THE DEVELOPMENT OF THE LAW OF INHERITANCE AND PATRIMONIAL PROPERTY IN POST-EMANCIPATION RUSSIA AND ITS SOCIAL, ECONOMIC, AND POLITICAL IMPLICATIONS

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Chapter 1

The Courts, the Law, and Social Change

At three o'clock in the afternoon of the sixteenth of April 1866, in the Senate building off St. Isaac's Square in St. Petersburg, Privy Councillor Aleksandr Danilovich Bashutskii, former chairman of the Fourth Department of the Senate and newly-appointed chairman of the Civil Cassation Department and of the General Session of Cassation Departments of the Senate, read out the Imperial proclamation creating the Cassation Departments of the Senate as the highest courts of the land for civil and criminal judicial processes and declared the Civil Cassation Department duly opened. Thus came to life what generally has been described as the most successful and one of the most far-reaching of the 'great reforms' of Alexander II.[1] These reforms, spanning the first half of the new Emperor's reign, constituted a monumental attempt to strengthen the Russian Empire by fundamentally

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1. For example, see in general F. B. Kaiser, Die Russische Justizreform vom 1864 (Leiden, 1972); S. Kucherov, Courts, Lawyers and Trials under the Last Three Tsars (New York, 1953); R. Wortman, The Development of a Russian Legal Consciousness (Chicago, 1976); G. A. Dzhanshiev, Epokha velikikh reform: istoricheskiia spravki (10th edn., Spb., 1907); idem, 'Osnovy sudebnoi reformy' in his Sbornik statei (Mos., 1914); S V. Gessen, Sudebnaia reforma (Spb., 1905); N. V. Davydov and N. N. Polianskii, eds., Sudebnaia reforma (Mos., 1915), 2 vols.; Sudebnye Ustavy 20 noiabria 1864 g. za 50 let (Ptgd., 1914), 2 vols. and supplement; B. V. Vilenskii, Sudebnaia reforma i kontrreforma v Rossii (Saratov, 1969); the articles in Zh. Min. Ius., 1914 no. 9. See also N. V. Riasanovsky, A History of Russia (2nd edn., London, 1969), pp. 417-18; B. Pares, A History of Russia (Vintage edn., New York, 1965), pp. 378-9; M. T. Florinsky, Russia: A History and an Interpretation (New York, 1953), ii. 902-5; G. H. N. Seton-Watson, The Russian Empire, 1801-1917 (Oxford, 1967), pp. 354-7; H. J. Berman, Justice in the USSR: An Interpretation of Soviet Law (rev. edn., Cambridge, Mass., 1966), pp. 212-24; M. N. Pokrovsky, A Brief History of Russia (London, 1933), i. 133, 137-9; D. M. Wallace, Russia on the Eve of War and Revolution, ed. C. Black (Vintage edn., New York, 1961), pp. 67-91, especially p. 79.

transforming various basic elements of the social and state structure. Hence, in addition to the complete restructuring of the judicial system, serfdom was abolished, rural and municipal local government was entirely reorganised, the governance of the universities was reformed, the budgetary system was overhauled, important changes in the military structure and terms of service were introduced, an intensive program of railroad construction was begun, and so on.

Whatever their other objectives, these reforms clearly sought to create a framework within which presumed commercial forces could develop the productive capacity of Russia. Indeed, this was an objective pursued, however unsystematically, by successive Ministers of Finance, from Reutern in the 1860s and 1870s to the more energetic and ambitious Witte, who at the turn of the century brought considerably more coherence and direction to government economic policy.[1] An important factor determining the relative success of this policy, however, would be the structure of civil law, in particular of property law. By defining the locus of control over the use of resources and the distribution of benefits derived therefrom, thus who decides in what ways resources are used and what material incentives are available, property rights are a key determinant of economic activity, and

1. This is not to say that the state's economic expectations were justified or the means chosen well conceived. See A. A. Skerpan, 'The Russian National Economy and Emancipation', in A. D. Ferguson and A. Levin, eds., Essays in Russian History: A Collection Dedicated to George Vernadsky (Hamden, 1964); A. Gerschenkron, 'Russia: Agrarian Policies and Industrialization, 1861-1914', in his Continuity in History and Other Essays (Cambridge, Mass., 1969); O. Crisp, 'The Pattern of Industrialization in Russia, 1700-1914', in her Studies in the Russian Economy before 1914 (London, 1976); T. H. von Laue, Sergei Witte and the Industrialization of Russia (Atheneum edn., New York, 1974). Skerpan questioned the economic assumptions of emancipation, Gerschenkron the method of application, and Crisp, especially pp. 17-22, *inter alia* Gerschenkron's analysis.

consequently of the rate and pattern of economic development in any society. Inheritance law, as an important determinant of the distribution, and in some cases mobility, of property rights, will have a similar influence.[1] Thus, to the extent that the laws evolved to suit a sedentary and patriarchal society dominated by a serf-owning class were an impediment to the movement of resources and types of activity and relationships characteristic of and, indeed, necessary in a developed commercial society, the structure of property and inheritance law in post-emancipation Russia would restrict the success of government economic policy. This could be especially important in the field of agriculture, which dominated the traditional Russian economy and which in any developing economy is called upon to provide many

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1. There is a vast literature on the relationship between property rights and economic activity and growth. Although a more complete list of references is contained in the bibliography, see the summary of recent literature in A. E. Furubotn and A. Pejovich, 'Property Rights and Economic Theory: A Survey of Recent Literature', Jour. of Econ. Lit., x (1972), 1137-62; R. M. Hartwell, 'Two Services: Education and Law', in his The Industrial Revolution and Economic Growth (London, 1971), pp. 244-61; D. North and R. Thomas, The Rise of the Western World: A New Economic History (Cambridge, 1973). The lawyers are represented by R. Posner, Economic Analysis of Law (Boston, 1972); W. J. Samuels, 'Interrelations between Legal and Economic Processes', Jour. of Law and Econ., xiv (1971), 435-50; and the much earlier works of R. Ely, Property and Contract in their Relations to the Distribution of Wealth (reprinted, Port Washington, 1971), and C. R. Noyes, The Institution of Property: A Study of the Development, Substance and Arrangement of the System of Property in Modern Anglo-American Law (New York, Toronto, 1936). On inheritance and economic growth, see H. J. Habakkuk, 'Family Structure and Economic Change in 19th Century Europe', Jour. of Econ. Hist., xv (1955), 1-12; D. P. Gagan, 'The Indivisibility of Land: A Microanalysis of the System of Inheritance in 19th Century Ontario', ibid., xxxvi (1976), 126-44; the relevant sections of Ely, above, especially pp. 93, note 7, 424-30; the introduction and essays by Goody, Thirsk, Thompson, Berkner, Sabean, and Cooper in J. Goody, J. Thirsk, and E. P. Thompson, eds., Family and Inheritance: Rural Society in Western Europe, 1200-1800 (Cambridge, 1976); A. Simpson, An Introduction to the History of the Land Law (Oxford, 1961), chs. 8-9.

of the resources and much of the markets for commerce and industry.[1] Hence one might expect government action to eliminate any impediments presented by the law.

Nor would this be a matter of concern only to the government. Whatever the attitudes of gentry landowners, merchants, and other groups in Russian society toward economic innovation and production for the market prior to the emancipation of the serfs in 1861, it is certain that afterwards they would have to accommodate themselves to market forces in order to survive socially and politically. This would be so particularly for the medium and larger gentry landowners who dominated local provincial and, together with the growing landless professional bureaucracy, national political life. For them, any adverse economic effects of the law, previously ignorable, but increasingly no longer so under changing economic and social conditions, would be reflected in diminished economic, and thence social and political, status. Thus, again, one would expect pressure from these quarters for reform of the law, directed either toward facilitating adjustment to changing conditions or toward trying to arrest these and preserve the traditional social and political order.

However, neither property nor inheritance laws are solely economic institutions, responding only to the demands of greater economic efficiency. Other social, political, and cultural values and objectives equally influence the evolution of the law. Conceptions of the family and its social function

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1. See in particular B. F. Johnston and J. W. Mellor, 'The Role of Agriculture in Economic Development', Amer. Econ. Rev., li (1961), 566-93; also the articles by Jones and Woolf, Zangheri, and Thompson in E. L. Jones and S. J. Woolf, eds., Agrarian Change and Economic Development. The Historical Problems (London, 1969).

or the differing social functions of its different, e.g. male or female, members, considerations arising from the conflict between the desire to secure the future of all children and the wish to preserve intact the economic enterprise of a life-time and perpetuate the family line and prestige, and considerations of achieving and maintaining social and political security, status, and power are the most obvious examples in this respect.[1] Insofar as these conceptions conflict with the dictates of economic efficiency, they may influence development of the law in such a way that it leads to economically inefficient results and creates a legal obstacle in the path of economic development.[2] Reconciling these often competing interests is the difficult task of those concerned with the making and administration of the law.

In addition, throughout the period under consideration Russia was undergoing considerable change. The apparent political, social, and economic decline of the dvorianstvo, dramatically symbolized by the loss of much of its land to other social estates, the gradual development of the

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1. See Goody, et al., Family and Inheritance; Gagan, op. cit.,; Ely, op. cit., pp. 93, note 7, 424-30; J. Goody, Death, Property and the Ancestors (Stanford, 1972); L. K. Berkner, 'The Stem Family and the Developmental Cycle of the Peasant Household: An 18th-Century Austrian Example', Amer. Hist. Rev., lxxvii (1972), 398-418; idem, 'Rural Family Organization in Europe: A Problem in Comparative History', Peas. Studies News., i (1972), 145-56; J. Thirsk, 'The Family', Past and Pres., no. 27 (Apr. 1964); idem, 'Younger Sons in the Seventeenth Century', History, liv (1969), 358-77; L. K. Berkner and F. F. Mendels, 'Inheritance Systems, Family Structure, and Demographic Patterns in Western Europe (1700-1900)', in C. Tilly, ed., Historical Studies of Changing Fertility (Princeton, 1976).

2. In addition to the references cited in note 1, p. 3 above and in the bibliography, the views of Posner, op. cit., and the critique of them by A. A. Leff in 'Economic Analysis of Law: Some Realism about Nominalism', Vir. Law Rev., lx(1974), 451-82, and J. M. Buchanan, 'Good Economics - Bad Law', ibid., 483-92, are particularly interesting.

zemstvo into an important instrument of local administration and political influence, the increased recourse to courts and the appearance of a legal profession occasioned by the judicial reforms, economic development, especially at times rapid industrial development, increased market integration, both domestic and international, development of more sophisticated financial institutions, and the revolution in communications caused by widespread railroad construction, and the rapid growth in the urban, industrial working class, and professional and other middle and lower middle class populations and the increased social mobility that these entailed, all caused considerable stress in the fabric of Russian society. Consequently, conflicting pressures were exerted on the government, from within and without, to introduce legal reforms designed to preserve and reinforce traditional institutions, to ameliorate the effects of change for certain groups or to help them adapt better to such change, or to facilitate further change. Not all such demands were compatible with a policy of promoting commercial development.[1]

Because property law and the distribution of property in inheritance can have important political and social as well as economic consequences, the system of property and inheritance was subjected to these same conflicting pressures for reform. While providing one of the most important legal supports of traditional agrarian societies, the laws of property and inheritance also are fundamental institutions in developed commercialised societies, with their functions in each instance in some ways being opposite.

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1. For some remarks on the tension that this introduced into the legal structure itself, see W. G. Wagner, 'Tsarist Legal Policies at the End of the 19th Century: A Study in Inconsistencies', _Slav. and E. Eur. Rev._, liv(1976), 371-94; J. W. Atwell, 'The Russian Jury', _ibid._, liii (1975), 44-61; Vilenskii, _op. cit._, pp. 265f; P. A. Zaionchkovskii, _Rossiiskoe Samoderzhavie v kontse xix stoletiia_ (Mos., 1970), especially pp. 234-61; Wortman, _op. cit._, pp. 244-5, 254-7, 269-89.

In both instances seeking to ensure stability of the social order, in the former the law attempts to do this by preventing or closely controlling mobility and preserving the substantive status quo, while in the latter it tries to accomplish this by providing rules that minimise conflict while maximizing mobility. In addition, these areas of law, more than any other save perhaps that of family law, are tightly bound up with the historical, cultural, ethnic, and familial life, traditions, and development of a people, and hence will both suffer the greatest stress in a period of substantial social and economic change and be among the most difficult and controversial areas of law to change.[1] Not surprisingly, then, the Russian government in the post-emancipation period was both subjected to pressure from various quarters of the public to change the law of property and inheritance in order either to strengthen the traditional order or facilitate its transformation and divided within itself over the same issue. This conflict, perhaps more than the fabled inertia of the Russian bureaucracy, accounts for the failure of the government to introduce any significant legislative changes in the law until, primarily under public pressure, major reforms were enacted in 1899 and 1912, far too late to have any practical impact.[2]

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1. This thought began creeping into the writings of Russian jurists and publicists from the late 1890s, but was expressed most forcefully in a speech by Prof. M. Ia. Pergament to the annual meeting of the St. Petersburg Juridical Society in 1913: 'Po povodu predstoiashchago vneseniia v gosudarstvennuiu dumu proekta grazhdanskago ulozheniia', Pravo, 1913 no. 14, cols. 863-74. See also O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', Mod. Law Rev., xxxvii (1974), 1-27.

2. It was intended to include a discussion of the wider public debate and legislative reform of the law in this thesis, but due to the requirement limiting the length of D. Phil. theses, this unfortunately has had to be omitted. However, a preliminary version may be found in W. G. Wagner, 'Legislative Reform of Inheritance in Russia, 1861-1914', in W. E. Butler, ed., Russian Law: Historical and Political Perspectives (Leyden, 1977).

Largely for similar reasons, the efforts of the special committee formed within the Ministry of Justice in 1882 to review the existing civil law and compile a civil code had equally meagre practical results, and its very existence often provided a convenient excuse for the inaction of other government agencies.[1]

However, legislative reform of the law is not the sole means by which existing law can be adapted to conform to and meet the needs of changing conditions. Depending on the judicial structure, the courts too can play a major role in this process.[2] Indeed, in a period of rapid change, judicial action in some respects may be more crucial than legislative action, because the courts can react more quickly than the legislator and far more flexibly and subtly in each case. Given the changing social and economic conditions in Russia throughout the post-emancipation period and the failure of the government to react quickly to these in the field of civil legislation, the judicial reform of 1864 thus assumed a perhaps even greater importance than that originally envisaged by its authors. The new courts, and standing at their apex, the Civil Cassation Department of the Senate, became the chief mechanism by which the existing traditional civil law was adapted, supplemented, and quietly amended or rendered void in order to bring it into

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1. This will become clear in the discussion to follow. But see also the reports in Pravo, 'Khronika', 1910 no. 22, col. 1415, and no. 45, col. 2723; 1912 no. 36, cols. 1939-40; 1913 no. 32, cols. 1880-82, and no. 33, col. 1933; 1914 no. 23, col. 1853, and no. 49, col. 3407; 1915 no. 12, col. 905.

2. In this respect, see Hartwell, op. cit.; O. Kahn-Freund's introduction to K. Renner, The Institutions of Private Law and their Social Functions (London, 1949); W. Friedmann, Law in a Changing Society (abrid. edn., London, 1964), pp. 35-67; R. Pound, An Introduction to the Philosophy of Law (revised edn., New Haven, 1954), pp. 49-54, 64.

conformity with changing social and economic conditions, attitudes and needs.[1]

The basis of the new courts' ability to perform this function lay in the structural and procedural innovations introduced into the judicial system by the judicial reforms. It is very unlikely that the old courts could have borne the same burden with any degree of success. Indeed, despite some significant improvements in certain areas of the upper reaches of the judiciary toward the middle of the century, the pre-reform judicial structure and the procedure used in both civil and criminal actions hardly were designed to achieve swift and impartial adjudication and a comprehensive and searching review of the merits of and law applicable to each case, let alone the adaptation of old or formulation of new legal rules to suit changing circumstances. Quite the contrary seems to have been the case.

The pre-reform legal system was closely intertwined with the general state administrative apparatus, both with respect to structure and to

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1. This was especially true in the previously comparatively barren, if less controversial, field of contract law. For brief general surveys of the court's law-creating activities see E. V. Vaskovskii, 'Pravotvorcheskaia deiatel'nost' novykh sudov v sfere protsessa i prava grazhdanskago', in <u>Sud. Ust. 50 let</u>, ii. 375-413; I. N. Berendts, 'Vliianie sudebnoi reformy 1864 g. na gosudarstvennii i obshchestvennii byt v Rossii', <u>ibid</u>., ii. 746-52; Gessen, <u>op</u>. <u>cit</u>., ch. 8; Baron A. E. Nolde, 'Pravotvorcheskaia deiatel'nost' Pravitel'stvuiushchago Senata v oblasti grazhdanskago prava', in <u>Istoriia Pravitel'stvuiushchago Senata za dvesti let, 1711-1911 gg.</u> (Spb., 1911), iv. 421-40; V. S. Malchenko, 'Obshchii ocherk dvizheniia grazhdansko-protsessual'nago zakonodatel'stva posle 1864 goda', in Davydov and Polianskii, <u>op</u>. <u>cit</u>., ii. 70-80.

personnel.[1] The provincial appellate and local courts were part of the general provincial administrative system under the supervision of the provincial governors, who as a result strongly influenced the selection of court personnel and frequently interfered in judicial actions and decisions. In the superior appellate instances, such interference by higher administrative officials was perhaps less prevalent, though still widespread. Not only was the judiciary not independent, it did not consist of professional jurists, nor even of civil servants with long experience in judicial affairs.[2] Judges and assessors of the courts of first instance and, with the exception of the deputy chairman, of the provincial appellate courts were elected by the local population on the basis of social estate, with the chairmen, except in the case of commercial and other local courts dealing solely or primarily with the merchantry and non-*dvorianstvo* urban population, being elected by the *dvorianstvo* and the assessors by the *dvorianstvo*, merchantry, and peasants, as appropriate. Such service was considered onerous by the local inhabitants, who consequently sought to avoid it. As a result, the standard

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1. Descriptions of the pre-reform legal system are numerous. See, *e.g.*, Kaiser, *op. cit.*, pp. 1-89; Kucherov, *op. cit.*, pp. 1-19, 107-13; *idem*, 'Administration of Justice under Nicholas I of Russia', *Amer. Slav. and E. Eur. Rev.*, vii (1948), 125-38; Wortman, *op. cit.*, pp. 1-95, 236-42; Dzhanshiev, 'Osnovy', ch. 1; Gessen, *op. cit.*, pp. 1-30; I. A. Blinov, 'Sudebnoi stroi i sudebnye poriadki pered reformoi 1864 goda', in *Sud. Ust. 50 let*, i. 3 -101; V. Bochkarev, 'Doreformennoi sud', in Davydov and Polianskii, *op. cit.*, i. 205-41; B. I. Syromiatnikov, 'Ocherk istorii suda v drevnei i novoi Rossii', *ibid.*, i. 16-180; F. Dmitriev, *Istoriia sudebnykh instantsii i grazhdanskago appelliatsionago sudoproizvodstva ot sudebnika do uchrezhdeniia o guberniiakh* (Mos., 1859), pp. 524-34. The law, for civil cases, is contained in *SZ* (1857), I, pt. 2 *Uchr. Prav. Sen.*; II, pt. 1, *Obsch. Gub. Uchr.*; X, pt. 2, *Zak. Sud. Grazh.* The following description is drawn largely from these sources.

2. By far the best analysis of pre-reform legal personnel is in Wortman, *op. cit.*, particularly pp. 52-95.

of elected judges and assessors was quite low, with most being illiterate and often poor ex-military officers who became abjectly subservient to the provincial governors or powerful local families. Depending on the level of their positions, these elected officials had to be confirmed either by the provincial governor or the Minister of Justice. The all-powerful scribes of these lower courts were appointed by the provincial governors, who often found that they had to appoint the nominally elected judges and assessors as well, due to the extent to which the local inhabitants managed to avoid elections and evade serving a full term if unfortunate enough to have been elected. In the higher appellate courts, the various departments of the Senate and their combined sessions, members were appointed directly by the Emperor. However, although with long service careers and of high rank, these justices too were seldom specialists in the law, but were elderly military officers or officials from other branches of the state administration, frequently of eminent families, who were being rewarded with a surrogate pension for their service. The Senate procurators tended to be young scions of good families, inexperienced in judicial affairs and only passing through the Senate on their way to higher office. Only the chancellory officials, who actually prepared the reports on cases, had passed the majority of their career in the Senate, and thus were versed in the workings, if not educated in the nature, of Russian law.[1] By mid-century this pattern was changing somewhat, as legal education expanded and the Minister of Justice tightened and extended his control over the judicial system, so that professionally trained and experienced jurists were becoming prominent in

1. Ibid., pp. 54-69.

the procuracy and chancellories of the Senate departments, to a lesser extent in the Senate itself, and in the provincial appellate courts. But the judicial system still remained a part of the state administrative apparatus, and the judiciary still largely unprofessional and of low standard.

