THE DOCTRINE OF ELECTION AND RIGHTS OF CREDITORS IN THE ETHIOPIAN LAW OF SUCCESSIONS

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> *The tributes and debts which are imputable to the deceased should be paid from the estate. If the property left is not sufficient to pay off the debts, the heir shall not pay the debt and the loan if he does not take the inheritance. If the heir accepts the inheritance, he must keep it separate, put the amount in writing, and show the amount to the creditors; he shall give to each in proportion to what is due to him. And if he accepts the inheritance and spends it by giving it away or in some such way; or if he hides it and does not reveal desirous that the other creditors remain deprived of their belongings; or if he has given them half of it, then he must pay all that is due to them, after the debt is ascertained by a reliable witness.*[1]

I

When a person dies leaving property interests behind, his patrimony is set aside to be administered by a person or a group of persons whom the law refers to as liquidators. Liquidators may be appointed by a will as testamentary executors. They may assume the office by operation of the law where a person dies intestate or where a person dies testate but did not appoint executors in his will. In this latter case, the mere fact of being an heir or a legatee by universal title suffices to claim the status of liquidator. A judicial liquidator may also be appointed where the heirs of a deceased person are unknown, or all the heirs-at-law have renounced the succession, or do not want to liquidate it, or where there are no heirs of the deceased and his succession is taken by the State. The other possibilities of appointing judicial liquidators are where the deceased has appointed an executor in his will but there is doubt regarding the authenticity of the will or where there are several liquidators who are not in agreement on the administration and liquidation of the succession, or

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[1] *The Fetha Nagast, The Law of the Kings,, Translated from the Geez by Aba Paulos Tzadua, Haile Sellassie I University, Addis Ababa, 1968, Part two, Chapter 42, Section I, p. 235.*

where there are persons who, for one reason or another, are not in a position to look after their interests.[2] The process of liquidation in the Ethiopian Law of Successions[3] covers the activities to be undertaken by the liquidator starting from making arrangements for the funeral and commemoration services of a deceased person, all the way to the determination of persons entitled to succeed him, collection and preservation of property forming part of the estate of the deceased, taking inventory and making valuation of such property, payment of certain, due and liquidated debts of the inheritance, and handing over of bequests ordered by the deceased person to legatees by singular title.

The scope of this work is, however, limited to just a single aspect of this lengthy process; i.e. treatment of the relationship between heirs of the deceased and creditors of the inheritance in the disposition of successoral property.

II

In the ordinary course of events, persons who may have claims on the inheritance of a deceased person are heirs at law, legatees by singular or universal title and creditors of the deceased, preferably mentioned as creditors of the inheritance.[4]

The law provides that heirs and legatees are at liberty to make an election. As applied to the law of successions, the doctrine of election refers to the option of an heir or a legatee to make a choice between two alternative and, sometimes, conflicting rights. The *'no necessary heir'* rule adopted by the Civil Code of Ethiopia prescribes that "no heir is bound to accept the succession or legacy to which he is called."[5] This rule, which is employed in both the Civil and Common law systems, is ". . based on the equitable ground that

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[2] *See Arts. 946 - 951 of the Civil Code of Ethiopia - Negarit Gazeta, Extra-ordinary issue, 19th year No. 2, Proclamation No. 165 of 1960.*

[3] *Ibid, Title 5, Chapter 2, Arts. 942-1059*

[4] *Since a deceased person has no longer rights and duties;*
Ibid, Art. 1.

[5] *Ibid., Art. 976; See also Art. 775 of the Civil Code of France which states that "nobody is bound to accept a succession devolved upon him" in Marcel Planiol, Traite Elemetaire De Droit Civil, Translated by the Louissiana State Law Institute, Volume 3 Part 1, 1959, p. 616.*

a person cannot be permitted to claim inconsistent rights with respect to the same subject matter ."[6] and that he who accepts the bounty of a deceased must be bound by the obligation the acceptance may bring about since one cannot enjoy its benefits and evade its burdens.

The right of election of an heir or a legatee, in this respect, is strictly personal to him and no other person can exercise it on his behalf so long as he is alive.[7] Without prejudice to their right of recourse by invoking the Paulian Action,[8] even creditors of the heir have no right to dictate the latter's election.

