

CHAPTER 74

Claims

I. SINGLE LAW OF SUCCESSION

1. The Question of Liability

FIRST attention is due to the case where one law governs the entire inheritance but the assets are scattered through several territories. Suppose that an American citizen domiciled in Cuba leaves shares of an American corporation deposited in a New York bank. His succession is governed by Cuban law under the conflicts law of New York and, presumably, also by renvoi in Cuba. What approach have the American or Cuban creditors to take when seeking payment out of those shares?

The inherent difficulties of the international problem are enhanced by the contrast of the conflicts principles. Where unity of succession is established, irrespective of the situation of the assets, should the foreign part of the assets simply be included in the account, even though at the place of the situation local assets are submitted to a separate administration? Common law lawyers, on the other hand, often consider "liability" for claims as a matter of administration; does this mean that no regard is taken to the conflicts rule of the situs? Some French writers suggest that the *lex situs*, more or less replacing the law of succession, should be looked to in the relationship between the estate and the creditors.

To start answering these questions, it should be clear for all systems whatsoever that the transmission of the debts of the deceased to a successor in any sense is a neces-

sary part of the law of succession,¹ quite as the transfer of the deceased's property is. Only enforcement is a separate activity at common law, subject to traditional dependence on territorial principles, and everywhere, of course, procedural incidents follow the *lex fori*.

The term "liability" should indicate who is the passive subject of the debt and what can be demanded. Common law segregates the question what distinction may be made among the funds out of which the creditor seeks to be paid. Three main systems of liability for the claim against the estate, apart from the claims created after death, may be distinguished.

Universal succession in the Romanistic doctrine commits the heir to unlimited responsibility with the means of the estate and all his own means, except where certain measures are taken for limiting his burden. Such measures are especially acceptance under the *beneficium inventarii*, restricting the liability of the accepting heir to the value of the assets to be listed in the inventory (*pro viribus hereditatis*²), and *separatio bonorum*, segregation of the inheritance from the heir's assets, on the request of an interested person. This is unlimited or limited personal liability.

The Germanic, agreeing with the general archaic, conception regards the debts of the deceased as burdening

¹ United States: ATKINSON, *Am. Property Law* 641 § 14.20: "Liability is independent of Administration."

England: DICEY (ed. 6) 811.

France: CHAMPCOMMUNAL 414; 3 BAUDRY-LACANTINERIE ET WAHL (ed. 3) 463 § 3094 f.; WEISS, 4 *Traité* 599 f.; NIBOYET, 4 *Traité* 914 § 1368, 921 § 1371; BATIFFOL, *Traité* 676 § 573.

Germany: 2 BAR 350; 2 ZITELMANN 976; LEWALD 389; NUSSBAUM 359; WOLFF, *D. IPR.* (ed. 3) 228.

Netherlands: KOSTERS 627; MEIJERS, *Weekblad* 3495, IX.

Switzerland: VOUMARD, *Transmission* 83 ff.

² See, e.g., for Argentina: C.C. art. 3363; MOLINA, 12 *Rev. Ciencias Jur. Santa Fé* (1950) 151.

the ancestral home and property. Whoever takes the assets responds for the debts so far as the assets go (liability *cum viribus hereditatis*). This is the foundation of the Anglo-American liability restriction to the assets of the inheritance, from which the feudal ties detracted the land.

A third group has looked for a modern method of limiting responsibility and found them close to common law methods. The German and Swiss Codes resort to official administration on request.

2. Civil Law

The law of succession determines whether liability is imposed on persons—the heirs, devisees, universal legatees, universal or residuary legatees, or under certain circumstances, a special legatee or donee—or whether it rests upon the assets. It determines whether liability is unlimited, or limited to the assets composing the estate, or to their value, and what steps are needed for any limitation.

An obvious consequence involves the recourse of a paying beneficiary against those persons charged by the inheritance law with primary liability.³

Under the nationality principle, this means that the rights of the creditors are subject to the law of the country whose national the deceased was. That in this application the national law is particularly improper, has been sometimes noted.⁴ An involuntary avowal of this fact is contained in a provision of the German Civil Code which calls for the national law of the deceased but permits the

³ Trib. Seine, Clunet 1895, 118; TRÉBAUT, 10 Répert. Succession § 46; on this point BATIFFOL 677 states an old tradition and unanimity in France.