The court structure was as complex and bewildering as the quality of the judiciary was poor. The court of first instance could be any of an array of local courts and even primarily administrative bodies, depending on the nature of the action, the object of litigation and its value, the social estate to which the litigants or, in criminal actions, the defendent, belonged, whether the case involved was a contested or an uncontested action, and so on. Simply determining which court had original jurisdiction in any given case could be a time-consuming process and itself the object of a separate action. Appeal in the first instance was to the provincial appellate courts, the civil and criminal palaty. If one of the litigants or the provincial procurator, an official under the jurisdiction of the Minister of Justice who was charged with ensuring that legality was observed in all official provincial affairs, both administrative and judicial, wished to appeal further, the case was forwarded, together with the reports of the provincial procurator and governor, to the appropriate department of the Senate, sitting in either St. Petersburg or Moscow. If this department failed to reach the necessary two-thirds majority agreement in its opinion, or if the department procurator disagreed with this opinion or the case involved interpretation of an unclear point of law, the case then would be heard by the appropriate combined session of Moscow or St. Petersburg Senate departments. For any of the above reasons, or on his own initiative, the Minister of Justice could review this decision, and then request the appropriate Senate combined session to reconsider it in light of his opinion. If

the Minister and at least two-thirds of the Senators in the combined session failed to agree on a decision, or if the case involved a disputed point of law, the case then was referred to the Department of Civil and Spiritual Affairs of the State Council, primarily a legislative body, and thence to the plenary session of the State Council. The State Council's decision then had to be confirmed by the Emperor, who also could review the case separately as a result of the private petition of one of the interested parties. Thus a case could move through nine separate instances, the last of which were primarily legislative bodies, before being decided finally. If, as often was the case, the Emperor's decision constituted only leave to prosecute the case on the basis of a particular understanding of the law or facts of the case, then the whole process would begin again at the provincial appellate level.[1]

All the courts were collegial, consisting of a judge and various numbers of assessors at the local and provincial levels and several Senators or State Councillors at the higher levels, and all the judicial appellate instances had a procurator assigned to them. However, due to pervasive incompetence and illiteracy of the judges, assessors, and often even Senators, their neglect of their duties, and the nature of the procedure used, the fate of judicial actions generally was controlled by the scribes of the local and provincial courts and the chancellory officials and, sometimes, procurators of the Senate, who prepared the cases and the reports on them, including the references to the laws applicable in any given case. Not

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1. See the references cited in note 1, p. 10. A good practical example of this process can be found in the case of Shilovy v. Rusanova, reported in Zh. Min. Ius., 1865 (xxiii, bk. 1), sud. prakt., pp. 103-24, and SRGKD 1873 no. 1530 and 1875 no. 288.

being familiar with the law or the details of any particular case, the lower court judges generally went along with the decision indicated by the scribes. Senators too were often prone to the same habit, but, while generally equally uninformed about the law and the case, they frequently formed an independent opinion based on the chancellory's report and their sense of equity and the law, and thus clashed with the procurators and the Minister of Justice.[1] In addition, there was no professional bar to help litigants or defendants present their case, although ex-officials familiar with the workings of the law and the courts generally could be employed to draft the original petitions and try to facilitate the case's successful passage through the complex legal machinery.

Both civil and criminal procedures were based on the inquisitorial principle and were as complex and baffling as the court structure. The entire process was based on written submissions and material, the court reviewed the case and formulated its decision in private and solely on the basis of the written submissions and scribe's or chancellory reports, evidence was evaluated on the basis of strict formal rules, and the litigants only were informed of the court's decision sometime after it had been reached and not in the presence of the court. In civil cases, the plaintiff and respondent would submit their original written petition and response, then written retort and refutation, to the court secretary, who then would prepare a summary of the arguments to be sent to both sides for their comments and any additions they wished to make. From these, the secretary would prepare a report of the case and list the laws he thought relevant.

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1. Wortman, op. cit., p. 54. This is clear from the case cited in note 1, p. 13.

These would then be considered by the judges. Obviously, the court secretary could influence the resolution of a case considerably through his report and listing of relevant laws. This procedure essentially was repeated at each appellate instance, with the court at each level having only the reports and other written material presented to it on which to base its opinion. In addition, each appellate instance, even the highest, could review the merits of the case as well as any disputed points of law or procedure.[1]

This diversity of courts and complexity of procedure resulted in extended prosection of cases, which could be drawn out still further by the manipulative efforts of any of the parties involved, and ample opportunity for bribery and corruption, which was pervasive at every level, but especially among the poorly paid, overworked, and frequently abused scribes and chancellory officials of the local and provincial courts and the Senate on whom the fate of the case largely depended and who had little hope for social or career advancement. The inevitable result was the low repute in which the courts were held by the general public, who consequently preferred to avoid litigation if possible and either suffered silently or sought remedies through other channels.

The judicial reforms blew this creaking and corrupt structure away with, for Tsarist Russia, a rare blast of intoxicatingly fresh air. To be sure, the winds of change blew a bit slowly at first, as the reforms were implemented only gradually. However, although partly due to political

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1. See the references cited in note 1, p. 10, particularly Kaiser, _op. cit._, pp. 39-63; Wortman, _op. cit._, 14-16, 239-40; Kucherov, _Courts_, pp. 109-113; Bochkarev, _op. cit._, pp. 217-31.

opposition to the reforms and perhaps some cooling of the Emperor's reformist ardour,[1] the main explanation for this appears to lie more in administrative and financial difficulties encountered in implementation and the care taken in finding competent personnel.[2] Thus in April 1866 were opened the Civil and Criminal Cassation Departments of the Senate, both sitting in St. Petersburg, and the courts of the St. Petersburg and Moscow Judicial Districts, comprising the northern lakes and the central industrial and part of the central black-earth regions of Russia respectively. An additional judicial district was opened in each of the following five years, so that by 1871 the reforms had been introduced into almost all the Great Russian areas of European Russia, the Caucasus, Novorossiia, and parts of Belorussia. In subsequent years they were extended to all the remaining parts of the Empire except the Grand Duchy of Finland.[3]

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1. See, e.g., Gessen, op. cit., pp. 122-9; Wortman, op. cit., pp. 271f; Kaiser, op. cit., pp. 465-6, 470-71, 473-4.

2. Wortman, op. cit., p. 262; Kaiser, op. cit., pp. 465-7; V. A. Gagen, 'Organizatsiia Pravitel'stvuiushchago Senata', in Ist. Pravit. Sen., iv. 25-6. The principal advocates of both immediate and gradual implementation, Prince Pavel Gagarin and Minister of Justice Zamiatnin respectively, were strong proponents of the reform.

3. Supplementary volume to Sud. Ust. 50 let, pp. 6-26; P. Maikov, O Svode Zakonov Rossiiskoi Imperii (Spb., 1905), p. 192; A. Zhizhilenko, 'Obshchii ocherk dvizheniia ugolovnoprotsessual'nago zakonodatel'stva posle 1864 goda', in Davydov and Polianskii, op. cit., ii. 66-7; Vilenskii, op. cit., pp. 202-19; Kaiser, op. cit., pp. 466-7, who lists the relevant legislation in note 2, p. 466. The statistical yearbook published by the Ministry of Justice from 1884 lists the courts by district, with the year in which each was opened. Sbornik statisticheskikh svedenii ministerstva iustitsiia. chast' 1. Svedeniia o lichnom sostave i o deiatel'nosti sudebnykh ustanovlenii Evropeiskoi Rossii (Spb., 1884-1916). The remaining judicial districts were: Kharkov (1867), Tiflis (1868), Odessa (1869), Kazan (1870), Saratov (1871), Warsaw (1876), Kiev (1880), Vilnus (1883), Novocherkassk (from already existing district courts of the Kharkov and Tiflis Judicial Districts), Irkutsk (1897), Omsk (1899), and Tashkent (1899). The Baltic provinces were placed within the St. Petersburg Judicial District in 1889.

Under the reforms,[1] the judiciary and the courts were separated from the state executive and legislative authorities and became independent organs of state power, free from interference by any administrative officials or bodies. Every case was to be decided solely and finally by the courts. Judicial personnel had to be trained jurists with varying degrees of experience in a judicial position or at the bar, depending on the post to which they were being appointed, although longer practical experience could compensate for a lack of juridical education. Judges of the general court instances and Senators were appointed for life by the Emperor, on the recommendation of the Minister of Justice and the judiciary itself, and all judges, Senators, and justices were impeachable only with extreme difficulty, for conviction of a crime, abuse of or inability to perform their duties, or other narrowly defined reasons, and only by a panel of superior court judges. This remained so even after later amendments to the law made the grounds for impeachment somewhat more vague and included some Senators from the primarily administrative First Department on the bench hearing such cases.[2]

Controversial procedure was introduced, with the litigants in civil actions presenting their case through written briefs and oral pleading in a court open to the public except in certain narrowly defined situations,

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1. 2PSZ, xxxix, pt. 2, nos. 41475 (Uchr. Sud. Ustan.), 41477 (Ust. Grazh. Sud.), and 41476 (Ust. Ugol. Sud.), (20 Nov. 1864), pp. 180-401, until 1892 printed separately from the SZ as Sudebnye Ustavy 20 noiabria 1864 goda or Sud. Ust. imperatora Aleksandra Vtorogo (various editions), and from then as SZ, XVI, pt. 1. The reforms are described in detail in the works listed in note 1, p. 1. The following description is drawn from both the above legislative and these sources.

2. 3PSZ, v., no.2959 (20 May 1885), pp. 219-24. Gagen, op. cit., pp. 51-2; Zaionchkovskii, op. cit., pp. 240-47; Wagner, 'Legal Policies', pp. 375-6.

normally involving sensitive family affairs, when the litigants could request or the judges direct that the case be heard in camera. Although inevitably and necessarily there were rules of evidence, the judges could weigh the strength of the arguments and the evidence presented and decide the case in accordance with their own conscience. Nor in practise were most judges content to adopt a passive role in court proceedings and leave the submission of evidence solely to the litigants and their advocates, but they generally took a more active part in the case by demanding the submission of further evidence, the clarification of evidence submitted, the testimony of expert witnesses, and so on.[1]

To aid litigants in the prosecution of their cases, Imperial permission was reluctantly and with some trepidation granted for the creation of an organised and self-administered bar of professional sworn attorneys.[2] Admission to the bar required juridical education and legal experience, either as an attorney's assistant or in a court organization. However, the number of such attorneys and their assistants-in-training was very small and increased slowly, and they tended to congregate in the cities of St. Petersburg and Moscow or the other urban centers that contained the appellate court of judicial districts and, often, a university law faculty. Other, and especially rural, areas of the Empire were poorly served by the

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1. Ia. K. Gorodyskii, 'Nashi sudy i sudebnye poriadki po dannym revizii 1895 g.', Zh. Min. Ius., 1901 no. 5, pp. 142-3, and no.6, p.120. This series of articles (1901 nos. 2-6) was based on the inspection of judicial instances carried out in the summer of 1895 for the commission under Minister of Justice N. V. Muravev that was reviewing the judicial statutes.

2. Kucherov, Courts, pp. 107-54, 161-3, and especially pp. 113-19 on the source of the Emperor's reluctance; Kaiser, op. cit., pp. 435-6; I. V. Gessen, Advokatura, obshchestvo i gosudarstvo (Mos., 1914), vol. i of Istoriia russkoi advokatury 1864-1914, pp. 26-32; Wortman, op. cit., pp. 11-12, 247.

new profession, and to meet this deficiency and try to control the use of untrained advocates in courts, in 1874 the government enacted legislation enabling each court to license persons other than sworn attorneys to practise before it and to supervise such persons. The overwhelming majority of these so-called private attorneys were licensed by the lowest court instances, particularly by the justices of the peace, and were found in rural areas. In 1894, nearly a third of them had received an education in law. Even so, the number of professional and licensed advocates remained inadequate, and most litigants conducted their own cases.[1]

All subjects of the Empire were made equal before the law, at least with respect to civil actions, and all such actions were heard before the same courts, although the few existing commercial courts retained their local jurisdiction over actions arising from a large number of commercial activities, and, at the request of any of the litigants, many minor peasant disputes could be dealt with by the special local peasant courts created by the emancipation legislation.[2] Otherwise, the only distinction drawn with

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1. 2PSZ, xlix, pt. 1, no. 53573 (25 May 1874), pp. 832-4. Gorodyskii, op. cit., no. 2, pp. 42-3, no. 5, pp. 125-30, and no. 6, pp. 120, 124. Kucherov, Courts, pp. 158-9, argues that by the mid-1870s there was no shortage of sworn attorneys, and the main motivation for indtroducing private attorneys was political. However, the 1895 revision and the statistics provided in the Sbornik stat. svedenii min. ius. for 1886 and thereafter belie this. Numbers of sworn attorneys remained low for the entire period, and nearly half of the total number, excluding Poland, were in the Spb. and Moscow districts, overwhelmingly in the two cities themselves. Consistently, on the other hand, nearly three-quarters of private attorneys were licensed by J.P. congresses in rural districts.

2. On the vexed question of peasant courts, see ch. 2 below. Commercial courts existed in the cities of St. Petersburg, Moscow, Odessa, Taganrog, and Kerch, and in Bessarabia; the latter three later were abolished. Gagen, op. cit., pp. 65-6. Rules governing them can be found in SZ, XI, pt. 2, Ust. Torg., and later Ust. Sudoproiz. Torg. Ecclesisastical and military courts also were retained. See Kucherov, Courts, p. 50.

respect to jurisdication in civil actions was based on the value or severity of the case.

Minor cases, essentially those with a value not exceeding 500 rubles or concerning slander, defamation, or recovery of recently lost possession of property, were heard under informal procedure before the local district justice of the peace, who was elected for a three-year term by the newly introduced organs of local self-government, i.e. the district zemstvo or, in the cities of Moscow, St. Petersburg, and Odessa, the municipal duma. Honourary justices of the peace were similarly elected, and were empowered only to mediate disputes. The qualifications for election to both posts were identical: the candidate had to be at least twenty-five years old, have a secondary or higher education or corresponding experience in the conduct of legal affairs, and possess a specified amount of local property. The clergy and those bankrupt, under guardianship, or under investigation for or convicted of a crime were ineligible for election. Appeal of a decision of a justice of the peace on any grounds was to the district congress of justices of the peace, which was composed of all the district and honourary justices of the peace within a particular district (uezd) and chaired by one from their number elected by the congress. One of the assistant procurators of the local district court participated in the sessions of the congress and in general fulfilled the functions of the procurator at this level.[1]

All remaining civil actions fell under the jurisdiction of the general

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1. In certain non-Russian areas, where the zemstva were not introduced, the justices of the peace were appointed by the Minister of Justice. For subsequent changes in the system, see Wagner, 'Legal Policies', op. cit., pp. 385-9; Kaiser, op. cit., pp. 486-90; Kucherov, Courts, pp. 89-91; Zaionchkovskii, op. cit., pp. 257, 366-401; Vilenskii, op. cit., pp. 358-69; Gessen, Sud. ref. pp. 173f.

courts. The court of first instance was the district, or circuit, court, which was responsible for a particular territorial district, normally about the size of but not necessarily corresponding to a province, and which in most cases went on circuit within this area.[1] Varying numbers of district courts were grouped into larger judicial districts under the supervision of a court of appeal, the Sudebnaia Palata, to which appeal of their decisions on any grounds was made. Ultimately, fourteen such judicial districts were created.[2] The court of appeal was, and a district court could be, divided into civil and criminal departments, and in both instances all cases were heard and decided collegially by three judges, one of whom prepared the case report and decision. Each court at both levels contained a procurator and a number of assistant procurators, one of whom also would submit an opinion to the court in civil cases, although this does not appear generally to have carried much weight.[3]

Further appeal of the decision of a congress of justices of the peace or a court of appeal could be made to the newly-created Civil or Criminal Cassation Department of the Senate, as appropriate, but only on grounds of cassation, i.e. only on the grounds that the lower court had incorrectly interpreted or applied the law, significantly violated procedural rules, or exceeded its general or jurisdictional authority.[4] Thus the Cassation

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1. The Russian word, okruzhnoi, could have either meaning.

2. For a list of these, see note note 3, p. 16 above.

3. Gorodyskii, op. cit., no. 5 pp. 141-2.

4. Uchr. Sud. Ust., art. 5; Ust. Grazh. Sud., art.793. In addition, the court could review its decision if new evidence came to light, etc., within ten years of the original decision, and third parties could bring an action on the grounds that their interests had been affected adversely by a court decision. Ibid., arts. 805-7.

Departments technically could not review the merits of a case or rule on the lower courts' interpretation thereof, and in practise they tended to reject outright any appeal based on such grounds. However, in its decision in Amirov v. Amirov in 1878, the Civil Cassation Department ruled that the mistaken or distorted description of evidence by a lower court represented a violation of the law, because the court was applying the law to non-existent facts, and therefore constituted grounds for cassation.[1] In short, the high court asserted its right to review the lower courts' interpretation of and ruling on the substance of a case and to reject this if it did not appear well-founded, although the court appears to have exercised this right only very rarely. Being courts of cassation, the Cassation Departments could not reverse the decision of a lower court, but only vacate it and remand the case for rehearing under the proper procedure or on the basis of the interpretation of law rendered by the high court. Obviously, the high court's rejection of an appeal confirmed and made final the decision of the lower court, as there could be no appeal of the ruling of a Cassation Department.

As the Civil Cassation Department played the central role in adapting Russian civil law to changing social and economic conditions, it perhaps would be worthwhile to describe the evolution of its structure and procedure

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1. SRGKD 1878 no. 274, which is described in detail in ch. 7. See also 1867 no. 493; 1869 nos. 89, 1053; 1870 no. 342; 1876 no. 463.

in somewhat greater detail.[1] The authors of the judicial reforms sought a single high court for the entire Empire in order to ensure the uniform application and interpretation of the law. They obviously did not foresee the demands that would be placed on this court, as each Cassation Department originally contained only four Senators, including the chairman, and an ober-procurator and assistant procurator. All four Senators reviewed each case, although only one of them was responsible for preparing the written case report and ruling. As in all general court instances, the procurator delivered an opinion, but did not participate in the judges' deliberations. However, already by early 1867, with only two judicial districts operating, the high court's case load had become too great, and two more Senators were added to each department. This proved to be only a fleeting palliative. As new judicial districts opened and the number of cases appealed from the existing judicial districts increased, the high court again found itself unable to deal sufficiently quickly with the cases submitted to it. By 1870, six more Senators and three assistant procurators had been added, and the court had begun splitting itself unofficially into smaller groups and sharing out cases in an attempt to increase the number of cases decided per session. However, this still proved inadequate, and in a discussion of the problem in 1874, the General Meeting of the Cassation Departments proposed, inter alia, that the number of Senators again be expanded, a summary procedure

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1. Uchr. Sud. Ust., arts. 1-4, 10, 114-119 (after 1877, 119[4]), 127, 129, 137-65, 200-202, 208-11, 216-17, 219, 223, 249 pt. 1, 250-52, 265-7; Ust. Grazh. Sud., arts. 792-815. Also, Gagen, op. cit., pp. 16-66; E. N. Berendts, 'Proekty reformy Pravitel'stvuiushchago Senata vo vtoroi polovine XIX stoletiia', in Ist. Pravit. Sen., iv. 463-79; N. Sh., 'K 35-letiiu deiatel'nosti kassatsionnykh departamentov Pravitel'stvuiushchago Senata', Zh. Min. Ius., 1901 no. 8, pp. 211-21; N. M. Reinke, 'Kassatsionnaia instantsiia', in Sud. Ust. 50 let, ii. 281-326; Kucherov, Courts, pp. 44-6; Kaiser, op. cit., p. 492; Zhizhilenko, op. cit., p. 67.

not requiring a full report be introduced to enable the court to deal swiftly with uncontroversial cases, and the Cassation Department chancellories be empowered to deal with such cases. While these and various proposals from Minister of Justice Palen and other quarters were being considered by government ministries and the State Council, three persons were appointed to temporary positions in each Cassation Department.[1]

As a result of the above proposals, the Cassation Departments were reorganised in 1877.[2] First, the number of Senators in each department was increased, so that the Civil Cassation Department now contained twenty-three Senators, including the chairman. Each department then was permitted to subdivide itself into several divisional benches composed of not less than three Senators. An executive session of the department would assign department members to these divisional benches, and also preliminarily review all cases submitted to the department, rejecting those improperly composed or lacking sufficient grounds for appeal and assigning the remaining cases to the divisional benches or the full bench of the department. This latter was to consist of not less than seven Senators, including the chairman, and was to hear all controversial cases or those requiring a new interpretation of the law. The divisional benches were to hear only the uncontroversial cases, those in which the law was clear or the department already had expressed its opinion. Thus the divisional benches were permitted to write decisions in summary form if they thought a more detailed exposition was unnecessary, and their decisions

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1. Gagen, op. cit., pp. 27-38; Berendts, 'Proekty', pp. 478-9.

2. 2PSZ, liii., no. 57471 (10 June 1877), pp. 722-4. These changes were incorporated into subsequent editions of the judicial statutes; see the articles cited in note 1, p. 23. See also Gagen, op. cit., pp. 39-46; Sh., op. cit., pp. 212-13; Kucherov, Courts, pp. 44-6.

were not to be published for the guidance of lower courts and the public. Only decisions of the full department bench were to continue to be so published. Thus a divisional bench had to transfer to the full department bench any case requiring a new interpretation of the law or a refinement of the court's previous practise. This reorganisation provided only temporary relief, however, and by 1881 three more Senators had been added to the Civil Cassation Department. A further eight positions, plus six for assistant procurators, were created in 1901, and by 1913 the number of Senators had reached forty-nine.[1]

Various combined benches of both Cassation Departments, or of one or both Cassation Departments and the primarily administrative First Department of the Senate, were created by the original reforms or the law of 1877, and these had jurisdiction over various types of cases.[2] However, only the General Meeting of the First and Cassation Departments, composed of two Senators from each of the three departments and chaired originally by the chairman of one of the Cassation Departments, and later by a specially appointed Senator, was of importance in the high court's development of the law, as, in addition to its other functions, it was empowered under the law of 1877 to rule on questions concerning the interpretation or application of laws submitted to it by the Minister of Justice. The Minister was empowered to raise such questions when, through the procuracy in the lower courts, it was observed that a law was not being applied or interpreted uniformly by the

1. Gagen, op. cit., pp. 47-8, 57-9; Sh., op. cit., pp. 214-16, 218-19; Kucherov, Courts, pp. 44, note 88.

2. Still other such instances were added later. For all of these, see Uchr. Sud. Ust., arts. 114-119^5, 137-65, 295^1; Ust. Grazh. Sud., arts. 244, 1317 pt. 3, 1322, 1327; Ust. Ugol. Sud., arts. 245, 1094. Kucherov, Courts, pp. 44-6; Gagen, op. cit., pp. 39-42, 48-51, 54-6.

lower courts, or in general whenever doubts arose concerning the practical application of a law.[1] Of course, the Minister also had the option of seeking to rectify such situations by proposing new legislation. In any event, the procurators and the Minister do not appear to have exercised their power to any great extent in matters of strict civil law.[2]

Clearly, then, as a result of the reforms, the administration of justice became swifter, impartial, more secure and predictable, and relatively free of corruption. However, while undeniably a considerable improvement over the pre-existing judicial system, this alone would not have secured for the courts the power and flexibility necessary to enable them to play the key role that they ultimately did in developing Russian civil law and adapting it to the needs of changing social and economic conditions. It was the courts', and particularly the Civil Cassation Department's, new and broad power to interpret, and thereby make, law that, when combined with their independence from the state administrative and legislative authorities and their monopoly over civil judicial actions, enabled them to perform this function.

Prior to the reforms, and largely as a result of Tsarist political fear of judicial power and concern to prevent arbitrariness and corruption in judicial decision-making, the courts had been prohibited from creatively

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1. SZ, XVI, pt. 1(1892), Uchr. Sud. Ust., arts. 119[1], 151-2, 160 pt. 14, 161, 259[1].