The heir makes the election by either accepting or renouncing the succession in toto.[9] Under the equitable doctrine of election, if a person accepts the succession for one purpose, it amounts to acceptance for all purposes and the renunciation of all rights and claims inconsistent therewith.[10]

Although the Ethiopian Civil Code of 1960 seems to have chosen a different approach to the problem of election, both the Civil and Common law systems provide for:-

1. the simple and unconditional acceptance, in some literatures referred to as 'acceptance pure and simple';
2. acceptance with the benefit of inventory; and
3. renunciation of succession.

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[6]*Corpus Juris Secundum, a complete restatement of the entire American Law, Volume 97, Wills, Section 1237, P.8.*

[7]*Civil Code, Arts. 977(1), 853.*

[8]*Ibid., Art. 993 cum Art. 977 (2) and (3). The Paulian action in this respect is a remedy available to creditors of an heir who, to their prejudice and with fraudulent intent, renounces a succession devolving upon him. For a discussion on this point see Amos and Walton's Introduction to French Law, Second ed., Calrendon Press, Oxford, 1963, pp. 243 - 247.*

[9]*Civil Code, Art. 989(1).*

[10]*Note, however, that a person who renounces a succession in his capacity as a legatee may still accept it in his capacity as an heir and vise versa. See Art. 989(2)and (3) of the Civil Code.*

The simple and unconditional acceptance is recommended when an heir is certain that the inheritance is free from encumbrances by creditors of the deceased or, at least, when one is certain that it is solvent. Acceptance with the benefit of inventory, on the other hand, is believed to be ". the best choice when there are doubts about the solvency of the succession. The benefit protects the heir against creditors' actions and still leaves him with a hope of gain if some surplus assets are left."[11]

Under the simple and unconditional acceptance, if a person accepts to take the benefits of a succession, be it testate or intestate, he must assume any burden annexed thereto even though it turns out that the burdens are greater than the benefits.[12] The heir who has so elected is given the ownership title of property forming the inheritance. Unconditional acceptance, in this context, brings an end to the estate of a deceased person as a distinct entity[13] and merges it with other personal property of the heir Creditors of the inheritance do not have to require the taking of inventory of the inheritance since they have a right to initiate proceedings even against the personal property of the heir

Acceptance with the benefit of inventory offers two advantages to the heir. For one thing, the liability of the heir to the debts of the inheritance is limited to the extent of the value of property or the amount of money he has received or will have received. For another, so long as the process of liquidation is not brought to its final conclusion, the personal assets of the heir do not merge with the estate of the deceased person. The property which forms the estate is the common pledge of all creditors of the inheritance. The heir is required to make a duly probated document in which inventory of the inheritance is drawn up.

As pointed out above, although the Ethiopian Civil Code of 1960 does not make an express reference to the phrase "acceptance with the benefit of inventory" before closure of liquidation, the liability of an heir to the

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[11]*Planiol, supra, note 5, Vol. 3, Part 1, p. 613.*

[12]*Corpus Juris Secundum, Supra, Note 6, Section 1285, p. 123*

[13]*As a distinct entity the estate is not a juridical person known to the law. It is merely a name to indicate the sum total of assets and liabilities of a deceased person whose succession is opened.*

debts of the inheritance does not extend beyond what he has received. But the effect of such a liability is sometimes distributed between two phases.

Before the process of liquidation is wound up, property of a deceased person constitutes a distinct estate in which the undivided interest of creditors of the inheritance and that of the heirs is represented.[14] Creditors of the inheritance are preferred to personal creditors of the heirs in so far as their claim over the estate is concerned.[15] Claims of heirs for partition of their shares in the succession is satisfied only after creditors of the inheritance who have made themselves known, persons entitled to maintenance, and legatees by singular title are paid their dues in the order established by the law.[16] Where all the property constituting the inheritance has been disposed of during the liquidation process, newly arrived creditors of the inheritance have no right of recourse against the heirs as it is clear that nothing has gone to them form the succession.

