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Vacant inheritance, heirless inheritance and claims from Warsaw Decree (part I)

Abstract

In the reprivatisation procedures, conducted in Polish courts and before public administration bodies following the restoration of independence, it is increasingly frequently necessary to determine the person currently holding the right to restitution or compensation due to the death of the past owners. This means a necessity of determining the legal successors to people who held the right to nationalised (communalised) property, including – for individuals – their inheritors. Due to the principles of the international law applicable to people assigned during or immediately following the conclusion of World War II, it is connected with the necessity to apply the principles of then-current inheritance law. These will therefore be – in the western and northern regions of Poland, applicable provisions of the German civil law of 1896 (BGB), in the southern regions – the Austrian code of civil procedure of 1811 (ABGB), while in the central regions – the Napoleonic Code of 1804.The latter applies to the area of application of the decree dated 26 October 1945, which provides for the communalisation of land in Warsaw (on the ownership and usage of land within the boundaries of the capital city of Warsaw, so called Bierut's Decree).

This paper comprising two parts presents the basic solutions that refer to the institution of heirless inheritance (in the Napoleonic Code, also in ABGB), and so called vacant inheritance *(les successions vacantes)*, which is a solution specific to French law, adopted in the territory of the Russian partition and which remained in force until 1947.

The second part of this paper (in the next issue of the quarterly) will be devoted to an analysis of the consequences of deeming an inheritance to be vacant under the erstwhile art. 811 of the Napoleonic Code, and to the provisions of Polish intertemporal law that applied to this solution following the standardisation of inheritance law after 1946.

Keywords: reprivatisation, inheritance law, heirless inheritance, vacant inheritance

I Legal succession and reprivatisation

1. Succession and Article 7(1) of the Decree on the Ownership and Use of Land in the Capital City of Warsaw

Until the harmonisation of the provisions of the inheritance law in 1946[1], the institution of succession in the Republic of Poland had been governed by the laws of the relevant partitioner. The solutions adopted, including those relating to the acquisition of inheritance by heirs, differed from partition to partition.

Due to term of their repeal, the provisions were in force between 1944 and 1946, i.e. during a period of wide-spread seizure of private assets by the Communist authorities, carried out as part of the system changes during the early days of the Soviet occupation, based on the imposed legislation of the so-called Polish Committee of National Liberation.

As a consequence, as regards succession rights of persons filing claims due to defective nationalisation or, alternatively, on the basis of provisions allowing acquisition of rights or receipt of compensation, the status of legal succession of such claimants vis-a-vis former owners of nationalised property, should now be considered in light of the laws applicable at the times of the Partitions. In accordance with Article XVIII of the Decree of 8 October 1946, Provisions implementing the inheritance law[2], inheritance cases are governed – in principle – by the law applicable at the time of a decedent's death (see also Article LI of the Act of 23 April 1964 – Provisions implementing the Civil Code[3]).As a result, provisions of the different laws and acts in force in the various parts of partitioned Poland should apply to successions opened before 1 January 1947.

As provided for in Article 7 of the Decree of 26 October 1945 on the Ownership and Use of Land in

1 Decree of 8 October 1946 inheritance law (Journal of Laws No. 60, item 328, as amended; hereinafter: d.s.l.).

2 Journal of Laws no. 60, item 329.

3 Journal of Laws no. 16, item 94, as amended.

the Capital City of Warsaw[4] , the subjective right allowing the possibility of applying for the establishment of a relevant land management right (right of land development, perpetual lease, later – temporary ownership and currently – perpetual usufruct) is widely recognised in the case law and in legal theory as a transferable property claim, subject to succession[5].

Although the private law nature of the subjective right under Article 7(1) of the Warsaw Decree and, as a result, its transferability, raise serious doubts, the provision in question made it possible for both owners of properties situated in Warsaw and their legal successors to make claims. In particular, there are no objections as to the fact that the provision of Article 7(1) of the Decree applies to legal successors under universal succession of title, i.e. primarily heirs of property owners who are natural persons. Unlike in the case of former (existing) property owners, it can't be challenged that in light of the Decree on the Ownership and Use of Land in the capital city of Warsaw, in order to be able to apply for an adequate land management right, legal successors of the existing owners should be in possession of the land in accordance with the requirement in Article 7(1)[6].

2. Lying and vacant inheritance – overview

2.1. Lack of legal successors in light of the Warsaw Decree

The assessment of the succession of the claims for the establishment of perpetual usufruct under the Decree of 26 October 1945 on the Ownership and Use of Land in the capital city of Warsaw, relies to a very large extent on the relevant provisions of the Napoleonic Code (Articles 718–930, 943, 967–1080, 1251(4), 1340, 1696–1698, 2205, 2258–2262 of the Code).

Both in the legal theory and case law, there are many doubts surrounding the interpretation of the provisions concerning the so-called vacant inheritance *(*Fr. *successions vacantes*, Art. 811 f.c.c), since if an estate was not claimed by heirs of its former owner within a specific time, such estate devolved to the State as heirless property (Article 789 and Article 539 f.c.c).