⁴ KAHN, 2 Abhandl. 286 perceived that "the interest of the creditors of an estate demands another contact than the national law," although his own suggestions were unacceptable.

heirs of a German who was domiciled abroad to invoke the limitation granted by the law of the domicil.⁵ Indeed, the Scandinavian Convention on Inheritance and Succession, deviating from its usual combination of tests, resorts to the decedent's domiciliary law for determining liability for debts; only the effect of public summons to the creditors, issued at the domicil, on creditors in other countries is qualified by appropriate conditions.⁶ The place where the debtor lived and carried on his business, is rightly supposed to have influenced the credit extended to him. Its law, of course, should not operate for the exclusive benefit of the heir.

Law of the debt. It stands to reason that the debt transferred to new debtors retains the character imprinted on it during the lifetime of the deceased. The claim may from its inception be indivisible or joint, and stays so.⁷ At civil law the question who may sue or be sued also is a part of the substantive order; hence, if English law governs the succession, not the beneficiary but the administrator has been allowed in a French court to sue a debtor,⁸ and the analogous solution may be expected in the case of claims against the estate. However, the complicated rules of the common law relating to extraterritorial situations, especially when a creditor of the estate sues the administrator outside the state of his appointment, disturb the problem—which, in the opinion of this writer, has not yet been mastered.⁹

⁵ EG. BGB. art. 24 par. 2; OLG. Hamburg (March 8, 1911) 28 R. OLG. 59; KAHN, 1 Abhandl. 465; RAAPE, Komm. 655 ff.

⁶ Scandinavian Convention of Nov. 19, 1934 (*supra* Vol. I, 33 n. 85), arts. 17, 18, 25; *cf.*, PLAISANT 253.

⁷ MAURY ET VIALLETON in PLANIOL ET RIPERT, 4 Traité 499 § 400; NIBOYET, 4 Traité 913 § 1368.

⁸ Cour Paris (April 2, 1896) Clunet 1897, 465; otherwise if French law governs, App. Grenoble (March 31, 1908) Revue 1908, 609.

⁹ See for the analogous question of the person qualified for receiving an appointment as ancillary administrator or a certificate of heirship, *supra*.

Enforcement. In the traditional Continental doctrine, the law of succession extends to enforcement by action, with the sole exception of pure procedural questions. This law dictates, in particular, the measures giving the beneficiary time for considering his attitude in the face of claims, the calling up of the creditors for filing their claims, and the cases in which separation of the inheritance may be requested, although assistance by foreign authorities may be needed, and may often be unavailable, to implement such measures.

According to this prevailing theory, where a French testator, domiciled in France, leaves movables in Italy, a French court applies French inheritance law to all movables and makes all heirs liable in proportion to their shares (Code Civil, article 732) with all assets remaining obligated to all creditors as they were in the lifetime of the deceased (article 2092).¹⁰

Lex situs. Opposition by the neo-territorialistic theoreticians,¹¹ in France gives the law of the place where the assets are situated and seized for enforcement the primary role, either on the strength of a principle valid for all assets¹² or by submitting enforcement upon movables to the *lex situs* because of the "public credit" affected.¹³ The prevailing opinion rejects these obscure reasonings. Discrimination according to territorially divided objects is inconsistent with the leading ideas of the Continental systems.

¹⁰ WEISS, 4 *Traité* 601.

¹¹ See the citations in the critical surveys by TRÉBAUT, 10 *Répert.* 516 No. 112 ff.; VOUMARD, *Transmission* 126 ff.; NIBOYET, 4 *Traité* 904 § 1364 ff.; also BEVILAQUA (ed. 3), 401 n. 12, citing PILLET, *Principes* § 179 inclines to *lex situs* for claims of creditors, because of the "public credit."

¹² BARTIN, 3 *Principes* § 450 f.; *contra* NIBOYET, 4 *Traité* 911 § 1366.

