THE BENEFIT OF THE SEPARATION OF ESTATES

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In consequence of the 'confusion' which occurs between the personal estate of the heir and that of the inheritance (in succession), the creditors of the decujus become creditors of the heir, and those who were already his creditors can obtain satisfaction of their debts from the property inherited. This state of affairs can prove to be prejudicial to the creditors and legatees of the deceased, especially when confronted by an heir who is inundated with debts. In order to safeguard their interests these individuals may resort to the "Benefit of the Separation of Estates."

As in the Italian Civil Code of 1927, this Institute forms the subject-matter of a separate title under our Civil Code, coming directly after "Priveleges and Hypothecs". The new "Codice Civile Italiano" and the French Civil Code have perhaps more appropriately, placed the Institute under the Law of Succession; but our legislator preferred to keep the "causes of preference" side by side. In fact section 3 of Ord. XI of 1856, which brought this Law up to date, says that "Le cause legittime di **prelazione** sono i privileggi, le ipoteche, e il 'benificio della separazione del patrimonio' "

This Institute derives from the "Separatio Bonorum" of Roman Law; but whilst the latter brought about a 'complete separation' of estates, keeping the estate of the decujus exclusively for the satisfaction of his creditors and that of the heir for the satisfaction of his personal creditors, in modern law there is no such absolute seperation. In the words of **S. 2201** of the Law "The benefit of seperation of estates is the right which the creditors of a deceased person and his legatees have, to demand that the property, both movable and immovable, of the inheritance be seperated from the particular property of the heir, and applied to the payment of their respective debts or legacies **with preference over all the heir's creditors**" i.e. this benefit ensures the "preferential treatment" of their heirs and legatees of the decujus, but it does **not** create two distinct masses and even the creditors of the heir can resort to the property of the inheritance for the satisfaction of their claims, after the creditors of the said decujus have been paid. Another characteristic of the said Institute, which again serves to distinguish it from the "separatio bonorum", is that since the benefit of separation is granted in the interest of the creditors of the decujus and not in that of the heir — there is nothing to stop the creditors and legatees, who have had recourse to this benefit, from further enforcing their claims on the personal property of the heir.

It has often been said that the "Benefit of the Separation of Estates" is diametrically opposed to the "Benefit of Inventory" in the Law of Succession — both produce a separation of the property of the inheritance from that of the heir; but the latter is granted to the heir in order to separate his property from the rights of the creditors of the inheritance of the legatees, whilst the "Benefit of Separation" is granted to the creditors of the deceased and to the legatees as against the particular creditors of the heir, who cannot demand this separation against the creditors of the inheritance. A judgement of the Court

of Torino (Moderni vs. Erba 25th July 1884) held that "L'accetazione della eredità col benefizio d'inventario esime i creditori del defunto dal chiedere la separazione dei patrimoni, giacche' quest'articolo è scritto unicamente nell'interesse dei creditori che vogliono premunirsi nel caso di decadenza dell' erede dal beneficio d'inventario'.

"The benefit is granted to all the creditors of the deceased indistinctly — priviledged,, hypothecary and simple, and to the legatees who become creditors as soon as the succession is opened". Although Maltese Jurisprudence on this Institute is very limited indeed, the question as to "whether there is also need for the hypothecary creditors of the deceased to resort to this benefit" appears to have been of some concern to our Courts, in the past. In **Mollia vs Ferriggi** (XVI.1. 10th June 1898) the Court of Appeal held that "I creditori ipotecarii del defunto **non hanno bisogno** di valersi del beneficio della separazione dei patrimonii per non essere pregiudicati dai creditori particolari dell'erede." In arriving at this decision the Court based itself on a previous judgement of the same Court — "come e' stato ritenuto da questo Corte nel'Concorso dei creditori dei fratelli **Zammit vs. Negte. Paolo Ellul'** " (3rd Feb. 1894). It is true that, in relation to the benefit of seperation, this Court said ". . . si verebbe a ritenere che quella separazione sia una misura che riguarda **solamente** i creditori chirografari o quei creditori rispetto ai quali o non sia iscritto la ipoteca contro il defunto, ovvero tale ipoteca abbia al tempo della morte perduto la sua efficacia; "but then the Court goes on to say **"cio' pero' non e' da ritenersi** poiche' la legge non fa una tale distinzione e quindi non e' neanche' a farsi dai tribunali" and in another part of the same judgement the Court quotes il "Trattato della separazione del patrimonio del defunto da quello dell'erede" by Prof. Melucci which says "Non osservando le formalita' prescritte per la conservazione della causa legittima di prelazione derivante della separazione dei patrimonii, il creditore del defunto **viene messo al pari** del creditore dell'erede e concorre con lui senza alcuna prelazione, e **sebbene il creditore** del defunto **sia un creditore ipotecario** . . ." In arriving at its decision, which is meant to be on this latter judgement, the Court in Mallia vs. Ferriggi appears to have missed out much that was relevant in the said judgement. The benefit is personal to the creditors and legatees who have made the "demand", and "shall not operate except in favour of the persons exercising it" **S. 2209(2)** This is also the accepted view in both France and Italy— "Questa preferenza non spetta a tutti i creditori del decuius e a tutti i legatori, ma soltanto **a coloro che** l-abbiamo esercitata." **Torrente Laurent** dismisses the idea that the creditors and legatee, who exercises this right, may be acting under a tacit mandate or as a negotiorum gestor of the others and he is in agreement with the French Courts "che' la separazione dei patrimonii non puo' giovare se non **a quelli che l'hanno domandato.**"

The Creditors and legatees cannot exercise the "benefit of Separation of Estates" if there has been novation, by acknowledging the heir as the debtor (2209(11)). Novation may also be implied from certain acts performed with the heir as representative of the decujus.