If, on the other hand, heirs have received whatever remains from the inheritance after just and liquidated debts of the inheritance are paid, the assets they have so received merge with their personal property.[17] Creditors of the inheritance who appear after closure of liquidation have no better right than personal creditors of heirs. Even worse; because of the fact that personal creditors of heirs may claim the whole estate of the heirs as their common security while the post-liquidation creditors of the inheritance may only claim the value of property or the amount of money the heir has taken as his share of the succession.[18]

Hence it is possible to argue that the doctrine of "election with the benefit of inventory" operates in the Civil Code of Ethiopia where:

1. creditors of the inheritance and legatees by singular title have been paid their claims and bequests;
2. there remains a residuary estate;

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[14] *Civil Code, Arts. 942, 943(1).*

[15] *Ibid, Art. 943(3)*

[16] *Ibid., Art. 1014, (on the order of payment) Art. 1052, (on closure of liquidation)*

[17] *Ibid., Art. 1053, (1)*

[18] *Ibid., Arts. 1054, 1055.*

3. such residuary has merged with the personal property of heirs or, where necessary. it is jointly owned by them;[19]
4. new creditors of the inheritance have appeared to claim payment of what is due to them.

The third possible option regarding election is, of course, renunciation of succession. It is an act by which a person called to a succession gives up his title. By so doing, an heir circumvents his liability on an obviously insolvent succession.[20] It is also a wise choice to be made "when a person has received a substantial donation from the deceased (sic) which would be merged in the succession and lost. "[21] under the rules of collation in which a descendant is supposed "to bring into the succession the value of the liberalities which he has received from the deceased and which are not exempted from collation."[22] Once a person renounces a succession, he is deemed to have never been an heir for all intents and purposes.

III

There are also instances wherein one may be in a dilemma as to whether or not to accept or renounce a succession. Let us consider the following situation.

A, in his will, gives B's property to C and at the same time A gives some of his property to B. Can B accept the bequest from A and attack the part of the will in which the deceased had bequeathed his (B's) property to C? If he renounces the succession, the part of the will referring to his property may be invalidated for reasons of nonenforcibility.[23] But it may be contended that he may not claim his bequest in the same will since there is no such thing as partial acceptance or renunciation.[24] If B accepts the succession and receives the bequest made to him by A, it implies that he has

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[19]Ibid. Art 1053(2).

[20]*Note, however, that as there is no such thing as simple and unconditional acceptance under Ethiopian law, this justification for renunciation is of no practical significance. Whether one accepts a succession or not, his liability is limited to the extent of the value of property he has received from the succession.*

[21]Planiol, supra, note 5, Vol. 4, Part 1, p. 613.

[22]Civil Code, Arts. 1065, 1067, 1068, 1073.

[23]*Ibid., Arts. 865(2), 878.*

[24]*Ibid., Art. 989(1)*

waived his statutory right to attack the validity of the will. Thus C can claim B's property on the basis of the will.

In a similar case in England it has been held that " .. where the true owner of the property so given also receives a benefit under the same will, such owner is put to his election whether he will give up such benefit or will give effect to the disposition by the testator"[25]

Before making the election, however, an heir has to weigh the possible advantage he may derive by so doing in terms of the value of his own property bequeathed to some other person and the value of the bequest made in his favour But some argue:

> *..since this could hardly be fair where there is great disparity between the value of the two gifts, . the owner of the property be (sic) .. given the opportunity of retaining his gift under the will provided he compensates the beneficiary by giving him the value of the property of which he is disappointed.*[26]

When considering the problem from the Ethiopian perspective, one may ask this question. Is it not possible for B to attack the validity of the will and still claim his bequest without doing any disservice to the rule against partial acceptance under the Civil Code? Arguably yes.

> That which one owns he can dispose of by will; but a testator can convey only such property or interest as he has.[27]

The postulate indicates that the subject matter of the bequest in a will must be capable of being disposed of by the testator As a matter of common sense too, a bequest made of an object that doesn't belong to the testator is of no effect. Even the testator's lack of knowledge regarding his title over the subject matter of the bequest is immaterial. This idea is explicitly provided in the Civil Code in which it is stated that "a

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[25]W.J Williams, The Law Relating to Wills - with precedents of particular clauses and complete wills; third ed., London Butterworths, 1967, p.224.

[26]*Ibid*.

[27]Corpus Juris Secundum, s pra, note 6, Vol. 94, Wills, Section - p. 782. emphasis supplied)

provision in a will shall be of no effect where it cannot be enforced."[28] Arguably, one aspect of enforcibility is that the object of the will must be the true property or right of the testator which actually passes directly to his heirs after all the debts of the inheritance have been paid.