In practice, the application of the provisions regarding vacant inheritance is particularly important in the context of claims made under the Warsaw Decree. This is due to the fact that the provisions of the decree were applied directly after the end of the Second World War when many former landowners were dead and when it was difficult or even impossible to determine fates of many. Crucially, from the point of view of the application of the relevant provisions of inheritance law, this also concerned legal successors of former owners of the communalized property and, above all, the determination of the circle of heirs and acquiring adequate rights as a result of the succession. Thus, with respect to a large number of lands in Warsaw, in the period when claims were made under Article 7 of the Decree and at a later time, it was not possible to determine unambiguously the circle of entitled persons whose acquisition of rights under the Decree on the Ownership and Use of Land in the Capital City of Warsaw depended on their compliance with the conditions specified in this law. In such circumstances it was necessary to apply to heirs the provisions of the Napoleonic Code and other laws governing succession rights and obligations.

2.2. Lying inheritance

Similarly to the Austrian concept of the so-called *lying inheritance (Schwebende Erbschaft*, § 547 a.c.c.), the French institution of the so-called vacant succession refers to some extent to the Roman *hereditas iacens*, and was codified by the French in a form drawing on the solutions found in the legal system of the French *Ancien régime*[7]*.* It was the focus of Section 4 Chapter V Title I Book III of the Code

4Journal of Laws no. 50, item 279, as amended.

5See the judgement of the Constitutional Tribunal dated 19 July 2016, Kp 3/15, OTK ZU 2016/A; resolution issued by five judges of the Supreme Administrative Court of 14 October 1996, OPK 19/96,ONSA 1997, no. 2, item 56; judgement of the Supreme Administrative Court dated 15 June 2000, ISA 1036/99, unpublished; judgement of the Supreme Administrative Court of 22 January 2003, I SA 1788/02, Lex No 159261; judgement of the Supreme Court of 26 August 2009, I CSK 26/09, OSNC-ZD 2010, No. 1, item 22; verdict of the Voivodeship Administrative Court in Warsaw of 23 February 2012, I SA/Wa 1811/11, Lex No 1137321.

6More on this topic in: K. Zaradkiewicz, *Posiadanie jako przesłanka nabycia roszczeń z dekretu warszawskiego*, "Nieruchomości@" 2019, no. 1, p. 13 et seq.

7As for the recitals, see *Code des successions, ou Traité complet sur les dispositions du Code civil relatives aux successions, donations, testamens, partages, etc. Partie 1*. les cc. Treilhard, Bigot de Préameneu et Siméon. Par Auguste Firmigier-Lanoix, Paris 1803, p. 67 et seq.

of Napoleonic, Of the different modes of acquiring property (Articles 811–814).

Vacant succession from the perspective of the French law cannot be equated with the *hereditatis iacentis* (under the old Roman law or the modern Austrian law)[8]. However, the similarity between the solution adopted in the French law and the Roman concept of *hereditatis iacentis* is only apparent[9].

In the Roman law, the acquisition of inheritance by the so-called voluntary heirs did not take place at the time of opening the inheritance (*delatio hereditatis*) but only as a result of subsequent events, including in particular by submitting an adequate statement (the so-called *adquisitio hereditatis*). In the period between the opening of the inheritance (the death of the estate owner) and its acquisition, the estate was treated as not acquired (*hereditas non acquisita*), "ownerless", "lying"[10], as a "granted inheritance" (*delata hereditas*)[11]. Lying inheritance*, or hereditas iacet*, was defined in Roman law as *bona hereditaria vacua sine domino iacent.* Such inheritance remained without an owner until the appointed heir declared their intention to accept it[12]. At such time it was deemed an independent estate and with time it was treated as a legal entity (Lat. *personae vice fungitur*)[13], or sometimes even as a legal person (*persona moralis ficta*)[14].

J. Zielonacki indicated that the Roman law "sanctified the legal fiction that inheritance, from the moment of the death of the ancestor until the acceptance of the inheritance by the heir, represents and in a way continues the deceased person *(person defuncti)* and, by this virtue, is a person".[15] Some authors, however, associate it with subjectless rights and obligations[16].The character and essence of the lying

8See F. Zoll, *Prawo cywilne opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*, vol. IV, *Prawo familijne i spadkowe*, ed.3, Poznań 1933, p. 206.

9 See for example, A. Stempniak, *Zarząd spadku nieobjętego w ujęciu przepisów KPC – cz. I*, „Monitor Prawniczy" 2010, issue 18, p. 998.

10 More on this subject, e.g. W. Osuchowski, *Hereditas iacens. Poglądy jurydyczne na istotę spadku leżącego w rzymskim prawie klasycznym i justyniańskim* [in:] *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Kraków–Warszawa 1964, p. 209 et seq.

