ADMINISTRATION OF GERMAN DECEDENTS' ESTATES

A COMPARATIVE STUDY OF CONFLICTING ASPECTS OF AMERICAN AND GERMAN LAW OF THE ADMINISTRATION OF DECEDENTS' ESTATES AND LEGAL PHRASEOLOGY INCIDENT THERETO*

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(I) *Introductory*

In working on estates assets of which are located in foreign countries, or where there are other reasons for proceedings in a foreign country, American lawyers are often faced with peculiar difficulties arising out of a system of practice, law and custom differing radically from our own. The present discussion will concern itself with some of the difficulties arising in the subject matter of wills and estates as between the United States and Germany.[1]

While these difficulties are due fundamentally to substantive or procedural variance between the two given jurisdictions, they are often attributable to a misunderstanding of terms. The American attorney who wishes to undertake some foreign proceeding goes to the library, takes a foreign language dictionary from the shelf, and translates the terms with which he is familiar in American practice into the corresponding dictionary equivalents in the foreign language. He then feels confident that his correspondent in the foreign jurisdiction will understand fully what is required in this country and that he can intelligently negotiate the proceeding which he contemplates. Unfortunately, he is usually mistaken. The use of language dictionaries by itself is inadequate. While the translated word may often have the proper denotation, it has rarely the same connotation, and confusion results.

Philologists who prepare dictionaries are not qualified to evaluate words of art in their legal significance, or to find foreign equivalents for them. Their philological training does not suffice to take the place of their lack of legal knowledge. When translating from one language into another, training in the two systems of law, as well as in the two systems of

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1. Space has not permitted consideration of variations in the law and procedure of the several American jurisdictions. For purposes of comparison with German law and procedure, the law and procedure of the State of New York have been assumed to be typical of the average American jurisdiction.

legal terminology, is absolutely necessary to render the correct denotations and connotations of the legal term to be translated.

While it should not be presumed that a perusal of this article will be sufficient to enable American counsel to cope intelligently with German law and procedure, for which a complete knowledge of the system of German law is necessary, some understanding of the essential differences in system can be given to American attorneys in order that they may comprehend the problems involved, and steer clear of some of the shoals.

Technical terms, particularly most legal terms, cannot be translated with accuracy, short of writing a brochure for each word. More important still, although some corresponding word or phrase may be found, it will probably carry a very different connotation in law. The probate of a will and qualification of its executor are expressions perfectly familiar to a New York lawyer; he may not even think that they are not fully comprehensible to a foreign practitioner. Yet, as will be detailed later, the German equivalents of those words convey nothing respecting the legal machinery for giving effect to wills. This article indicates the differences between the legal systems of the two countries, and emphasizes the inadequacy of translations as mediums of communication. Its necessarily limited scope precludes consideration of more than one nation; but the purposes of the authors will be fulfilled if this can serve as a definite guide to administration in Germany, and as a sharp warning of the dangers which beset any correspondence in an unfamiliar language.

The statement is often made by lawyers, in discussing jurisprudence, that all legal systems are, after all, fundamentally alike. This statement is not only misleading but flatly untrue. While the economic or sociological results of the operation of the various legal systems of the civilized world are very closely alike, the systems themselves vary very fundamentally in theory and practice. Between the legal systems used on the continent of Europe and the Anglo-Saxon system, there are such broad gulfs in theory and practice that often identical economic or sociological results are arrived at by radically variant routes.

It is important for the domestic attorney to understand the comparative terminologies and to do so he must have some comprehension of the respective legal signifiance of these terminologies.

(II) *The Jurisprudential and Practical Difference in the Execution of Testaments in New York and in Germany* [2]

There is no important distinction between the theories of wills themselves in the law of each of the two countries under discussion, Germany

2. There is eliminated from this discussion all consideration of special forms and varieties of wills which brings them outside the general rules of law, such as wills of soldiers on the field of battle, *etc.*

and America. Wills both in Germany and America have the same general historical origin and have developed on the same general theory. What historical or actual difference in significance exists is of no importance to this discussion.

Under both Anglo-Saxon and German systems of jurisprudence, the will is an expression of the direction of a living person as to the disposition of his property after his death. Within certain limits provided by law, these dispositions are made as a matter of right. Society may, however, limit the extent to which property may be willed and may surround the execution of wills with such formalities or restrictions as it cares to impose. This discussion does not concern itself with restrictions on the disposition of property in substance but with those of form only.