Therefore, B may make use of this provision to have the part of the will in which his property is bequeathed annulled. But the nullity of this part of the will does not necessarily ". . . entail the nullity of other provisions . . ." unless, of course, one establishes the existence of ". . . a necessary connection between the execution of the provision which is null and that of other provisions."[29]

Once B succeeds in having that very provision in A's will annulled, C no longer has any claim on B's property bequeathed to him by A's will. The question to be asked in this respect is: does B's action for nullity of that particular provision in A's will amount to renunciation of succession? By no means. In the first place, renunciation has to be communicated to the liquidator in writing or in a declaration made in the presence of four witnesses. It must also be made in pure and simple terms.[30] B's action for nullity is not directed against a bequest in which A had a valid title. It cannot be construed that B was exercising his right of election when he was attacking the validity of that particular provision in the will. Thus, one may safely argue that B may accept the succession and claim the bequest made to him in A's will inspite of the fact that he has attacked part of the will in which his own property had been bequeathed to some other person.

IV

Upon examining rights of creditors in succession, distinction needs to be drawn between the two classes of creditors: those of the heritance and those of the heirs.

Creditors of the inheritance have the property constituting the estate of the deceased "as their exclusive security", but do not have any right over personal property of heirs and legatees.[31] On the other hand, personal creditors of heirs and legatees do not have any right over the estate constituting the inheritance pending liquidation.[32]

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[28]*Civil Code, Art. 865.*

[29]*Ibid., Art. 878.*

[30]*Ibid., Arts. 979(1), 988.*

[31]*Ibid., Art. 943(1) (2)*

[32]*Ibid., Art. 943(3).*

Creditors of the inheritance may be secured creditors, creditors with priority rights under the law and ordinary creditors who have no special security and enjoy no privilege. As a rule, the debts incurred by the deceased during his life time are enforced against his estate. Such debts cover not only liabilities stemming from the contractual obligations of the deceased but also debts:

> *.originating in torts and criminal acts. Hence, a penalty pronounced against the deceased (sic) can be claimed from his heirs. The principle of personal character of criminal penalties prevents only the adjudication against the deceased (sic) after his death.*[33]

What actually matters is the fact that claims of creditors must be based on some obligation of the deceased recognized by the law as valid and enforceable. On the contrary " claims which would be invalid, or illegal and void as against the deceased (sic) if living are not enforceable against his estate."[34] As creditors are not, under normal circumstances, expected to seek specific performance[35] of a debt arising from obligations of a deceased person since he is no longer alive to perform it, the standard remedy available for them is an action for damages to obtain a sum certain in money as an equivalent satisfaction to their claim.[36] Where the obligation is some thing that does not require the personal qualities of the deceased, creditors have other remedies available to them. They may demand the liquidator to do or cause to be done the acts which the deceased assumed to do, they may be authorized to buy the things which the deceased assumed to deliver; they may. for good cause, refuse to accept the thing offered to them by the liquidator; and they may even move to cancel the contract that created the obligation where the deceased in his life time or the liquidator after his death has not fully and adequately performed it as agreed.[37]

Once creditors have established their valid claims against the estate, the mode of execution of their rights is in the domain of civil actions as prescribed in the Code of Civil Procedure. If the decree is for the

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[33] *Planiol, supra., Vol. 3, Part 2, p. 12.*

[34] *Corpus Juris Secundum, supra, note 6, 34, Executors and Administrators, Section 367. p. 95.*

[35] *Civil Code, Art. 1776.*

[36] *Ibid., Art. 1790.*

[37] *Ibid., Arts. 1777-79, 17 4.*

payment of money. it is to be executed by the attachment and sale of the property[38] constituting the estate of the deceased unless, of course, the liquidator or one of the heirs makes cash payment or settles the account in any other appropriate manner.[39] If the decree is for delivery of a specific corporeal chattel, it may be executed by the seizure of the property from the estate and delivery thereof to the creditor.[40] If it refers to the delivery of immovable property, the creditor may be authorized to take possession of the property and, where necessary, any person who refuses to vacate the property may forcibly be evicted out of it.[41]