11 F. Maciejowski, *Zasady prawa rzymskiego pospolitego podług Instytucyj Justyniańskich*, Warszawa 1861, p. 299.

12 F. Zoll (st.), *Rzymskie prawo prywatne (Pandekta)*, vol. V.A, ed. Z. Lisowski, Warszawa–Kraków 1920, s. 55.

13 See e.g. W. Osuchowski, *Hereditas iacens. Poglądy jurydyczne na istotę spadku… , passim* .See also: F.C . v. Savigny, *System des heutigen römischen Rechts*, Band II, Berlin 1840, p. 363 et seq.; C. Pfeifer, *Die Lehre von den juristischen Personen nach gemeinem und würtembergischem Rechte*, Tübingen 1847, p. 154 et seq.; [B.] Windscheid, *Die ruhende Erbschaft und die vermögensrechtliche Persönlichkeit. Kritische Ueberschau der deutschen Gesetzgebung und Rechtswissenschaft*, 1853, vol.1, p. 151 et seq; G.F. Puchta, *Vorlesungen über das heutige römische Recht*, Band 2, ed.4, Leipzig 1855, p. 314 et seq; J.F. Dworzak, *Zur Lehre von der juristischen Persönlichkeit der ruhenden Erbschaft*. *Oesterreichische Vierteljahresschrift für Rechts- und Staatswissenschaft*, 1863, vol. I, p. 219 et seq; E. Till, *O podmiocie praw i prawach bez podmiotu. Studjum z dziedziny prawa prywatnego*, "Prawnik" 1872, no. 25, p. 97, no. 26, p. 101, 102, no. 27, p .105, No. 28, p.110, 111, no. 29, p.113 et seq., no. 30, p.117 et seq.; E. Zitelmann, *Begriffund Wesender sogenannten juristischen Personen* , Leipzig 1873, p. 69 et seq.; B. Windscheid, *Lehrbuch des Pandektenrechts*, vol. III, ed.5, Stuttgart 1879, p. 11; F. Zoll (st.), *Rzymskie prawo prywatne (Pandekta)*, vol. V.A, p. 55; H. Insadowski, *Osoba prawna. Studjum-prawno-kanoniczne*, Lublin 1927, p. 79; J. Gwiazdomorski, *Prawo dziedziczenia* [in:] H. Konic (zal.), F. Zoll, J. Wasilkowski (ed.), *Encyklopedja Podręczna Prawa Prywatnego. Tom trzeci: osobistości prawa przedsiębiorstwo*, Warszawa b.d.w., pp. 1737–1738; G. Hohner, *Subjektlose Rechte.Unter besonderer Berücksichtigung der Blankozession*, Bielefeld 1969, p. 41 et seq; W. Brauneder, *Von der moralischen Person des ABGB zur juristischen Person der Privatrechtswissenschaft* [in:] *Quaderni Fiorentini per la storia del pensiero giuridico moderno*, 11/12 (1982/83); *Itinerari moderni della persona giuridica*, t.I,s.263 et seq; T. Giaro, *Krótka historia istoty osoby prawnej* [in:] F. Longchamps de Bérier, R .Sarkowicz, M. Szpunar (ed.), *Consul est Iuris et Patriae Defensor.Księga pamiątkowa dedykowana doktorowi Andrzejowi Kremerow*i, Warszawa 2012, p. 65.

14 See for example F. Maciejowski, *Zasady prawa rzymskiego pospolitego…*, p. 298.

15 J. Zielonacki, *Pandekta czyli wykład prawa prywatnego rzymskiego*, Kraków 1862, pp. 625–626; see also F. Zoll (st.), *Rzymskie prawo prywatne (Pandekta)*, vol. V.A, p. 55.

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inheritance is disputable and has been the subject of lively discussions between legal theorists[17]. It is not necessary to analyse it in this paper.

2.3. Lying inheritance in the Austrian Law

In modern times, Austria adopted in its legal system a solution most similar to the Roman concept[18].The 1811 Code with the amendments introduced in 2015[19] treats inheritance as a legal person, a continuation of the subjective status of the decedent (§ 546 a.c.c, Germ. *Verlassenschafts juristische Person).*According to § 797 ABGB, “No person may take wilful possession of inheritance. The right of inheritance should be recognised by the court, as should be the granting of inheritance order, that is the transmission of the estate into lawful possession. Thus, the Austrian Civil Code envisaged that the heir must obtain the so-called court transfer of title decree (i.e. *Einantwortung der Erbschaft*)[20]. Also in the Polish legal theory in the inter-war period (despite the absence of the current wording of § 546 of the Code), it was assumed that the lying inheritance was, in light of the laws applicable in the Małopolska region, a subject of rights and obligations, and as such had legal capacity – “despite the fact that the relevant entity has died and no longer exists, the act treats the legacy as if it were in the decedent's possession”; at the same time, however, the legacy was not recognised as a legal person since “the concept of a legal person is usually associated with the existence of a status and an intrinsic objective of legal existence, which the legacy does not have”[21]. Under the Austrian law, the lying inheritance was also considered a temporary and transient state, “succession under suspension”[22].

3. Fundamental principles of succession in light of the Napoleonic Code

As per the Napoleonic Code in force in the central regions of the Republic of Poland until 1947, successions opened by an ancestor's death (natural death, earlier also civil death, see Article 718, currently Article 720 of f.c.c.).Despite the significant changes in the French law at the beginning of the 21st century, there has been no departure from the original fundamental model solutions of the inheritance law[23.]

See for example J. Ugner, *Das österreichische Erbrecht*, ed.4, Leipzig 1894, p. 28.

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As concerns old Polish literature, this problem was tackled extensively by L. Piętak, *Prawo spadkowe rzymskie*, vol. I, Lwów 1882, p. 53 et seq.