In the Anglo-Saxon system, there are certain formalities which must be observed in executing a will. They consist chiefly in the presence and attestation of a proper number of competent witnesses, usually two, who must see the maker sign or hear him acknowledge his signature and know that they are witnessing the execution of a will, and must then sign in his presence and in the presence of each other. The document is purely private until filed or "probated" after death. It does not need to be recorded or filed and may repose anywhere until ready to be used in court. No one, other than the maker and witnesses, need know of its existence.

In the legal system employed by Germany, there are two general forms of will: (1) the will made before a court or notary, which will be referred to hereinafter by the not too carefully descriptive term "public" will; and (2) the "holographic" will which will be called, equally loosely, the "private" will.

The public will is made before a court or notary and may be recorded in full or may merely have the signature authenticated and a record made of such authentication. In Germany, the public will is a formal document in so far as it requires the cooperation of public authorities. The very essence of the execution of the public will is the making and recording by the notary or the court of the *Protocoll* or record. The *Protocoll,* as a record of the transaction made by the court or notary, must be signed by the testator, the *Erblasser,* but the will itself need not be signed. The will may be either a writing which is prepared by the testator or by some one at his direction, and is then attached as a disclosed or undisclosed document, to the *Protocoll,* or it may be stated to the notary or the court orally and the terms of it recited by the notary or the court in the *Protocoll.* The court or the notary, in making the *Protocoll,* must call in witnesses to attest the *Protocoll.*[3] If the will is made before the court, there must be two witnesses or a court clerk; if made before a notary, there must be two witnesses or another notary.

3. The will is not witnessed; it is the *Protocoll* which is witnessed.

The public will is officially retained by the court or the notary before whom it is made and protocoled.[4] The will remains in the custody of the court or notary and not in the custody of the maker or his agent. In most German states, the notary hands the will over at once to the proper court for permanent custody. In some states, however, the notary retains the will until after the death of the testator, the notary being himself the proper legal depositary of the will. At death, no search of deposit boxes of the deceased or his effects is necessary as far as a public will is concerned, for the will is either in the hands of the court already, or in the hands of the notary ready for filing in court. The court or the notary respectively, upon taking custody of the will, issues to the maker a certificate of receipt which the maker retains among his effects instead of the will itself. The notary acts as a judicial officer with some of the recording duties which our county clerks have. It is as though a will were here filed with the county clerk with instructions not to disclose the document until after death.

The "private" will is a holographic will, written in its entirety by the testator himself. Such a will does not need to be protocolized, does not need witnesses and does not need to repose in the hands of a court or of a notary. Provided the permissive statute be complied with exactly, it is a valid will. The statutory requirements are that it must be *entirely* in the handwriting of the testator, must be signed by him and must state (in his writing) the exact date and place where written and signed. The holographic will is thus less formal than our will, while the public will is surrounded with greater formality.

The American attorney, seeking a dictionary equivalent in German of the "execution", would pick out *Vollziehung* as its closest translation. The two words have the same general denotation, but a different principal connotation, for the "execution", which takes place when the will is made in New York, is different from the *Vollziehung* if the will is made in Berlin (very radically so, if the will is a public will), and the distinction is of great importance. The dictionary word, *Vollziehung,* does not carry any significance to the German attorney, in connection with the "execution" of a will beyond the simple fact of the signature of the will. There is not even an approximate equivalent in the German language for "execution" in its American connotation. *Vollziehung* is a mere word of swank, or flourish, signifying no more than "signing".

(III) *The Significance and Practice of Probate and Testamentsvollstreckung Respectively*

In the United States, after the death of the testator, the will is filed in court and offered for "probate". The natural heirs, the next-of-kin, re-

4. It is not "executed" and there is no exact German legal word to cover the process which would be "execution" in this country, except the simple word "made".

ceive notice of the probate proceedings and have an opportunity to object to probate in open court. The distributees are notified in less formal manner. After due notice to all these parties, the witnesses are examined as to the proper execution of the will. If no objection is made to the probate, the court admits the will to probate and, in due course, gives authority to the administrative functionary to proceed with administration. If an executor is named in the will and qualifies, he receives letters testamentary. If there is no executor who has qualified, an administrator-with-the-will-annexed (*cum testamento annexo*) is given letters of administration. If objection is made to probate of the will, a hearing is held before the probate judge (in New York, the surrogate), at which the contested questions are litigated and no appointment as to the administration of the estate is made until the hearing is finally terminated and decision rendered. The court can, of course, appoint a temporary administrator to conserve the estate pending the appointment of the final administrator or executor. If more than one will is offered the court decides, after litigation, which is the valid will, if any.

In Germany, wills and estates after the death of the decedent are treated so differently that it is extremely difficult to find parallel language with which to describe the process.