Even before the debt is liquidated, if creditors show that the liquidator or the heirs are about to dispose of property constituting the estate or any part thereof, they have the right to demand deposit of security for the production of property as may be sufficient to satisfy their claim.[42] If such security is not furnished by the liquidator, creditors may demand attachment of the property forming the estate or any portion thereof.[43] Similarly, when creditors show that any property forming the estate is in danger of being wasted or damaged by any party, they may apply for an order of temporary injunction to restrain such act or obtain a similar order for the purpose of conserving the property.[44] To this effect, they are entitled to request affixing of seals on the effects of the deceased or removal of such seals therefrom. They may also request the confection of an inventory, file an objection to impugn the order of partition proposed by the liquidator or the heirs, or demand separation of patrimonies.[45] What creditors of the inheritance have to show to ask for such measures is to

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[38]Civil Procedure Code of Ethiopia, Negarit Gazeta, Extra-Ordinary Issue, 25th year No.3, Decree No. 52 of 1965.

[39]*Ibid., Art. 395(1), 396(1)*

[40]*Ibid., Art. 399.*

[41]*Ibid., Art. 402. These three forms of seizure which vary with the nature of the property so seized are known as a saisie-arret, a saisie-execution, and a saisie- immobiliere under French laws. See Amos and Walton, supra, Note 8, p. 240 foot note No. 1*

[42]*Civ. Pro. Code, Art. 151 - See also Civil Code, Art. 1988.*

[43]*Civ. Pro. Code, Art. 152.*

[44]*Ibid., Art. 154; See also Civil Code, Art. 1992.*

[45]*For a concise remark on this point see Aubry and Rau, Droit Civil Francais, Vol. 4 - 6th ed., Obligation, An English Translation By the Louisiana State Law Institute, 1965, pp. 124-25.*

convince the trier of fact that there exists:

> *an imminent risk of the assets being dissipated or diminished in value and a money debt is prima facie due to them. The advantage of this procedure is to bring the deceased's (sic) property into the safe keeping of an officer of the law pending the ultimate decision by the Court upon the validity and amount of the debt.*[46]

Other forms of remedy available to creditors of the inheritance, just as to all other creditors, are what are known as the oblique action and the Paulian action. Both are exceptions to the general rule that limits the effects of contracts only as between the contracting parties.[47]

The oblique action enables creditors to exercise all the rights and actions available to the liquidator and heirs except those rights in which the personal qualities of the deceased were the leading motives. Primarily, the right emanates from the inaction of the liquidator or the heirs to claim a debt due to the inheritance. Creditors may not preclude the liquidator or the heirs from exercising the rights and actions of the deceased. They are merely entitled to act where the liquidator or the heirs neglect the right or refuse to exercise it so as to jeopardise their claims. The action is to be employed only with the authorization of a court where the right is exigible, something more than an ordinary conservatory measure, where the liquidator, as a personal representative of the deceased, fails to act, and where such inaction imperills the rights of the creditors.[48]

The Paulian action is an instrument of revocation available to creditors of an inheritance in which they may attack in their own name acts done by a liquidator or heirs in fraud of their rights. Before closure of liquidation, creditors may attack any fraudulent act done with the object of alienating property constituting the inheritance.[49] Personal creditors of an heir who renounces a succession to which he is called may also avail themselves of the Paulian action by applying for nullity of such renunciation if it is prejudicial to them.[50]

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[46]*Amos and Walton, supra, Note 8, p. 240.*

[47]*Civil Code Art., 1952(1) See also note 8 supra.*

[48]*Ibid., Art. 1993. See also the discussion in Planiol, supra, note 5, Vol. 2, Part 1, pp. 173-74.*

[49]*Civil Code, Art. 1995.*

[50]*Ibid., Art. 993*

The action is a remedy the law provides for a creditor who may otherwise become a victim of bad faith of liquidators or heirs, or may be both "...as a debtor burdened with debts, who is threatened with suits, is naturally tempted to conceal his assets from his creditors."[51] A liquidator or an heir may make use of different means to this end.

> *He can have an understanding with a third party, who will be reputed as having acquired the property by purchase or donation, and who will secretly recognize that he is not the real owner; he can liquidate the visible property, which would easily be seized and replace it by cash or other securities easy to conceal; he can even, from pure evil intent and without profit to himself, agree to transactions which enrich his relatives and friends and impoverish the creditor. Moreover, business transactions which exist between men and which are of an infinite variety, offer a thousand opportunities to defraud creditors, under forms which can neither be proved or determined in advance.*[52]

An interesting point to dwell upon in this context is the exercise of the Paulian action by personal creditors of a renouncing heir Creditors cannot make election on behalf of the heir. Neither can they compel him to do so as the act is strictly personal to the heir. Normally, their claim is limited to his personal assets. Only by showing the insolvency of the heir may they avail themselves of the Paulian action. If it can be shown that the heir has property enough to satisfy their claims, there is no reason why they should insist on making use of the Paulian action.