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A. Stempniak, *Zarząd spadku nieobjętego w ujęciu przepisów KPC…,* p. 999.

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Bundesgesetz, mit dem das allgemeine bürgerliche Gesetzbuch, das Anerbengesetz, das Außerstreitgesetz, das Gerichtsgebührengesetz, das Gerichtskommissärsgesetz, das Gerichtskommissionstarifgesetz, das allgemeine Grundbuchsgesetz 1955, das IPR-Gesetz, die Jurisdiktionsnorm, das Kärntner Erbhöfegesetz 1990, die Notariatsordnung, das Rechtspfegergesetz, das Tiroler Höfegesetz, das Wohnungseigentumsgesetz 2002 und die Kaiserliche Verordnung über die dritte Teilnovelle zum allgemeinen bürgerlichen Gesetzbuch geändert werden (Erbrechts-Änderungsgesetz 2015 – ErbRÄG 2015), BGBLA_2015, vol. I, p. 87.

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F. Zoll, *Prawo cywilne opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*, vol. IV, p. 188.

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F. Kurzer, *Zastępstwo prawne spuścizny w procesie*, „Głos Prawa” 1937, no. 9–10, p. 450.

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E. Till, *O podmiocie praw i prawach bez podmiotu…,* no. 30, p. 117.

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Loi n° 2001–1135 du 3 décembre 2001 relative aux droits du conjoint survivant et des enfants adultérins et modernisant diverses dispositions de droit successoral, NOR:JUSX0104676L.

As in other legal systems, the acquisition of inheritance under the French law is not, in principle, an obligation but depends on the will of the heir[24].Pursuant to Article 775 of the Napoleonic Code, "no one is bound to accept a succession to which they are called". Pursuant to Article 724 of the Napoleonic Code (in its wording in force in the Kingdom of Poland until the end of 1946), "The lawful heirs are seized in full right of the property, claims, and funds of the deceased, under the obligation to discharge all the expenses of the succession: natural children, the spouse surviving, and the state, must cause themselves to be put in possession by act of law which shall be determined"[25].The latter entities, referred to as "*héritiers irreguliers*" under Article 770 f.c.c, were required to obtain provisional possession (Fr. *l'envoi en possession*)[26]. In contrast to the Austrian Civil Code, the Napoleonic Code did not provide for a court title transfer decree (§ 797 a.c.c) or a succession certification (as in g.c.c.).[27] It subscribed to the rule of seisin (*le vif saisit le mort*), indicated directly in Article 724 sentence 1. As a consequence of this provision, it was assumed that the assets of the estate were transferred directly and without formalities to lawful heirs (of the first category)[28]. Seisin involved putting someone in possession of inheritance[29].

However, it should be noted in this context that the attachment cannot be regarded as justifying the waiver of the necessity to fulfil the obligation to have Article 7(1) of the Warsaw Decree of 1945 or the premises referred to by the Mortgage Law of 1818.[30] These two legal acts, as far as appropriate, complement and detail the Codes due to the fulfilment of specific objectives. In particular, the premise of possession included in the Decree constituted an instrument of transparency not only for the purposes of assessment of existence of the subjective right but, above all, of the possibility of actual use of the property (which, in turn, was important for considering the petition). It is worth noting that, in the context of the discussion on the purpose of this premise, a possible lack thereof with respect to successors would be in light of the provisions of the Code concerning the putting of heirs in fictitious possession more justified than in the case of existing owners.

4. Harmonisation of the inheritance law in 1947

Neither the Roman construct of *hereditas iacens* nor the Austrian and French solutions were incorporated into the laws harmonised in 1946 or into the subsequent Civil Code (1964), which were modelled mainly on the German concept of appointment to succession (the transfer of rights and obligations onto the heir by operation of law upon the death of the ancestor)[31].

The harmonised inheritance law of 1946 introduced new rules of succession, providing for *ipso iure*

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J.S. Piątowski [in:] idem (ed.), *System Prawa Cywilnego*, vol. IV, *Prawo spadkowe*, Wrocław–Warszawa–Kraków– Gdańsk–Łódź 1986, p. 92.

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If not indicated otherwise, the Polish translation of the f.c.c quoted in this work comes from: E. Muszalski, *Kodeksy cywilne obowiązujące na Ziemiach Centralnych Polski włącznie z Kodeksem Zobowiązań*, Warszawa 1936, here p. 671.

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F. Jaglarz, *Jak usuwać kolizje zachodzące przy stosowaniu dzielnicowych ustaw spadkowych i hipotecznych*, "Palestra" 1927, no. 4, p. 426; J.S. Piątowski [in:] idem (ed.), *System Prawa Cywilnego*, vol. IV, *Prawo spadkowe*, Wrocław–Warszawa– Kraków–Gdańsk–Łódź 1986, p. 92.

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F. Jaglarz, *Jak usuwać kolizje zachodzące przy stosowaniu dzielnicowych ustaw…*, p. 426.

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H. Konic, *Otwarcie i objęcie spadku*, Warszawa 1923, p. 63.

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W. Dutkiewicz, *Jak rozumieć art. 789 Kod.Cyw.?*, "Gazeta Sądowa Warszawska" 1878, no. 33, p. 259.