2. See, e.g., N.P. Druzhinin, Obshchedostupnoe rukovodstvo k izucheniiu zakonov (2nd edn., Spb., 1889), pp. 131-2.

interpreting the law.[1] To be sure, as every judicial decision to a certain extent involves some legal interpretation, this prohibition could not be observed rigorously, and even the law itself was ambiguous on this point. Thus, while the courts could decide a case only if there was an exact law governing it, and they had to decide the case in accordance with the precise literal meaning of this law, provincial and higher appellate courts appear to have had the right to resolve questions involving unclear or contradictory laws. Only cases in which the law was insufficient or incomplete mandatorily had to be referred to the State Council.[2] In practise, however, this distinction was difficult to draw, and the courts at each level, perhaps being excessively prudent, generally passed both types of cases to their superiors.[3] However, even if the courts, including the Senate, did resolve the issue by more broadly interpreting the law, by law the

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1. SZ, I, pt. 1(1857), Osnov. Gos. Zak., arts. 47, 52, 54-5, 57, 65, 67-9, 72-3; I, pt. 2 (1857), Uchr. Prav. Sen., arts. 59 pt. 3, 61, 101-2, 225-8; II, pt. 1 (1857), Obshch. Gub. Uchr., arts. 281, 744-6. See also V. G. Kukol'nik, Nachal'nyia osnovaniia rossiiskago chastnago grazhdanskago prava dlia rukovodstva k prepodovaniiu onago na publichnykh kursakh (Spb., 1813), pp. 8-9; N.M. Korkunov, Ukaz i zakon (Spb., 1894), pp. 349, 356-7, 365; idem, Lektsii po obshchei teorii prava (7th edn., Spb., 1907), pp. 305-8; E.V. Vaskovskii, 'Sudeiskoe usmotrenie pri tolkovanii zakonov', Pravo, 1901 no. 50, col. 2219; M. Szeftel, 'The Form of Government of the Russian Empire Prior to the Constitutional Reforms of 1905-06', in J. S. Curtiss, ed., Essays in Russian and Soviet History, in Honor of Geroid Tanquary Robinson (New York, 1962), pp. 115-16; Wortman, op. cit., ch. 1 in general, and especially pp. 10-12, 270.

2. SZ, I, pt. 1 (1857), Osnov. Gos. Zak., arts. 52, 65; I, pt. 2 (1857), Uchr. Prav. Sen., arts. 226-8; II, pt. 1 (1857), Obshch. Gub. Uchr., arts. 281, 744-6.

3. Sudebnye Ustavy 20 noiabria 1864 goda, s izlozheniem razsuzhdenii, na koikh oni osnovany. chast' pervaia, Ustav Grazhdanskago Sudoproizvodstva (Spb., 1866), pp. 20-22 (explanation to arts. 9-10); and I. M. Tiutriumov, comp., Ustav grazhdanskago sudoproizvodstva, s zakonodatel'nymi motivami, raziasneniiami pravitel'stvuiushchago senata i kommentariiami russkikh iuristov (4th edn. , Ptgd., 1916), i. 205-6.

decision could not serve as a precedent for future cases.[1]

Under the existing procedure, from which only the new courts were excluded by the 1864 reforms, all cases requiring legal interpretation, whether arising in a judicial or an administrative instance, had to be referred to the court's or administrator's provincial superiors, who in some cases were obliged and in all others permitted, and therefore generally inclined, to forward them, along with the provincial governor's and procurator's reports, to the appropriate Senate department. After making a preliminary review of the case, this department had to submit it to the superior Combined Meeting, which in turn was obliged in some cases and permitted in the remainder to forward it, together with the opinion of the Minister of Justice, to the State Council. The case here would be decided in legislative form, with the decision requiring Imperial confirmation.[2] Some decisions were distributed for general guidance, and thus, as a legislative act appropriately promulgated, became general law. Otherwise, as with any judicial decision, they were obligatory only for the case in which they were rendered and could not serve as the basis for the decision of any similar cases in the future.[3] In practical terms, this was impossible anyway, as no decisions, court reviews, etc., were published prior to the late 1850s. The process of clarifying, adapting, and developing the law therefore was extremely cumbersome, and the decision ultimately lay with a legislative body remote from the situation surrounding the case and hardly able to appreciate

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1. SZ, I, pt. 1 (1857), Osnov. Gos. Zak., arts. 68, 69.

2. See the references to the SZ in note 1, p. 27.

3. SZ, I, pt. 1 (1857), Osnov. Gos. Zak., arts. 67-9.

where it and its resolution should fit in a general system of civil law.

The judicial reforms fundamentally altered this. One of the basic objectives of the authors of the reforms was the complete separation of the courts from state administrative and legislative powers. Hence all civil actions were to be decided solely by the courts, without reference to any administrative or legislative body. Obviously, if this objective were to be achieved, it was necessary to allow the courts to decide cases even when the law was unclear. Thus each court not only was allowed, but was obligated, to decide every case submitted to it that lay within its jurisdiction; if the existing law was unclear, contradictory, incomplete, or insufficient, the court was to determine the law and decide the case in accordance with the general meaning of the laws.[1] This clearly gave the courts very broad power, as they alone would determine when the law was in need of interpretation and in what the general meaning of the laws consisted. The reference to insufficiency and incompleteness in particular was an invitation to the courts to create law where no existing legislation appeared to be applicable. The reformers must have understood that this would occur, but they either did not foresee the extent to which this power could be used by the courts, or, if they did, chose not to advertise it, as in justifying the courts' new power of interpretation they did not mention its role in law-making, but relied almost exclusively on its necessity in ensuring the desired separation of powers.[2]

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1. Sud. Ust., s izlozh. razsuzh. (1866), Ust. Grazh. Sud., arts. 9-10 (and explanations, pp. 20-22); Tiutriumov, op. cit., i. 158-9, 205-6; Korkunov, Lektsii, pp. 305-8; Kucherov, Courts, p. 34.

2. Sud. Ust., s izlozh. razsuzh. (1866), Ust. Grazh. Sud., pp. 20-22; Tiutriumov, op. cit., i. 158-9, 205-6; Vilenskii, op. cit., pp. 335-7.

This power to make law by means of judicial interpretation was accorded to all the new courts, but, in cases of civil law, the Civil Cassation Department bore the heaviest burden and was the most important source of judge-made law because it was the court of last resort and specifically was assigned the tasks of interpreting the law and ensuring its uniform application and interpretation by the lower courts.[1] To achieve this end, the law directed that the high court's decisions alone be published for the guidance of the lower courts.[2] To be sure, the law stated that the high court's decisions were obligatory only for the case in which they were rendered and only for the court to which this case was remanded for rehearing, and were to be only for the guidance of all other courts in similar situations. However, the use of this terminology most likely was a result of the reformers' caution, as judicial law-making was politically suspect in the eyes of the Tsars. Hence the judicial statutes appeared to follow the Fundamental Laws of the Empire with respect to the force of judicial decisions, and hence to judicial power, while in fact they diverged from the latter significantly.[3] Surely, if the reformers intended the Cassation Department to ensure the uniform application and interpretation of the laws

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1. Sud. Ust., s izlozh. razsuzh. (1866), Ust. Grazh. Sud., arts. 9-10, 793, 813, 815 (with explanations), and chast' tretiia, Uchrezhdenie Sudebnykh Ustanovlenii, arts. 1, 114-19 (with explanations, pp. 13, 15-17, 83-4); Tiutriumov, op. cit., ii. 1544; Nol'de, op. cit., pp. 421-5; Gorodyskii, op. cit., no. 2, pp. 20-21; Gagen, op. cit., pp. 16-23; Berendts, 'Proekty', pp. 473-4; Vilenskii, op. cit., p. 173.

2. Ust. Grazh. Sud., art. 815.

3. Article 813, Ust. Grazh. Sud., corresponds to articles 67-9, SZ, I, pt. 1 (1857), Osnov. Gos. Zak. The key difference lies in articles 9, 10, and particularly, 815 of the former. Subsequent controversies centered on the meaning of 'rukovodstvo' in article 815.

by the lower courts, they must have meant its decisions to be of a more binding nature than simply a guide which the lower courts could follow insofar as they agreed with them. In addition, the reformers may have been motivated in part by the theoretical consideration that no two cases are identical and therefore no decision rendered in one case can be directly applicable to another.

The question of the legal force of the high court's decisions arose almost immediately after the reforms had been implemented, but was debated particularly intensively by jurists from the early 1890s onwards.[1] However,

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1. It was hoped to develop this point more fully, but unfortunately considerations of length requirements have precluded this. See, e.g., Korkunov, Lektsii, pp. 295-8, 305-8, 330-32; idem, Ukaz, pp. 349, 356-7, 365; idem, 'Znachenie Svoda Zakonov' in Sbornik statei N.M. Korkunova, 1877-97 (Spb., 1898); N.I. Lazarevskii, 'Tolkovanie zakonov po russkomu pravu', Pravo, 1902 no. 8, cols. 361-8; I.V. Gessen, 'Obnovlennyi stroi i kodifikatsiia', Pravo, 1909 no. 10, cols. 605-19; Druzhinin, op. cit., pp. 127-31, 157-9; Vas'kovskii, 'Sud. usmotrenie'; idem, Kurs grazhdanskago protessa (Mos., 1913), i. 215-18; A. Dumashevskii, 'Zaveshchanie imushchestva v pozhiznennoe obladenie', Zh. Min. Ius., xxxvi (1868), pp. 83-6; G. F. Shershenevich, Uchebnik russkago grazhdanskago prava (6th edn., Spb., 1907), pp. 64-5; idem, 'Primenenie norm prava', Zh. Min. Ius., 1903 no. 1, pp. 34-82; A. M. Guliaev, 'Obshchiia ucheniia sistemy grazhdanskago prava v praktike Grazhdanskago Kassatsionnago Departamenta Pravitel'stvuiushchago Senata za 50 let', Zh. Min. Ius., 1914 no. 9, pp. 333-409; A. D. Gradovskii, 'O sudebnom tolkovanii zakonov po russkomu pravu', Zh. Gr. i Ug. Pr., 1874 no. 1, pp. 1-62; S. A. Muromtsev, 'Sud i zakon v grazhdanskom prave', Iurid. Vest., 1880 no. 11, pp. 373-93; Ia. G. Esipovich, 'O tolkovanii zakonov', Zh. Min. Ius., 1894/95 no. 2, pp. 84-112; G. V. Demchenko, 'Sudebnyi pretsedent', Zh. Min. Ius., 1903 no. 3, pp. 79-142, and no. 4, pp. 26-82; K. P. Pobedonostsev, Sudebnoe rukovodstvo. Sbornik pravil, polozhenii i primerov (Spb., 1872), p. 349; fon Rezon, 'O sile kassatsionnykh reshenii', Sud. Zhur., 1873 no. 4, pp. 1-31; L. I. Petrazhitskii, Teoriia prava i gosudarstva v sviazi s teoriei nravstvennosti (2nd edn., Spb., 1909, 1910), ii. 572-9, 637-9; V.K. Sluchevskii, 'Ob otnosheniiakh sudebnoi ugolovnoi praktiki k zakonodatel'stvu i nauke prava', Zh. Gr. i Ug. Pr., 1883 no. 4, pp. 145-66; D.D. Grimm, 'K voprosu o poniatii i istochnike obiazatel'nosti iuridicheskikh norm', Zh. Min. Ius., 1896 no. 6, pp. 133-57; N. A. Milovidov, 'Zakonnaia sila sudebnykh reshenii po delam grazhdanskim', Vrem. Demidov. Iurid. Lits., bk. 11 (1876), pp. 1-114. The debate is surveyed in Kucherov, Courts, pp. 46-8; P. Orlovskii, 'Znachenie sudebnoi praktiki v razvitii sovetskago grazhdanskago prava', Sov. Gos. i Pravo, 1940 no. 8-9, pp. 91-4.

while jurists' opinions differed over the scope allowed the courts in the interpretation of law, the criteria, i.e. narrow textual or broader historical analysis, custom, moral or jurisprudential principles, etc., the courts could use in making this interpretation, and the legal nature of such interpretation, i.e. whether it constituted a source of positive law equal in status to legislation, with a few prominent exceptions they agreed that in general in similar cases the lower courts were obliged to follow the precedents set by the Senate Cassation Departments in order to ensure uniformity of interpretation and application of the law and thereby provide the stability and security necessary for citizens and their actions. Political considerations also very often appear to have been as influential as jurisprudence in determining the positions adopted by different jurists, with some seeking to curb administrative arbitrariness and compensate for what they considered governmental inactivity through broad judicial powers of interpretation and review, while others exhibited a corresponding fear of uncontrolled judicial interpretation and judges and sought a perfect form of legislation that would not require interpretation.[1] However, whatever the true position in theory, aside from perhaps encouraging some lower courts occasionally to disregard the decisions of the Cassation Departments on controversial issues with which they disagreed, this debate seems to have been without serious

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1. Compare, e.g., the opinions of Korkunov, Gessen, and Lazarevskii with those of Vas'kovskii and Druzhinin, all cited in note 1, p. 31. In practical matters, compare I. Orshanskii, 'Nasledstvennyia prava russkoi zhenshchiny', Zh. Gr. i Ug. Pr., 1876 no. 3, pp. 14-16, and L. Shvartsburd, 'Po povodu zakona 3 iuniia 1912 goda', Pravo, 1912 no. 50, cols. 2748-52, with V. Riasanovskii, 'O sile i znachenii st. 1068[1] t. X ch. 1', Pravo, 1913 no. 10, cols. 602-8, and A. Kunitsyn, 'O prave plemianits na ukaznyia chasti iz nasledstva (otvet g. Motovilovu)', Zh. Min. Ius., 1866 no. 4, pp. 33-46.

practical effect, as within the reformed judicial system the high court itself essentially defined the extent of its power in this regard. The Civil Cassation Department, later supported by the General Meeting of the First and Cassation Departments, ruled that its decisions had the force of judicial precedents, which were binding on all lower courts in all similar situations.[1] Although the high court held that it lay to the lower courts to decide whether the factual situation was sufficiently similar for the high court's ruling to be applicable, this decision too was subject to review by the high court.[2] Furthermore, decisions of the Civil Cassation Department and, in certain instances, the General Meeting of the First and Cassation Departments were the only judicial decisions that were to carry such weight.[3]

Thus under the high court's influence, the Russian legal system became a hybrid of the Civilian and Common Law systems, and Russian civil law became based as much, or more, on judicial decisions as on statutory law.

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1. See, e.g., SRGKD 1868 no. 326; 1870 no. 1598; 1873 no. 1214; 1878 no. 92; 1879 no. 3; 1880 no. 46; 1884 no. 74; 1899 no. 105; 1907 no. 102; 1911 no. 52; ROSPKD 1903 no. 25; 1907 no. 63. On the lesser strength of unpublished decisions, SRGKD 1884 no. 47; 1913 no. 5; 1914 no. 59. See also the plaintiff's argument in 1895 no. 96.

2. See, e.g., SRGKD 1868 no. 326; 1869 nos. 675, 853; 1870 nos. 330, 451; 1872 no. 534; 1873 no. 1214; 1875 no. 969; 1882 nos. 46, 160, 166.

3. See, e.g., SRGKD 1868 no. 869 and 1886 no. 42 (on pre-reform Senate decisions in private legal cases); 1872 no. 685; 1883 nos. 11, 49; 1898 no. 11; 1907 no. 102; 1908 no. 46; 1914 no. 17. See also 1867 no. 519.

The statutes of the Svod Zakonov and its Prodolzheniia[1] and recent or other legislation not included in these provided the framework around and within which the Civil Cassation Department adapted and created legal norms and a system of civil law. Of course, the court was limited by the statutes, but these became unintelligible without the court's decisions, which in addition soon became more complete and covered a broader area of civil activities than the statutes. Thus, the privately published unofficial editions of volume ten of the Svod Zakonov, containing the bulk of statutory civil law, generally included summaries of all relevant decisions of the Civil Cassation Department under each article, and in actual cases the litigants referred to these decisions as often as to the statutes. To be sure, the lower courts, as they can in a practical sense in other Civilian or even Common Law jurisdictions, could disregard the precedents set by the high court in reaching a decision in any given case, as indeed could the high court itself, as technically it was not bound by its own decisions.[2]

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1. The legal force of the SZ relative to the original legislation on which it was based also was debated intensely by jurists from the early 1890s. See, e.g., Korkunov, 'Znachenie', and Lektsii, pp. 330-32; Lazarevskii, op. cit., no. 6, cols. 361-8; idem, 'Zakon i svod', Pravo, 1899 no. 39, cols. 1681-91; M.A. Lozina-Lozinskii, Kodifikatsiia zakonov po russkomu gosudarstvennomu pravu (Spb. 1897) (reprinted from Zh. Min. Ius., 1897 nos. 4 and 5); Gessen, 'Obnov. stroi', and the discussion of this in Pravo, 1909 no. 12, cols. 781-7; A.I. Kaminka, 'Sila svoda zakonov', Pravo, 1908 no. 1, cols. 6-19; idem, 'Novyia izdaniia svoda zakonov', Pravo, 1908 no. 10, cols. 547-52. The dispute is reviewed in Maikov, op. cit., pp. 137-44, 262-76. The Civil Cassation Department generally upheld the primacy of the SZ. See, e.g., SRGKD 1870 no. 516; 1879 no. 16; 1890 no. 40; 1905 no. 96; 1912 no. 46; also, limiting this, ROSPKD 1890 no. 7.

2. Thus one of the two pre-requisites for the existence of judge-made law set down by Dicey technically was not fulfilled. A.V. Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (2nd edn., London, 1940), pp. 483-4. This only emphasises the hybrid nature of the legal system created by the reforms. In addition, it made it much easier for the court to refine or amend its position on any given issue.

But if the lower courts did this, their decisions were likely to be appealed and vacated. The Civil Cassation Department generally adhered to its previous rulings, although occasionally on controversial propositions of law it would alter its position after holding to it for several years or, more rarely, even vacillate between positions for several years before finally settling on one interpretation of the law. Thus the lower courts appear normally to have followed the precedents of the high court,[1] and probably for the same reasons that this occurs in any legal system: respect for the high court, recognition of the practical need for uniformity of application and interpretation of legal norms, the judges' natural desire not to have their decisions reversed or vacated, and their desire to advance to higher judgeships, combined with a realisation that constant reversals and possible resulting reprimands by the higher courts would not help to achieve this. Whenever a court of appeal did assert openly that it was not bound by the rulings of the Civil Cassation Department, it found its assertion rebutted and its decision vacated.[2] So if the lower courts strongly disagreed with a principle laid down by the high court, rather than directly defy the latter, they normally would seek to circumvent its ruling indirectly by basing their decisions on different statutes or reinterpreting the facts of the case.[3] Of course, in such cases, the lower court's decision again would be subject

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1. Druzhinin, op. cit., pp. 128-9, 131-2; Dumashevskii, op. cit., pp. 83-6; Gorodyskii, op. cit., no. 2, p. 21, and no. 6, p. 91.

2. See, e.g., SRGKD 1876 no. 102 (together with 1872 no. 1188). However, sometimes the lower court's intransigence would be rewarded. See 1887 no. 106.

3. Gorodyskii, op. cit., no. 6, p. 91. For examples, see SRGKD 1869 no. 675; 1870 no. 330; 1872 no. 534; 1873 no. 1214; 1875 no. 969; 1882 no. 166.

to appeal to the high court.[1]

The nature and deficiencies of the Svod Zakonov Rossiiskoi Imperii, the Russian digest of laws, which was the source of law to which all private individuals, state officials, and courts had to refer in legal matters,[2] provided the new courts with ample opportunity to use their power of interpretation to develop the civil law, possibly to a greater extent than would have been the case had a proper civil code existed.[3] This was due partly to the fact that the digest, as it pertained to civil law, was oriented toward the needs and preservation of the ruling elites of a sedantary, hierarchically structured, serf-owning society, and hence proved woefully deficient in those areas of law, such as contract and commercial law, which tend to assume greater importance in a more commerically oriented and mobile society. In the conditions of a developing market and substantial social change occurring in Russia from the 1860s, the courts had to deal with relationships only very poorly provided for, or simply unforeseen, in the existing statutes. Even more important than this, however, were deficiencies in the Svod Zakonov's compilation, structure, and content. It was a digest of current law and not a code, and therefore lacked the completeness, unity, and system of the latter. Notionally being composed of all legislative or other normative acts promulgated since the Ulozhenie of 1649 and not superseded by subsequent acts, its coverage of

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1. See the cases cited in note 3, p. 35.

2. 2PSZ, viii., pt. 1, no. 5947 (31 Jan. 1833), pp. 68-9; ix., pt. 2, no. 7654 (23 Dec. 1834), pp. 258-9.

3. This is not to say that a proper code would not have been far more preferable; only that the Digest was so deficient in some areas as to provide the courts with more opportunity to amend the law.

such acts was incomplete, those acts on which it was based were not always accurately reproduced in it, and it included a number of statutes based on other material, such as judicial decisions in private cases, ministerial or other official directives, and even general jurisprudential considerations of the compilers. Thus different areas of law were covered unevenly, and nearly all areas incompletely. There were few general principles of law and little accepted legal terminology. Hence the statutes were often vague, confusing, and generally casuistic. Being an amalgam of specific decisions made in particular cases, specific and more general legislation, ministerial and other official directives, and so on, all made at widely varying times and usually for specific and often divergent purposes, the Svod Zakonov lacked continuity and cohesion and frequently contained internal contradictions and gaps in the law.[1] Nevertheless, despite all its defects, it was the first comprehensive source of Russian law available since the Ulozhenie of 1649, and hence proved to be a valuable instrument in the administration and study of Russian law.[2] While the new courts, and particularly the Civil Cassation Department, were limited by these very considerable deficiencies in the statutory law, they also were able

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1. There are a number of good accounts of the compilation, nature, and deficiencies of the Svod Zakonov. See, e.g., Maikov, op. cit., especially pp. 49-72, 243-61, 272-6; S.V. Pakhman, Istoriia kodifikatsii Grazhdanskago prava (Spb., 1876), ii. 19f.; M. Raeff, Michael Speransky, Statesman of Imperial Russia (The Hague, 1957), pp. 334f.; Kaiser, op. cit., p. 143.

2. On the difficulty of locating laws prior to the appearance of the SZ, see particularly Maikov, op. cit., p. 10; Raeff, op. cit., pp. 322f.; Berman, op. cit., pp. 206-9; Kaiser, op. cit., pp. 132-6; M.M. Speranskii, Obozrenie istoricheskikh svedenii o svode zakonov, izdana Odesskim iruidicheskim obshchestvom v pamiat' 50-ia dnia smerti grafa M.M. Speranskago (Odessa, 1889), pp. 12-18, 35-7; Wortman, op. cit., pp. 32-3.

to exploit them, by choosing among contradictory articles, defining vague terms, filling in gaps, and so on, to interpret the law expansively or restrictively, on the basis of textual, historical, or jurisprudential analysis, etc., and thereby significantly amend the civil law and adapt it to changing economic and social conditions and attitudes.