We may even take this idea further Personal creditors who have entered into dealings with a renouncing heir in anticipation of his succession may not invoke this remedy even if they show the insolvency of the heir For instance, anticipatory contracts"... relating to the succession of a person who is still alive. ." are of no effect in the eyes of the law.[53] Let us consider this situation. A lends Birr 50,000 to B. In the contract, it is agreed between the two that B would pay the money back to A as soon as his father C, who, due to a serious illness, is on his death bed and has a bank savings account of Birr 500,000, dies and as soon as he gets his share of the succession. As expected,

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[51] *Planiol, supra, note 5, Vol. 2, Part 1, p. 178.*

[52] *Ibid., p. 178-79.*

[53] *Civil Code Art. 1114, "Any contract or unilateral undertaking relating to the succession of a person who is still alive shall be of no effect unless it is expressly authorized by law."*

C dies intestate. When the succession is opened and B is put to his election, he renounces the succession in favour of his two brothers D and E. Can A invoke the Paulian action against B's act of renunciation? Of course no!

When one contemplates rights of different classes of creditors of the inheritance, those with certain, due and liquidated claims do not have any problem in the collection of their claims amongst themselves as long as the assets of the estate are sufficient to satisfy all of them. But problems arise where it is obvious that such assets do not satisfy claims of all creditors. One may treat the problem from two perspectives.

The first is where the contending creditors are on an equal footing but the property forming the estate does not satisfy their claims. In this case, the rule of pro rata distribution is applied in which the estate is to be distributed between the creditors in proportion to the amount of claim each one of them shows.[54]

The other is where there are secured creditors and creditors who enjoy special privilege under the law. Secured creditors are those who possess what is known as 'real security' by way of a mortgage (hypothec) or a pledge. They have a right of preference over all other creditors and a right to follow the property which constitutes their security. Where it is mortgage, "the mortgagee may demand to be paid, out of the proceeds of the sale of the immovable, in priority to any other creditor."[55] If the immovable is sold without his consent by the mortgagor, the creditor (mortgagee) may attach it in the hands of the purchaser[56] As an act creating priority right, a mortgage drawn up in favour of a creditor of an inheritance, secures him payment of the registered amount of claim in preference to other creditors.[57] Similarly, a creditor who has secured his claim by a contract of pledge is to be paid out of the proceeds of the sale of the pledge before all other creditors to the maximum amount of his claim specified in the contract.[58] Secured creditors, in addition, do have all the rights of ordinary creditors if proceeds of the sale of the mortgage or pledge does not satisfy all their claims. Apart from and in addition to their right over

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[54]*Civil Pro. Code, Art. 403. For a comment on the idea of pro rata distribution see also Robert Allen Sedler, Ethiopian Civil Procedure, HSIU, 1968, pp. 283-285.*

[55]*Civil Code, Art 3059(1)*

[56]*Ibid., Art. 3059(2)*

[57]*Ibid., Art. 3076.*

[58]*Ibid., Arts. 2857, 2858( ).*

the mortgage or the pledge, they may apply for attachment or sale of any other property constituting the estate, just like an ordinary creditor Also, they are not bound to limit their claims on the mortgage or the pledge prior to resorting to some other property

Creditors with special privilege under the law may be workers who claim payment arising from employment contracts Tax authorities may also have similar rights. Their claims have to be paid in priority to other payments or debts.[59]

The other point worth mentioning when dealing with the rights of creditors during the liquidation phase of distribution of succession is the fate of creditors whose debts are not liquidated and those who have conditional claims over the estate. Such creditors may require deposit of securities from the liquidator or the heirs so that the latter pay their claims when the debts of the inheritance fall due or when the conditions for the claims materialize.[60]