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See Prawo o ustaleniu własności dóbr nieruchomych, o przywilejach i hipotekach z dnia 26 kwietnia 1818 r. (Official Journal vol. V, p. 295).

acquisition of inheritance by heirs upon the opening of inheritance[32], even though the draft provisions on non-contentious jurisdiction which had been prepared in the inter-war period by the Polish Codification Committee still envisaged separate regulations for the vacant inheritance (Articles 66 to 71), while the draft implementing provisions drawn up and published simultaneously envisaged the repeal of all provisions on vacant inheritance, including the Napoleonic Code (Article VII § 2).[33] As a consequence, similarly to the German codification of 1896[34], the current Polish inheritance law modelled upon it[35] is not familiar with the concept of lying inheritance (Ger. *ruhende Erbschaft*) or heirless ("ownerless") and vacant inheritance. Such a significant change in the inheritance rules required that the provisions implementing the harmonised law 1946 included appropriate intertemporal provisions relating to the abandoned French and Austrian solutions, previously in force in the central and southern regions.

II General rules of succession in the private internal law

Prior to the harmonisation of the inheritance law, the existence of different regulations in the various parts of the Republic of Poland, generally overlapping with the boundaries of the partitions, forced the legislators to determine which provisions and what criteria should be used in the event a decedent leaves estate. These issues were regulated in the private internal law.

Pursuant to Article 27(1) of the Act of 2 August 1926 on the law applicable to private internal relations[36], inheritance matters were to be governed by the law applicable to the decedent at the time of death (*lex domicilii*).[37] Pursuant to paragraph 2 of the above-mentioned provision, heirs must be capable of acquiring inheritance, not only under the law governing inheritance rights, but also under the relevant laws applicable to them.

A Polish citizen living abroad is subject to the law applicable to his most recent domicile in Poland. If the domicile in Poland cannot be determined, the applicable law is the law of the capital of the State (Article 3(1), the so-called "fictitious domicile"[38]).

III Inheritance by the State Treasury

1. Heirless inheritance – historical and comparative overview

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For codification work in the post-war period, see e.g. K. Przybyłowski, *Polskie międzywojenne prace kodyfikacyjne w dziedzinie prawa spadkowego* [in:] *Księga pamiątkowa ku czci Kamila Stefki*, Warszawa–Wrocław 1967, sp 263 et. seq.; see also: L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfkacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, Wrocław 2000; A. Moszyńska, *Geneza prawa spadkowego w polskim Kodeksie cywilnym z 1964 roku*, Toruń 2019.

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See for example, S. Szer, *Prawo spadkowe*, ed. 2, Warszawa 1955, pp. 26–27.

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Komisja Kodyfkacyjna. Podkomisja Postępowania Niespornego, issue 2. *I. Projekt księgi drugiej kodeksu postępowania niespornego. II. Projekt przepisów wprowadzających. III. Uzasadnienie*, Warszawa 1939.

34

See for example, G. Otte [in:] idem (ed.), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Fünftes Buch. Erbrecht*, Berlin 2008, p. 392.

35

See for example, W. Borysiak, *Dziedziczenie – konstrukcja prawna i ochrona*, Warszawa 2013, p. 128.

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Journal of Laws No. 101, item 580.

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See F. Jaglarz, *Jak usuwać kolizje, zachodzące przy stosowaniu dzielnicowych ustaw*…, pp. 428, 429.

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F. Jaglarz, *Jak usuwać kolizje, zachodzące przy stosowaniu dzielnicowych ustaw*…, p. 428.

In accordance with Article 713 f.c.c, *les biens qui n'ont pas de maître appartien-nent à l'Ètat*. The state was, then, entitled to property which had no owner. This solution, which provided for the reversion of property to the State under the so-called escheat (Ka*duzität, Fiskuserbrecht*, wakancye, *successio fisci*, *ius caducum, caducitatis, bona vacantia*)[39] in the absence of statutory heirs belonging to a particular circle, could be found in all legal systems within the Polish territory (Article 539, Article 713 and Article 768 of the Napoleonic Code, § 1936 BGB, Article 1168 part 1 vol. X Collection of Russian Acts, d. § 760, currently
§ 750 ABGB – *Heim-fallsrecht des Staates*)[40].

The introduction of this rule was associated with the fact that since the Roman law it had been recognised that a decedent's estate could not be ownerless[41]. The principle of the State's succession and rejection of "ownerless" inheritance could be first found in the Roman law (*Lex caducaria Julia Pappia et Poppaea),* which held – until the times of the Justinian *Constitutio de caducis tollendis* – that married and childless people should be excluded from succession under a will and that their inheritance should be devolved to the *aeriario populi*, and then to the emperor's revenue[42]. Throughout history they were also adopted into the legal systems of some European countries[43] (see e.g. § 16 et seq., part II Title 16 of the General State Laws for the Prussian State (1794); § 556 and § 625 part II of the East Galicia Civil Code (1797) and the West Galicia Civil Code, – "treated as an heirless inheritance", Germ. *als ein erbloses Gut behandelt*). Finally, they have also been adopted into the Polish inheritance law (see Art. 935 c.c.) and in other legal orders[44], including some modern ones, such as the Dutch Civil Code of 1994 (Article 4:189 *Burgerlijk Wetboek*), as well as in Anglo-Saxon systems (as the right to escheat).