Whereas in this country the will is offered for probate by anyone who has some color of authority to present it, the will in Germany, except in the case of a holographic will, is already in the custody of the court. It is, however, not a document available to inspection by the public until it has been officially "opened" by the court; until then it is in the custody of the court in a sealed condition. A holographic will may be placed by the testator, during his lifetime, in the custody of any competent court, but he is under no obligation to do so, and no other person who happens to have custody of the will may do so without express instructions from the testator. After the death of the testator, anyone having a holographic will in his possession is under legal obligation to deliver it immediately to the appropriate *Nachlassgericht* (competent surrogate's court), and this court can enforce such duty of delivery by imposing a succession of fines.

This court before which initial proceedings transpire is the *Nachlassgericht,* which is the *Amtsgericht* (generally speaking the civil court of lowest monetary jurisdiction) of the decedent's last domicil, functioning in a special capacity. If there has been a change of domicil and an *Amtsgericht* has in its custody the will of a decedent who has died domiciled in another district, the will must be forwarded to the *Amtsgericht* (acting as *Nachlassgericht*) of the last domicil after "opening" it.

The *Nachlassgericht,* having received satisfactory information of the death of the testator, sets a date for the "opening" of the will and through

its own mechanism, gives notice to all legal heirs as far as the court can ascertain, of the date set for the appropriate session, which is called the *Termin.*

At the *Termin* occurs the *Verkuendung* (publication) of the will. This consists of the opening of the will by the court, and of its reading by the judge or the clerk. The will is then filed with the court, and is thereafter open to the access of persons who can establish to the satisfaction of the court that they have a genuine interest in or plausible reason for seeing the will.

The *Nachlassgericht* then sends to each person named in the will such excerpts from the will itself as may apply to him. Transcriptions of the whole or of parts of the will are sent to all persons interested in the estate, depending on the nature of interest, but transcripts are not sent as of course to any persons who attend the *Termin.* Any person interested in the will may apply to the court at any time for a copy of such parts of the will as his interest may demand.

The proceedings before the *Nachlassgericht* do not "approve" the will. The *Nachlassgericht* will open and publish any will or a number of conflicting wills. It does not concern itself with the authenticity or merits of a will or wills. The will is not "probated" in the American sense, nor is it established in the sense that it is declared to be the last will and testament of the deceased. It is merely read and published as what purports to be a will.

If the will names a *Testamentsvollstrecker* (for general purposes identical with the American executor), he may accept or refuse his appointment by a declaration to be filed with the *Nachlassgericht.* If he accepts the appointment, the *Nachlassgericht* issues a certificate to him that he is the *Testamentsvollstrecker* under the will, which does not, however, signify that he is appointed by the *Nachlassgericht.* The *Nachlassgericht* thereupon has essentially completed its functions. It may, under certain circumstances, thereafter entertain proceedings to remove the *Testamentsvollstrecker,* but never of its own motion. Having removed him, the court has no power to appoint a successor or substitute. There is only one instance in which the court may appoint a *Testamentsvollstrecker* and that is in the event that the will, naming no *Testamentsvollstrecker,* expressly requests the court to name one.

No further court proceedings of any kind are necessary in the administration of the estate. No litigation can take place before the *Nachlassgericht.* If there is litigation which concerns the authenticity or validity of the will, or any matters pertaining to the estate, it must be brought before the ordinary courts.

In attempting, in German procedure, to find a process in the treatment of a will after the death of the testator, similar to "probate", the closest one can come is *Verkuendung.* At least, this is the first step taken in open court in the direction of "establishing" the will. The difference between "probate" and *"Verkuendung",* however, is so great that a comparison is almost useless, for while by the process of "probate" a will is officially accepted as valid by our courts, the process of *"Verkuendung"* in the German *Nachlassgericht* in no way lends the will any judicial sanction or acceptance whatsoever. In fact, the German court as *Nachlassgericht* at no time ever accepts, approves or in any way officially gives validity to the will. This court in Germany does nothing further than "publish" the will, in a limited sense, and expresses no attitude towards its validity unless there is an actual contest, which, as has been explained above, must be started by way of an action brought in the competent court having jurisdiction for such litigation. Therefore, if there is a contest, it is a court of ordinary litigation and not the *Nachlassgericht* which decides the issue.

The *Nachlassgericht* has only one possible important function in the actual administration of the estate: it will, on the motion of the heirs, prepare a plan of division or settlement of the estate, a *"Teilungsplan",* which is effective, however, only in so far as it is agreed to by the respective parties concerned. To the extent that the plan is not agreed to, there is no recourse to parties interested except litigation before the ordinary courts.