While the reformed judicial system and the nature and characteristics of the Svod Zakonov provided the judiciary with the means and opportunity to develop the law by judicial interpretation, changes in legal education and the characteristics of judicial personnel ensured that it would have the capability and motivation to accomplish this. Until the mid-1830s, aside from some occasional courses in general law and jurisprudence or various areas of commercial law taught in the universities, lycees, and other specialised schools, usually intended either for future state officials or the sons of merchants, there was no systematic and comprehensive teaching of the law in general or Russian law in particular anywhere in the Empire. The education in and knowledge of law of those concerned with its administration generally was acquired, if at all, from practical experience and apprenticeship in government chancellories and other offices.[1] Consequently, judges, court secretaries, and other judicial officials were not trained and professional jurists, but general civil servants, ex-military officers, lower chancellory functionaries, etc.,

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1. Wortman, op. cit., pp. 24-8, 30-33, 38-41, 44-5. This is by far the best work on legal education and the knowledge of law in Russia prior to and immediately after the judicial reforms. See also Druzhinin, op. cit., pp. 79-82; Kaiser, op. cit., pp. 97-100, 102-6; Berendts, 'Proekty', pp. 454-9; Speranskii, op. cit., pp. 12-13, 16, 35-6. Legal education among the Baltic Germans, and at the University of Dorpat in this region, seems to have been at a distinctly higher level. See also V.I. Gsovski, 'Roman Private Law in Russia', Bulletino dell' Instituto di Diritto Romano, xlvi (1939), 363-75; D.P. Hammer, 'Russia and the Roman Law', Am. Slav. and E.Eur. Rev., xvi (1957), 1-13.

possessing only a general education, if any at all. However, shortly after his ascension and largely for political reasons, Nicholas I was persuaded of the danger of study only of the general philosophical and moral aspects of law and justice and of the need for personnel trained in the specified application of Russian law. Thus in 1828 he agreed to allow groups of students to study general and Russian law under the tutelage of the Second Department of his personal chancellory, which at that time was engaged in the work of compiling Russian law and composing the *Svod Zakonov*, and then proceed to Germany for several years to continue their legal studies. In 1835, drawing largely on these students, law faculties offering a comprehensive curriculum in general and Russian law were opened in nearly all Russian universities, and the Imperial School of Jurisprudence was founded to provide a somewhat less comprehensive yet nonetheless specialised study of law for members of the higher *dvorianstvo* who were preparing for government careers.[1] As a result, increasingly from the 1840s, a group of trained jurists versed in the law and legal analysis and imbued with a strong belief in the role, necessity, and benefit of law began to appear in Russia and to occupy important positions in the judicial system. The post-reform judiciary, judicial administration, and bar was dominated almost totally by this emerging group of professional jurists, who often were *dvoriane*, but generally landless or of only modest means. Their career and livelihood lay in the practice of law, to which they were totally dedicated;

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1. Wortman, *op. cit.*, pp. 44-50, 198-234; Kaiser, *op. cit.*, pp. 98-102, 106-10; Berendts, 'Proekty', pp. 459-60; N. Rennenkampf, 'Sud'by privillegirovannykh i neprivillegirovannykh iuristov (k statistike iuridicheskago obrazovaniia v Rossii s 1863 g.)', *Zh. Gr. i Ug. Pr.*, 1881 no. 1, pp. 67-98, who compares the curriculums at different schools.

their training gave them the knowledge and expertise necessary to enable them to deal as effectively as possible with the deficiencies of Russian civil law.[1]

Thus, in the words of the apocraphyl prosecutor, were established opportunity, motivation, means, and capability. Working through the reformed judicial structure and using the courts' newly acquired power of judicial interpretation, the newly emergent group of trained professional jurists could play a significant part in determining the relative success of the government's general policy of promoting economic growth through fostering development of the market and in helping Russian society adapt to the changes taking place within it, by clearing away or mitigating any legal impediments to expanded commercial activity and facilitating the adaptation of the existing incomplete, deficient, and in many ways outdated civil law to new social and economic conditions through the creative interpretation and development of the law. One of the most difficult areas of law to adapt, and yet in some ways the most crucial, was the law of property and inheritance. Here the tension between old and new, between deep-seated traditions and new conceptions and needs with respect to familial, social, economic, and political structures and attitudes, between the traditional sedantary, patriarchal, and hierarchical society and

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1. This is one of the main themes in Professor Wortman's book, op. cit. See especially the tables and profiles in chs. 3 and 9. See also Gorodyskii, op. cit., no. 2, pp. 8-11, 21-2, 42-3; Rennenkampf, op. cit.; Berendts, 'Proekty', pp. 459-60; Hammer, op. cit. This was part of a general trend in the gradual professionalization of Russian officialdom. For the literature on this, see D. T. Orlovsky, 'Recent Studies on the Russian Bureaucracy', Rus. Rev., xxxv (1976), 448-67; M. Raeff, 'The Bureaucratic Phenomena of Imperial Russia, 1700-1905', Am. Hist. Rev., lxxxiv (1978), 399-411.

a modern individualistic and mobile commercial society, would be greatest. In the absence of appropriate legislative activity by the government, the new courts became the chief mechanism by which this tension could be relieved and the demands of change reconciled with the desire for stability. This responsibility fell heaviest on the Civil Cassation Department, as the court of last resort and the instance providing the interpretation and definition of civil law which all remaining courts of the Empire were to follow. The issues coming before the court were complex and frequently politically controversial, and the court appears to have been well aware both of the broader implications of its decisions and its precarious position in the autocratic state system. Thus its task was extremely difficult. How it acquitted itself of this task, the bounds of its interpretative power that it set itself and the changes that it felt able to introduce in a fundamental area of law, form the subject of the remainder of this study. It is hoped that in this way some small contribution will be made not only to our understanding of the affect of the judicial reforms on Russian society and economic development, a subject hitherto wholly neglected except to a limited extent with respect to criminal law and government activities, but also to our understanding of the changes and stresses appearing in Russian society throughout this period and the relationship of law to social and economic development in general.

Chapter 2

The Law of Patrimonial Property and Inheritance as It Existed at Emancipation

I. The Law as It Existed at Emancipation

A. Jurisdiction of Imperial law

Imperial Russian civil law, as it concerned the definition of property and the devolution of property rights to succeeding generations, was contained primarily in volume X, parts 1 and 2, of the *Svod Zakonov*, although relevant articles also were found elsewhere[1], and in general applied throughout the Empire and to all subjects, although its application was limited geographically, ethnically, by social estate, and in some instances on the basis of religious faith. The Baltic provinces, Bessarabia in many respects, the Grand Duchy of Finland, and the former Kingdom of Poland came under the jurisdiction of local laws or the *Code Napoleon*, and in the provinces of Chernigov and Poltava remnants of the *Litovskii Statut* took precedence over Imperial law when so specified. Likewise, certain peculiarities of Georgian law were retained when Russian Imperial law was extended to this area. Nomadic peoples of the eastern steppes, cossacks, and Mohammedans were subject to their own laws to a greater or lesser extent.[2]

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1. Particularly vols. II, IX, XI, XII.

2. N. Korevo, *Ob izdaniiakh zakonov Rossiiskoi Imperii. 1830-1899. Sbornik svedenii ob izdaniiakh Svoda Zakonov i Prodolzhenii k nemu, Polnago Sobraniia Zakonov, Svodov Voennykh i Morskikh Postanovlenii, a takzhe ob izdaniiakh mestnykh zakonov* (Spb., 1900), pp. 83-104, who cites all relevant legislation.

Prior to emancipation, serfs were subject to arrangements made by their owners, while property relations and inheritance among state peasants and foreign colonists were regulated by special provisions of the law.[1] However, these would appear to have been no more than guidelines formulated on the basis of existing custom. Although statutory law is silent on the issue, it is likely that the remaining peasant groups were governed by their own customs as well. After emancipation, former serfs and other peasants and foreign colonists after they had been reclassified as 'settler-owners' came under the jurisdiction of customary inheritance law, and the land received by them acquired a separate legal status.[2] Thus the law under review concerned primarily the non-peasant population of the Great and Little Russian, Belorussian, Caucasian, and Siberian provinces and regions

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1. SZ, X, pt. 1, art. 1184; XII, pt. 2 (1857) Ust. o Blag. v Kaz. Sel., arts. 114-15, 117-18, and Svod Uchr. i Ust. o Kol. Inostr., arts. 169-79.

2. SZ, X, pt. 1, art. 1184; IX (Prod. 1863) Osob. Pril., Obshch. Pol., art. 38 (1902 edn., art. 13), (Prod. 1876) Osob. Pril. IV, art. 110, V, art. 93, XV, art. 19, XX, arts. 2 prim. 2 pril: 42, 81 (1902 edn., IV, razd. I, art. 15, razd. II, art. 66, razd. VI, arts. 296, 587, V, art. 41). 2PSZ, xlvi., pt. 1, no. 49705, pravila, art. 19 (4/16 June 1871), p. 819. ROSPKD 1892 nos. 33, 41, 42; 1894 no. 11; 1898 no. 2 (SRGKD 1898 no. 71); 1909 no. 19; 1910 no. 1. SRGKD 1873 no. 1507; 1875 no. 839; 1878 no. 225; 1880 no. 174; 1882 no. 225; 1884 nos. 22, 105; 1885 nos. 3, 74; 1890 no. 110; 1891 no. 86; 1893 nos. 66, 77; 1901 no. 69; 1902 no. 37. K.P. Pobedonostsev, Kurs grazhdanskago prava (2nd edn., Spb., 1896), ii. 356-8, 360-62; K. D. Kavelin, 'Pravo nasledovaniia. Ocherk iuridicheskikh otnoshenii, voznikaiushchikh iz nasledovaniia imushchestva', in Sobranie sochinenii (Spb., 1904), iv. 1276; P. Pavlov, 'Dopustimost' zaveshchatel'nykh rasporiazhenii nadel'noi zemlei i nasledovanie posle krest'ian po t. X ch. I', Pravo, 1911 no. 25, cols. 1402-6.

of the Empire, although it increasingly was having some effect on the peasantry as well.[1]

B. Classification of the objects of property

Russian law classified the objects of property into one or more categories according to their physical or imputed characteristics. Due to the nature of the compilation of the Svod Zakonov, the definition of these categories was seldom precise, and often consisted of little more than an enumeration of examples. However, the extent and content of property interests which could be acquired with respect to any object were determined by the category into which the object fell. The absolute powers of ownership granted by article 420, SZ, X, 1, were qualified by the limitations embodied in any particular category of property. Thus all objects of property had tobe included in one or another category, and in any particular judicial action it was essential for the court to determine with which type of property it was dealing.

Objects of property were either immovable or movable. The former consisted of all land and attendant ugod'ia and all objects and structures permanently affixed to it. Everything else was considered to be movable property, including all negotiable instruments, monetary capital, obligations, and agricultural implements, livestock, and produce separated from

1. Although customary law itself exhibited the essential features of general law, i.e. equal division among males of the household and discrimination against females. The question of the nature, characteristics, and applicability of customary law was very vexed, and unfortunately any discussion of it has had to be omitted due to considerations of length. See the works cited in the bibliography.

the land.[1] The latter is an important point, because statutory law did not define such agricultural inventory as appurtenant to land except in a few limited situations.[2] Indeed, statutory law provided very little guidance with respect to appurtenances in general, in the case of land confining this to the structures erected by man and the natural features, surface growth, and minerals to be found on or under it.[3] Only dwellings and factories or other manufacturing establishments were otherwise mentioned, the appurtenances of the former being defined as all permanent fixtures and any decorations which could not be removed without harm to the dwelling, and of the latter as all structures, utensils and instruments, and land with its attendant _ugod'ia_ and minerals.[4]

The designation of an object as movable or immovable was important primarily in determining its further classification as either patrimonial or acquired property, the degree of formality required in transactions concerning it, and the type of evidence acceptable in disputes concerning it. In general, transactions involving immovable property had to be registered, although frequently they were not, and documentary evidence was required or took precedence in court actions, whereas transactions involving movable property did not need to be registered and the testimony of witnesses was

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1. _SZ_, X, pt. 1, arts. 383-4, 398, 401-3. Leaseholds would be included among obligations in general (_ibid._, Bk. 4, pt. 3).

2. Chiefly, when land was mortgaged to a state credit institution. _Ibid._, art. 392; XI, pt. 2 (1857) _Ust. Kredit._, arts. 467-8.

3. _Ibid._, X, pt. 1, arts. 386-7.

4. _Ibid._, arts. 388-9. For the development of a doctrine of appurtenances by the high court, see ch. 3.

sufficient in court actions.[1]

Immovable property could be either divisible or indivisible, depending upon whether by nature or by law it could not be divided in such a way that each part could be owned or possessed separately. For example, factories, mines, shops, certain landholdings acquired in ownership by former state peasants or dvoriane of insufficient means, and various entailed estates were declared by law to be indivisible.[2] The only legal effects resulting from such a designation were those obviously following from the fact of indivisibility. For example, coheirs succeeding to indivisible property could not divide it should they decide not to remain as co-owners. The property would have to pass to a single heir, who would have to compensate his coheirs if necessary.[3]

Land was designated as either settled or unsettled, although in this instance the definitions provided by the Svod Zakonov were particularly vague. Article 385 SZ, X, 1 stated simply: 'Lands are settled or unsettled. Lands not settled are known as waste lands (pustoshami), vacant lands (porozhnimi zemliami), steppes or by other local names.' Some further guidance was provided by articles 386 and 387, which stated respectively that the appurtenances of settled lands consisted of all man-made structures found thereon and the appurtenances of both types of land consisted

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1. SZ, X, pt. 1 (1857), arts. 696-933; X, pt. 2. These subsequently were superseded by the provisions of the Statute on Notaries and the Code of Civil Procedure, but the distinctions remained intact. See Pakhman, Ist. kodif., pp. 95-142.

2. SZ, X, pt. 1, arts. 393-5, 1324; VII (1857) Ust. Gorn., arts. 476-8, 562, 2439; XI, pt. 2 (1857) Ust. Promysh. Fabrich. i Zavod., art. 72.

3. Ibid., X, pt. 1, art. 1324; VII (1857) Ust. Gorn., arts. 477-8, 562.

of its natural features, minerals, and so on.

This might lead to the conclusion that the distinction was merely that between vacant and inhabited land, and originally this may have been so. Article 406, defining state lands, seemed to support this by distinguishing between settled and unsettled state land. As none of the peasants settled on state land were considered serfs, it might be inferred that the distinction was simply between inhabited and uninhabited state land. However, the article then confused the issue by distinguishing between both of these on the one hand and vacant and wild lands and forests on the other. Perhaps this was meant to distinguish vacant lands over which the treasury administration asserted some sort of control from other vacant lands. On the other hand, articles 1067 pt. 2 and 1350 imply that the basis of the distinction was not the mere fact of habitation or use, but of habitation by serfs, because they assume that unsettled land could be owned and used by a private individual and concern the transfer of land primarily from persons having the right to own serfs to persons not having this right.[1] This is confirmed by the articles in volume IX limiting the ownership of serfs to hereditary dvoriane already possessing settled land, as in these articles the term 'settled land' was used specifically to distinguish land occupied by serfs from all other land.[2] This reveals but one of the many inconsistencies contained in the Russian digest, for the settled state

1. Art. 1067 pt. 2 sets out the conditions under which unsettled land may be devised to the church, and art. 1350 prohibits redemption in the event of the sale of unsettled patrimonial property to a non-clansman of a different social estate.

2. SZ, IX (1857), arts. 208-9, 232-4, 1069, 545, 1139, 1372-3, 1525, 1537, pt. 2, 227 pts. 1, 2, 5. Arts. 232-4 corresponded to arts. 1304-6, vol. X, pt. 1. See also X, pt. 1 (1857), arts. 1105, 1108.

lands referred to in article 406 above and dealt with in the Ustav o khoziaistvennom upravlenii kazennykh naselennykh imenii obviously were not inhabited by serfs, but by state peasants. Nevertheless, both laymen and jurists contemporary to the emancipation clearly understood 'settled land' to mean only land occupied by serfs, and the rules limiting ownership of settled land after the emancipation refer only to land occupied by temporarily-obligated peasants.[1]

There was no statutory differentiation between urban and rural land, or between lands based on their use, so that it would seem that all land wherever located and however used had to be either settled or unsettled, depending upon the presence or absence of serfs.

The principal legal effect of this classification was to restrict the group of possible owners. Unsettled land could be acquired by anyone, with the exception of certain members of the clergy, whereas even after the emancipation enjoyment of the full rights of ownership of settled land was restricted to the hereditary dvorianstvo.[2] Prior to emancipation such land coming to a person not belonging to this social estate was taken over by the state with payment of compensation; after the emancipation the land was held in trust by the Dvorianskaia Opeka until the peasants had begun to

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1. D. I. Meier, Russkoe grazhdanskoe pravo. Chteniia D. I. Meiera, izdannyia po zapiskam slushatelei pod redaktsieiu A. Vitsyna (5th edn., Mos., 1873), pp. 107-8; K. A. Nevolin, Polnoe sobranie sochinenii K. A. Nevolina (Spb., 1858), v. 108; 'Obozrenie spetsial'nykh zhurnalov', Otech. Zap., 1865 bk. 1, pp. 204-8; A. Liubavskii, 'Vykup nenaselennykh zemel'', in Iuridicheskiia monografii i izsledovaniia (Spb., 1875), iii. 415-17; 2PSZ, xxxvi, pt. 1, no. 36674 (19 Feb. 1861), pp. 399-402 (SZ, IX (1876) pril. to art. 330 prim. (1899 edn., art. 88)).

2. See the references in note 2, p. 47; SZ, IX (1876, Prod. 1890), pril. to art. 330 prim.

redeem their land.[1]

The central distinction in the system of property classification was that between acquired and patrimonial property.[2] While the previous classification limited the group of possible owners, that of patrimonial property limited the owner's powers of disposition and extended certain rights to his relatives. The owner's rights of possession and use were not affected.

Only immovable property could be patrimonial, thus all movable property was considered acquired and any dispute claiming patrimonial origin for such property was specifically prohibited by law.[3] Because they constituted obligations and hence were considered movable property, limited interests in immovable property arising from contractual agreements obviously could not be patrimonial. However, because Russian law had no doctrine of tenurial relationships, it is unclear whether at the time of emancipation hereditary tenements of immovable property not held in ownership could be considered as patrimonial. This would have affected the vast majority of the non-serf peasantry, foreign colonists, and various urban and other groups who were not considered owners of the immovable property that they occupied, but merely as having a hereditqry right to the possession

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1. SZ, IX (1857), arts. 232-4, (1876, Prod. 1890), pril. to art. 330 prim.: arts. 1-3; X, pt. 1 (1857), arts. 1304-6 (Prod. 1876, art. 1304).

2. For general analyses of the law see the works by Nevolin, Meier, Pobedonostsev, Il'iashenko, Pakhman, Shershenevich, Kasso, and Dufour cited in the bibliography.

3. SZ, X, pt. 1, arts. 396, 398, 401-3.

and use of state land.[1] After emancipation, the peasantry and foreign colonists were excluded from the effect of the law by the application of customary law, whereas for other groups the courts had to decide the issue as the need arose.

Patrimonial property was any immovable property that had passed by right of inheritance from its original owner to his direct legal heirs either under the rules of intestacy or by will.[2] Property continued to be patrimonial so long as it was owned by a member of the clan (rod) in which it was considered patrimonial, irrespective of the means by which he had acquired it. Thus patrimonial property sold to a clan member remained patrimonial.[3] However, it should be noted that for this to be so, the purchaser had to belong both to the vendor's clan and to the particular clan in which the property was patrimonial. Thus maternal patrimonial property sold to a paternal uncle or cousin became acquired property because although both the purchaser and vendor belonged to the same clan, the purchaser was not a member of the clan in which the property was patrimonial, i.e. the vendor's mother's clan. The sole exception to this was that in the event that such property was sold at public auction for default

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1. The court ruled such property was not patrimonial. See, e.g. SRGKD 1874 no. 126 (and 1878 no. 164); 1897 no. 11; 1899 no. 56 (former possessional factories); also SZ, XII, pt. 2 (1857) Ust. o Blag. v Kaz. Sel. and Svod Uchr. i Ust. o Kol. Inostr.; X, pt. 1, art. 403.

2. SZ, X, pt. 1, arts. 399, 1100 (1857, 1887 edns.). The rule on wills did not apply in Chernigov and Poltava provs., ibid., art. 400.

3. Ibid., art. 399 pt. 3.

of the owner's debts it became acquired for whoever purchased it.[1]

Patrimonial property was not qualified by any territorial, temporal, personal, or functional restrictions. It could exist in any part of the Empire to which general Imperial civil law extended; it retained its status for any period of time until the conditions terminating it had occurred; it applied to property owned by persons of any social estate, wherever located and however used. As all objects not considered patrimonial were acquired property, patrimonial property was a special case and acquired property the residual.[2]

Any immovable property obtained by the owner by any means from a person not of the same clan was considered acquired.[3] Property would remain acquired until it passed to the owner's legal heirs by right of inheritance, so that transfer of such property to a relative by sale or gift would not affect its status. Statutory law was silent on the effect of the conveyance of acquired property to the direct legal heir by means without consideration other than inheritance. Patrimonial property thus became acquired when ownership was obtained by a person of a different clan, and it continued to be so even if subsequently reacquired by a member of the clan in which it previously had been patrimonial, unless this was by right of redemption.[4]

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1. Ibid., art. 1347 pt. 3. The clan was the group of all persons descending from and linked by blood relationship to a common male head of the clan (rodonachal'nik). Membership was transmitted through both males and females. Ibid., arts. 196-210, 1111-18, 1120.

2. Meier, op. cit., pp. 110-12; A. Liubavskii, 'Unichtozhenie razlichiia mezhdu imushchestvami rodovymi i blagopriobretennymi', in Iurid. mon., iii. 11.

3. SZ, X, pt. 1, art. 397.

4. Ibid., art. 397 pt. 4.

The legal effects of patrimonial property concerned the owner's power of disposition both during his life and by will, the order of intestate succession, and the relatives' right of redemption.