Regardless of whether in the legal orders subscribing to the above principle the rights of the State (public authorities) are rooted in the principles of the sovereignty (having in its public nature *droit de souveraineté*, the State substitutes, as it were, the heir – *heredis loco est*[45]) or in the law of inheritance (treating a unit of local government or the State Treasury as the ultimate statutory heir – *ultimus haeres*)[46], the effect is the same.

The issue of qualification has significant practical consequences, however a closer analysis of this issue

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Zob. P. Dąbkowski, *Prawo prywatne polskie*, vol. II, Lwów 1911, p. 60.

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For the solutions found in the Austrian law, see: E. Till, *Prawo prywatne austryackie*, vol. VI, *Wykład austr. prawa spadkowego*, Lwów 1906, p. 257 et. seq.; F. Zoll, *Prawo cywilne opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*, vol. IV, p. 268.

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J.S. Piątowski, B. Kordasiewicz, *Prawo spadkowe. Zarys wykładu*, wyd.5, Warszawa 2002, p. 83.

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E. Till, *Kaduk* [in:] Z. Cybichowski (ed.), *Encyklopedja Podręczna Prawa Publicznego*, vol. I, *Abolicja – państwo*, Warszawa b.d.w., p 216; J. Louis, *Prawo spadkowe*, Kraków 1865, pp90–91; F. Zoll (st.), *Rzymskie prawo prywatne (Pandekta)*, vol. V.A, p. 105; more about this topic also in C.A. Schmidt, *De successione fisci in bona vacantia ex jure romano*, Jena 1836.

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See for example, R. Weyl, *Der Fiskus im gegenwärtigen deutschen Privatrecht* [in:]*Festgabe der Kieler Juristen- Fakultät Ihrem hochverehrten Senior Dr. Albert Hänel*, Kiel–Leipzig 1907, pp. 88–89.

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See e.g. the detailed comparative analysis in: M. Heckel, *Das Fiskuserbrecht im Internationalen Privatrecht*, Tübingen 2006.

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E. Till, *Prawo prywatne austryackie*, vol.VI, p. 258.

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See for example, J. S. Piątowski, B. Kordasiewicz, *Prawo spadkowe. Zarys wykładu*, pp. 84–85; see also for example F. Zoll, *Prawo cywilne opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*, vol. IV, *Prawo familijne i spadkowe*, ed.3, Poznań 1933, p. 268; E. Till, *Kaduk* [in:] Z. Cybichowski (ed.), *Encyklopedja Podręczna Prawa Publicznego...*, p. 216.

goes beyond the scope of this work. Considering the wording of Article 935 of the Civil Code, the Polish law expressly indicates that the appointment to succession results from the law of inheritance (from *iure hereditario* rather than *iure imperii)*[47].

In simplified terms, estates without heirs (i.e. persons entitled to inheritance by operation of law or based on a legal transaction), treated as ownerless property (*bona vacantia*), are, as it were, "appropriated" by certain public law entities, usually tax authorities (State Treasury).In the doctrine, this approach is regarded – and rightly so – as an expression of the socialisation of the inheritance law[48].

Historically in the Polish law, the ruler had the right to legacy of a foreigner who died without leaving any heirs, while the legacy of childless peasants (*mortuarium*) fell to noblemen[49]. The king also had the right to escheat with respect to assets of a person who did not have any relatives who could be potential heirs[50]. J. Louis wrote that "according to the German laws adopted by the Polish cities, a heirless property was administered by a judge, with movable assets held for one year and immovable assets – for 30 years. – During that time relatives were allowed to claim the property – however, after the period ended, the property was seized by the ruler or by a lord with judiciary powers".[51]

The European Union legislation confirms the right of the state to heirless estates. In accordance with Article 33 of Regulation (EU) No 659/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession[52], "To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole."

The above rule applies to the so-called heirless inheritance, which should not be equated with the Roman institution of *hereditas iacens*, or with the French concept of vacant inheritance. However, the approach adopted in the French law, in particular in Article 539 of f.c.c., lets us conclude that in all cases where there was no private individual entitled to inheritance, the public authority (the Majesty, State) was the favoured beneficiary of such "ownerless property", regardless of why the property acquired such a status. A similar solution exists in e.g. the Scottish law[53], which provides for *prerogative rights as respects ownerless or unclaimed property* and the so-called *regalia maiora*[54]. Historically, another example would be the Frankish law where it was assumed that ownerless estate was the property of the

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See e.g. J.S. Piątowski [in:] idem (ed.), *System Prawa Cywilnego*, vol. IV, *Prawo spadkowe,* p. 143; M. Pazdan, *Czy przywrócić dziedziczenie ustawowe gminy?*, "Samorząd Terytorialny" 1991, no.11–12, p. 165.

48

H. Konic, *Prawo spadkowe wobec nowoczesnych prądów w prawie cywilnem*, Warszawa 1925, p. 22.

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For more details on how the approach of the Polish law changed over time, see J.W. Bandtkie-Stężyński, *Prawo prywatne polskie. Dzieło pogrobowe*, Warszawa 1851, p. 28.