(IV) *The "Executor" and the "Administrator" in New York and Germany Respectively: Their Functions, Authority, Rights, Powers and Liability*

In the United States the executor or administrator is the administrative official, it may be said, acting for the court in conducting the handling of the estate. He is in full charge, until discharged or removed by the court and until he has made the final disposition of the decedent's property in accordance with the terms of the will and the instructions, by decree, of the surrogate. He collects the assets, goes through such tax proceedings as may be necessary, federal and state, takes such steps as may be necessary to conserve the assets, pays the creditors after they have proved their claims and, having done everything proper in administration, makes the appropriate final dispositions of the assets of the estate. He accounts, if he so wishes, intermediately, from time to time, and finally, after his work is completed, he receives his discharge if everything is in order. He receives the commissions or fees prescribed by law. He is entitled, at the expense of the estate, to employ counsel and, in fact, counsel usually performs most or all of the actual work of administration on behalf of the executor or administrator. The will itself may prescribe and proscribe the rights and liabilities of the executor or administrator and he has certain

statutory and legal duties and powers. He is bound by strict duties of a fiduciary nature, such as the careful investment of the assets of the estate during administration and may be surcharged on his final accounting (of which all unpaid legatees and distributees have notice) for failure to do his duty. He may be said, subject to the direction of the court and the limitations placed upon him by the will and the law, to have full authority in administration.

In Germany the administration of an estate is conducted on an entirely different basis. Whether there is a will or not, upon the death of the decedent, title to the property of the decedent passes by operation of law directly to his heirs, the *Erben,* without the intermediate or qualified title resting in an executor or administrator.

"Erben" (heirs) in German law is a technical expression and denotes such person or persons as receive the whole estate or a fractional share in it, whether under the terms of a will or by reason of an intestacy, as distinguished from persons who receive a specific piece of property under the will and who are called by the technical term of *"Vermaechtnisnehmer"* (legatees). The legal position of these two classes of persons is entirely different. No title whatsoever passes to a *Vermaechtnisnehmer;* all title passes to the *Erben.* If there is a will, title to the entire estate passes directly to the heirs named in the will in accordance with its terms, and if no such heirs are named in the will, but legatees (*Vermaechtnisnehmer*) only, then to the natural heirs of the decedent. Even where a *Testamentsvollstrecker* is appointed under the will, this approximate equivalent of the American executor has no title whatsoever, even of a qualified kind, to the property of the decedent. The will may provide specific bequests and name both heirs and a *Testamentsvollstrecker.* In such event, legal title to the entire estate passes to the heirs, subject however to the obligations of the *Testamentsvollstrecker* after having settled all liabilities of the estate, to pay over the specific bequests out of the shares of the heirs and to effect the division of the remaining estate among the heirs if there is more than one heir. In other words, the heirs and the *Testamentsvollstrecker* together approximate the personality of the American executor. The *Testamentsvollstrecker* is responsible for the proper payment of taxes and for the actual distribution of the estate. This last function may sound in conflict with the statement made above that the heir has legal title; nevertheless this is exactly the situation. The heir has the only title and the *Testamentsvollstrecker* has no title; he has only a power of disposition. No equitable title is known in German law, as there is no distinct system of equity in German law. The heir, however, cannot dispose of the property when there is a *Testamentsvollstrecker;* the *Testamentsvollstrecker* alone can do so. The actual conflict in interest between the *Testamentsvollstrecker* and the heirs is shown by the

fact that while one of two or more heirs may also be appointed *Testamentsvollstrecker,* a sole heir cannot be *Testamentsvollstrecker.*

The will can restrict the powers of the *Testamentsvollstrecker,* and in any event it is not required that a *Testamentsvollstrecker* be named. Since the heir is the owner or repository of all the rights, duties and powers of "administration", except in so far as the appointment of a *Testamentsvollstrecker* may deprive him of some of them, naturally if a *Testamentsvollstrecker* is omitted from the will, the heir retains all functions.

Creditors apply to the *Testamentsvollstrecker,* and must be satisfied by him before bequests are paid; and if there is no *Testamentsvollstrecker,* they apply to the heir or the heirs respectively.

No bond is required either of the heir or of the *Testamentsvollstrecker,* nor is there any way for either of them to account to any court for their respective parts in the administration of the estate. The *Testamentsvollstrecker* therefore cannot be discharged in the American technical sense of the word "discharge". (He can, of course, be removed, under certain circumstances, for cause; the German provisions for removal, however, are quite different from American law). The *Testamentsvollstrecker* remains permanently and personally responsible for any act of misfeasance or malfeasance which may have occurred during the administration of the estate.