The owner of patrimonial property could not transfer it without consideration except in certain narrowly defined circumstances. During his life he could so transfer it to his heirs presumptive by gift, allotment, or dowry, but only in an amount not exceeding the share of his inheritance due the recipient under the rules of intestate succession.[1] At death, he had only the recently established right to grant his surviving spouse a life estate in all or part of such property in lieu of her statutory provision and the power in the absence of descendant heirs to assign all or part of it to a single collateral relative in the clan in which the property was patrimonial.[2] He could do this for each separate clan in which different properties that he held were patrimonial. Thus in all but the latter case, patrimonial property had to devolve to the next generation in accordance with the rules of intestate succession. The owner's powers of disposition for consideration were unaffected, and therefore he retained the power to dispose of his property by sale, lease, mortgage, and so on as he wished.

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1. Ibid., arts. 967, 996-8, 1001, 1003; IX (1857), arts. 222, 550 pt. 2. There was no restriction on gift in Chernigov and Poltava provs., ibid., art. 970.

2. Ibid., X, pt. 1 (1857), arts. 116 prim., 1068 (1887 edn., arts. 116, 1068, 1070, 1148); IX (1857), arts. 222, 550 pt. 2. Prior to 1862, Imperial consent was required for each instance that an owner sought to create a life estate in favour of his or her surviving spouse. See, e.g., 2PSZ, xxxiii, pt. 2, no. 33819 (28 Nov. 1858), pp. 414-15. Due apparently to the large number of such petitons, a decree of 1862 enabled such life estates to be established generally by registered or deposited will. 2PSZ, xxxvii., pt. 1, no. 38005 (27 Feb. 1862), pp. 153-5; I. Orshanskii, op. cit., pp. 3-4.

In inheritance, the order of succession to patrimonial property followed the general rules of intestacy, except that succession was limited to persons who were members of the clan in which the property was patrimonial.[1] This clan was determined by the identities of the first owner within the clan and the first heir to whom the property passed by right of inheritance. Thus, acquired immovable property inherited by a son from his father became patrimonial in the father's clan, whereas that inherited from his mother became patrimonial in her clan; every person thus belonged simultaneously to two separate clans. In the case of succession to descendant heirs this presented no difficulty, as all children and their issue obviously were included in both of the clans of each of their natural parents. However, given that a single owner could have property patrimonial in different clans, the situation could become more complicated with respect to succession to collateral heirs. For example, paternal uncles would have a right to the patrimonial or acquired immovable property inherited by their nephew from his father, but not to that inherited from his mother. Consequently, there would be a different set of heirs for each property and the succession to each had to be treated separately.

Any member of the clan in which property was patrimonial had the right to redeem it from the first and any subsequent purchaser within three years of its originally having been sold to a person who was not a member of the clan.[2] Preference in the exercise of the right followed the order of succession in inheritance, except that the vendor's children and grand-

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1. Ibid., arts. 1110 pt. 1, 1111-18, 1120, 1138, 1140, 1068.

2. Except in Chernigov and Poltava provs. Ibid., arts. 1346, 1354-5, 1360-63, 1366, 1372.

children were barred from exercising it during his lifetime and any relatives taking part in or witnessing the transaction were barred absolutely, and females and their heirs enjoyed an equal right with males.[1] Having an equal right to redeem the property, relatives of equal degree in relation to the vendor would divide it equally should more than one choose to exercise his right, and nearer relatives could transfer their right to more distant relatives.[2] If three years elapsed during the course of a judicial action contesting the original act of conveyance, the right nevertheless expired.[3] Patrimonial property could not be redeemed if it was resold voluntarily by the purchaser or his heirs to the vendor or his heirs, nor when it was sold at public auction or reverted to creditors for default of the owner's debts, nor when it was composed of unsettled land and was sold to a person belonging to a different social estate than the vendor.[4] The redemption price was the original sale price as stated in the act of conveyance, plus all expenses made by the purchaser for maintenance and improvements based on the court's assessment, plus the registration tax on the original sale and the redemption (i.e. 4% of the total value for each

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1. Ibid., arts. 1355-6, 1358, 1360, 1362. Pobedonostsev, Kurs, ii. 441-51; A. Nol'de, 'O prave rodstvennikov zhenskago pola na vykup rodovago imeniia', Zh. Min. Ius., 1911 no. 8, pp. 139-56; R. Dufour, Les Biens Patrimoniaux en Russie (Lille, 1913), pp. 145-7. Those deprived of their rights of social estate due to conviction for a felony and those entering a monastery also lost the right of redemption.

2. SZ, X, pt. 1, arts. 1357, 1359.

3. Ibid., art. 1366.

4. Ibid., arts. 1347-8, 1350, 1506; but see Pobedonostsev, Kurs, ii. 443-4; 'Rodovoe imenie, prodannoe chuzerodtsu i ot nego pereshedshee obratno k prodavtsu, ne podlezhit' vykupu', Zh. Min. Ius., 1863 vol. xvi, II. Chast' neoff., pp. 81-100; N. Kalachov, 'Zametka v raz'iasnenie 1-go punkta stat'i 1347-i t. X ch. 1-i', Iurid. Vest., 1863 no. 2, pp. 77-8.

act, or a total of 8%).[1] If the property had been resold by the purchaser prior to submission of a petition to redeem it, the redemption price was calculated on the basis of the second or subsequent deed of sale.[2] The person redeeming the property had to deposit the entire redemption sum at the time he submitted his petition to redeem.[3]

None of the above restrictions on disposition nor the right of redemption pertained to acquired property, which thus could be disposed of freely.[4]

C. The law of intestate succession

The laws of inheritance in force immediately after the emancipation of the serfs reflect a system of rules oriented toward the dominant class of an agrarian society having strong traditions of male headship of households and clan ties which had been imperfectly adjusted to accommodate other social classes. The primary concern was with the *dvorianstvo* and the transfer of their land at death, ensuring that each male offspring was provided with sufficient land with which to establish a household and perpetuate the clan's name and yet ensuring as well that daughters and widows, only recently generalized to spouses, received some dowry or other provision. Although subject to the general civil laws unless specifically exempted, merchants, *meshchane*, peasants, and other groups seemed to be of

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1. *SZ*, X, pt. 1, arts. 1367-8.

2. *Ibid*., art. 1369.

3. *Ibid*., art. 1370.

4. There were some other classifications of property, but these were minor or unimportant for our purposes. *Ibid*., arts. 405-19; Pakhman, *op. cit*., pp. 59-60.

only secondary importance, and, together with certain, particularly non-agricultural objects such as factories and mines, allowance was made for their particular characteristics only in brief passages found outside the general civil laws.[1]

A surviving spouse did not inherit from the deceased, but was entitled to demand as a provision for maintenance from the latter's estate one quarter of the undevised movable property and one-seventh of the patrimonial and undevised acquired immovable property.[2] After 1862, this right was lost if the surviving spouse accepted a bequest of a life estate in all or part of the deceased's patrimonial property.[3] The allotment could be requested at any time after the deceased's death; failure to make such a demand deprived the surviving spouse's heirs of any right to this share. Although the surviving spouse could not represent the deceased spouse in any inheritance, the former was entitled to a statutory share of the share of his or her father-in-law's estate that would have come to the deceased had the latter survived his or her father.[4] The surviving spouse could demand that this share of the father-in-law's immovable property be allotted even during the latter's life if he or she had received no immovable property

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1. E.g., SZ, X, pt. 1, arts. 1184, 1238; XI, pt. 2 (1857), Ust. Torg., art. 154-77, 758-61.

2. Ibid., arts. 1105, 1120, 1123, 1148, 1152, 1153, 1155, 1068. In Chernigov and Poltava provs. the surviving spouse was entitled to varying provision only for life or until remarriage. Ibid., art. 1157. See also Pobedonostsev, Kurs, ii. 337, 341-3; A. Liubavskii, 'Poluchenie vdoviu ukaznoi chasti', in Iurid. mon. (1867) i. 66-73; Ct. Vol'tke, 'Ob ukaznoi dole ovdoveishago supruga', Zh. Spb. Iurid. Ob., 1896 no. 4, pp. 42-56.

3. SZ, X, pt. 1 (Prod. 1876), art. 116 prim., pril.: 3, (1887) art. 1148 prim.

4. Ibid., (1857), arts. 1149, 1153. N. Kalachov, 'Otvet na voprosu po stat'iam 1149, 1151, 1153, 1154-i t. X ch. 1-i', Iurid. Vest., 1862 no. 10, pp. 75-88.

from the deceased.[1] This did not apply with respect to movable property, the surviving spouse's share of which thus was based on the undevised movable property remaining after the father-in-law's death. These provisions serve only to emphasize that at least from the point of view of the law, the wife still was considered an outsider in her husband's clan.

The right of inheritance was based on the clan formed by blood relationship to a common male clan head (rodonachal'nik) and on the relative degree of relationship to the deceased, with nearer relatives excluding those more distant and descendants representing their deceased ascendant relatives.[2] The degree of relationship to the deceased was based on the number of intermediate points of relationship in the direct line between him and any given relative. A series of relatives descending consecutively from one person was called a line, which would be descendant, ascendant, or collateral depending on the relationship between the deceased and the person with whom the line originated. It will be recalled that the right to inherit patrimonial property was limited to members of the clan in which it was considered patrimonial, so that succession to such property could differ from succession to the acquired property or other patrimonial property of the same owner.

Descendant lines had priority after deduction of the spouse's statutory share.[3] If males or their representatives of either sex survived, each female of equal degree, or her representatives in her place, received

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1. SZ , X, pt. 1, arts. 1151, 1153, 1154.

2. Ibid., arts. 1105, 1111-26; see note 1, p. 51.

3. Ibid., art. 1121.

a statutory share of one-fourteenth of the immovable and one-eighth of the movable property.[1] Her representatives divided her share per stirpes. Males of equal degree divided the remaining inheritance equally, and their representatives per stirpes. In the absence of males or their representatives, females and their representatives inherited according to the rules established for males. If the number of children meant that the size of the statutory share given to each female exceeded the size of the share inherited by each male, all would inherit equally. Some authors argued that in this case the inheritance would be divided into two equal parts, with all males equally sharing one part and all females equally sharing the other, but the legislative sources do not support this contention.[2]

Step-children inherited from their natural parents on the basis of the general law, but had no right to the inheritance of their step-parent.[3]

Illegitimate children were excluded entirely from the inheritance unless they had been declared legitimate and granted full rights of

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1. Ibid., arts. 1127-32; V. Lozinskii and N. Kalachov, 'O vydele chetyrnadtsatoi chasti iz nedvizhimago imeniia umershago vladel'tsa v pol'zu ego docherei ili sestry ostavshiksia po nem naslednikov, pri zhivoi materi', Iurid. Vest., 1863 no. 3, pp. 69-74. In Chernigov and Poltava provinces, sisters did not inherit from their father in the presence of brothers, but were entitled to a dowry, sharing one quarter of the estate equally. Brothers and sisters shared the mother's entire estate equally. SZ, X, pt. 1, arts. 1005, 1133.

2. Ibid., art. 1131. M. F. Vladamirskii-Budanov, Obzor istorii russkago prava (6th edn., Spb., Kiev, 1909), p. 506; N. N. Tovstoles, 'Iuridicheskoe polozhenie zhenshchiny pri otkrytii nasledstva po russkomu zakonodatel'stvu', Zh. Min. Ius., 1910 no. 1, p. 74; Pakhman, op. cit., p. 186; Kalachov, 'O vydele'; A. G. Goikhbarg, Zakon o rasshirenii prav nasledovaniia po zakonu lits zhenskago pola i prava zaveshchaniia rodovykh imenii (3rd edn., Spb., 1914), pp. 64-6 note 1. 1PSZ, xxxiii, no. 25784 (15 Feb. 1815), pp. 23-4; xxxix, no. 29891 (3 May 1824), pp. 297-8.

3. SZ, X, pt. 1, art. 1129.

inheritance by special Imperial decree.[1] Children adopted by persons of the merchant or lower taxed estates acquired the rights of natural children, whereas those adopted by heriditary dvoriane merely retained those rights that they had had before adoption.[2] However, if a hereditary dvórianin had no male descendants or relatives bearing his surname, the husband of one of his daughters or other female relatives could incorporate the surname into his own and thereby receive the right to inherit any property received by his wife from the person whose name he had adopted should his wife die without issue.[3]

Succession passed to the collateral lines if the descendant lines were exhausted.[4] Within the collateral lines, the principle paterna paternis, materna maternis was observed with respect to patrimonial property, but all acquired property followed the paternal line.[5] The collateral line having its origin nearest in degree to the deceased had priority over others, and male lines excluded female lines of equal priority. Within each line, the inheritance passed to those nearest in degree to the deceased, and males or their representatives of either sex excluded females of equal degree. The inheritance was divided equally among all lines of equal relation to the deceased, and within each line, those of equal degree inherited equally, and their representatives per stirpes. Thus in any given situation, a brother or his descendants of either sex

1. Ibid., (1857, 1887), arts. 136-7, 1119.

2. Ibid., (1857, 1887), arts. 145-6, 149, 151, 155-6, 161.

3. Ibid., (1857, 1887), arts. 150, 1160.

4. Ibid., arts. 1121, 1134.

5. Ibid., arts. 1135-8.

would exclude his sister or her descendants entirely.[1] There was no statutory share for females.

In the absence of full brothers and sisters or their representatives, the deceased's paternal and maternal half-brothers, and then half-sisters, were preferred to other collateral relatives with respect to his acquired property.[2] It was unclear, however, whether a paternal half-brother had a right equal to that of full brothers and thereby excluded full sisters from the inheritance in this instance, because under article 1138 acquired property passed to the paternal collateral lines, of which that of a paternal half-brother undoubtedly was one. As full members of the clan, half-brothers and -sisters had an equal right to property that was patrimonial in the clans of their natural parents.

Ascendant relatives were excluded entirely from the inheritance.[3] However, parents had a right to a life estate in the undevised acquired property of their children dying without issue, which became an absolute right of ownership if the property originally had been a gift from the parents.[4] Patrimonial property passed immediately to the collateral lines.

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1. The sole exception was in Chernigov and Poltava provs. where brothers and sisters or their representatives had equal rights to the property inherited by any of them from their mother. Ibid., art. 1139. See also Zh. Min. Ius., 1860 no. 3, sud. prakt., pp. 113-24.

2. SZ, X, pt.1, art. 1140.

3. Ibid., arts. 1121, 1141. In Chernigov and Poltava provs., parents did inherit their children's acquired property if the latter died without issue and were not survived by full or half-brothers or sisters or their descendants. Ibid., art. 1143 pt. 2.

4. Ibid., art. 1141-7.

Persons deprived of all rights of social estate for conviction of serious criminal offences were deprived of their rights of inheritance, as were monks and all clergymen except with respect to certain religious objects.[1] Property acquired by persons after their exile passed only to members of their family who had accompanied them.[2] Jewish subjects were prohibited from inheriting any immovable property lying outside the pale of settlement and any settled land at all.[3] Except when provided for by treaty, aliens were governed by the same laws as Russian subjects, except that all settled land was purchased compulsorily by the government.[4]

Although the situation was rather more complex, it will be sufficient to state that all heirs both inherited all proprietary and contractual rights or other credits and the right to judicial actions and became proportionately liable for all the debts, obligations, and other liabilities of the deceased that were not of a personal nature, even with their own resources should the estate prove insufficient.[5] The heirs had the right to reject the inheritance, in which case they were not so

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1. Ibid., arts. 1107-9, 1184 pts. 2 and 12 and prim., 1186-7, 1234; IX (1857), arts. 227, 259, 267, 305-6, 356-7; XI, pt. 1 (1857), Ust. In. Ispoved., art. 116.

2. SZ, XIV (1857), Ust. Ssyl., arts. 785-6, 789-94; X, pt. 1 (1857), art. 1184 pt. 12.

3. Ibid., IX (1857), arts. 1372-4.

4. Ibid., arts. 1525, 1537; X, pt. 1, arts. 1184 pt. 9, 1218, 1247-8.

5. Ibid., X, pt. 1, arts. 1104, 1258-9, 1298, 1543-4, 566, 1329-30, 112, 1000 prim., 1009 prim.; X, pt. 2 (1857), Zak. Sud. Grazh., arts. 214, 2268-76; XV (1866), Ulozh. Nakaz., art. 61; XI, pt 2 (1857), Ustav Kredit., arts. 357-8, 760, 1271, 90, 149, 286-7, 292, 659, 1199, and Ustav Torg., arts. 1932-7, 1950, 154, 160-62, 166; Ust. Grazh. Sud. (1866), arts. 457-8; Ust. Ugol. Sud. (1866), art. 18.

liable.[1] Although only merchants formally had the right to examine an inheritance before deciding whether to accept or reject it, the law otherwise provided no formal mechanism or time limit for acceptance or rejection, and consequently non-merchants might achieve the same result by keeping the estate separate and delaying their decision until they had ascertained its net value.[2]

The inheritance passed to all the heirs collectively, who then could divide it as they wished.[3] The law only established the share to which each heir was entitled and the extent to which each was obligated in the event of failure to agree on whether or how to divide the inheritance or of some other dispute. However, each heir had an absolute title to his notional share of the whole and thus could dispose of it at his discretion at any time, even prior to a division, and any heir could demand that the estate be divided.[4] In the latter case, if the coheirs failed to agree on the terms of division within two years, the estate would be frozen until a division was imposed by the court, and those being responsible for the failure to reach an agreement would be fined.[5]

A division reached by amicable agreement was irrevocable and not

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1. Ibid., X, pt. 1, arts. 1255, 1257, 1262, 1268; XI, pt. 2 (1857), Ust. Torg., arts. 161, 163.

2. Ibid., XI, pt. 2 (1857), Ust. Torg., arts. 154, 159-63. For example, the heirs of shtab-rotmistr Iakov Likhachev specifically delayed accepting the inheritance until they could determine whether his estate would cover his apparently considerable debts. SRGKD 1890 no. 22.

3. SZ, X, pt. 1, arts. 1313, 1315, 1323, 1332, and in general, arts. 1313-45.

4. Ibid., arts. 1314-15, 1317-18.

5. Ibid., arts. 1315, 1317-18. The fine was 6% of the estate's value.

subject to judicial appeal, whereas that imposed by a court could be appealed within one year by a disgruntled coheir who felt that he had been treated unfairly or that the rules governing judicial divisions had not been observed.[1] Monetary payments to adjust for unequal physical shares were permitted, but coheirs could not exchange any of their own physical assets for the same purpose.[2] Under article 1323 heirs were allowed, perhaps more properly, urged, to divide immovable property into consolidated units, but could not be compelled to do so.

Property mortgaged to state credit institutions could be divided with the prior consent of the institution, in which case liability for the outstanding debt and arrears in repayment was assigned proportionately to each recipient of a share.[3]

Indivisible property obviously could not be divided among the heirs. In this case either they could remain in copossession, making some arrangement for management and the division of income, or the property would pass to one heir, who would have to compensate the remaining coheirs if the value of the property exceeded the value of his share of the inheritance.[4] Preference in retaining the property passed from the eldest to the youngest heir, and if there was more than one such property, these could be distributed among the heirs on the basis of seniority unless, in the case of

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1. Ibid., arts. 1332, 1334-5.

2. Ibid., arts. 1328, 1320.

3. Ibid., arts. 1329-30; XI, pt. 2 (1857), Ust. Kredit., arts. 357-8, 1271 (1887 edn., Razd. VIII, Sokhr. Kazna, arts. 22, 79-81), A. N. Butovskii, 'O razdel'nikh aktakh', Zh. Min. Ius., 1905 no. 3, pp. 29-83, particularly p. 57.

4. SZ, X. pt. 1, arts. 1238, 1324-5; VII (1857), Ust. Gorn., arts. 477-8, 562.

manufacturing and mining concerns, this was likely to disrupt their operations.

If no bona fide heir appeared within ten years of the final public summons of the heirs, the estate was considered to have escheated, in most instances to the state.[1] There were, however, a number of exceptions to this rule in favour of various social, religious, or military organizations or communities. For example, the property of members of universities and officials of educational institutions escheated to the educational institution to which the deceased had belonged, the immovable property of urban inhabitants escheated to the city or town in which they had been enrolled, the property of cossacks escheated to their communities, and so on.[2] The state or whichever group or organization that accepted an escheated estate likewise became liable for all the debts, obligations, and other liabilities which formed a part of it.[3]

D. The law of testamentary succession

Statutory law provided no clear definition of the nature or purpose of a will. Article 1010, SZ, X, pt. 1, stated simply: 'a will is the legal declaration of the owner's will (volia) with respect to his property in the event of his death'.[4] However, the testator did not have to deal with all his property, and any undevised property passed to his legal heirs.

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1. Ibid., X, pt. 1 (1857), arts. 1162-3, 1166-7, 1242, 1246, and in general, 1162-83, 1241-6.

2. Ibid., (1857, Prod. 1876), 1168-9, 1172, 1174.

3. Ibid., art. 1263.

4. See also ibid., arts. 229-30, 295, which allowed parents to appoint guardians for their children.

Nor did the law make any provision for either appointing an heir in place of or in the absence of an heir by law or disinheriting an heir. Thus, at least until the mid-nineteenth century, the will was considered more a supplement than an alternative to inheritance by law.[1]

Statutory law was based largely on the Statute of Wills of 1831, which itself was merely a compilation of existing legislation made by Speranskii and the Second Department in response to the large number of civil suits concerning wills which were coming before the Senate.[2] However, this Statute was concerned primarily with the external form of wills and the prevention of fraud and very little with defining and regulating the substantive content of testamentary power. Thus statutory law was devoted mainly to the definition of various types of wills and the rules for their composition.

All mentally healthy persons who had the right to dispose of property were allowed to make a will.[3] Thus the mentally infirm, persons under twenty-one years of age, persons deprived of the rights of social estate for conviction of a crime, and, less explicably, persons later committing suicide had no such right, and members of the higher clergy could

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1. N. N. Tovstoles, 'Svoboda zaveshchatel'noi voli po russkomu pravu v razlichnye periody ego razvitiia', Zh. Min. Ius., 1902 no. 8, especially pp. 63-89, 108; P. I. Beliaev, 'Istoricheskiia osnovy i iuridicheskaia priroda sovremennago russkago zaveshchaniia', Zh. Min. Ius., 1903 no. 5, pp. 105-8; K. P. Zmirlov, 'O nedostatkakh nashikh grazhdanskikh zakonov. Zakony o nasledovanii po zakonu', Zh. Gr. i Ug. Pr., 1884 no. 5, pp. 77-8, 80-82; Pobedonostsev , Kurs, ii. 482-4.

