; (Jan. 1, 1892) D. 1892.1.497, S. 1892.1.76; Trib. Seine (May 21, 1879) Clunet 1879, 549 (not to violate the statute real); SAVATIER, Cours 304 § 436.

Switzerland: BG. (June 29, 1928) 54 BGE.I.216. American domiciled in Switzerland. American real property is left out of accounting for forced shares. The nonbarrable share of children in Switzerland of $\frac{3}{4}$, in Germany of $\frac{1}{2}$ of their intestate portion is counted separately.

¹⁸ 4 PAGE 729 ff., § 1651.

¹⁹ 4 FRANKENSTEIN 380 n. 110.

²⁰ *Supra* Ch. 71 n. 36. The inventory must include all foreign assets, Cass. (July 11, 1865) S. 1865.1.406.

2. Advancement

As seen before, it is primarily though not exclusively a matter of the inheritance law to decide whether premortuary gifts made by the testator to a beneficiary of his inheritance ought to be accounted in his share. In the concurrence of two laws of succession, notably the French courts have confirmed the total scission.

Lady Fairbairn, claiming the legal usufruct of half in French land, under French C.C., article 767, paragraph 2, was not held to deduct the value of the gift she had received in England.²¹ The rule was definitely announced in one of the law suits involving the succession of the Spanish Queen Marie-Christine, which comprised land in France and a Spanish estate. The Tribunal Civil de la Seine stated that the inventory of the French inheritance consisted in the proceeds from the sale of French land—a subrogation preserving French jurisdiction²² and inheritance law—but had to exclude immovables and movables received by the French beneficiary in Spain.²³

The European authors almost unanimously endorse this solution as the inevitable product of the scission adopted by the courts.²⁴ Any gift considered an advancement is referred to the aggregate from which it was taken, independent of the assets of another succession. Sometimes such tracing is impossible.²⁵ Generally, fortuitous chance rules this “unjust and absurd” procedure.²⁶ Two persons

²¹ Trib. Bayonne (Aug. 11, 1902), *Fairbairn v. Wailes*, Clunet 1903, 179.

²² Cour Paris (Dec. 31, 1889), S. 1891.2.186, Clunet 1890, 121.

²³ Trib. civ. Seine (Dec. 27, 1906) *Del Drago v. S. M. Alphonse XIII of Bourbon*, Clunet 1907, 770, Rev. 1907, 398.

²⁴ France: CHAMPCOMMUNAL 418; MAURY ET VIALETON in PLANIOL ET RIPERT §§ 623 f.; DENNERY 127; LEREBOURS-PIGEONNIÈRE (ed. 6) 411; ARMINJON (ed. 2) 3 Précis 160 § 145; NIBOYET, 4 Traité 873 § 1352.

Germany: RAAPE 687; LEWALD, Questions 83.

²⁵ 4 FRANKENSTEIN 566; against his proposals in this case ZEUGE 71.

²⁶ ARMINJON, *l.c.*; NIBOYET, *l.c.*

having received at the same time equal gifts, one may have to account for it, the other not. Yet the timid attempts to avoid these hardships²⁷ were necessarily rejected.

The Montevideo Treaty, article 50, affirms this source-theory but makes an exception for gifts of money; the amount should be distributed among the territories in the proportion of the benefits drawn from each of them. Any such solution is possible in a multilateral treaty. But how can it work?

A similar situation was apt to arise even within one state in the United States when the probate court restricted to personalty could not reach land given by advancement. Despite some remaining difficulties, this case is largely cleared away, as most though not all probate courts have the power to include the land in the adjustment, or an action in equity is available.²⁸ If, however, land is under foreign administration, the ordinary jurisdictional conflicts occur which are the subject of the next chapter.

3. Prerogatives of Domestic Beneficiaries

The various provisions upholding the domestic inheritance law against a recognized foreign inheritance law reach a climax where a domestic succession opens at the same time. But it may be conceded that not much can be added to the crude results of the French or Argentine court practice even though only one, foreign, succession is in the picture.

A French national is entitled to what French inheritance law would give him, if that law were to govern, not only in the meaning of what he would receive out of the assets situated in France, but to the effect that he be awarded

²⁷ NAST, *Revue* 1907, 406, expounding two theories, but consenting to the prevailing doctrine.

²⁸ ATKINSON, 3 *Am. Prop.* 499 f.

everything he would obtain if the foreign movables of the foreign succession were located in France. Of course, the French assets are the maximum fund of enforcement.²⁹

An Argentine decision is in the same vein. The decedent, a Spanish national domiciled in Spain, in addition to leaving movables and immovables in Spain, was creditor of a deposit with an Argentine bank. A domiciliary of Argentina received indemnification out of this asset for loss of the share he would have had under Argentine inheritance law, although the law of succession was Spanish under both conflicts laws.³⁰

4. Partition

It seems safe to state that courts are restricted by the territorial limits of their jurisdiction in a noncontentious judicial division of inheritance. This is a matter of course in the Anglo-American organization, distinguishing personal remedies in equity. It is also settled in France that a judicial partition cannot include foreign immovables,³¹ and this may be presumed where the procedural statutes are silent on the question.³²

On the other hand, freedom of agreement between the beneficiaries helps to eliminate the disturbances caused by plurality of governing laws.³³

²⁹ DENNERY 146 explains that the equality emphasized by the law of 1819 did not refer to distribution but to devolution, in the old language called *partage de droit*, but concedes, p. 149, with MAURY ET VIALLETON, 4 PLANIOL-RIPERT § 36 f., that the so-called equality is nothing but the French law of descent.

³⁰ Cám. civ. 2a Cap. (June 22, 1925) 57 Gac. del Foro 98.

³¹ Trib. Seine (Jan. 21, 1950) Nouv. Rev. 1949-1950, 214; Cass. (July 5, 1933) Nouv. Rev. 1934, 75; 4 FRANKENSTEIN 561, n. 82. Controversial in Italy, see CAVAGLIERI, *Lezioni* (ed. 2) 358; MONACO, *Efficacia* 89 n. 1.

³² E.g., in Chile, see BALMACEDO CARDOSO 167.

³³ *Supra* Ch. 69; even the narrowest definition of party autonomy in France allows submission to one of the several laws of succession "provided that *lex situs* permits it," LEREBOURS-PIGEONNIÈRE (ed. 6) 415 § 363.

IV. ADMINISTRATION

Privity of administration, despite large exceptions, is a principle in the United States even in the case of a unitary succession of movables. In the civil-law countries, the same conception is connected with plurality of successions. Accordingly, where a testamentary executor was appointed by a French testator, his powers were construed by the German court under German law with respect to the immovables left in Germany, although the same person had different powers regarding the movables.³⁴

³⁴ KG. (May 13, 1912) 42 JKG. 141 No. 29.