The *Testamentsvollstrecker* is authorized by law to receive compensation. There is no statutory rate and charges are those of custom, amounting, in fact, to compensation somewhat less than usual in the United States. The *Testamentsvollstrecker* can, of course, as a legitimate expense in the estate, employ counsel.

It is apparent from the discussion above that considerable thought must be given to the character and powers of the respective administrative functionaries before an American attorney can plan procedure which requires action in Germany, or himself solve one of the many estate administration problems in which German assets are concerned.

(V) *Brief Notes on Documentation*

Attestation, Affidavit, Acknowledgment, Authentication, Certification, Deposition, Exemplification, Verification. These fine words bring deep confusion to the mind of a German attorney. An American lawyer should not glibly use them and their dictionary translations in correspondence with Germany and hope for anything but an unfortunate result. For example, a good German dictionary will give as values for "attest": *attestieren, zeugen, bezeugen, bescheinigen, bekunden.* No one of these words, if used, will convey to a German attorney that it is desired to have a document attested. It is obvious that an understanding of German terms through which the import of these English words of art can be brought home to a German lawyer—and the extent to which the *acts* which these words

respectively are intended to signify, can be accomplished in Germany—is essential to intelligent communication between American lawyer and German correspondent.

These English words of art may be placed in three groups: (1) certification, authentication and exemplification, as concerning acts performed by officials to attest the authenticity of documents; (2) acknowledgment and verification, as the acts primarily of the authors of documents, in contradistinction to the acts of officials in formalizing the documents; (3) the affidavit and deposition, as the act of an individual relating to proof of facts.

The first group contains two words of art, certification and exemplification, while authentication, although in a way a word of art, is more general in its connotations. Certification implies the attachment to a document of a certificate or legend, by an official competent to do the act, stating that the document is a true copy. Exemplification commences with the same process but includes a succession of certifications superimposed on certifications until the identity of the original certification has been verified through the highest competent verifying authority. Authentication is a more general term, meaning only such official certification as would be sufficient to admit the document in evidence. This might be simple certification. In the case of foreign documents it would unquestionably be nothing short of exemplification.

In seeking German equivalents we have only two words of art available to us: *beglaubigte Abschrift* and *Ausfertigung*. Both terms refer to the authentication of copies of documents. *Ausfertigung* is the more formal because a document which has been *ausgefertigt* is intended for the purposes of all persons interested therein to take the place of the original. An *Ausfertigung* can, however, be procured only of court or notarial protocols and of official acts of the court, as for example judgments and decrees. *Ausfertigung* is so formal in its nature, because it represents the original document itself, that, except in rare circumstances, only one may be procured by any interested party, while any number of the *beglaubigte Abschriften* may be applied for. No *Ausfertigung* could be procured of a holographic will or of any documents in an estate proceeding which are not actually protocols or court decrees. Any other authentication or the authentication of all other documents would consist of a *beglaubigte Abschrift* which is similar to a certification. It is made by a notary or court. The *Ausfertigung* or *beglaubigte Abschrift* can, of course, be made the equivalent of the American exemplification by passing it through a succession of certifications. For such exemplifications the German term of *Legalisierung* is frequently used.

Passing to the second group, an acknowledgment imports an oath before a notary that the signature to a document is that of a person named in the document. A verification goes further. It is an affidavit attached to a document and sworn to before a notary in which the affiant states that the facts in the document, which he has signed, are true.

The corresponding German equivalent to acknowledgment is *Beglaubigung*. It is a very close translation except that while the essence of an acknowledgment is the oath of the signer of the document, the essence of the *Beglaubigung* is the statement of the notary or court himself or itself that he or it identifies the signature and nothing else. *Anerkennung* is not an accurate translation of acknowledgment and is not, strictly speaking, a German word of art.

There is no German equivalent whatsoever for verification. For it must be substituted a simple *Beglaubigung* or the German equivalent of an affidavit, which is discussed below.

As stated above, the German word *Beglaubigung* covers, approximately, both "acknowledgment" and "authentication". This is because the act of *beglaubigen* is one performed by the notary or the court alone. In the case of an authentication, even the American notary needs no assistance from the author of the document. In the case of an acknowledgment, however, the American notary merely records the sworn oath of the author that he has signed or executed, while the German notary himself or the court respectively certifies to the signature or execution, no oath being required of the author—the German notary or court thus certifying, in a way, to the authenticity of the signature or execution. The act of the German notary or court is thus a *Beglaubigung* in either event.

