Notaries, *Saisine*, and Family Secrets in Modern France

American Society of Legal History Lecture
Fall of 1977
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In 1971, the annual meeting of the notaries of France took place at Vittel. There had been new legislation concerning succession that year, and since successions constitute almost half of the business of a notary, the proceedings were largely devoted to estate transfers upon death.

One of the major papers was given by a Parisian notary, Maître J.-J. Préa. His main purpose was to show that French successoral procedures were, as he said, "aged and ill-suited to modern times," but he began by trying to reassure his colleagues that philosophically the principles of the age-old system quite laudable. To do this he made comparisons with other nations' systems. "Anglo-American" procedure, Maître Préa told his colleagues, differs most strikingly from the French, but I dare to say that how he argued this will startle students of Anglo-American law.

The Anglo-American system, Maître Préa put it bluntly, is extremely authoritarian. This stems from the power of the courts--the court of probate in the United States--to supervise successions from the very moment of death. How strange it is, Maître Préa opined, that the English "who by nature are hostile to all state intervention, have accepted such a direct constraint by the courts upon their private life." No Frenchman could abide such a state-controlled system--*dirigist* was Maître Préa's word, one of his favorite terms--where the courts appointed an executor or administrator to lay hold of the estate instantly, settle its debts and pay its taxes, and then only distribute the remainder to the heirs or beneficiaries according to the testament or, if there was not one, according to the local rules of intestate succession.

Maître Préa did not need to spell out for his colleagues what characteristic of French law made Anglo-American law, by comparison, seem so autocratic. It was the process of *saisine*. In its origin, *saisine*, like its English counterpart, seizin, referred simply to taking possession of something, but already in early modern times *saisine* became restricted to mean the instantaneous possession of an estate by the heirs of the deceased. The Code Civil preserved this practice, so that in France the family heirs have full legal possession of the deceased's goods before any governmental authority has cognizance of them. A certain quasi-official personage, however, does enter the affair between the moment of *saisine* and the official registration of the succession: the notary. The notary may well make an inventory of the estate himself, at the heirs' request, but in any event it is he who authenticates the estate declaration when it is completed by the heirs, and then submits it to the government bureau.

It takes little working of the imagination to wonder what happens to the estate of the deceased--especially to the moveables that can be easily concealed--in the two different systems. On one hand, the Anglo-American, a certified and bonded executor or administrator takes possession in order to settle the debts of the *de cujus* and pay the estate taxes before distributing the remainder to the beneficiaries; on the other hand, in French successions, the beneficiaries themselves are allowed to have full possession of the entire estate for weeks, even months, before making a public declaration of its contents. Demon fraud lurks in the offing.

Though they are the same word in both languages, the *fraude* involved in French successions is not the same as fraud in English estate dealings. It is much less: *fraude* usually brings no more than a fine, not the criminal sentence that fraud can bring in common law.

Fraude is more like a national sport: *homo gallicus ludens*.

Conventional wisdom has it that *saisine* was generalized during the course of the 15th and 16th centuries as the right of the heirs of the deceased to continue family possession of lineage property against efforts to possess it by a feudal lord to whom some form of indenture might be due. Possession and proprietary right got confounded in ways that modern scholars still quarrel about, and the issue was complicated further in the 18th century when the *coutumier* notion of *saisine* was connected with a similar the principle found in France's other law, the *Corpus luris Civilis,* that "the heir continues the person of the deceased" (in French: "la continuation de la personne du défunt")