¹³ PILLET, 2 *Traité* 414 § 602; NIBOYET, *Manuel* § 536; LEREBOURS-PIGEONNIÈRE (ed. 6) 411 f., who, however, corrects the result by introducing the French rule of a liability proportional to the value inherited. See the convincing refutation of the "credit public" theory by MAURY ET VIALLETON in 4 *PLANIOL ET RIPERT* 491 f.; NIBOYET, 4 *Traité* 919 ff. § 1370 f.

Under the Treaty of Montevideo, the law is different, but it constitutes always a plurality of successions when the assets are in different states.

3. Common Law

England. If it is said that the assets in the hands of an English administrator are liable for all debts whether incurred in England or abroad,¹⁴ it is to be understood that the law of succession determines what debt of the deceased passes and against whom. On the other hand, proof of the claim and order of priority are subject to English law as *lex fori* with the exception of assets under foreign administration and removed to England.¹⁵

Among the numerous particulars of this doctrine which cannot be explored here, the old case of *Aldrich v. Cooper*¹⁶ is interesting. A mortgagee may proceed against freehold and copyhold, but if he exhausts the personal estate, a simple creditor may take his place; accordingly, where claimant A has a real security in two funds, X and Y, and B only in X, A may satisfy his claim at his option, but when he chooses the fund X, B is subrogated in A's right in Y.

United States. The law of the place of administration certainly does not control the existence of a debt or determine who should pay it after distribution of the assets. But it fixes the time within which a claim must be proved,¹⁷ the manner in which it may be proved,¹⁸ the modalities of payment, and the preferences of classes of creditors.¹⁹ These

¹⁴ DICEY (ed. 5) Appendix Note 25, p. 971 ff.; (ed. 6) 811.

¹⁵ DICEY (ed. 6) 812.

¹⁶ Lord Eldon in *Aldrich v. Cooper* (1808) 8 Ves. 382, 32 Eng. R. 402; WILLIAMS (ed. 12) § 812.

¹⁷ Restatement § 498.

¹⁸ Restatement § 499.

¹⁹ Restatement §§ 500-503; STORY § 524 f.; WOERNER § 166; 3 BEALE § 497.1; § 501.1.

questions are independent of the domiciliary law of the deceased or of the creditors.²⁰

The principle of equality. A basic idea, similar to that of the civil law, was once announced by the Supreme Court of Massachusetts: the assets, wherever situated, should be available to all creditors of the same class without discrimination.²¹ But since it was predicated that each state has independent power over the assets situated in its territory,²² the general doctrine isolates the local property of each state from all other assets. The right to be satisfied out of this property belongs to those creditors who bring and prove their claims before the local court.

The Restatement expresses this rule in an explicit manner :

§ 495. . . . "all creditors regardless of where they are domiciled can prove their claims in any state in which administration proceedings have been instituted."

§ 497. "All creditors of a decedent who have proved their claims in a competent court in which there are administration proceedings of the estate of that decedent are entitled to share pro rata in any application of the assets of the local administrator to the payment of claims, irrespective of the source of such assets or of the residence, place of business, domicil or citizenship of the creditors, except

- (a) where there are valid claims against specific funds, or
- (b) where there are valid preferences given by local statute to creditors of a particular class."

Although the Restatement left the question open whether preferences could constitutionally be given to resident non-citizens, there is certainly a difference to the effect that the

²⁰ Baker v. Baker (1917) 242 U.S. 394; Wilson v. Hartford (1908) 164 Fed. 817; Duehay v. Acacia Mut. Life Ins. Co. (1939) 105 F. (2d) 768.

²¹ Dawes v. Head (1825) 3 Pick. (Mass.) 127, per C. J. Parker.

²² STORY § 420; Bostwick v. Carr (1914) 165 App. Div. 55, 151 N.Y.S. 74.

Privileges and Immunity Clause of the Federal Constitution assures equality to citizens only; therefore the formulation of the Restatement exceeds somewhat the actual law in generosity.