There remain the two American words of art: affidavit and deposition, which concern testimony or evidence. It must be remembered that all these words have grown out of the Anglo-Saxon usage and refer to institutions and processes which are purely Anglo-Saxon. Affidavit, for example, designates an instrument of unique nature found only in Anglo-Saxon countries. The same result can be obtained in other countries through instruments essentially the same in nature but differing in character. In Germany there is the *eidesstattliche Versicherung*. This is a document signed by the maker and expressly designated by him as an *eidesstattliche Versicherung*. It is not sworn to before any official, but making false statements in such a document in certain cases is an offence punishable by imprisonment.

The word "affidavit" has recently been used in certain German ordinances, but it is only used for purposes of clarification in dealing with matters in which foreign countries (the *Ausland*) are involved, and is not a

German word of art. In fact, it is not a word to be found, strictly speaking, in German law.

There is no equivalent for deposition in Germany. No such legal process is known, as a specific process. Prussian notaries as well as Prussian courts can, however, in accordance with a specific section of Prussian law, perform the act of taking depositions in connection with foreign proceedings.

The section of the German law referred to above is a reciprocation of a provision in the law of New York applying to notaries, the substance of which is little known to lawyers here. Section 105 of the Executive Law provides that the powers of notaries public in New York shall in part be as follows: ". . . to exercise such powers and duties as by the law of nations and according to commercial usage, or by the law of any other government, state or county may be performed by notaries." This part of Section 105 has not been interpreted by the courts to the fullest extent which the practitioner with frequent foreign work might desire, but it is safe to state that it enables the performance of all normal notarial acts for use in foreign jurisdictions, which notaries in such jurisdictions could accomplish. It is wider in its scope than the corresponding German rule.

In issuing a commission for the taking of depositions in Germany, there are three effective commissioners to designate. The first is an American consul, who is, of course, familiar with such proceedings and can act promptly and with clarity, but cannot coerce witnesses into attending and, as a rule, now takes the depositions of American citizens only. The second is the German notary who, by special provision of law, can effectively take a deposition. He must be very carefully instructed, however, for he is entirely unfamiliar with the American practice and the American law of evidence, which is quite at variance with the corresponding German law and which he, naturally, will apply in taking the deposition. Unless he receives detailed instructions given in such manner that he can, with his concept of law and practice—he is always a German attorney—understand them and avoid the pitfalls resulting from the provisions of American law unknown to him, the result is likely to be unsatisfactory. He also cannot compel witnesses to attend. The third is the *Amtsgericht* (court) of the proper district, which must, for the same reasons, be as carefully directed as the notary, but has the advantage over the other commissioners in that it can compel witnesses to attend.

It is possible to secure delivery of original documents which are on file with, or in the custody of, a Prussian court. This, however, can be done only with the consent of all those persons who, in the particular instance, may be entitled to an *Ausfertigung;* and it must also be borne in mind that not all of the interested parties may be entitled thereto. With the consent

of the parties so entitled, the original document may be removed from the custody and the court retains an *Ausfertigung* for its custody instead of the original. This applies to wills as well as other documents, but not to holographic wills. The court cannot prepare an *Ausfertigung* of an holographic will and therefore cannot permit it to leave its files under any circumstances. However, if the decedent were domiciled outside of Germany and only temporarily residing in Germany, there would have been no court in Germany competent to act as *Nachlassgericht,* for such a court can only act within the district to which the place of domicil or permanent residence of the decedent belongs. Therefore, the holographic will of such a person would, normally, never be found in the files of any court and the particular point under discussion is academic with regard to such a situation. In case, however, the decedent, during his lifetime, has chosen to place such a will in the custody of a court, which he may do with any *Amtsgericht* (court), such court will after the death of the testator and after "opening" the will, transmit it to the competent court, domestic or foreign, and merely retain a *beglaubigte Abschrift* of the will.