A great deal of modern jurisprudence concerning *saisine* in the Code Civil swirls around the seized heirs' obligations to requite the debts of the deceased. Common law hardly knows this problem: the executor or administrator resolves it before the heirs or beneficiaries are given possession. In modern French law, however, in an age where so much of the wealth lies in moveable property that is easily hidden, it cannot be a happy thought for the creditors of a deceased person, known to have been heavily in debt, that the heirs who succeed to the estate will have uncontrolled possession of it for many weeks or months before deciding whether to accept or reject the heir-ship. If the debit-credit balance is nearly even in the estimation of the heirs who are the first ones to know the exact dimensions of the estate, and know it secretly, how great the temptation to keep for one's self the secret wealth in moveables, renounce the heir-ship and let the creditors realize what they can from the property that cannot be concealed. However much the interest of creditors may swell the speculative literature on *saisine*, the instances of it are few in practice and less academically interesting than the contest between the heirs and the state. Almost all countries influenced by the Napoleonic Code have modified the doctrine of *saisine* (if they ever adopted it at all) so that governmental officials have some kind of control early in the succession. The French government tried for a century to limit *saisine* by such *de facto* means as requiring that safe deposit boxes be sealed the moment of demise, but, *de iure* France has remained the only land of pure *saisine* by heirs. The attacks upon it during the past century have almost all been by those who are concerned with the payment of succession taxes. If my image of a mafia forty million strong is correct, it is not against other individuals who are creditors of the deceased whom the seized heirs are inclined to cheat, but against the state, which is the opponent of everyone.

To understand the conjuncture of *saisine*, family secrets and fiscal fraud in modern France, we must recall the truly significant difference between the *Code Civil's* and Common Law's succession principles--something much more important than the procedural contrast between, them that Maître Préa chose to make. That greater principle is the power of the deceased to make testamentary dispositions. If we were to envision that the arm of the English legal profession which deals with estates--i.e., principally, solicitors--were to have been meeting at the same time that the French notaries were listening to Maître Préa's discourse, we can hear one of their number conjuring up an image of French authoritarianism with English freedom by pointing to the French system of "forced heir-ship" embodied in the *Code Civil* contrasted with the broad testamentary liberties in Common Law. In France the principle of forced heir-ship requires that at least half of every estate, more if there are more than two children, must be given to the direct descendants and must be shared equally by them. This leaves a "disposable portion" of up to fifty percent, but this disposable option is not exercised in most successions--proven simply by the fact that the majority of French successions still today are intestate, even a large percentage of the very wealthy ones. The seized heirs themselves make the division. This is for

the most part true even in testamentary successions, since the purpose of testament is usually to designate legacies to collateral relations, servants and charities, within the limit of the disposable portion--legacies that must be requited from the *masse successora!e* by the seized heirs before they divide the remainder. That remainder, it will be recalled, must be the largest part of the estate: legacies to non-heirs must be reduced or annulled if they exceed the disposable portion and infringe upon the heir necessary portion.

In respect to the deceased person's powers, therefore, the French legal system is definitely more authoritarian and *dirigist* than the Anglo-American. Dead British and Americans (one might say) are truly freer than their French counterparts, due to their great testamentary powers.

The state, therefore, does not interfere in the private lives of British and Americans when the courts create executors and administrators to control the succession; rather the state is being the servant of deceased persons, making sure that their last wills and testaments are carried out.

To listen to 19th-century opponents of the Code Napoleon's forced heirship, such as Frederic le Play, France would soon be depopulated because families would avoid having children for fear of not being able to support any one of them decently due to the equal division of the patrimony among them, or that the French economy would be constantly damaged by the fragmentation of viable agricultural or commercial patrimonies; or--what some thought was the worst of all-- indifference to parental authority would be bred by the children's certainty in law that they would inherit their parents' fortune. According to popular belief, cafés of the *Boulevard des Italiens* were filled with such prodigal offspring whiling away the time of their parents' last years. The restoration of testamentary power would correct these ills of familial discipline as well as keep patrimonies unified by advantaging one child when necessary, said Fréderic le Play.

Few French risked advocating entail or enforced primogeniture, since both of them had been so indelibly marked as feudal privilege during the Revolution; still, the business community in France and elsewhere on the continent was certain that the success of English overseas commerce was due to the corps of cadet sons without expectations who had to make their own fortunes. Proto Gallup opinion polls showed that to be true.

The late 19th century is filled with commonsensical explanations of the goods and ills caused by forced heirship and equality among heirs. It is my impression that they come in mutually annulling pairs, and so can be ignored on principle; but in any event they seem to die out around the turn of the century because of a new element in successoral matters which could only work to bring the family together: the states's becoming an heir of sorts in the form of succession taxes.