The standard by which preferences may be granted by statute to local creditors in a solvent estate has recently been defined. Citizens must have "reasonable and adequate access to the courts" for filing their claims. They need not necessarily enjoy all technical and precisely similar rights conferred upon the local claimants.²³

Insolvent estates. If an estate is known to be insolvent, it is settled in theory that equality of all creditors ought to outweigh convenience of local distribution. The creditors having proved their claims receive only a pro rata percentage corresponding to the dividend that is likely to result from all assets and debts of the entire estate.²⁴ It has been held, however, that the local creditors may receive this quota before the others.²⁵ Nevertheless, it has become obvious that multiple administration must lead to "conflicts and confusion."²⁶ It demands a very difficult interstate cooperation. Receivership in the case of insolvent corporations has been reformed for analogous reasons by Con-

²³ 3 BEALE §§ 466, 510.1, 512.1; Canadian Northern Railway Comp. v. Eggen (1920) 252 U.S. 553, 562; Duehay v. Acacia (*supra*. n. 19) at 776, where a statute of the District of Columbia was construed so as to conform with the Constitution. See also In re Torrington (1934) 70 F. (2d) 949.

²⁴ Blake v. McClung (1898) 172 U.S. 239; In re Hanreddy's Estate (1922) 176 Wis. 570, 186 N.W. 744, LORENZEN, Cases 967; In re Hirsch's Estate (1946) 146 Ohio St. 393, 66 N.E. (2d) 636, ann. 164 A.L.R. 761, 765. Similar for receivership, Restatement §§ 559, 560.

²⁵ In re Estate of Brauns (1936) 276 Mich. 598, 268 N.W. 893; see in general Note, 164 A.L.R. 768; 21 Am. Jur. 863 § 878 n. 11.

In Owsley v. Bowden (Ga. 1926) 132 S.E. 70, the creditors filed in Georgia received sufficient payment "to discharge these debts," which seems to be full payment, because they had not filed in time in Alabama, the domiciliary state, and were barred there.

²⁶ Report on Uniform Ancillary Administration of Estate Act, Handbook of the Commissioners on Uniform State Laws, 1934, 365. See, as early as 1840, Goodall v. Marshall, 11 N.H. 88, 98, 101.

gressional action²⁷ and purposeful policy of the United States Supreme Court.²⁸ Concentration on the domiciliary administration as in the case of receivership has been justly advocated in the whole field of the administration of decedent's estates.²⁹ Where the estate is insolvent, however, the most efficient and adequate measure would be the extension of the national Bankruptcy Act to the estate administration, matching the legislation of all other significant countries.³⁰

Effect of Judgments. The Supreme Court of the United States as early as 1841 stabilized the doctrine that in consequence of the territorial limits of his powers an administrator cannot bind the estate outside of the state in which he is appointed.³¹ Even a judgment rendered in the state of his appointment has no binding effect upon another administration.³² The judgment against him as representative is merely regarded as an order to pay out funds committed to his care just in the same jurisdiction. As the Supreme Court expressed it: "While a judgment against a party may be conclusive not merely against him but also those in privity with him, there is no privity between two administrators appointed in different states"; hence a judgment obtained against the ancillary administrator with the will annexed in Massachusetts has no effect against an executor at the testator's domicile in Michigan.³³ It has

²⁷ Bankruptcy Act, chapter X.

²⁸ CHEATHAM, "The Statutory Successor, The Receiver and the Executor in the Conflict of Laws," 44 Col. L. Rev. (1944) 549.

²⁹ HOPKINS, 53 Yale L.J. 221, 634; and especially CHEATHAM, *l.c.*

³⁰ See NADELMANN, "Insolvent Decedents' Estates," 49 Mich. L. Rev. (1951) 1129, 1161 f. and (cited by him) SIMES, "Some Lessons from a Comparative Study of American Probate Legislation," Proceedings, Section of Real Property and Trust Laws, Am. Bar Ass. (1949) 42, 48.

³¹ *Vaughan v. Northrup* (1841) 15 Pet. 1.

³² *Stacy v. Thrasher* (1845) 6 Howard 44, 60 f. See also *Low v. Bartlett* (1864) 8 All (Mass.) 259.

³³ *Brown v. Fletcher's Estate* (1907) 210 U.S. 82.

equally remained constant practice that a judgment against a domiciliary administrator has no effect on assets in an ancillary state,³⁴ or one against a foreign executor outside the state of his appointment on the entire estate.³⁵ It does not even make a difference that the same person is the administrator in both courts or the executor in one and administrator in the other.³⁶

An exception was once made by the Supreme Court when the same person was executor in both states, because his support by the will of the testator unified his position; the judgment was given full faith and credit.³⁷ Yet, despite the alleged privity in such case, such a judgment was subsequently merely considered *prima facie* evidence of the debt³⁸ (which in itself is also an exceptional favor).