V

Once creditors of the inheritance who have made themselves known have been paid their claim, and legatees by singular title, if any, are given their legacy, liquidation of succession comes to an end.[61] The residuary estate, if there is any may remain in common between the heirs and the legatees by universal title forming a community of property and representing the undivided estate (*masse indivise*); or it may be converted into individual shares. Normally, both forms of partition bring an end to the estate of the deceased and merge the residue with other personal property of the heirs.[62] If the property remains in common, its legal status changes from a distinct estate to that of a jointly owned property.[63] If it is divided between the heirs, the abstract fraction of each heir in the state of indivision crystallizes into separate ownership of a particular object or a specified amount of money

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[59]Labour Proclamation No. 42/1993, Negarit Gazeta, 52nd year - No.27, Art. 167. See also Legal Notice No. 197/55, Negarit Gazeta, 14th Year No, 9, Art 2(a)

[60]*Civil Code, Art 1021*

[61]*Ibid., Art 1052(1)*

[62]*Ibid., Art. 1053(1)*

[63]Ibid., Arts 1053(2), 1060(1) cum Arts. 1257-1277

As we have seen above, the doctrine of election with the benefit of inventory operates after closure of liquidation where new creditors of the inheritance appear and claim payment of what is due to them from the heir. We have also noted that the liability of the heir is limited to the extent of the value of property or the amount of money he has received from the succession. This implies that post-liquidation creditors of the inheritance have no better claims on the value of property the heir has so received than his personal creditors.[64] The heir who is proceeded against by the post-liquidation creditors of the inheritance is expected to produce a statement showing what the succession was made up of and the value of property he has received. Where no inventory is taken or where the document purporting it cannot be produced by the heir, creditors may establish the property that constituted the estate and its value.[65]

If the creditors can show an act of concealment of property forming the inheritance by the heir, his bad faith is presumed. They shall be believed on their mere affirmation with regard to the value of the thing. If the heir contests the valuation, creditors may simply confirm on oath that their evaluation is made in good faith.[66] The heir may also not be relieved of his liability by showing the loss of the thing or the deterioration of the value once it is established that he has received it as his share of the residuary estate.[67]

Another problem worth mentioning is the manner of initiating proceedings by the post-liquidation creditors of the inheritance where there are several heirs of the deceased. Is a joint and several action feasible? Yes and no.

Yes; where the hereditary estate is held in common between the co-heirs as a joint property In so far as their relationship with the creditors of the inheritance is concerned, heirs who hold a hereditary estate in common are co-debtors to the extent of the value of property they jointly own. Just as personal creditors of each heir may attach the share of his debtor, creditors of the inheritance who can show a valid claim on the jointly owned property may attach this particular property To this extent, co-heirs are assimilated to co-debtors who shall be jointly and severally liable.[68]

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[64] *Ibid.*, Art. 1054.

[65] *Ibid.*, Art. 1055.

[66] *Ibid.*, Art. 1056.

[67] *Ibid.*, Art. 1057

[68] *Ibid.*, Art. 1062(2) *cum* Arts. 1259, 1260, 1896.

No; where the heirs have effected partition and thereby taken their respective shares. Creditors of the inheritance are supposed to divide their claim among the heirs in proportion to the value of the share received by each heir. But this does not imply that creditors are precluded from joining all the co-heirs in a proceeding. So long as the liability of each heir is stated in proportion to his share, the rule of joinder of parties contained in the Code of Civil Procedure may be employed by the creditors.[69] Again, if all the co-heirs are proceeded against but some of them are insolvent, creditors of the inheritance have a right of recourse against the solvent ones. The portion of the debt of the insolvent heir shall be divided pro rata among the other ones.[70]

The rule of proportional allotment of debts of co-heirs is not necessarily employed by creditors where the debt due to them is indivisible.[71] Indivisible debt in this context refers to a right *in rem* in which the creditor can follow a particular piece of property. The heir who has received such property may not invoke this rule against the creditor so that he divide his claim among all the co-heirs. The remedy available to an heir who is evicted or dispossessed by creditors is recourse against his co-heirs. As co-heirs owe to each other the warranty which a seller owes to a buyer, he may demand that other co-heirs restore the amount he had paid more than the portion he was actually bound to pay [72]

An interesting issue to be taken up at this point is the position of a legatee by singular title vis-a-vis the post-liquidation creditors of the inheritance. Although bequests made to a legatee by singular title are themselves treated as debts of the inheritance during the process of liquidation next to claims of creditors and debts regarding maintenance,[73] there is a possibility where such a legatee may be held liable to the debts of