Succession taxes began to appear in the late 1800's in France, as elsewhere in Western nations, and reached their peak in World War I. The depredations of a non-family heir (for the state is always so regarded) made it the best interest of all necessary heirs of the family to reach tacit agreement about the division and transfer of the patrimony. Forced heir-ship always led to many more lifetime transfers than was true in testamentary succession, for if you must give equally to children at death, why not begin the process while you are still alive.? Enforcement of succession taxes therefore required that *inter vivos* gifts be included in the calculation of equal shares to heirs at the time the succession took place. Correspondingly, if fraud were to be effective, it would have to extend throughout the duration of a given generation. This follows from the fact that before succession taxes existed there had been no particular reason to hide lifetime transfers; now it became necessary to do so if evasion of succession taxes were to be

effective. Secrecy in family matters became a lifetime proposition.

We have thus a pair of legal principles, forced heirship and saisine, counterbalanced by a pair of actual practices, family secrets and *fraude*. These pairs enjoy a congenial relationship, for the unity of forced heirship and *saisine* derives from the logic that the same people should have possession of the estate instantly whom the law decrees must possess it eventually. The French, to my knowledge, do not have the dramatic convention of the reading of the last will, so common in English novels and theatre. In France everyone knows what his share of the estate will be, unless the nearest of kin is beyond the sixth degree, in which case testamentary disposition becomes the rule. In the usual cases, where direct descendants' succeed, a lifetime of preparation for the moment will have occurred. And the greater the anticipated fraud, the greater the need to avoid disputes which might lead to litigation and the exposure of the entire estate to the eyes of agens of the finance ministry. We must consider in social historical terms the very positive influence of estate taxes upon family harmony.

Logical as the interrelationship of forced heirship, *saisine*, family secrets and fraud may be made to appear, it is an unholy alliance in so far as illegal practices reinforce legal principles. The reason for the anomaly, of course, is that succession taxes constitute an administrative expedient which is contrary to the much older philosophy of the law which promotes and protects family interests. Those who commit *fraude* can well believe they are obeying an ancient principle of familial rights against contradictory modern legislation. The literature to this effect is abundant, and I have often heard it attested to by French people, even notaries.

The main elements of the battle between the French government and its citizens over the collection of succession taxes are well enough known not to require more than enumeration: sealing of safe deposit boxes at the moment of death; divulgence by banks and insurance companies of the *de cujus'* accounts; bearer bonds; foreign-based securities; foreign bank accounts; objets d'art; jewels; and most of all (some say) gold. The citizens have won significant contests in recent times. As of 1 January 1960, stringent rules about sealing safe deposit boxes and divulging bank and insurance records were relaxed, after almost a century of constant pressure to make them work. This was not done as some Gaullist government's concession to the wealthy, but came in recognition of reality. Just last summer a distinguished French notary, caretaker of a fabulously wealthy family, related to me that in the five years before 1960 he and his staff of 65 people found nothing of value in safe deposit boxes opened under the supervision of revenue agents in the presence of the "seized" heirs and their notary. One way to avoid having safe deposit boxes inspected was to incorporate in a civil company (*société anonyme*), which never dies in the eyes of the law. That same notary told me that one family incorporated itself in the name of its dog. "The caninified body never dies" (*corpus canis numquam moritur*) a modern Baldus de Ubaldis might have quipped.

Surrender on the succession tax front has been offset, however, by a new offensive on an allied front, income taxes. During the 1960's and 1970's there has been a steadily growing policy to watch for signs of new wealth in a form that cannot be hidden, like yachts and second homes, and by requiring that jewelers and art dealers report sale of objects which the buyers can hide. These and many other "notorious and ostentatious expenditures" (as the phrase goes) give a silhouette of the annual change in the enrichment of the individual throughout his lifetime. This part of the annual income tax report is kept permanently. In this fashion *inter, vivos* gifts are identified in the estate of the recipient, not that of the donor, and clearly known benefits *causa mortis* are measured against the apparent change in the wealth of the heirs.