It follows that any creditor may present a claim in any jurisdiction³⁹ where assets are found⁴⁰ and at the domicil.⁴¹ If the claim is rejected, he may prove it elsewhere. If it is allowed, this is not even an evidence of the existence of the claim in other jurisdictions.⁴² Limitation of action in one state has no importance in the others;⁴³ in the kindred English view, a surplus reached in the ancillary English administration was surrendered to the local beneficiaries without regard to American creditors barred by the Eng-

³⁴ *Johnson v. Powers* (1890) 139 U.S. 156; *Wilson v. Hartford* (1908) 164 Fed. 817; *Green v. Martin* (1932) 239 N.W. 870.

³⁵ *Learned Hand J.*, in *Burrowes v. Goodman* (1931) 50 F. (2d) 92; see also *Feldman v. Gross* (1952) 106 F. Supp. 308.

³⁶ Restatement § 506, comment a. STORY § 522a was doubtful.

³⁷ *Carpenter v. Strange* (1891) 141 U.S. 87, 104.

³⁸ *Hill v. Tucker* (1851) 13 Howard 458.

³⁹ Restatement § 506 (2).

⁴⁰ WOERNER § 172; GOODRICH 570 and citations. *Cf.*, 3 A.L.R. 64.

⁴¹ *Goodall v. Marshall* (1840) 11 N.H. 88, 98.

⁴² *Green v. Martin* (1932) 239 N.W. 870; Restatement § 495 comment b. In *Johnson v. Powers* (1890) 139 U.S. 156, the same result follows naturally in the absence of identity of *res* and *persona*.

⁴³ *Wilson v. Hartford* (1908) 164 Fed. 817.

lish statute of limitation though not by the statute of the American domicil.⁴⁴

Disposition of Ancillary Funds. The American courts, like the English, claim discretionary power to dispose of the assets or the surplus. Where no special reasons demand attention, the most usual proceedings are the following: If no locally domiciled creditors exist from the beginning in an ancillary court, transfer of the funds to the domiciliary administrator is ordered.⁴⁵ Likewise, if all locally appearing creditors are paid, the remaining balance of the personal estate is transferred to the principal administrator; the Restatement favors this.⁴⁶ An exception has been made, for instance, where expedience, costs, and other reasons advised the contrary⁴⁷ or there was no assurance that an administrator "is or will be appointed" at the domicil in Argentina.⁴⁸

Conflict of Systems. In a hundred-years-old English case, it was held that a foreign personal representative, having taken heirship according to foreign law without benefit of inventory, is personally liable in England, not as an administrator of English movables but as a debtor.⁴⁹ Hence, while the administration in England, governed by English law, is accountable for the assets only, in addition English proceedings make the successors accountable according to foreign inheritance law. This is one way to adjust the English system to the recognition that the succession is governed by a foreign law determining also the scope of liability for debts.

This example may inspire solutions in many other situa-

⁴⁴ *In re Lorillard* (1922) 2 Ch. 638.

⁴⁵ *Dow v. Lillie* (1914) 144 N.W. 1082; Restatement § 496.

⁴⁶ Restatement § 522.

⁴⁷ *Burman v. Lenkin Construction Co.* (1945) 149 F. (2d) 827.

⁴⁸ *In re Bokkelen* (N.Y. 1935) 155 Misc. 289.

⁴⁹ *Beaven v. Lord Hastings* (1856) K. & J. 724.

tions where the systems clash. In accordance, it has been stated in the Netherlands that the creditors of an Englishman who died domiciled in England cannot sue the beneficiaries personally in Holland as they would be entitled to under Dutch law.⁵⁰

II. SEVERAL LAWS OF SUCCESSION

I. Lack of Privity

Realistic understanding on the Continent faces the scission of inheritance laws, if nothing corrects it, with the same awe and displeasure as common law lawyers realize the splitting up of the assets in multiple administration. The several independent systems, indeed, in the case of their international segregation, result in the incoherent existence also of several systems of liability and enforcement. An heir may, with deliberate planning, accept one succession and repudiate the other, so as to become liable to the claims against the first but not to those against the second, which are higher. The law of state X may hold land liable only to mortgagees or claims otherwise arising in connection with land, and the beneficiary leaves the small assets in Y to the pleasure of all other creditors. On the other hand, if there happens to be total responsibility of all estates to all creditors, they may exhaust the funds left to one successor under the law of X to the advantage of the successor called by the law of Y. Moreover, an absolute lack of correlation deprives the payor of any recourse for contribution.

