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THE COMPETING CLAIMS OF FISCI TO LAPSED PERSONALTY.

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THE COMPETING CLAIMS OF FISCI TO LAPSED PERSONALTY.

By G. STUART ROBERTSON.

The brief paper which I am to have the honour of reading has been classed for convenience under the head of "Double Taxation," but its relation to that subject is one of similarity only. I propose to discuss the destination of movable property situate in country A, which belonged, at the time of his death, to an intestate without known next of kin who was domiciled in country B. Clearly the fiscus of one country or the other will take it, but the question is, which? The matter has been the subject of a legal decision in England in recent years, *In re Barnett's Trusts* [1902] 1 Ch. 847, and it was professional connection with that case which drew my attention to this interesting topic. The facts were that an Austrian who was entitled to a fund standing in Court in England died a bastard and intestate, and it was held that the English Crown was entitled to the fund as against the Austrian fiscus. From the point of view of the English lawyer the main feature which emerged was that some of the principal writers on the conflict of laws who had dealt with the subject had been led astray in this case, as in others, by excessive devotion to a maxim. The maxim in this instance was the irrefragable statement that *Mobilia sequuntur personam*, the result of which in relation to succession, is that succession to personalty is governed by the law of the domicile of the deceased person. The bell-wether of the flock is Savigny. He says (*System des Heutigen römischen Rechts*, (ed. 1849) viii. 315):—"Das Recht auf einen erblosen Nachlass (*bona vacantia*) ist stets als Surrogat des Erbrechts anzusehen, also gleichfalls nach dem Gesetz des Wohnorts des Erblassers zu bestimmen, ohne Rücksicht auf die Lage des Vermögensstücke, selbst des auswärtigen unbeweglichen Vermögens. Insbesondere nach dem römischen Recht is das Successions-

recht des Fiscus zwar nicht *hereditas* zu nennen, wohl aber ganz nach den Grundsätzen derselben zu behandeln, so dass der Fiscus selbst zu Legataren und Fideicommissaren ganz in dasselbe Verhältniss, wie ein wahre Erbe, treten kann. An sich verschieden von dieser, allein hierher gehörenden, Frage nach dem anwendbaren örtlichen Recht über die *bona vacantia*, ist die Frage, *welchem* Fiscus der Anspruch auf dieselben zusteht, dem Fiscus des Wohnsitzes, oder dem der gelegenen Sache. Denn diese Frage kann unter zwei Ländern entstehen, die gleichmässig das römische Recht anerkennen. Auch diese Frage muss zum Vortheil des Fiscus entschieden werden, in dessen Gebiet der Wohnsitz liegt, aus demselben Grunde, der für das örtliche Recht geltend gemacht wurde, nämlich weil dieses Recht des Fiscus die juristische Natur eines Erbrechts, und nur nicht den Namen desselben hat." The contradictions in this remarkable passage are sufficiently obvious. The learned author first of all refers to an heirless inheritance as *bona vacantia*, and then admits that the succession of the fiscus to it is not to be called an *hereditas;* but after this he somehow arrives at the result that it is to be treated as a " wahre Erbe," and, lastly, goes so far as to say that it has the juristic nature of an " Erbrecht," but only lacks the name. This does not point to much clarity of conception on his part. Nor do his authorities appear to bear out what he says, so far as we can discover what it is that he means to say. The Code distinctly provides (x. 10) that, with certain exceptions, specified in vi. 62, the fiscus is to take heirless property as *bona vacantia*: " Vacantia mortuorum bona tunc ad fiscum iubemus transferri si nullum ex qualibet sanguinis linea vel iuris titulo legitimum reliquerit intestatus heredem." Puchta (*Pandekten*, § 564), to whom Savigny also appeals, says most reasonably that to regard the taking of heirless property as an " Erbrecht " is a contradiction in terms of the statement that it is " heirless," and appears not to object strongly to Blume's opinion (Rheinisches Museum, iv. 6) that the fiscus takes as an occupant. But it is true that in his later " Vorlesungen über das heutige römische Recht," § 564, while repeating that the taking is not an " Erbrecht," he combats Blume's view, and goes on, like Savigny, to the apparently contradictory statement that the fiscus stands *loco heredis*. He bases this on the fact that the fiscus, at Roman law, having taken the property, fulfils certain functions with regard to it which resemble those of an ordinary successor. But, although this may be so, it does not follow that the original taking was a taking in the nature of a succession,