2. Pakhman, op. cit., pp. 154, 175; Tovstoles, 'Svoboda zaveshch.', p. 99; Beliaev, op. cit., no. 6 p. 68; Pobedonostsev , Kurs, ii. 482-6, 488, 565.

3. SZ, X, pt. 1, arts. 1016-22, 1025; IX (1857), arts. 267, 550 pt. 2, 1536.

dispose of only a limited number of personal items by will. On the other hand, only monks and persons deprived of the rights of social estate for conviction of a crime could not benefit from a will, and settled land could not be devised to a person or institution not entitled to own such land. Any devise of immovable property to a church or other ecclesiastical institution, to an established charity, or for public uses had to receive Imperial consent.[1]

All wills had to be written, and had to be one of three types: either registered, or after 1866 notarial, or domestic, or a domestic will declared to and deposited with certain specified organizations.[2] The composition of each of these was governed by a different set of rules, which were designed to ensure the will's authenticity to varying degrees and in some cases precluded later dispute over this. Wills concerning patrimonial property had to be either registered, notarial, or appropriately deposited.[3]

Some basic features of the will still were unsettled in the mid-nineteenth century. It seems to have been firmly established by the early

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1. Ibid., X, pt. 1, arts. 1067 pts. 2, 3, and 4, 1028, 1089, 984-5; IX (1857), arts. 259, 298, 304, 309; XI, pt. 1 (1857), Ust. In. Ispoved., arts. 115, 609.

2. Ibid., X, pt. 1, arts. 1012-14, 1023, 1033-66, 1068, 1087; XI pt. 2 (1857) Ust. Kredit., arts. 1204-9; 2PSZ, xli., pt. 1, no. 43186 (14 April 1866), pp. 346-62; xliv., pt. 1, no. 46935 (5 April 1869), pp. 297-9. A. K. Fride, Zakony o dukhovnykh zaveshchaniiakh ra'iasnennye sudebnoiu praktikoiu (Mos., 1870), pp. 26-32, 53-94; Pakhman, op. cit., pp. 157, 161-5, 172-5; Pobedonostsev, Kurs, ii. 492-530; on different forms of acts in general, Meier, op. cit., pp. 210-26.

3. SZ, X, pt. 1 (1857), art. 1068. In addition, there were a number of special rules to provide for particular situations. See ibid., arts. 1071-83; IX, Osob. Pril. (1876), I. Obshch. Pol., art. 91 prim. 1, XIX. Pol. Zakavk., art. 84 prim. 3. Fride, op. cit., pp. 94-107; Pobedonostsev, Kurs, ii. 530-40.

part of the century that a will took effect only from the death of the testator and thus could be altered or revoked, unless perhaps the testator himself explicitly forswore this right.[1] It was not at all clear that a will could be ambulatory.[2]

However, the rules defining the substantive content of testamentary power were even more vague, and it is worth citing them at length. In addition to article 1010, the relevant statutes read:

> 1011: Acquired property may be devised either in complete ownership or in limited possession and use.
> note: In the Imperial decree of 18 November 1839 issued in the case of Brigadier Lopukhina, inter alia, it was explained that 'the owner of acquired property disposes of it freely and without limit, can give and devise it at his discretion and even has the right by the strength of the will to obligate his chosen heir, for the period of his life, to execute certain dispositions with respect to the property, such as, for example, monetary payments (article 1086) etc.; but on the death of this person, when the property devised to him becomes hereditary (nasledstvennykh), it no longer can be subject to the will (proizvol) of the first owner either with respect to the order of management or the order of subsequent succession to it'. On this basis it was ordered to recognize as invalid Lopukhina's disposition concerning the order of inheritance on the death of her daughters to property which she had devised to them and which, having come into their possession and having already become patrimonial property, no longer was subject to the action of the will.
> 1067: All acquired properties, movable and immovable, may be devised without limit. . . .
> 1086: The testator may obligate his heirs, however only for the period of their life, to make monetary payments when he makes a disposition concerning his acquired property. However when he leaves patrimonial property, then his heirs have the right to refuse to execute dispositions

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1. SZ, X, pt. 1, arts. 991, 1010, 1030-32, 1110 pts. 2 and 3, 1222. Zmirlov, op. cit., 1883 no. 10, pp. 54-5; Tovstoles, 'Svoboda zaveshch.', p. 97; Beliaev, op. cit., no. 5 pp. 79-95; 2PSZ, ii., no. 1108 (22 May 1827), pp. 451-2.

2. Beliaev, op. cit., no. 5 pp. 96-7, 101-2.

> made by him with respect to this property which would involve the loss of a greater or lesser part of it.

This is the sum total of the definition of testamentary power under Russian statutory law. It is clear that a person could devise limited rights with respect to use and possession, for a definite term or for life or some other indefinite period, and that he could impose certain conditions or obligations on the devisee. However, the extent and limits of such conditions, obligations, and so on are not clear. Indeed, there is no specific mention of conditions of any sort, of substitution, of trusts, or of legacies. Thus, *inter alia*, it is not clear what conditions could be imposed on the devisees, whether rights could be suspended, or whether and what limitations could be placed on the power of disposition. The testator could obligate the heir to make monetary payments to various beneficiaries, but these were not binding on the heir of patrimonial property if they would result in any loss to this property. However, the status of such beneficiariés was not clear.

The vagueness of the law and the lack of precise legal terminology meant that all but the simplest testamentary dispositions would be extremely insecure. Due to the former, an owner could not be sure that a particular disposition would be legal, while as a result of the latter he could not be sure that it would be properly understood.[1]

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1. Dumashevskii, 'Zaveshchanie'; Zmirlov, *op. cit.*, 1883 no. 10, pp. 71-7; Beliaev, *op. cit.*, no. 6 p. 68; N. Kalachov, 'Otvet g. B__nu', *Iurid. Vest.*, 1860-61, no. 4, pp. 35-7; *idem*, 'Otvet g. D. Ch.', *ibid.*, no. 7, pp. 73-6; D. Ch__vu, 'Vopros po odnomu zaveshchaniiu', *ibid.*, no. 7, pp. 71-2; V.L. Isachenko, 'Zaveshchatel'nyia rasporiazheniia uslovnyia. Podnaznachenie', *Pravo*, 1911 no. 1, cols. 8-23; S. B. Gomolitskii, 'Mozhet li byt' priznano pravom sobstvennosti predostavlennoe po zaveshchaniiu bezsrochnoe pravo pol'zovaniia?', *Vest. Pr.*, 1902 no. 9-10, pp. 353-69. For examples, see *SRGKD* 1868 no. 25; 1869 no. 1334; 1870 no. 1856; 1873 no. 201; 1879 nos. 21, 78; 1882 no. 83; 1892 no. 76; 1901 no. 111; 1902 no. 112.

In addition, as a consequence of the rule in article 1086, any settlement attempting to assign landed estates to one or two children while providing for the others with annuities from the income would be very insecure, because the payment of the annuities would continue not for the life of the recipients, but only for the life of the first heir of the landed estate. Assignment of a lump sum legacy was possible, but required financial resources normally beyond the means of Russian landowners.

The power of testamentary disposition depended upon whether property was acquired or patrimonial. In general, acquired property was devisable freely, with certain insignificant exceptions, whereas patrimonial property was not except in certain specified instances.[1] There were two such instances. First, there was the apparently quite common assignment of a life estate to the surviving spouse.[2] The life tenant could not alienate or mortgage the tenement. Second, a person having no surviving heirs in the direct descendent line could devise all or part of his patrimonial property to any single person in that clan from which it had been received originally, subject only to the surviving spouse's statutory share.[3] It was not clear whether the owner in his will could distribute his patrimonial property

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1. SZ, X, pt. 1, arts. 1011, 1067, 1068; XI, pt. 2 (1857), Ust. Kredit., arts. 293, 1199; IX (1857), arts. 222, 550.

2. See above, p. 52 and note 2, p. 52. Orshanskii, op. cit., pp. 3-4; L. A. Kasso, Russkoe pozemel'noe pravo (Mos., 1906), p. 218.

3. SZ, X, pt. 1, art. 1068.

among his legal heirs in the amount due each by law.[1]

It will be recalled that all agricultural inventory was movable, hence acquired, property and was not appurtenant to the land. Thus, according to the above rules, this inventory could be assigned separately from the land, even if the land itself was not subject to testamentary disposition, which could cause serious problems.[2] This situation would not arise with respect to manufacturing and industrial establishments, as the inventory of such concerns was appurtenant to them.

E. Alternative means of devolving property rights: gift, allotment, and dowry

Alternative means of devolving property rights to heirs or other persons did exist. While these generally increased the owner's flexibility in arranging a settlement and enabled him to avoid some of the disadvantages arising from the limitations on testamentary power embodied in patrimonial property, they also resulted in some or complete loss of proprietorial control by the owner during his life. Such means included gift, allotment, and dowry. Though similar, there were significant differences between these institutions, and a distinct form of legal act was required

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1. N. N. Novosil'tsev, 'Mnenie senatora Novosil'tseva, poddanoe v Sovet Kommissii sostavleniia zakonov 1809 goda, o nasledovanii imushchestvom v Rossii', ChOIDR, 1859 vol. ii., smes', pp. 125-33. Some jurists argued that this was possible: Kavelin, op. cit., col., 1218; Pobedonostsev, Kurs, ii. 569; Tovstoles, 'Svoboda zaveshch.', p. 102. See also SRGKD 1881 no. 31, in which the courts did not disallow such a devise, although this was not the issue under dispute.

2. Kavelin, op. cit., col. 1217.

in each case.[1]

The meaning of a gift is self-evident. Acquired property could be given in any amount to any person at the owner's discretion, whereas patrimonial property could be given only to the heirs presumptive.[2] In the latter case, statutory law did not specifically limit the amount of patrimonial property that could be given to a legal heir, nor did it state whether this was considered part of the heir's share of the donor's inheritance. A gift could be in full ownership or of only limited interests, and the donor could retain limited interests and impose on the donee any condition with respect to use and management not contrary to law.[3] As in the case of testamentary disposition, there was no definition of what conditions were considered legal. Failure to observe any condition, disrespect by the donee towards the donor, or the bankruptcy of the donor within ten years of the gift could cause the gift to revert to the donor or his heirs; otherwise, a gift was irrevocable.[4] As there was no distinction between a gift of acquired and of patrimonial property, the donor could impose the same conditions on the recipient of either type of property.

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1. For a gift, an act of gift (darstvennaia zapis'), SZ, X, pt. 1, arts. 987-93; for an allotment, an act of separation (otdel'naia zapis'), ibid., art.1000; for a dowry, for want of a better term, an act of dowry (riadnaia zapis'), ibid., arts. 1006-9.

2. There was no such limitation in Chernigov and Poltava provs. Ibid., arts. 967, 970; IX (1857), arts. 222, 550 pt.2.

3. Ibid., X, pt. 1, arts. 975, 977.

4. Ibid., arts. 974, 976-7; XI, pt. 2 (1857), Ust. Torg., arts. 1932-7. Apparently this was a fairly common practise in attempting to avoid responsibility for debt. Shershenevich, Uchebnik, pp. 491-4; A. von Haxthausen, Studies on the Interior of Russia, ed. S. F. Starr, trans. E. Schmidt (Chicago, 1972), p. 23.

By allotment and dowry was meant a gift by the owner to certain relatives as heirs. As such, the property received was considered part of the recipient's share of the donor's inheritance and was taken into account when calculating this share when the inheritance opened.[1] The share of patrimonial and of acquired property had to be calculated separately. If the recipient had received less than the share of the inheritance due him by law, he could demand additional property to supplement this unless prior to the donor's death he had renounced his right to the inheritance.[2] In the latter event, none of the property received could be taken from him even if it exceeded the share of the inheritance due by law.

The grant of an allotment was restricted to descendant relatives, apparently of either sex, whereas a dowry could be given to any female relative on the event of her marriage.[3] As with a gift, acquired property could be alloted or given as dowry in any amount.[4] Patrimonial property could be so transferred only to an heir presumptive and only in an amount not exceeding that due by law.[5] Other than allowing the recipient to renounce his or her rights to the donor's future inheritance, statutory law was completely silent on the subject of a conditional allotment or dowry or the retention of limited interests by the donor. Nor did the law state

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1. SZ, X, pt. 1, arts. 997-8, 1002-4.
2. Ibid., arts. 997-8, 1002-4.
3. Ibid., arts. 994-6, 1001.
4. Ibid., art. 996; IX (1857), arts. 222, 550 pt. 2.
5. Ibid., X, pt. 1, art. 996; IX (1857), arts. 222, 550 pt. 2. The law was much more liberal in Chernigov and Poltava provs., where no limit was applied. Ibid., arts. 999, 1005.

whether an allotment or dowry was revocable in any instance other than the bankruptcy of the donor within ten years of the act.[1]

The use of gifts, allotments, and dowrys did enable the owner at least to control which particular parts of his estate passed to which heirs, and in this way he could hope to prevent acrimonious disputes between his heirs and, if he so desired, ensure that separate holdings remained consolidated. However, these attractions were diminished by the fact that they were accompanied by considerable loss of proprietorial power, and the ultimate division of patrimonial property was not avoided. In addition, the owner risked depriving himself of any means of future support should the heir to whom he had transferred property predecease him. Unlike his own children, the latter's heirs had no obligation to support him,[2] and if the property had been patrimonial and the heir receiving it died without issue, the property may have passed to the heir's collateral relatives rather than reverting to the donor, as was the case with acquired property.[3]

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1. Ibid., X, pt. 1, arts. 1000 prim., 1009 prim. (1900 edn., 1008 prim.); XI, pt. 2 (1857), Ust. Torg., arts. 1932-7.

2. Ibid., X, pt. 1, art. 194.

3. Ibid., arts. 1141-2, 1144-7; SIRIO, iv (1869), 252, 371, 418, 471; viii(1871), 444, 482, 514, 524-5; xiv(1875), 287, 447; lxviii(1889), 6, 31-2, 115, 330, 411, 459, 489, 493, 516, 551-2; xxxvi(1882), 138-9; xciii(1894), 170, 430; Cvii(1900), 128; xxxxiii(1885), 26, 174-5, 179. Still, apparently such transfers were frequent, at least in the late 18th century. W. R. Augustine, 'Notes Toward a Portrait of the Eighteenth Century Russian Nobility', Can. Slavic St., iv(1970), 401, and above references to SIRIO.

II. The Effect of the Law

Clearly, the above system of law could have significant social and economic effects, even though both prior to and after the emancipation of the serfs the free peasantry was largely excluded from its purview. Before 1861 nearly all the privately owned land in the Empire, outside of Poland and some of the non-Slavic areas, was subject to these laws, and even after 1861 this was so far for an overwhelming majority of privately owned non-allotment land. Thus in the 49 provinces of European Russia, they applied to over 85% of such land in 1877, to over 75% in 1905, and to somewhat under 70% in 1914.[1] More importantly, they affected precisely that land which could have been more easily and was more likely to have been reorganised on a more progressive and commercial basis, _i.e._ land owned by _dvoriane_, townsmen, and other non-peasant classes. Of course, the grand-seigneur, having more land to dispose of and thus more flexibility and ability to avoid the effects of the law, would have been much less affected by it than would small and even medium-sized landowners, and, at least initially, the large amounts of land purchased by townsmen in the years following the emancipation would have been less affected because it would have been classified as acquired property. For them, the difficulties presented by the law would begin to arise only after their acquisitions had passed to the next generation by inheritance. Nevertheless, the law could have a significant influence on the development of commercialised agriculture.

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1. G. T. Robinson, _Rural Russia under the Old Regime. A History of the Landlord-Peasant World and a Prologue to the Peasant Revolution of 1917_ (New York, 1932), pp. 268, 270. Privately owned non-allotment land constituted somewhat less than half of all privately owned land, _i.e._ the former plus allotment land.

Most commercial, manufacturing, and industrial property would have been fully subject to the above laws both before and after 1861, although even here that owned by peasants frequently was subject to customary law, at least after 1861.[1] However, the effect of the law would have been much reduced in these instances due to the nature of the property involved. Industrial concerns, shops, and the like were indivisible by law, although they still could constitute patrimonial property. Thus at least the inheritance laws would have considerably less impact here than would be the case with respect to land. Moreover, the bulk of a trader's or even a manufacturer's wealth consisted of goods and capital, which, as movable and therefore acquired property, were not subject to the restrictions on disposition and succession that encumbered immovable property.

The constraints presented by the law were not particularly great during an owner's lifetime. After the emancipation the restriction on the ownership of settled land became less and less significant. Otherwise, only patrimonial property was affected, and then only with respect to its transfer without consideration. As an owner was most likely to want to transfer significant amounts of his property in this way only as part of a general strategy for his inheritance, this restriction could have a significant effect only in that instance, and elsewhere could not be considered to constitute a substantial constraint.[2] Thus after the emancipation the law presented no real obstacle to the transfer of privately-owned land.

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1. See above, pp. 43-4, and notes 2, p. 43 and 1, p. 44.

2. Except perhaps for those seeking to defraud creditors. Shershenevich, <u>Uchebnik</u>, pp. 491-4; Haxthausen, <u>op</u>. <u>cit</u>., p. 23.

However, the right to redeem patrimonial property could serve to discourage or raise the cost of the acquisition of property, particularly for the purpose of its economic development. This would affect both rural and urban property. It was extremely possible for a person to acquire and develop a property, and then suddenly be confronted with an action for redemption brought by the vendor's relatives, sometimes with the collusion of the vendor himself. In the least, this would tie up the property and the capital invested in it for several years while the case was being decided. If the action was successful, the developer would not be reimbursed for the time and energy that he had expended, for the interest lost on the capital invested, or for the enhanced value and income of the property. Indeed, the temptation existed to sell property and allow the purchaser to develop it, and then extort an extra payment from him by threatening to redeem it.[1]

The law's greatest impact, however, clearly was with respect to the devolution of property to succeeding generations, either during the owner's lifetime or by inheritance at his death. If the property was acquired, the owner had considerable power in effecting a settlement at his discretion, although the terms and conditions that he could impose were unclear. However, throughout the nineteenth century most private non-allotment

1. M. Daragan, 'O vykupe rodovykh imushchestv', Sovrem. Let., 1862 no. 41, pp. 1-4; L., 'Vykup rodovykh imushchestv', Nov. Vr., 1900 no. 8879 (14 Nov.), p. 2 (letter to ed.); G., 'Pis'ma v redaktsiiu (III)', ibid., 1901 no. 9039 (29 Apr.), p. 4; Zamechaniia o nedostatkakh deistvuiushchikh grazhdanskikh zakonov. Izdanie redaktsionnoi kommisii po sostavleniiu grazhdanskago ulozheniia (Spb., 1891), No. 725; P. N. Gussakovskii, 'Nasledstvennoe pravo po proektu Grazhdanskago Ulozheniia', Zh. Min. Ius., 1903 no. 9, p. 4; Liubavskii, 'Unichtozhenie', pp. 34-5; see below, pp. 174-6, 179.

landed property was patrimonial, particularly that owned by the dvorianstvo, and it is likely that a significant share of commercial and industrial immovable property was as well.[1] Thus the owner's power to arrange a settlement and impose it on his heirs was very limited, whereas the heirs' power to effect a division and to determine the configuration of that division was nearly unlimited, provided only that they could agree. This, of course, was less true of commerical and industrial property, which was indivisible by law. Conversion of patrimonial into acquired property by a real or fictitious sale and repurchase, etc., was possible, but was also expensive, and it is not clear how often this occurred.[2] Thus the effect of the law was that most immovable property had to devolve, whether inter-vivos or mortis causa, to the next generation according to the rules of intestate succession.

The tendency of this system with respect to landed estates was to produce constant division, and the resulting holdings, particularly those resulting from the statutory shares given to spouses or female descendants, could be quite small. With each succeeding generation the estates would become progressively smaller. This effect was compounded by the

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1. I have not been able to locate any figures giving the share of patrimonial property in total immovable property. However, as a very unsatisfactory proxy, in discussing higher state officials in various state departments concerned with law between 1825 and 1856, Wortman (op. cit., p. 56, table 3.2 note) notes that there were few cases in which their land was listed as acquired. Zaionchkovskii (op. cit., pp. 113-15) found the same was true in general for higher state officials owning land. According to his figures, in 1854 75% of the land owned by such officials was patrimonial, while in 1888 this had declined to 68%. See also Augustine, op. cit., p. 396.

2. Liubavskii, 'Unichtozhenie', pp. 11-12, claims this was infrequent.

traditional method of division, in which each field and village was divided proportionately among all those entitled to share in the inheritance. Hence emerged the high proportion of small and fragmented land-holdings scattered among the holdings of neighbours from various social groups [1] and the large number of land transactions which sought to achieve a more convenient pattern of landholding which were characteristic of dvorianstvo land ownership.

There was very little remedy for this except by informal family agreement. The surviving spouse might be induced to accept a life estate in place of absolute title to a statutory share, the daughters might be persuaded to accept a large dowry of movable property on condition that they renounce any right to the inheritance, but division among the male heirs or their representatives was unavoidable. Allotment among the sons could ameliorate the conditions of division somewhat by enabling the owner at least to control which shares passed to whom, but this involved both loss of control over the property and the risk of being left without support should the son predecease the parent.