Glossary

The authors give below some of the terms of most current usage in New York estate practice which are likely to be found most confusing in translation into the German. In each instance, the closest German approximation is given with an explanatory note. The notes do not purport to do more than indicate the chief dangers in accepting the German translation of the American term in its full denotation and connotations. These notes are mere danger signals, but even so they do not point out all the dangers. They are meant to put the user of the terms on guard. Where no German equivalent is given, the English word alone should be used.

accounting—*Rechnungslegung:* There is no German procedure similar to an American testamentary accounting. Neither the *Testamentsvollstrecker* nor the *Erben* ever account to the court. The *Testamentsvollstrecker* has to account, however, to the heirs.

acknowledgment—*Beglaubigung:* Nearest equivalent. Note that, while an acknowledgment is the act of the signer of the document acknowledged, the *Beglaubigung* is the act of the notary or the court. The signer takes no oath. The notary or court certifies that the signature is true.

administration (of an estate)—*Verwaltung:* The *Verwaltung* of estates in Germany comprises processes and principles radically at variance with the American system. This is a general term which has no legal meaning whatsoever.

administrator: There is no possible translation. The German law knows no such thing as an administrator. If the will names no *Testamentsvollstrecker,* which is, approximately, the equivalent of executor, then the heirs themselves act in the capacity of "executor" and no

administrator is needed or indeed possible. Dictionary translations are completely false and should never be used when referring to administrator. In writing about an American administrator, it would be well to use the American term with an explanatory note stating the nature of his office and appointment.

affidavit—*Eidesstattliche Versicherung:* Nearest equivalent. Note that the *Eidesstattliche Versicherung* is not usually made before a notary or official of any kind, nor even made under oath, but merely contains the statement that it is made *eidesstattlich* (*an Eidesstatt*), instead of an oath. Note that the word "affidavit" is used in certain German ordinances in its American sense but for certain restricted uses. Except for these particular uses, the word should not be employed.

ancillary: No translation is possible, for there are no ancillary proceedings possible in Germany, nor does German law require that in any case such proceedings take place abroad when the estate is primarily "administered" in Germany.

authentication—*amtliche Beglaubigung:* The translation is close enough for all normal purposes. Note that it may be either a *beglaubigte Abschrift* or an *Ausfertigung* which is *amtlich beglaubigt.*

bequest—*Vermaechtnis:* The German law does not know the distinction between "bequest" and "devise".

certification—*Beglaubigung:* The translation is close enough for all normal purposes.

citation (on probate)—*Vorladung:* In Germany citations or their equivalent are not served by the attorneys for the parties but by the court itself. Note that, there being no "probate" or equivalent, there is no citation for the purpose of notifying contestants to come and appear for the purpose of contesting probate. The German citation is a mere notice to the heirs and legatees which is only for the purpose of giving them the opportunity to come into the limited proceedings before the *Nachlassgericht.* If the heirs wish to contest the will, they must start an action in an ordinary court for the purpose.

codicil—*Testamentsnachtrag:* The old word, *"Kodizill",* is no longer technically correct to use. There is in the present German law under the Civil Code no distinction between *Testament* and *Testamentsnachtrag*—which itself is no technical term—for both are made under the same rules and with the same significance.

contest (of will)—*Anfechtung eines Testaments:* Contests are accomplished entirely differently in German law; see text, pp. 41-42, *supra.*

deposition—*Zeugenaussage:* There is no possible adequate translation for, nor equivalent of, the process, as it is unknown in the American legal sense. However, a German notary or court can take a deposition for use in other countries. (The only similar process known in German law of procedure, the *"Zeugenvernehmung durch den ersuchten Richter," i. e.,* the taking of testimony of witnesses through a court other than the court of litigation, rests upon a different theory.)

devise—*Vermaechtnis:* The German law does not know the distinction between "bequest" and "devise".

discharge (of executor): No translation is possible, for the German *Testamentsvollstrecker* cannot be discharged. He can be removed from office for cause, but there is no mechanism by which he can have a court pass his accounts and so discharge him.

domicil—*Wohnsitz:* The translation is accurate except that the rules of ascertaining domicil differ.

execution (of a will)—*Vollziehung:* Not an equivalent, for the character of the process is radically different. Strictly speaking, there is no execution of wills in Germany; at best, it may be said that wills are "made" in Germany. *Vollziehung* itself, which is no distinct legal term, means no more in German than the act of "signing".

executor—*Testamentsvollstrecker:* The denotation is close but the connotations remoter. The *Testamentsvollstrecker* has no legal title to the assets of the estate and shares with the heirs (*Erben*) some of the rights and duties of the American "executor".

exemplification—*Legalisierung:* The translation is close enough for all normal purposes. Note that it may be either a *beglaubigte Abschrift* or an *Ausfertigung* which is *legalisiert.*

guardian—*Pfleger, Vormund: Pfleger* corresponds roughly to special guardian and *Vormund* to general guardian, but the powers of these persons in Germany are far different from those in America. If a father or a mother be living, they represent the infant legally but have far greater powers than a general guardian would have in America. No other guardian can be appointed while a parent is alive, except where there is a conflict of interest. The translations of guardian given opposite are only approximate equivalents and do not convey the full identity.