Such a system is obviously only approximate in gathering information about wealth, and

nothing would seem more easy to do than simply to keep secret things secretly transmitted. But such is the Gallic character that only the truly eccentric Frenchman would not live a style of life appropriate to his means. The source of the means may be guarded secretly, but the dispensing of it cannot be so to any but a small degree. Home, table, car: these are known. The automobile is illustrative. No more obvious way to camouflage private wealth from the eyes of those looking for outward manifestations of it would seem to exist than to drive a wreck of a car, or one markedly punier than one's means. But it is just not done. The French hierarchy of cars on the road parallels the hierarchy of wealth of the drivers, and for this reason the annual declaration of one's automobile(s) of the year is a basic part of the measure of the "train of life" (*train de vie*) in income tax declarations.

The government need not prove, nor even accuse the individual of the source of hidden income: it merely shows evidence of its existence and imposes a supplemental tax. The individual may then escape the tax by proving that part of his patrimony was sold to allow for an exceptional expenditure in a given year, but the question may then arise where did that piece of the patrimony come from in the first place? Patrimonial secrets and fraud thus reach out and embrace income taxes--or, better to say, vice versa.

The decision to concentrate upon revenue taxes in order to control succession taxes--a decision consciously made by the French administration in the past decade and a half, as far as I can discover--makes sense in terms other than its ease of enforcement. It makes the collection of the revenue more regular and frequent. For one thing, the utility of estates taxes for the fisc varies inversely as the life expectancy of the individual (which has grown by over fifty percent during the past century.) For another, succession taxes in France are levied not on the estate as a whole, as in the United Kingdom and the United States federal instances, but upon the individuals who are benefitting, graduated according to the familial relationship with the deceased, as is done also on the state level in our country. This individualizing of succession taxes makes them more
easily assimilated with the income tax.

In short, my whole topic of succession tax deliquesces in the last decades of the 20th century and begins to flow in the channel of revenue taxes. Much of what I thought would be important in the struggle between state vs citizen turns out to lead into an annual struggle over revenue taxes--something outside the scope of this paper. Still, much of what I have learned about succession practices from the half dozen French notaries I interviewed in preparing this paper may be of historical interest.

The notary's role in succession poses for him a dilemma. His office is venal and hereditary, a true remnant of another time and order of things. He authenticates transactions between private parties and reports them to the state if they involve taxation. Since the largest part of the French state's revenue comes from indirect taxation, such as tax value added on real property transactions, the notary plays *de facto* the role of a public servant by validating the sums involved. Fraud in these transactions are legion, taking the form usually of understating the actual sale price in order to lessen the tax value added. Notaries surely know that money has been exchanged under the table before the parties come to him to complete a sale, and some notaries will force the parties to raise the declared price of the sale in order to be more in line with known market prices.

Notaries thus develop a thorough knowledge of affairs concerning realty, land and houses, in familial patrimonies, and realty is a fair indication of the extent of personal wealth. Notaries deal with these matters over many generations of the same families; in fact, the main

reason the notarial office is venal and hereditary still is that the same notarial families guard the clientele families' secrets over many generations. Notaries are bound by rules of confidentiality similar to those of lawyers, doctors and priests. The registers, or *minutes,* of a notary's activity can be subpoenaed by the courts--but most of the information it has about a given individual is already filed with governmental agencies, albeit widely scattered among them and thus more easily gathered from the *minutes*. What notaries know about family secrets that is not found in authenticated acts would be of inestimably greater value to tax agencies, but that data cannot be asked for or subpoenaed.

It was, therefore, the key question of the set of questions which I put to the notaries was whether they felt pangs of conscience when they were asked to authenticate for purposes of taxation declarations of estates which they knew full well were far from truthful. The answer was always the same, as if learned by rote from the manual of notaries: we are obliged to tell our clients what the law is and what the penalties for fraud are, but once this is done we are simply executing a legal formality.

I asked also, of course, about *saisine* as a main reason for *fraude*, but was surprised to be answered regularly in the negative. Those things which can be hidden, like gold, will always go somehow to the heirs unbeknownst to the state, even if the convenience of the heir's *saisine* were ended. Tighter control of *post mortem* transmissions will only lead to greater use of *inter vivos* transmissions, they said: the will to fraud in order to preserve patrimonies is far stronger than the power of the state to tax them.