The benefit may be exercised "in respect of **all the property indiscriminately and for the seperation of one or more things specified** in the demand **(2209(3))** In Italy, in the words of **Torrente,** "la separazione ha carattere particolare e non universale: essa si

esercita non sull'intera massa del patrimonio ereditato, ma sui singoli beni che la costituiscono." As in France and Italy, in Malta this benefit can be exercised over both **movables and immovables**. It takes the form of a "judicial demand" in case of movables and in regard to immovables there is a "registration" of the benefit, in the manner prescribed for the registration of hypothecs. This is in keeping with Italian Law; but there seems to be a divergence of opinion in France, where according to **Demolombe** both doctrine and jurisprudence are "uncertain and obscure" with regard to the manner in which this benefit is to be exercised. This obscurity is to a great extent due to Demolombe himself, in the opinion of **Laurent** who is in agreement with **Pothier** that "a solution to the problem can be found in the text of the law itself." The relevant section of the law (S.878) speaks of "a demand" and this demand can be none other than **"a judicial demand."** In regard to immovables "oltre l'iscrzione occorre anche' una domanda" — **Laurent.** Thus in this case the author is of the opinion that registration is not sufficient; but that the demand prescribed in the Law should also be put forward. On the otherhand, our Law and its Italian counterpart state quite clearly that "the registration takes the place of such demand"

In Malta this right may only be exercised within the period of **one year** from the opening of the succession" **S. 2203.** Italian Law prescribes the rather short period of three months and Sec. 880 of the French Code says that this right may be exercised over immovables only "finche' esistono in potere dell'erede". In regard to movables the term of prescription of three years would apply. It is evident that separation becomes impossible after the lapse of a considerable period of time for it is a universal presumption that with the passage of time the confusion between the estates of the heir and the inheritance increases and a day arrives when it becomes impossible to distinguish the one from the other, especially in regard to movables.

Our Civil Code is in keeping with the Italian Code of 1927 in regard to the **"alienation of the hereditary property"**, though no mention of such sales is made in the present Italian Code and the French Civil Code. The Law distinguishes between alienations made prior to the exercise of the benefit and those made after the benefit is exercised:—

In the former case the benefit may still be exercised over the price "which is still due" **(S. 2204)** If the price has been paid, it becomes one with the property of the heir and thus escapes the hereditary creditors — this being a consequence of the right of ownership and a measure of the respect which is due to it. If the property is alienated after the exercise of the benefit, the rights of the creditors and legatees continue to subsist in relation to the immovable property; but any such alienation of movables (except with regard to litigious rights) shall remain unimpaired. In **"Buhagiar utrinque"** (12th Feb. 1897 Vol. XVI. 11) Judge Giovanni Pullicino said that "I creditori del defunto ed i legatori che esercitono l'azione di separazionen dei patrimonii **possono chiedere** in riguardo **ai mobili ereditarii le cautele ed i provedimenti conservatori** che la Corte credesse necessarii nel loro interessi." This view is upheld by the French Courts and by Demolombe. Prof. Melucci makes reference to it in his treatise on the Seperation of Estates.

Although the French Civil Code makes no direct reference to alienations of this sort, the French hypothecary low in relation of immovables

lays down that "the heir may not make any alienation prejudicial to the creditors within the period of six months from the opening of the succession." A contrariu sensu one could argue therefore that sales made after this period of six months would remain unimpaired and the price would be the property of the heir. Where the sale of movables is concerned, **Laurent** affirms that the creditors have no 'droit de suite' against the 3rd party in possession.

One of the effects of this Institute is the **right of suit** of the creditors and legatee against third parties in possession of hereditary immovables. As to the moment when the benefit becomes operative, one must refer to the date of registration. A registration effected within three months from the opening of the succession will be operative from such date, in regard to immovable alienated within that period **(S.2208)**; if the benefit is registered later, it will operate from the day if registration.

The chief aim of the benefit is to grant the creditors and legatees of the decujus **a right of preference over the particular creditors** of the heir, even though priveledged and hypothecary; and "Kontra wirt battal **ma' tistax tintalab** is-separazzjoni tal-patrimonju għaliex sakemm il-wirt jibqa' battal hemm partrimonju wieħed waħdu" — **Giuseppe Chetcuti vs. Valentino Malia,** Harding (22nd Nov. 1934-XXIX.11. P109). The only effect of the Seperation is that of **protecting** the said creditors and legatees from any prejudice they might sustain in consequence of the claims of the particular creditors of the heir. However, their internal relations remain unimpaired and they retain the same order of ranking" . . . . this benefit maintains in favour of all and each of them, in competition, such rights only as are competent to them respectively, according to the nature and the conditions of their debts and other rights over the property of the inheritance" (S.2202). The death of their debtor cannot in any manner alter the internal position of the creditors, making it more favourable and otherwise. It can only bring about a new class of creditors — the "legatees" who rank after the creditors.

"Tutti i caratteri che abbiamo delineato inducono a ritenere che per effetto della separazione viene a costituirsi un vero e proprio diritto reale di garanzia sui beni che ne formano l'oggetto, anologo al pegno e all'ipoteca" — Cicu.