heirs—*Erben: Erben* does not denote the American "next-of-kin". The German *Erben* are the inheritors of a share in, or, in the case of a sole heir, of the whole of, the estate, whether by will or by operation of law in intestacy. If in intestacy, they will coincide with the American "next-of-kin". If there is a will, *Erben* may be created by it who are not "next-of-kin". This distinction must be understood before using the word in translation. *Erben* take immediate title to all the assets of the estate subject to the obligation to pay taxes, debts, legacies, *etc.*

holographic will—*holographisches Testament:* The New York holographic will needs execution before witnesses. The German variety does not, but must conform strictly to statutory requirements of other kinds.

inventory—*Nachlassverzeichnis, Inventar:* Translation adequate. There are various instances under German law in which a *Nachlassverzeichnis* is made and also various purposes for one. Of peculiar interest to the American attorney might be the *Nachlassverzeichnis* which must be filed with the *Nachlassgericht* by the *Testamentsvollstrecker* immediately after acceptance of his appointment. This compensates in part for the lack of the procedure of accounting, for the *Nachlassverzeichnis* gives interested parties an opportunity to scrutinize the list of what the *Testamentsvollstrecker* claims are the assets and debts of the estate.

legacy—*Vermaechtnis:* The German law does not know the distinction between "bequest" or "legacy" and "devise".

life tenant—*Vorerbe:* Although *Vorerbe* denotes a person acquiring rights first after the death of the decedent, the legal position of the persons concerned is absolutely different. The use of the word *"Vorerbe"* is dangerous, since its connotations are much at variance with the English term of American law.

notary—*Notar:* A notary in Germany is a state official of far greater importance than a notary public in America. He is usually an attorney, as legal knowledge is absolutely necessary for him and he is responsible for the legal correctness of his acts. His position in German law and procedure is of the greatest importance.

probate—*Testamentsbestaetigung:* The translation is a mere attempt to find an equivalent in the German language—not in German law—but actually is no German word at all. There is no corresponding German word of art. The process of "establishing" a will in Germany is so radically different that there cannot even be an approximate equivalent. Wills in Germany are not "probated" nor, strictly speaking, even "established".

remainderman—*Nacherbe:* Although *Nacherbe* denotes a person acquiring rights after the lapse of the rights of a *Vorerbe,* the legal positions of the two persons, *Nacherbe* and remainderman, are absolutely different. The use of the word *Nacherbe* is dangerous, for its connotations are much at variance with the English term in American law.

residence—*Aufenthalt: Aufenthalt* must not be confused with *Wohnsitz,* which is domicil.

residuary estate—*Ueberrest:* It is of assistance in weighing the significance of *Erben,* to note that while the *Ueberrest,* which is no technical term in this sense, is the property of the *Erben* (because it is part of the whole of the estate which has passed to them by operation of law immediately on the death of the testator, with the obligation to pay legacies, if any, *etc.*), the residue of an American estate does not necessarily belong to the heirs.

revocation—*Widerruf:* In New York a will can be revoked by destruction by the maker. In Germany, only a holographic will can be so revoked. The "public" will can be revoked only by the making of a new will or the return of the will from the custody of the court at the request of the maker.

settlement (of an executor's account): No translation possible, for the *Testamentsvollstrecker* cannot account to any court.
See "discharge".

trustee: There can be no translation of the word "trustee", for there is no such institution as a trust under German law. The German law does not recognize the divisibility of property rights into legal ownership and equitable interest.

verification: This word cannot be even approximately translated. There is no corresponding procedure in German law.

will—*Testament:* Nature the same, but method of making far different, and significance of act at variance.

witnesses (to a will)—*Zeugen:* Witnesses are required to a will (except an holographic will), but they witness not the will itself, but the *Protocoll* made with regard to it.

Bibliography

The student will find in the *Principles of German Law,* by Ernest J. Schuster (Oxford 1907), an excellent study of the general principles of German law in the English language. The topics of German law covered by this article may be found in the following laws:

Buergerliches Gesetzbuch (Civil Code)

Gesetze des Reiches und Preussens ueber die freiwillige Gerichtsbarkeit (laws of the Empire and of Prussia concerning non-contentious litigation).

There exist English translations of the German Civil Code but the cautions uttered by the authors in relation to using dictionary translations of words apply with equal force to translations of the German laws as they do not cover the full meaning of the German text. For a proper understanding of the German laws and procedure, a study of the text in the German original is necessary and even then is adequate only if accompanied by a sufficient training in the German legal system. For this reason, the authors are reluctant to refer the reader to English writings on the subject which might be more misleading than helpful.