The economic effects and political implications of this system were considerable. Economically, it created a number of serious difficulties

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1. R. Pipes, Russia under the Old Regime (London, 1974), pp. 174-6; Augustine, op. cit., pp. 395-6; M. Confino, Systemes Agraires et Progres Agricole. L'Assolement Triennal en Russie aux xvii-xix Siecles (Paris, 1969), pp. 104-6; Pobedonostsev, Kurs, i. 143, 149, ii. 565, 575-6; A. Ia. Antonovich, 'Chrezpolosnoe zemlevladenie, ego proiskhozhdenie i khoziaistvennoe znachenie', Sel. Khoz. i Les., 1878 ch. cxxvii (March), 301-19; idem, 'Ekonomiko-iuridicheskiia osnovaniia razverstaniia cherezpolosnykh zemel'', ibid., 1878 ch. cxxviii(May), 55-75; E. P. Karnovich, Zamechatel'nyia bogatstva chastnykh lits v Rossii. Ekonomichesko-istoricheskoe izsledovanie (Spb., 1874), pp. 52-3; Haxthausen, op. cit., pp. 250-51, 257; Sh., 'Dvorianstvo v Rossii', Vest. Ev., 1887 bk. 3, pp. 249, 262, 264, 274-5; J. Blum, Lord and Peasant in Russia from the Ninth to the Nineteenth Century (Princeton, 1961), pp. 376-9.

that could complicate decision-making concerning the use or sale of various resources and the management of estates in general and frustrate any attempts at more rational economic organization.[1] Most of these problems were referred to in the nakazy compiled by the provincial dvorianstvo and sent to Catherine II's Legislative Commission in 1767, although few of the complaints were concerned primarily with the economic disabilities of the system.[2] Although the nakazy refer to the latter half of the eighteenth century, the remarks of mid-nineteenth century observers suggest that the complaints contained in them continued to apply long afterwards, with concern for the economic consequences of the law growing.[3] Moreover, the nakazy provide perhaps the best single source for determining the attitudes of a significant proportion of landowners on this subject until the late nineteenth century. The landowners' chief concern in the nakazy seemed to be preventing the appearance through purchase of a scrap of land of an unwanted and aggressive shareholder in the plowlands and common resources of a village. Frequently owning more serfs in other parts of the district, the newcomer would use

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1. Confino, op. cit., pp. 104-6; J. Blum, 'Russia', in D. Spring, ed., European Landed Elites in the Nineteenth Century (Baltimore, 1977), pp. 77-8, 83; Antonovich, 'Chrez. zemlevlad.'; idem, 'Ekon.-iurid. osnov.'; Sh., op. cit., bk. 3 pp. 249f.; D. N. Strukov, 'Otvet na otkrytyi vopros: pochemu ne vsiakoe blagopriobretennoe imenie mozhet' byt' obrashcheno v maiorat i ne vedet li takoe zapreshchenie k razdrobleniiu imenii po bol'shei chasti vrednomu i v otnoshenii razvitiia sel'skago khoziaistva i dlia samikh naslednikov?', Gaz. dlia Sel. Khoz., 1861 no. 7 (16 Aug.), cols. 102-5; Liubavskii, 'Unichtozhenie', pp. 34-5; M. Speranskii, 'O rodovykh imeniiakh', Arkhiv ist. sved. Kalachovym, 1859 bk. 5, pp. 62-70; Pobedonostsev, Kurs, i. 143, 149, ii. 570-71; Haxthausen, op. cit., pp. 250-52.

2. These are summarised in Augustine, op. cit., pp. 395-408.

3. See the references in note 1, above.

these to occupy more land and use more of the common resources than corresponded to his share, thereby harassing and impoverishing his neighbours and embroiling them in lengthy and costly legal disputes.[1] Nevertheless, more directly economic complaints, such as the difficulty in reaching agreement on the use of common resources or the sale of land, particularly if one or more of the owners were constantly away in state service, were voiced as well.[2]

The authors of the nakazy proposed a number of measures as remedies. For example, to reduce fragmentation, it was suggested that the surviving spouse receive only the rights of possession and use for life or until remarriage, or that the statutory share due the surviving spouse and daughters be commuted to a money equivalent.[3] Others requested increased testamentary power, either unlimited or limited to distribution of the estate among the heirs.[4] Still others proposed that separate villages and fields remain indivisible in inheritance and be so distributed among the heirs, with

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1. SIRIO, iv(1869), 325, 342, 345, 364, 368-9, 378, 388, 430-31; viii (1871), 462, 481, 526-7, 539, 547-8, 549-51; xiv(1875), 390-91, 428-9, 448; lxviii(1889), 106-7, 347-8, 381-2, 401-2, 405-6, 458-9, 623.

2. Ibid., iv(1869), 275, 423-4, 451; viii(1871), 455, 462, 481, 497-8, 501; xiv(1875), 244, 286, 390-91, 448, 459-60, 464-5, 475-6; lxviii(1889), 3, 401-2, 405-6, 440, 441, 443, 458-9, 488-9, 496-7, 623. See also iv (1869), 240, 315-16, 448-9, 470; xiv(1875), 405, 419, 437; lxviii(1889), 21-2, 25-6, 381-2, 414-15, 529, 554, 585-6, 606-7.

3. Ibid., iv(1869), 252, 368-71, 393, 424; viii(1871), 481-2; xiv(1875), 398-9, 448, 494; lxviii(1889), 7-8, 25-6, 115, 331, 344, 368-9, 492, 441, 488-9, 532, 622-4; xxxvi(1882), 98, 138-9; xxxxiii(1885), 176-7, 178-9.

4. Ibid., iv(1869), 242, 369, 403, 462; viii(1871), 444, 455, 482, 488, 496-7, 508; xiv(1875), 288, 397-8, 446-7, 459-60, 481; lviii(1889), 6.

those heirs receiving a smaller or no portion receiving monetary compensation.[1] Altogether, 80 of the 124 nakazy from the Russian dvorianstvo contained some sort of proposal on this subject, indicating clearly that it was a source of widespread concern.

Politically, it has been argued that the law contributed significantly to the failure of the dvorianstvo to cohere into a more united corporate body similar to other European landed aristocracies and thereby strengthen its political position and limit correspondingly the power of the autocracy.[2] Unquestionably, the constant division of landed estates in inheritance did result in considerable instability among the dvorianstvo, so that within a few generations even the wealthiest families might be reduced to obscurity. A noted traveller to Russia in the second half of the nineteenth century observed that,

> '. . .we can find in the neighbourhood a number of poor, uneducated nobles, who live in small, squalid houses, and are not easily to be distinguished from peasants. In other parts of the country we might find men in this condition bearing the title of prince! This is the natural result of the Russian law of inheritance. . .'[3]

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1. Ibid., iv(1869), 228, 275-6, 423-4; viii(1871), 455, 481; xiv(1875), 244, 460; lxviii(1889), 496-7, 624; xxxvi(1882), 98.

2. Pipes, op. cit., pp. 172-7; Blum, 'Russia', pp. 69, 77-8; idem, Lord and Peas., pp. 376-9; Wallace, Russia, pp. 113-14, 156, 159; A. Romanovich-Slavatinskii, Dvorianstvo v Rossii ob nachale xviii veka do otmeny krepostnago prava (Spb., 1870), pp. 25, 254-5, 509-10; Karnovich, op. cit., chs. 1, 3-4, 6, 8, 10-13; N. Khlebnikov, O vliianii obshchestva na organizatsiiu gosudarstva v tsarskii period russkoi istorii (Spb., 1869), p. 13; Haxthausen, op. cit., pp. 250-57; Sh., op. cit., bk. 3 pp. 249, 264-5, 274-5, bk. 4 pp. 531-71, bk. 5 pp 186-210, bk. 6 pp. 421-7, 441-4.

3. Wallace, op. cit., p. 159; see Karnovich, op. cit., in general.

Hence, the preservation of a family's wealth and power over a long period was unusual. For example, with a few exceptions, the prominent families of the seventeenth century had become insignificant by the mid-eighteenth century, whereas the wealth of most of the grand-seigneurs of the mid-nineteenth century was based on large Imperial grants made in the preceding century.[1] Such instability certainly was not conducive to the formation of a politically powerful landed elite that could limit the autocracy in the course of a struggle with it for power, and indeed the dvorianstvo were in many ways politically weak and dependent on the autocracy. However, it is not clear whether the inheritance laws were a primary cause of this weakness or only one manifestation of a social and political culture in which this weakness was inherent. But in either case, the laws did nothing to ameliorate, and everything to perpetuate, the insecurity of individual families and the political weakness of the dvorianstvo as a group.

From at least the mid-eithteenth century some members of the dvorianstvo had begun to be conscious of this. The Vice-Chancellor and confidante of the Empress Elizabeth, Count Mikhail Vorontsov, proposed that certain lands of particular dvoriane be entailed and the name of the geographic location of the estate incorporated into the family name, and in the nakazy there are a few requests by dvoriane, most notably from Moscow uezd, for the right to entail at least part of their estates.[2] In the reign of Nicholas I, the Secret Committee of 6 December 1826 urged that entail be permitted in order to enable certain elements of the dvorianstvo to form a

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1. Karnovich, op. cit., pp. 34-5.

2. Ibid., p. 260; SIRIO, iv(1869), 228; lxviii(1889), 624; see also iv(1869), 275-6; xiv(1875), 244.

true aristocracy, and an undated memorandum by the former influential State Secretary Count Mikhail Speranskii, written after he had begun work on the codification of Russian law and in which he proposed various measures designed to reduce the extent of division in inheritance, suggests that even within the government there was some concern over the political and social effects of the law.[1] A law enabling a tiny proportion of dvoriane to entail their estates was enacted in 1845, but the effect of this was so limited that the dvoriane of St. Petersburg province requested a more extensive right of entail at the time of the emancipation.[2]

However, despite such manifestations of discontent and concern, the law remained basically unaltered by statute until 1899, and one suspects that the reasons for this were more fundamental than simply government inertia.

First, the system prevailing did represent deeply-embedded traditions which included concepts of family structure and the social position of the family. The nakazy to the Legislative Commission in general exhibit strong support for the institution of patrimonial property and the preference for males in inheritance as perpetuators of the clan and future heads of

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1. Romanovich-Slavatinskii, op. cit., p. 255; D. Field, The End of Serfdom. Nobility and Bureaucracy in Russia, 1855-1861 (Cambridge, Mass., 1976), pp. 41, 382-3 (note 103), and personal letter, Field to Wagner, 6 June 1979; Speranskii, 'O rod. imen.'.

2. 2PSZ, xx., pt. 1, no. 19202 (16 July 1845), pp. 528-38; SZ, X, pt. 1, arts. 391, 395, 432 pt. 3, 467-93, 564, 969, 1069, 1184 pt. 7, 1192-1213, 1641; X, pt. 2 (1857) Zak. Sud. Grazh., arts. 2252-6 (1876 edn., arts. 1467-71); Romanovich-Slavatinskii, op. cit., pp. 254-6, 528-9; Sh., op. cit., bk. 3 p. 259; Blum, Lord and Peas., pp. 368-9; Wagner, 'Legisla. Reform', pp. 152-3; Iu. B. Solovev, Samoderzhavie i dvorianstvo v kontse xix veka (Lenin., 1973), p. 205; Field, op. cit., p. 224. See also Karnovich, op. cit., pp. 38-43, 165-7.

families. The dvoriane composing them normally did not seek to abolish the existing system, but rather to amend it in order to overcome certain difficulties arising from it. In the first half of the nineteenth century, when reviewing particular legal cases or legislative proposals, considerable support for the fundamental principles of the system was expressed in the State Council and the Senate, and on the eve of the emancipation, the respected legal historian Nevolin still wrote of it with acceptance and referred to the traditional respect for the strength of clan ties as one basis for its continuation.[1]

Second, given the traditional nature and undeveloped state of the Russian economy, the lack of development of financial institutions, and an often unstable currency, land and serfs remained the most secure form of wealth.[2] Replacement of a share of realty in inheritance by payment of a legacy was not a viable alternative. Landowners generally were poor and did not possess sufficient financial resources for this,[3] and prior to the 1860s and 1870s the banking system and financial institutions in general were too poorly developed to provide adequate alternatives. Except for a brief period during the reign of Nicholas I and again during

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1. A. E. Nol'de, 'O poriadke nasledovaniia rodstvennikov bokovykh linii nasledodatelia v ego blagopriobretennom imushchestve (Arkhivnaia spravka)', Zh. Min. Ius., 1907 no. 9, pp. 92-8, no. 10, pp. 83-91; Ia. I. Gurliand, 'O neravenstve prav zhenshchin s pravami mushchin pri nasledovanii po zakonu', Iurid. Obozr., 1885 no. 207, pp. 330-31; Vest. Ev., 1903 bk. 11, pp. 360-62; Speranskii, 'O rod. imen.'; Nevolin, op. cit., iv. 26-36, v. 111, and 60-111 in general.

2. Crisp, Studies, pp. 96-7, 114-15, and in general chs. 1 and 2; Karnovich, op. cit., pp. 15-16, 48-50; Pipes, op. cit., pp. 93, 176, 191, 206-7.

3. Haxthausen, op. cit., pp. 215, 257, and see note 1, p. 86 below.

Reutern's administration of the Ministry of Finance under Alexander II, Russian currency was very unstable from the introduction of paper rubles in 1768 until the late 1880s. 'Fear of currency depreciation led to a disinclination to hold resources in liquid form'.[1] Thus prior to the mid-nineteenth century there was no secure financial alternative to realty, whereas distribution of the realty among the heirs at least would assure them of a secure asset and some sort of steady income, even if only in kind. The low level of economic development further contributed to perpetuating the existing system because as a result there were few acceptable alternative forms of employement for younger sons that also would provide an adequate income. For example, as late as 1861, one critic of entail argued against its introduction on the grounds that, inter alia, it would be too costly for the state, which would have to support all the deceased's younger sons through state service.[2] Indeed, the state originally had granted dvoriane land partly becuase it could not afford adequately to pay its servitors, civil or military, in any other way, and this situation continued until the early nineteenth century. Thus prior to then even state service was not an entirely satisfactory alternative. If landowners had to remain in state service to supplement their income, state servitors needed the income from land and serfs to supplement that from service.

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1. Crisp, Studies, p. 115; see also Karnovich, op. cit., pp. 48-50.

2. Strukov, op. cit.; Pipes, op. cit, p. 176. Pipes implies that the lack of alternative employment was one cause of the existing system of inheritance. However, it is more likely that this was but one manifestation of the basic problem which was impeding the development of more complex and varied forms of settlement, i.e. the general poverty and lack of commercial development. See also Blum, Lord and Peas., p. 385; Romanovich-Slavatinskii, op. cit, pp. 65, 69.

Unlike Western Europe, the Russian church did not provide a particularly attractive alternative either.

The lack of secure financial alternatives was reinforced by the lack of legal security for such arrangements. As noted above, payment of a termly legacy incumbent on the heir receiving realty was insecure for the legatee because the obligation to pay it terminated with the life of the heir rather than that of the legatee, and if the realty involved was patrimonial, the heir could refuse payment anyway. Payment of a lump sum to coheirs generally was beyond the means of most landowners and would involve a heavy mortgage. Although prior to the emancipation landowners were not particularly reluctant to mortgage their serfs, especially to state credit institutions, they normally did so for the quite different purpose of daily consumption.[1] The absence of any legal doctrine concerning legacies, conditions, substitutions, and so on meant that complex settlements were insecure. In addition, legal action prior to the court reforms was lengthy and costly, so that it could be extremely difficult for the legatee or other beneficiary to obtain payment from a recalcitrant heir. Finally, it was not clear what protection a legatee would have in the event that the heir became insolvent, which, given the profligacy of some Russian landowners,

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1. On this and the general poverty of landowners, see Pipes, op. cit., pp. 175, 178-9; M. Confino, 'A propos de la noblesse russe au xviii siecle', Annales, no. 6(1967), 1196 (1163-1205 in general); Blum, 'Russia', pp. 78, 83; idem, Lord and Peas., pp. 375-6, 379-85; Karnovich, op. cit., pp. 11-12, 15-22, 67-8, 70f.; Romanovich-Slavatinskii, op. cit., pp. 25, 64-6, 69, 509-10; Wallace, op. cit., pp. 56-9; Haxthausen, op. cit., p. 251; Sh., op. cit., bk. 3 pp. 250f.; A. Kahan, 'The Costs of "Westernization" in Russia', Slav. Rev., xxv(1966), 40-66; W. Pintner, Russian Economic Policy under Nicholas I (Ithaca, 1967), pp. 35-9, 42; A. V. Iakovlev, 'Zemledelie, zemlevladenie i kredit', Trudy Vol. Ekon. Ob., 1886 no. 1, pp. 1-29.

was not an unimportant consideration.

However, perhaps most importantly, it would seem that the law remained fundamentally unaltered because, at least until the 1860s, despite its apparent disadvantages, the system seemed to work as long as the commercial level of the economy in general and of agriculture in particular remained low and the ownership of settled land was restricted to the numerically relatively small dvorianstvo. Under the traditional system of agriculture, landowners normally did not perceive of their estates as entrepreneurial undertakings, but as sources of income and security as well as of status.[1] Thus the pattern of an individual owner's holdings and the location of his estates were of almost secondary importance. What mattered was the ownership of a sufficient total amount of settled land to generate an adequate income and which could be used as collateral to procure government loans. This was reinforced by two factors. First, paradoxically, the institution of serfdom was conducive to the perpetuation of existing practice because it was primarily serfs and the products and income they produced that were the objects of division and the system of farming basically consisted of peasants working on small plots, the number of which varied with the number of adult married males.[2] Second, the dvorianstvo primarily constituted a service estate the members of which had received land and serfs in lieu of a salary. Thus they were interested in the land primarily as a means of providing their family and descendants with a livable income,

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1. Blum, 'Russia', p. 77; idem, Lord and Peas., pp. 375, 385, 390; Sh., op. cit., bk. 3 pp. 272-3, 275-7, bk. 6 p. 441; Wallace, op. cit., p. 55; Haxthausen, op. cit., pp. 250, 258; Field, op. cit., pp. 134-41, 359.

2. Haxthausen, op. cit., pp. 81-2, 250.

but usually not to the extent that they would take an active interest in agriculture and its improvement. Indeed, given the lack of commercial development and the poor system of transport, there was little incentive for them to do so.[1]

Other than by direct government grant, which tapered into insignificance from the reign of Alexander I, the chief means of acquiring settled land were by inheritance and through marriage.[2] Consequently, the economic disadvantages of dividing landed estates in inheritance, particularly in a non-commercialised system of agriculture, did not appear to outweigh the benefit of the system of inheritance as a source of landed wealth. The resulting difficulties could be overcome by placing the serfs on obrok or by various informal agreements. For example, where there were several owners of various-sized shares of a particular village, it was possible simply to let a steward manage the entire estate, with the owners dividing the income proportionately.[3] As long as the ownership of settled land was limited to the dvorianstvo, that social estate was assured of a constant source of wealth which continuously circulated among its members, largely due to the operation of the laws of inheritance.[4]

The criticisms of the law contained in the nakazy do not invalidate this. It must be remembered that they were composed by persons who already

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1. Haxthausen, op. cit., pp. 37-40, 78, 86, 248f., 258; Blum, Lord and Peas., pp. 375, 385, 390; Pipes, op. cit., ch.7; Pobedonostsev, Kurs, i. 136-8; Sh., op. cit., bk. 3 pp. 272-3, 275-7, bk. 6 p. 441.

2. Karnovich, op. cit., pp. 4-5, 33-5, 74, 80-81, 125-41, 213-31.

3. Augustine, op. cit., p. 398 (note 71), gives an example of this.

4. This is the general impression given by Karnovich, op. cit.

had received land and were concerned primarily with its management and passing it on to their heirs. The law had created difficulties for them in respect of the former and severely limited their powers in respect of the latter. Consequently, they were seeking remedies for both. However, their heirs were in the position of not having land and serfs and were expecting to inherit them. Given the nature of the economy and the inadequacies of the legal system, they would have been very reluctant to accept a brother's obligation to make periodic payments to them instead of a share of realty. This and the attitude described above also help to explain the apparent inconsistency between the prevalence of the complaints in the *nakazy* and the broad flexibility allowed the heirs by law when dividing an inheritance.

The effect of the law on commercial and industrial property is more difficult to determine, not least because of the merchantry's traditional reticence about expressing its opinion on any public matter. From the little evidence available, however, it does seem clear that the law did not cause the merchant and manufacturing classes undue concern. In sharp contrast to the *nakazy* submitted to the Legislative Commission by landholding classes, those submitted by the towns rarely referred to inheritance. The few comments that were made suggest that for most of the eighteenth century inheritance among the urban estates was governed by a blend of custom and legislation which was similar, but not identical, to the system in effect for the *dvorianstvo* and which was largely administered by

the townsmen themselves.[1] The urban estates were brought within the purview of the general law of property and inheritance only by Catherine's charter in 1785.[2] Again, when at the end of the nineteenth and beginning of the twentieth century the issue of inheritance had become very controversial, organs representing the opinion of these estates remained largely silent and confined themselves to an occasional comment on the public debate or on the law as it affected other social estates.[3]

Undoubtedly, this was due partly to the different character of the property involved, which consisted of either movable goods, over which the owner retained complete powers of disposition and which were both easily divisible and not as economically perniciously affected by division, or of objects which physically and by law could not be divided. It is probable as well that members of the commercial estates simply were more accustomed to making more complex arrangements concerning property and were more aware

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1. SIRIO, xciii(1894); cvii(1900); cxxxiv(1911); cxliv(1914); cxlvii (1915). For example, the Moscow and St. Petersburg merchantry complained of the disorder caused by the lack of clear legislation regarding inheritance among the merchantry, and requested either a new and comprehensive law specifically for that estate or the application of the general civil law to it. Ibid., xciii(1894), 129; cvii(1900), 219. Haxthausen, op. cit., p. 233, states that many towns operated under their own customary law.

2. 1PSZ, xxii., no. 16188, arts. 4, 88 (21 Apr. 1785), pp. 359, 367. See also below, ch. 4.

3. E.g., see the comments in Nov. i Birzh. Gaz., 1892 nos. 58 (28 Feb.), p. 2 ('Rus. pech.'), 73 (14 March), p. 2 ('Otkl.'), 74 (15 March), p. 2 ('Rus. pech.'), 77 (18 March), pp. 1-2 ('K voprosu maioratov'); V. Bystrenin, 'Zemledel'cheskii "krizis"', ibid., 1898 no. 330 (30 Nov.), p. 1; Birzh. Ved., 'Nasha pech.', 1892 nos. 65 (6 March), p. 2, 76 (17 March), p. 2, 92 (2 Apr.), p. 2; 'Nedvizhimaia sobstvennost' i maioraty', ibid., 1892 no. 95 (7 Apr.), p. 1; ibid., 1893 no. 173 (26 June), 'Nov. i otgol.', pp. 1-2; Wagner, 'Legisla. Reform', pp. 155-78.

of the various possibilities for this. For example, after the development of industry and appearance of joint-stock companies and relevant legislation in the first half of the nineteenth century, many industrialists avoided the problems created by the law by incorporation, retaining the shares within the family.[1]

Nevertheless, the law did have some effect on the commercial estates. Frequently the sons or other heirs continued trading or manufacturing operations jointly. However, if they did not do this, the deceased's goods were divided equally among them or, in the case of indivisible property, one son eventually would have to buy out his coheirs. Thus commercial wealth too tended to dissipate, and clans such as the Stroganovs, which retained and increased its wealth for over 400 years, were the exception rather than the rule.[2]

By the early nineteenth century, the combined effect of the laws of patrimonial property and inheritance clearly was causing some concern in government circles. However, whenever the issue was discussed by the government, it was primarily with reference to the dvorianstvo. The dilemma was perceived as a conflict between a combination of political and social considerations on the one hand and of social, moral, and economic considerations

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1. Crisp, Studies, p. 113; V. K. Iatsunskii, 'Kapitalisticheskoe razvitie Rossii v 80-90-kh godakh', in Istoriia SSSR s drevneishikh vremen do nashikh dnei (Mos., 1968), v. 334; L. E. Shepelev, 'Aktsionernoe uchreditel'stvo v Rossii (istoriko-statisticheskii ocherk)', in M. P. Viatkin, ed., Iz istorii imperializma v Rossii.Akademiia Nauk SSSR. Trudy Leningradskago otdeleniia instituta istorii (Mos., Lenin., 1959), vyp. i., p. 135 note 6.