and it is this which, if I may respectfully say so, has led these great authorities astray. The one cardinal fact on which attention must be fixed is that the fiscus takes the personalty of an intestate without known heirs as *bona vacantia*, and not in any other manner. If once that is recognized, the question with which the paper deals is solved. Puchta himself recognizes this, saying that, if it be the case, as Blume alleged, that the fiscus *loci rei sitæ* took such personalty, that was the natural result of the right having arisen from occupation. This is also the opinion of Foelix, *Traité du Droit International Privé*, § 62. He expresses himself as follows: "Nous avons vu que la règle, suivant laquelle les meubles sont régis par la loi du domicile de celui à qui ils appartiennent, repose sur le rapport intime entre les meubles et la personne du propriétaire, sur une fiction légale qui les répute exister au lieu du domicile de ce dernier. . . . . La règle est sans application à tous les cas où les meubles n'ont pas un rapport intime avec la personne du propriétaire: par exemple . . . lorsqu'il s'agit . . . d'en prononcer la confiscation ou de déclarer une succession mobilière en déshérence au profit du fisc. Dans tous ces cas il faut appliquer la loi du lieu où les meubles se trouvent effectivement, car ladite fiction cesse par le fait." This is quite consistent with the provisions of the French Code Civil, which, as Laurent points out (*Droit Civil International*, § 255), takes property to which there is no successor, under Art. 768, by the application of Art. 539, which gives the State all *bona vacantia*. He cites the *Discours Préliminaire* of Portalis, which puts the matter very clearly: "Le droit de l'Etat sur les successions que personne ne réclame n'est pas un droit d'hérédité, c'est un simple droit *d'administration* et de gouvernement."

English writers are mostly silent on the matter, or content themselves merely with citing the decision *In re Barnett's Trusts*, so I will conclude with one more citation from a German author, who crystallises the whole discussion, and expresses his particular view with remarkable vigour, I mean Von Bar, in his *International Law*, § 387. He says: "The question to which State property is to fall where there is no heir, whether to that in which it is situated, or to that to which the last possessor belonged, is dependent upon whether the right of the State to succeed is to be considered to be a right *occupatione*, or a right of consolidation belonging to the feudal superior, or as a true right of succession. In either the first or second case the property will go to the State where the property is situated; in the last case it will

fall to that of the domicile of the deceased, in so far as both States hold the theory of a universal succession, and the estate is made up of movables. The theory which is in conformity with modern ideas of law, which is one deserving of our respect and which undoubtedly now prevails as the theory of the law in Germany, is that, if there is no one nearer in blood to be called to the succession, a man's fellow-countrymen must be regarded as his heirs. This view is supported by the fact that it is the State to which a man belongs that fixes the circle of those who are entitled to succeed him as heirs, drawing it more or less wide, as it pleases; while, on the other hand, it has more or less of the air of robbery for a State to seize on the movable estate of a deceased person who was by mere accident resident there at the moment of his death. Thus the State, whose subject and citizen the deceased was, will be entitled to succeed to him. But, beyond Germany, the other rule still prevails, and each State seizes the movables which happen to be within its borders."

Paragraphs 1964 to 1966 of the German *Bürgerliches Gesetzbuch* express the German view of the matter on which Von Bar's statement is based. In Austria the taking of the property is regarded as a confiscation and not as a succession (see paragraph 760 of the General Civil Code).

I hope I shall not be accused as accessory to a felony if I strenuously support the act which Von Bar describes as a robbery, but which he admits to be customary outside Germany and to commend itself to jurists who are not Germans. I submit that the only logical view is of the French jurists and the English law, namely, that on the death of a person intestate and without known heirs, his *persona* entirely disappears and leaves nothing which the *mobilia* can follow. His movable property is left lying ownerless, and is therefore, in accordance with ordinary principles, taken by the fiscus of the country where it is situated, the fiscus being in all countries the general assimilator of unconsidered trifles. It is perfectly true that the fiscus, for the sake of greater certainty and convenience, goes through certain formalities in such cases with regard to administration and distribution, which are analogous to those gone through by an ordinary successor, but this fact cannot alter the nature of the act by which it takes the property, and the quality of the property which it takes. The act is an occupation of the property as *bona vacantia*. The opposite view has been supported not only by the notion that the fiscus takes by succession and not

by occupation, with which I have just dealt, but also by the suggestion that the Crown takes as *parens patriæ*, as a sort of general father of all fatherless individuals; and it has been urged that while the king of Barataria may be regarded as the universal sire of fatherless children in Barataria, he could not reasonably be viewed as the universal sire of fatherless children in Zenda as well, and therefore the movables of the latter should go to the king of Zenda, who is technically responsible for their paternity. But it is not as *parens patriæ* that the Crown takes *bona vacantia*, and it is not only fatherless individuals who leave lapsed personalty behind them.

Again, it has been suggested that where the conflict arises between the fiscus of a country which recognizes the principle advocated in this paper and a fiscus which does not, the comity of nations may step in and affect the question. I very much doubt it. There is next to no comity about a fiscus, and I question whether even the strict principles of the German Treasury, as exhibited by Savigny and Von Bar, would stand the test, if a really substantial inducement in the opposite direction were offered to it. You remember the pathetic mediæval proverb: "Quod non capit Christus capit fiscus" ("What the Church leaves, the Treasury takes"); and nowadays, while the Church does not get so much as she used to get, by way of compensation the Treasury takes more than ever.