When in England movables alone were attachable by creditors of the estate (and the case is the same where at present a Scotch heir to an immovable is liable only in a

⁵⁰ MEIJERS, *Weekblad* No. 3495, IX; GHEEL GILDEMEESTER, *Vererwing* (1948) 134.

subsidiary order), the paying heir was granted recourse in England.⁵¹ In international relations nothing similar is assured.

That mortgages and other security rights can, and in the case of land charges not supported by an underlying personal obligation must, be enforced in their totality against the assets affected, is settled.⁵² But an old French doctrine construed a category of "*dettes immobilières*," including mine royalties, that would be restricted to the territory of the land, whereas the movables had to support the great majority of the claims.⁵³

In the prevailing opinion, the principle is certain: all assets are liable to all creditors, but each asset only according to the law of succession recognized in the country where it is situated. No privity exists among the several laws of succession so followed.⁵⁴

2. Equalization

Correction of this sad outlook has been sought in various ways. An influential doctrine postulates proportional division of the assets among the creditors of the various systems, conforming to the value of the assets situated in the several territories.⁵⁵ However, not only is it very difficult to assemble the facts for such evaluation, but no pertinent rule can be founded in the absence of federation or treaty. The Montevideo Treaty in fact provides a liabil-

⁵¹ WESTLAKE § 118; DICEY (ed. 5) 973; (ed. 6) 813.

⁵² VOUMARD 86, 144.

⁵³ For extension of this category, JOUSSELIN, (Thèse, 1899) 105; *contra* PLANIOL ET RIPERT § 906 f.; NIBOYET, 4 Traité 905 § 1364.

⁵⁴ France: NIBOYET, Traité 916 § 1370; SAVATIER, Cours 304 § 436.

Germany: NUSSBAUM 359.

⁵⁵ France: MAURY ET VIALLETON in 4 PLANIOL ET RIPERT 489; LEREBOURS-PIGEONNIÈRE (ed. 6) 412.

Germany: 2 BAR 350.

Switzerland: VOUMARD 89.

ity merely proportional to the part obtained by the local assets in the entire inheritance, but gives the local claims preference for total satisfaction.⁵⁶ The very idea of preventing a creditor from requesting full payment of his claim is unsound and disastrous to personal credit. Credit is usually granted in reliance on the entire possessions of the debtor, which may be true even of a mortgagee. Therefore, in another view, all assets must be available to every creditor.⁵⁷ At present, this responds of course to the principles of most countries, though not all; but the result of applying the divergent modalities of limitation and enforcement has never been studied. One difficulty has been overcome in France; an heir claiming benefit of inventory must extend the inventory to the entire inheritance.⁵⁸

In the internal relationship between the beneficiaries of the separate successions, an obligation of contribution is as desirable as it is far from recognition. It has been suggested that joint debtors with recourse proportional to the values received by them,⁵⁹ provided that the construction of a will does not involve a different regulation. This rule, not of conflict of laws but a uniform substantive rule, deserves to be carefully worked out. It is not a part of any present law.

⁵⁶ Treaty of Montevideo, arts. 46-48.

⁵⁷ M. WOLFF, D. IPR. (ed. 3) 227; NUSSBAUM, D. IPR. 359; BATIFFOL, *Traité* 676 f. § 673 (making no difference whether there is one or several laws of succession).

⁵⁸ Cass. req. (April 23, 1866) S. 1866.1.290; C. Paris (Dec. 12, 1886) S. 1886.2.42; TRÉBAUT, 10 *Repert.*, Successions No. 118.

⁵⁹ WOLFF and NUSSBAUM, *supra* n. 55; RAAPE, *Kommentar* 688; 4 FRANKENSTEIN 580 develops a different proposal which is impractical.