Notaries in provincial cities and in villages do not think that *fraude* is very important in successions because there just is not a very large concealable element in the patrimony. But in Paris, where the really great patrimonies reside, successoral *fraude* in terms of easily negotiable bonds, gold, jewels, art and the like is very great. Provincial notaries, whom I happened to interview first, told me I would find this to be true, and Parisian notaries later confirmed it. I was always lectured, however, on the relatively inocuous character of *fraude* in French law and reminded of the Anglo-American devices of trusts and foundations to preserve family fortunes, the first of which, trusts, is forbidden in the Code Civil, and second also if it benefits an heir.

The extent to which family secrets was an effective device to evade estate taxes should be revealed in cases of contested successions. If all the heirs of the degree of relationship that have *saisine*--usually the surviving spouse, surviving children and grandchildren of pre-deceased children (by representation)--have the right to enter the house and possess goods upon the demise of the *de cujus,* and if the intent to fraud is common to all of them, are we not likely to have many cases of contested successions? They are, in fact, quite rare. Since successions and most often intestate in France, division of the estate is made by the heirs themselves; hence there must be a very strong sense of trust and honesty between family members.

I do not argue that there is any greater familial piety or fraternal affection among the French than among other peoples, but rather only that they are very calculating and self-controlled in guarding the secret of the family's patrimony. If this be true, then the administrative shift to scrutinizing individual incomes and expenditures is shrewd indeed: the annual growth in the children's declared worth--i.e., new patrimoni nourished from old ones--will prove more controllable than trying to understand the lifetime history of a patrimony only at fifty-year intervals, *causa mortis.* What will probably ensue--what is growing yearly, I was told--is the flight of wealth to foreign tax havens, or *les paradis fiscaux* as the French call them. These have not been used at all as much as one would think, up to the present. The domestic ways of *fraude* seem to have proven quite adequate up to now.

Maître Préa, in concluding his paper, allowed that the French successoral system was too "autonomous and anarchic," which he seemed to regard as less damning than the Anglo-American system's "authoritarianism and *dirigisme*". The greatest complication comes in international successions, where the deceased holds considerable property in two countries. This will be ever greater an issue if French patrimonies seek fiscal paradises abroad. Could the whole tendency towards fraud be reversed by making the penalties for it greater--such as adding criminal penalties to the usual fines? For reasons not yet quite clear to me, there has not been a great clamor for this. Some steps were taken in this direction last spring by the French parliament, and I would like to relate this as a final instance of the baffling differences between French and Anglo-American ways.

The legislation to which I refer was initiated to protect citizens from overzealous tax agents. It seems that several *petits commerçants* hade committed suicide leaving notes blaming penetration of their private lives--let us say, family secrets–by revenue personnel. This concerned income tax fraud, to be sure, but as I have said it is very difficult nowadays to separate this from succession fraud. Among the new provisions was the establishment of a special tribunal to deal with cases of *fraude* by the very wealthy. Those cases, involving tens of thousands of dollars, would automatically pass out of the hands of ordinary tax agents into the care of a blue-ribbon tribunal.

Two new penalties were voted. As I see them, and I believe all of you will likely agree, they amount to striking the *fraudeur* with a hammer in one case and a feather in the other--although not in the same match of crime and punishment that the French seem to have viewed them. The first called for a suspension of the culprit's right to exercise his profession for a year or two. That is so drastic (deny a lawyer to deal with his clients, or a doctor with his patients, for a year?) that I cannot imagine its ever being talked about in our law; but the French National Assembly seems to have passed it almost without discussion.

The second penalty, however, was very heatedly discussed, and many amendments to it voted upon. According to the report in *Le Monde* that I read, the deputies of all parties seemed to be very agitated, but finally a majority of the deputies came to an agreement, which became law: super-rich *fraudeurs* stood to be penalized by having their driver' s licenses revoked for a year or more.

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