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[69]*Civ. Proc. Code, Art. 36(1) "All persons against whom the right to any relief is allaged to exist, whether jointly severally or in the alternative may be joined as defendants where, if separate suits were brought against such persons, any common question of law or fact would arise."*

[70]*Civil Code, Art. 1111.*

[71]*Ibid., Art. 1110(1)*

[72]*Ibid., Arts. 1097(1), 1113 cum Arts. 2281-2283.*

[73]*Ibid., See the heading of Title 5, Chapter 2, Section 4 of the Code which says "Payment of the debts of the succession" and the place of a legacy by singular title in the order of payment under Art 1014(e)*

the succession. Creditors may bring their claim against the legatee but his liability is limited to the extent of the value of his bequest. Furthermore, the action is to be brought only when the heirs fail to discharge their obligation. The legatee may compel creditors to bring an action against the heirs if they have not done so. For this purpose, he is assimilated to the status of a simple guarantor in the law of obligations.[74] Hence, he may avail himself of any defence open to a guarantor as soon as he is proceeded against. He may invoke the defence of benefit of discussion and demand creditors to discuss the assets of the deceased that have gone to the heirs or realize their available real securities.

Even if he has not invoked this defence of benefit of discussion, a legatee by singular title may pay the liquidated claims of creditors and substitute himself for the creditors of the heirs. As a creditor, he may compel the heirs, who alone bear the ultimate burden of debt payment, to restore the sum he has paid.

There are two limitations of his right in this regard, however:

a) a legatee by singular title cannot compel heirs to pay over and above the value of property they have received even if he can show that he, for one reason or another, has done so; and

b) a legatee by singular title has no right of recourse against another legatee by the same title.[75]

VI

We have seen that after closure of liquidation personal creditors of the heirs have no lesser claim on the property which their debtors have received from the succession than creditors of the inheritance.[76] If the property is held as a hereditary estate between the co-heirs, creditors of an heir may apply for partition so that they may attach the share of the heir against whom they have a valid claim.[77] They may also invoke the Paulian action to impugn a partition made in fraud of their rights where they have made an application for partition earlier and where it took place without their knowledge or participation.[78]

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[74] *Ibid.*, *Art. 1058, 1934, 935.*

[75] *Ibid.*, *Art. 1059.*

[76] *Ibid.*, *Art. 1054(2)*

[77] *Ibid.*, *Art. 1081(1), (12 0(2)*

[78] *Ibid.*, *Art. 1109.*

Once the property forming the residuary estate is partitioned among the co-heirs, personal creditors have a right of claim over the share of their debtor, just as they have a right of claim over other property of the heir.

One last point to be raised here is the fate of personal creditors of a renouncing heir who have come to invoke the Paulian action after partition but before the lapse of the two year prescription period under the law.[79] If these creditors show the insolvency of the renouncing heir, his act is obviously prejudicial to them. But can they demand payment of their claim from the other co-heirs in proportion to the benefit they have derived from the act of renunciation?

As a rule, the liability of co-heirs due to the insolvency of one of them is limited to the claims of creditors of the inheritance. But in this case the claimants are creditors of one of the co-heirs and not of the inheritance. One may argue that they are under no obligation to satisfy claims of personal creditors of a renouncing heir But a close reading of the law would seem to suggest otherwise. We have seen above that the Paulian action is a remedy available for creditors who may be frustrated by the bad faith of a debtor. So long as a creditor is not barred by limitation of actions, he may apply for nullity of the act of renunciation only up to the extent of what is due to him. The speedy effectuation of the partition process must not operate to his detriment. For the purpose of protecting the interests of personal creditors of such an heir, there is no reason why the court should not revoke the renunciation so that other heirs who have taken the share of the debtor satisfy claims of his creditors to the extent of the value of property or the amount of money they have so received.

To sum up, election under the 1960 Civil Code of Ethiopia, just as in many other legal systems, is the option available to heirs and legatees to make a choice between two alternative and, at times, inconsistent rights. Both alternatives have their own legal effects before and after the process of liquidation of succession is wound up. The beneficiary needs to weigh the possible advantages he may derive from his act of acceptance or renunciation prior to exercising his right of election. Likewise, the right of recourse available to creditors of the inheritance and those of the heirs, by and large, depends on the careful assessment of the option taken by the heirs and legatees.

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[79] *Ibid., Art. 993(1)*