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E. Till, *Kaduk* [in:] Z. Cybichowski (ed.), *Encyklopedja Podręczna Prawa Publicznego...*, p. 216; see more in e.g. J. Louis, *Prawo spadkowe*, p. 91; a detailed historical analysis of the Polish law can be found in P. Dąbkowski, *Prawo prywatne polskie*, vol. II, p. 60 et seq.

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J. Louis, *Prawo spadkowe*, p. 92.

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O.L.EU no. L 201, 27.7.2012, pp. 107–134.

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D.L. Carey, A. Pope, *Acquisition of Ownership* [in:]R. Zimmermann, D. Visser, K. Reid (ed.), *Mixed Legal Systems in Comparative Perspective. Property and Obligations in Scotland and South Africa*, Oxford 2005, pp. 676–677; for an analysis of the Danish law, see: Fr. Vinding Kruse, *Das Eigentumsrecht*, vol. I, Berlin–Leipzig 1931, p 477.

ruler[55].

2. The law applicable on the territory of the former Kingdom of Poland (Congress Poland)

As the starting point for the analysis of the regulations in force on the territory of the central Republic of Poland, it should be indicated that they were not familiar with the concept of ownerless ("vacant") inheritance. In accordance with Article 539 of the Napoleonic Code, "all property unclaimed and without owner and that of persons who die without heirs, or of which the succession is abandoned, belongs to the nation"[56].

Within the territory subject to the Napoleonic Code, an autonomous definition of the so-called heirless inheritance was introduced by the decision of the former Administrative Council of the Kingdom of Poland of 30 January / 11 February 1842 on heirless and vacant inheritance[57]. In Article 1, two separate categories of inheritance were distinguished: heirless and vacant (abandoned)[58]. It was indicated that the heirless inheritance is one with respect to which the decedent left no heirs of the blood, nor natural children or divorced spouse and which, as a consequence, belongs to the Kingdom's Treasury. This definition corresponded with the view that the heirless inheritance is that which "falls to the State"[59].

The vacant inheritance was, in turn, defined as "abandoned", i.e. one "which has not been claimed within the prescribed time or which has been declined expressly by known heirs, [and which] shall be under the supervision of curators, appointed under Article 812 of the Civil Code".

These definitions referred to the already-mentioned division of inheritance under Article 539 of the f.c.c, distinguishing between the heirless inheritance, i.e. inheritance without entitled heirs, and the vacant inheritance which has been abandoned by heirs whose fates remain uncertain". In particular, inheritance is deemed heirless in the absence of a surviving spouse (Art. 768 f.c.c.), and when there are no relatives of a degree capable of succeeding, nor natural children (Article 767). In light of these regulations, the doctrine did not view the State as an heir but rather as an entity exercising its sovereign right[60].This justified the use of the term "heirless legacy", as the estate fell to the State otherwise than by operation of the inheritance law. Under the French law, the vacant inheritance could become heirless inheritance and as a consequence, could be passed to the State[61].

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Sec. 58(2b) *Abolition of Feudal Tenure etc*. (*Scotland) Act* 2000; in the explanatory note, we read: "The prerogative powers are preserved generally, but three of them are mentioned specifically for the avoidance of any doubt. Firstly, the prerogative of honour is mentioned to make it clear that matters such as peerages are not affected , even although many of these matters may have their roots in the feudal system. Secondly, the Crown's prerogative rights in relation to ownerless or unclaimed property are also specifically excluded. These cover the Crown's rights as the so called last heir (ultimus haeres) to property which is unclaimed by any heir on the death of the deceased and the Crown's right of property, whether moveable or heritable, which ceases to have an owner (bona vacantia)".

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H. Dernburg, *Die Allgemeinen Lehren und das Sachenrecht des Privatrechts Preußens und des Reichs*, ed.3, Halle 1881, p. 552; idem, *Das Bürgerliche Recht des Deutschen Reichs und Preußens*, Bd. III, *Das Sachenrecht*, 3. Revise dedition. Halle 1904, s. 291; see also: M. Sczaniecki, *Powszechna historia państwa i prawa*, ed. K. Sójka-Zielińska, edition9, Warszawa 1998, p. 56.

56

Translation after *Kodex Cywilny Francuzki, w Warszawie, w Drukarni Rządowey naprzeciwko Dyrekcyi i Kantoru Głównego Loteryi* z 1829 r., i.e. the Piarists version.

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Dziennik Praw XXIX, p 23.

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See for example, C. Demolombe, *O spadkach*, vol. III, Warszawa 1901, p. 277.

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M. Planiol, *O spadkach*, Warszawa 1927, p. 73.

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M. Planiol, *O spadkach*, p. 73.

3. Harmonised law and the Civil Code of 1964

The inheritance right of revenue authorities, drawing on the Roman concept, was also recognised in the harmonised Polish post-war legislation. Pursuant to Article 27 § 1 of the Inheritance Law Decree of 8 October 1946, "in the absence of relatives and a spouse called to inheritance by operation of law, the estate shall be transmitted to the municipality of the last domicile of the decedent, and if such a domicile was located abroad – to the State Treasury. However, immovable land property and immovable property situated outside the territory of Poland shall be inherited by the State Treasury, while other immovable property – by the municipality in which they are located". This solution was based on the concepts prevailing in the inter-war period when the rule of municipal succession was postulated[62] (similarly as in the Swiss legislation, see Article 466 of the Swiss Civil Code)[63]. Despite the lack of amendments following the liquidation of the local government in 1950, these rules resulted in the succession of assets by the State, irrespective of the domicile of the decedent and the nature of the property. Originally, the 1964 Civil Code stipulated in its Art. 935 § 3 that "in the absence of the spouse and relatives called to inheritance by operation of law, the estate shall fall to the State Treasury as the statutory heir". As a result of discussions[64] and works conducted by the Codification Committee for the Civil Law, this provision was amended in 2003 by the Sejm of the Republic of Poland.[65] Under the Act of 14 February 2003 amending the Civil Code and certain other acts[66], in accordance with the new wording of Article 935 § 3 c.c., in the absence of the spouse and relatives called to inheritance by operation of law, the estate falls to the municipality of the last domicile of the decedent as the statutory heir. If the last domicile of a decedent in the Republic of Poland cannot be determined or if the last domicile of the decedent was located outside the territory of Poland, the estate shall fall to the State Treasury as the statutory heir. In a judgement of 4 September 2007, file ref. P 19/07, the Constitutional tribunal confirmed the compliance of Article 935 § 3 of the Civil Code with the Constitution (with its Article 2, Article 18, Article 21(1), Article 31(3), Article 32, Article 47, Article 64(1) and (2) and Article 71(1))[67], in the wording adopted by the Act of 2 April 2009 amending the Civil Code[68]. § 3 was numbered as Article 935, but its content has not changed.

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A. Okolski, *Zasady prawa cywilnego obowiązujące w Królestwie Polskiem*, Warszawa 1885, p. 345.

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See L. Górnicki, *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*, pp. 291– 292; M. Strus, *Ewolucja zasad dziedziczenia ustawowego w prawie polskim (1918–1964)*, part II, "Rejent" 2005, no. 11.

63

H. Konic, *Spadkobranie z prawa (ustawowe)*, "Gazeta Sądowa Warszawska", 1920, no. 12, pp. 98–99.

64

M. Pazdan, *Czy przywrócić dziedziczenie ustawowe gminy?*, p. 164 et seq.; J. Pietrzykowski, *Wybrane zagadnienia reformy prawa spadkowego* [in:] *Z zagadnień współczesnego prawa cywilnego. Księga pamiątkowa ku czci profesora Tomasza Dybowskiego*, „Studia Iuridica" 1994, no. 21, p. 252 et seq.; M. Pazdan, *O potrzebie i kierunkach zmian dziedziczenia ustawowego w polskim prawie cywilnym*, "Rejent" 2005, no. 9, p. 46 et seq; R. Ciosek, *Dziedziczenie ustawowe Skarbu Państwa i gminy*, "Przegląd Sądowy" 2006, no. 7–8, p. 75 et seq.; W. Baran-Kozłowski, *Dziedziczenie ustawowe w Polsce*, Piotrków Trybunalski 2014, p. 68 et seq.

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For more details, see: M. Pazdan, *Dziedziczenie gminy i Skarbu Państwa – po nowelizacji Kodeksu cywilnego w 2003 roku*, "Rejent" 2003, no. 2.

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Journal of Laws no. 49, item 408.

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OTK ZU no. 8/A/2007, item 94.

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Journal of Laws no. 79, item 662.

Vacant inheritance, landless inheritance, and claims from the Warsaw decree (part I)

Abstract

In the reprivatisation procedures, conducted in Polish courts and before public administration bodies following the restoration of independence, it is increasingly frequently necessary to determine the person currently holding the right to restitution or compensation due to the death of the past owners. This means a necessity of determining the legal successors to people who held the right to nationalised (communalised) property, including – for individuals – their inheritors. Due to the principles of the international law applicable to people assigned during or immediately following the conclusion of World War II, it is connected with the necessity to apply the principles of then-current inheritance law. These will therefore be – in the western and northern regions of Poland, applicable provisions of the German civil law of 1896 (BGB), in the southern regions – the Austrian code of civil procedure of 1811 (ABGB), while in the central regions – the Napoleonic Code of 1804.The latter applies to the area of application of the decree dated 26 October 1945, which provides for the communalisation of land in Warsaw (on the ownership and usage of land within the boundaries of the capital city of Warsaw, so called Bierut's Decree).

This paper comprising two parts presents the basic solutions that refer to the institution of heirless inheritance (in the Napoleonic Code, also in ABGB), and so called vacant inheritance *(les successions vacantes)*, which is a solution specific to French law, adopted in the territory of the Russian partition and which remained in force until 1947.

The second part of this paper (in the next issue of the quarterly) will be devoted to an analysis of the consequences of deeming an inheritance to be vacant under the erstwhile art. 811 of the Napoleonic Code, and to the provisions of Polish intertemporal law that applied to this solution following the standardisation of inheritance law after 1946.

Keywords: reprivatisation, inheritance law, heirless inheritance, vacant inheritance