2. Karnovich, op. cit., pp. 174f., 203-4, 206; Pipes, op. cit., p. 192; V. Polunin, Three Generations. Family Life in Russia. 1845-1902 (London, 1957), p. 267; Haxthausen, op.cit., p. 214; SIRIO, xciii(1894), 100, 308, 432.

on the other. Whereas the division of estates and the inability of owners to avoid this by testamentary or other action was thought to impoverish dvorianstvo families within a few generations, thereby causing political and social instability, and to impede the introduction of improved agricultural methods, the only alternatives considered would have deprived some heirs of a share in the inheritance, or drastically have reduced this, which was thought to be morally, socially, and politically unacceptable. Yet the situation was becoming more serious since the elimination of the system of adjusting landholdings by the grant of pomest'ia and the conversion of these into full ownership in the late seventeenth and early eighteenth century and the ending of the practice of making large grants of settled state land by Alexander I.[1]

The memorandum by Speranskii referred to above is an indication of the concern felt within the government. In it, the author argued that the objective of patrimonial property, that is the maintenance of property within the clan to secure its continued material prosperity, was desirable, but that the institution as constituted was too weak to achieve this satisfactorily, and therefore ought to be strengthened.[2] In particular, the rights of females to inherit or redeem such property conflicted with its objective, as this usually resulted in the property passing to another clan. Further, 'the participation of females in the inheritance of patrimonial property . . .and the entire existing order of inheritance unavoidably leads to

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1. Vladamirskii-Budanov, op. cit., pp. 567-73, 578-9; Sh., op. cit., bk. 3 pp. 262-4, 274-5; personal letter, Field to Wagner, 6 June 1979, on debate between Baron Korf and Count Bludov; B. Landau, 'Otzhivskii institut', Pravo, 1908 no. 23, cols. 1370-75.

2. Speranskii, op. cit., especially pp. 67-70.

the fragmentation of estates, and with this to the impoverishment of families'.[1]

A remedy was needed, but this should not unduly constrain the owner's existing rights to dispose of his patrimonial property, because not only would this violate the right of ownership, but also 'in many instances this would conflict with good husbandry and the better organization of estates'.[2] Thus although entail was considered, it appears to have been rejected by Speranskii. Indeed, his memorandum may in fact have been a counter-proposal to that made about the same time by the Secret Committee of 6 December 1826. Instead, Speranskii proposed strengthening the right of redemption, prohibiting the sale or mortgage of patrimonial property if the owner owned acquired immovable property as well, allowing the alienation of patrimonial property only for a term not to exceed ten years, limiting the power to mortgage the property to no more than one-half of its value, with the property to pass immediately to the heirs and the income to be attached in the event of default, eliminating the right of females or their descendants to redeem patrimonial property and excluding them from inheriting it except in the absence of males, having all patrimonial property pass to a single collateral heir in the absence of descendants, establishing a limit to the divisibility of acquired and patrimonial estates in inheritance in the descendant lines, and, finally, strengthening the provisions for guardianship over known spendthrifts.[3]

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1. *Ibid.*, p. 69.

2. *Ibid.*, p. 67.

3. *Ibid.*, pp. 68-70.

However, the government's dilemma is most clearly expressed in an exchange in 1848 between Nicholas I and Count Bludov, head of the Second Department of the Imperial Chancellery, which was charged with the codification and editing of laws. Directed to undertake an urgent reivew of the existing inheritance law, Bludov proposed that in the interests of justice and in conformity with prevailing social opinion the rights of females in inheritance be made equal with those of males. He argued that the recent law introducing the reserved hereditary estate had eliminated any cause for concern over the excessive fragmentation of estates, and in any case this could not be the sole consideration in determining the general law of inheritance.[1] However, he thought it unwise to introduce full equality immediately, and 'for the good of the state economy and especially of agriculture, for which large, extensive material means concentrated in a single owner are still necessary, it seems necessary to allow an inequality in division at least with respect to immovable estates, particularly settled /estates/'.[2] Thus the share of this property due women was to be increased to one-half that received by males.

Nicholas accepted this proposal in principle. However, he clearly was more concerned over the economic and political effects of the excessive division of landed estates than Bludov. He directed Bludov 'to compose a project in accordance with these proposals, but in addition to examine the

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1. Goikhbarg, op. cit., pp. 6-8; A. Kaminka, 'Proekt nasledstvennago prava', Pravo, 1903 no. 47, cols. 2640-42; Grazhdanskoe Ulozhenie. Proekt Vysochaishe uchrezhdennoi Redaktsionnoi Kommisii po sostavleniiu Grazhdanskago ulozheniia. Kniga chetvertaia. Nasledstvennoe pravo, s ob'iasneniiami (Spb., 1903), intro., pp. 7-19.

2. Goikhbarg, op. cit., p. 8.

possibility of reconciling, at least to some degree, the demands and feelings of justice with the necessity of trying to preserve inherited property in dvorianstvo clans as far as possible without division by the establishment of a system whereby patrimonial immovable, patricularly settled estates, would pass indivisibly to the eldest heir in his own right or by representation, and acquired property and all movable would be divided equally between the remaining coheirs of each sex'.[1] Bludov replied that it would be impossible to introduce such a system, and the project appears to have been dropped, although similar measures were contained in his later proposal concerning testamentary power.[2]

The result of this dilemma tended to be inaction on the part of the government. Nol'de noted an extreme reluctance on the part of high officials to alter the system of inheritance in any way, however insignificant.[3] But from the preceding it would appear that the lack of reform was due not so much to reluctance, as there always appeared to be a group of high officials prepared to change the law, but more to the inability to achieve any consensus on either the gravity of the problem or what to do about it. This position could be maintained as long as the disadvantageous effects of the system were not felt too obviously or remained largely theoretical and there was not much serious agitation by landowners for reform.

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1. Goikhbarg, op. cit., p. 8; I. G. (I.V. Gessen?) 'Reforma nasledstvennago prava', Rech', 1911 no. 48 (18 Feb.), p. 2.

2. Goikhbarg, op. cit., pp. 8-9; Kaminka, op. cit., cols. 2640-42; Vest. Ev., 1903 bk. 11, pp. 360-62; Mos. Ved., 1870 no. 224 (8 Oct.), p. 3; Pakhman, op. cit., p. 179; Liubavskii, 'Unichtozhenie', pp. 9 (note 2), 19 (note 1), 22-3; Prilozheniia k stenograficheskim otchetam gosudarstvennoi dumy. Tretii sozyv, sessiia chetvertaia. 1910-1911 gg. (Spb., 1911), iii. no. 212, pp. 3-6.

3. Nol'de, 'O poriadke', bk. 10 pp. 83-91.

However, the effects of the emancipation combined with the increasing commercialisation of agriculture resulting from the construction of railroads in the 1860s and 1870s drastically altered the conditions under which the system of inheritance operated,[1] with the result that its real and potential harmful effects became more apparent and pronounced. A large percentage of the land previously held by the dvorianstvo was alloted to their former serfs and that which remained to them was open to acquisition by members of any other social estate. Thus the basis of their wealth simultaneously was reduced and no longer securely confined to them. Commercial viability of their estates became essential for the survival of the landed dvorianstvo, particularly as mortgage credit had been reorganised on a private commercial basis.[2] Hence the implications of the law for economic management and development increased in importance. On the other hand, increasing commercialisation and development of financial institutions and the new judicial system provided greater scope for more flexible and complex settlements by providing alternative forms of secure wealth to land and by increasing the legal security of more complex settlements and reducing the costs of their enforcement. In these conditions the system of devolving property rights and the restrictions imposed by the law of patrimonial property acquired new political and economic significance. It was in this atmosphere that the new courts had to interpret the existing law.

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1. Crisp, Studies, pp. 17-18; Sh., op. cit., bk. 3 pp. 250-52; V. K. Iatsunskii, 'Razvitie kapitalizma v Rossii v 60-70-kh godakh', in Ist. SSSR, v. 122-5.

2. Iakovlev, op. cit.; S. F. Starr, Decentralization and Self-Government in Russia 1830-1870 (Princeton, 1972), pp. 233-41.

Chapter 3

Judicial Development of the Law of Patrimonial Property and the Definition of Settled Land

The core of both the institution of private property and the system of inheritance was the institution of patrimonial property. From this arose the limitations on the owner's power of disposition, the male heirs' right to demand an equal physical division of the deceased's estate, and the relatives' right of redemption. Hence it was the legal source of most of the difficulties and disadvantageous socio-political and economic effects caused by the law of property and inheritance, and consequently it would provide the greatest legal barrier at least to the adjustment of landed estates to post-emancipation market conditions and the necessity of commercial viability. The manner in which the courts enforced and developed the law on patrimonial property thus would significantly affect this process of adjustment.

The courts were bound by the statutory law contained in the Svod Zakonov and other enactments and therefore obviously could not have abolished the institution of patrimonial property outright even had they so desired. However, their powers of judicial interpretation enabled them to influence considerably the law and its effects. Depending on how they chose to interpret the law, the courts either could broaden or narrow its effects by defining it and the means by which property became either patrimonial or acquired either strictly or expansively. The same would be true with respect to the exercise of the right of redemption. In the event, both the high court and the lower courts exhibited a general hostility to

the institution of patrimonial property, but were reluctant to restrict it to the extent that appeared to be possible.

I. Definition and Purpose

Statutory law provided no precise definition of patrimonial property, and there was considerable disagreement among jurists over the institution's purposes.[1] Thus it fell to the Civil Cassation Department to provide such a definition, and in formulating this, the court necessarily would be influenced by the objectives that it believed the institution to serve.

The court's thinking on this subject is revealed in the cases of Cherepovy v. Pishchevich, decided in 1884.[2] In these cases the deceased, Andrei Cherepov, had devised all his movable property, including the livestock, machinery, seed reserves, and harvested and unharvested produce of his patrimonial estates, but excluding all agricultural implements, to his niece Olga Pishchevich. The deceased's legal heirs, Leontii and Vladimir Cherepov, contested that part of the will concerning the disposition of the livestock, produce of the land, etc., arguing that such objects were inseparably appurtenant to the land. Therefore, as the land was patrimonial, under article 1068, SZ, X, 1, an owner not devising the land could not be allowed to devise separately the inventory necessary for its exploitation and the harvest expected from it. The district court and the Kharkov Court of Appeal each twice found for the respondent, the

1. See ch. 4.

2. SRGKD 1884 nos. 75, 108.

beneficiary of the will, on the grounds that the property concerned, as movable and therefore acquired property, was freely devisable. In vacating both decisions, the Civil Cassation Department stated that:

> . . .as concerns the owner of patrimonial property, he by no means can be considered its unlimited owner, since in the interests of his clan he is limited in the disposition of this property, particularly in the event of death, and from this it follows that in this event he has no right to separate and devise to a person not being a member of the clan or having a right of inheritance those movables which constitute the necessary appurtenances of a patrimonial estate, and to leave to the legal heirs bare earth in place of an economically organised estate. . . .From this it follows that the horned and domestic cattle, seed reserves, fodder and machines on a patrimonial estate, to the extent that they are necessary for the proper exploitation of the estate, constitute its appurtenances, which are not subject to testamentary disposition, and that the Court of Appeal, having found to the contrary, acted not in accordance with the general meaning of the laws on the appurtenances of property. . .[1]

Thus in the court's opinion the purpose of the limitations on the rights of the owner of patrimonial property was the protection of the interests of the clan, by which was meant the material security particularly of the owner's legal heirs. Therefore the owner was not to be allowed to exercise the testamentary power over appurtenant movable objects that a literal reading of the law would have allowed if this would be to the material detriment of his legal heirs.

The court confirmed and developed this principle in two subsequent decisions. In 1890, in the case of Fal'ts-Fein v. Fal'ts-Fein,[2] the plaintiff, Sofia Fal'ts-Fein, had contested a number of limitations placed on

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1. Ibid., no. 75, emphasis added.

2. SRGKD 1890 no. 42.

her rights of use, possession, and management by her deceased husband, who had devised his entire estate, including patrimonial property, to her in life possession and use, on the grounds that they were illegal and not in agreement with the rules established by law for the surviving spouse's life estate in patrimonial property.[1] The Odessa Court of Appeal, in upholding the district court decision denying the suit, stated that a life estate in patrimonial property was created by the will of the testator, and although the law established certain special conditions concerning the life tenancy in order to protect the interests of the legal heirs, these did not prevent the testator from further restricting the life tenant's rights for this same purpose. The court argued that:

> . . .patrimonial property passes to the legal heirs of the deceased owner, whose rights *as representatives of the clan* thus have preferential significance in the eyes of the law. . .Having permitted life possession of patrimonial property as a form of exception, however, the legislator recognised the necessity of taking measures *to protect the rights of the heirs* and *with this goal* established a series of limitations for the life tenant (articles 4, 8, 9, 14 of the supplement to article 116 /volume X, part 1/). Thus having distinguished the interests of the *legal heirs* as *deserving preferential protection*, the law could not without contradicting the above-mentioned fundamental principles constrain the owner in testamentary dispositions which limit the extent and means of use of the life tenant of patrimonial property and which equally *are directed toward the defense of the interests of the legal heirs*.[2]

The court added that in such instances the surviving spouse's interests were protected by the right to reject the life estate in favour of the

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1. *SZ*, X, pt. 1 (1857, *Prod*.), art. 116 *pril*. (1887, 1900 edns., arts. 533^{1}-533^{13}).

2. *SRGKD* 1890 no. 42, emphasis added.

statutory share if the conditions of the former were considered too onerous. The high court cited this reasoning approvingly in its own decision.

In 1899, in the case of Sipiagin /v. Sipiagin?/, the Civil Cassation Department again confirmed that the objective of the law was to secure the material welfare of the legal heirs, but refined its position such that the limitations on the owner might be relaxed if this objective had been satisfied in some other way.[1] Having two sons, the owner of a patrimonial estate had transferred the entire landed estate to one son by gift, giving other property to the second son, Staff-Captain Boris Sipiagin. In the act of gift, the latter declared that he considered his rights to his father's future inheritance as satisfied and renounced these. Obviously having second thoughts and in need of assets (he had been declared an insolvent debtor), Captain Sipiagin contested the gift to his brother on the grounds that, by conveying to the donee a share of patrimonial property greater than that due him as a legal heir, it violated article 967, SZ, X, 1. The Moscow Court of Appeal denied the suit, and this decision was upheld by the Civil Cassation Department. The high court stated that the gift and allotment of patrimonial property was limited by law to the legal heirs in an amount not exceeding the share due them in inheritance by law.

> However, limiting in such a manner the owner's freedom of disposition of patrimonial property with respect to both allotment and gift, in both instances the law pursues one and the same objective, which consists exclusively in protecting the private interest of the nearest heirs from the disadvantageous consequences for them of their deprivation of their lawful share of patrimonial property by a one-sided, arbitrary act of the owner.

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1. SRGKD 1899 no. 49.

> Therefore, although an allotment or gift of patrimonial property completed by the father in favour of one of his sons in violation of the rules cited above undoubtedly in general can be contested by the other son with respect to that part due him as his share as nearest heir, he cannot be recognised as having this right in the event that he himself voluntarily accepted this transaction, renouncing in it his right to receive patrimonial property in return for the receipt of his share from other property.[1]

In other words, the primary objective of the law, i.e. the material welfare of the legal heirs, having been achieved, the court was willing to relax the restrictions imposed by the law, particularly as in so doing the material welfare of the first son was made equal to that of the second.

From these decisions it is clear that the court perceived the institution of patrimonial property as primarily a means by which the material interests of the legal heirs were protected. As such, the law was seen to provide a limited guarantee that parents would fulfill their moral obligation to provide for their children. As this provided nearly the sole means for this protection in Russian law, the court appeared unwilling to weaken too greatly this particular aspect of the law.

The court also continued to be influenced by the concept of property being identified with and belonging to a particular clan. In 1879, in Dan'kovskii v. Prince Vadbol'skii and the Church of St. Stanislaus in St. Petersburg, the court stated that,

> The general sense of these laws in conjunction with the general meaning of patrimonial property shows that in the inheritance of patrimonial property the law has in view to preserve this in the clan from which it was received, and that therefore the right of collateral relations to the inheritance of patrimonial property is conditioned not solely by blood

1. Ibid., emphasis added.

> relationship with the father or mother of the estate-leaver, but also by their membership of that clan from which the property was received, i.e. by the common origin of the estate-leaver and the person seeking the inheritance from that head of the clan from which the patrimonial property composing the object of inheritance was received.[1]

The law protected only the interests of this clan, and thus extended rights only to members of it. Thus the court ruled that even though the property devised to the respondents in this case was patrimonial and therefore the devise technically illegal, and although the plaintiff was maternally related to both the deceased and the woman for whom the property first became patrimonial, nevertheless the plaintiff was not a member of the clan in which the property was patrimonial and consequently had no right of action.[2]

This emerges again in the court's decision in Smirnovy v. Borodkina in 1901.[3] The widow and heirs of Vasilii Mikhailovich Smirnov had remained in copossession of a house owned by him in the city of Orel. The eldest heir, Ivan Vasilevich, sold his share of the house to Borodkina, who then occupied part of the house. Sometime later the deceased's widow and remaining coheirs demanded a division of the property, hoping to acquire Borodkina's share on payment of compensation. However, the Kharkov Court of Appeal granted Borodkina's petition for sole possession of the house, with the obligation to compensate her coowners, on the grounds that

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1. SRGKD 1881 no. 30, emphasis added.

2. See also SRGKD 1891 no. 61; but cf. 1880 no. 1; N. V. Kalachov, 'Vopros o primenenii st. 1138 t.X ch. I', Iurid. Vest., vyp. 8 (1860-1861), 73-80; S. Raevskii, 'O nasledovanii v rodovykh imeniiakh posle bezdetnykh vladel'tsev', Zh. Min. Ius., X (1861), 105-10.

3. SRGKD 1901 no. 41.

she was the eldest surving heir or assignee thereof, and thus under article 1324 pt. 3, SZ, X, 1, had preferential right to the possession of indivisible property. Not being an heir, the deceased's widow could not claim possession. Vacating the decision, the Civil Cassation Department argued that the basis of Russian inheritance law was the clan formed by blood relationship. The law therefore must seek to preserve patrimonial property within the clan, and consequently the transfer of such property to a person not belonging to this clan would be contrary to the spirit of the law. Given that the right established in article 1324 pt. 3 derived from the right of inheritance and membership in the clan, it must be considered a personal right and therefore not transferable, and consequently it could not pass to the purchaser of an heir's share of patrimonial property. Thus neither the deceased's widow nor Borodkina could have a preferential right of possession, as neither was a member of the clan in which the property was patrimonial.

Thus in addition to seeing the institution of patrimonial property as a means to protect the material welfare of heirs from possible disadvantageous arbitrary acts by their parents or other owners, the court acknowledged that the institution had broader purposes with respect to the clan and that therefore it had some obligation to try to preserve such property within the clan. Indeed, the court went even further and argued that the owner's clansmen had a separate and enforceable property right. It will be recalled that in Cherepovy v. Pishchevich the Civil Cassation Department had stated that the owner of patrimonial property held such property only in limited ownership. In 1895 in the case of Chertova v. Neliubov the court further defined this by stating that the nearest

relatives of the owner of patrimonial property had an independent right to this property which was distinct from that of the owner and existed apart from the right of inheritance created by the owner's death.[1] Thus fellow clansmen of the owner had the right to challenge an act of the owner, in this case a mortgage, on the grounds that it was fictitious or illegal and sought to transfer patrimonial property to a nonclansman without consideration. The court had recognised this right previously, and was to do so subsequently on several occasions, but this was the first time that it had stated that this right rested on an independent property right of the clansmen.[2] The court recognised in Gol'chenko v. Kuz'minskaia in 1900 that this right was equal to other property rights by making it subject to the general ten-year period of prescription.[3]

Further, the court held that this independent right of the relatives was expressed in their right of redemption, although here the weakness of this right in the eyes of the court is revealed as well. In 1891 in Bogomolov v. Khlopotovy _et al._ the plaintiff, the peasant Bogomolov, having successfully brought an action to redeem 3½ _desiatin_ on which the respondents were conducting fairly profitable goldmining operations, sought termination of the respondents' lease of the mining rights and recovery of full possession.[4] He argued that contractual obligations incumbent on patrimonial property made by a nonclansman who had purchased

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1. _SRGKD_ 1896 no. 93.

2. _SRGKD_ 1872 no. 474; 1890 no. 41; 1906 no. 38; 1908 no. 13.

3. _SRGKD_ 1900 no. 8.

4. _SRGKD_ 1891 no. 40.

the property were not binding on a clansman who redeemed it. The Ekaterinburg District Court denied the suit, but the Kazan Court of Appeal reversed this decision, stating that under article 1372, SZ, X, 1, redeemed patrimonial property was returned to the person redeeming it 'in entirety' (v tselosti), by which was meant that it must be free of all obligations which might devalue it and prevent the person redeeming it from enjoying all the benefits and profits of ownership. In vacating this decision, the Civil Cassation Department recognised the relatives' independent interest in patrimonial property by stating that the right to redeem such property was a special legal institution which was not connected with and substantively differed from the right of inheritance, although both were related to the union of the clan. Thus the remaining clansmen's interest in patrimonial property continued even after that of the owner terminated with the sale of this property to a non-clansman, but prior to submission of a petition for redemption, their interest in no way limited the purchaser's right of ownership. Their right consisted merely in the power to repurchase the property for a legally-determined price. Hence any contracts encumbering the property made by the purchaser, as unlimited owner of this property, were binding on any person subsequently redeeming it. Rather than releasing the latter from such obligations, the phrase in article 1372 indicated that he received not only a right to the specified area, but all the rights and obligations currently attached thereto.

This point was made even more forcefully in Kozlovskaia v. Dobrzhinskaia in 1903.[1] The plaintiff, Sofia Kozlovskaia, sought to

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1. SRGKD 1903 no. 51; N.N. Tovstoles, 'Vykup rodovykh imushchestv v zapadnom krae (st. 1346-1373 T. 10, ch. 1, v sviazi, s zakonom 10 dekabria 1865 g.)', Zh. Min. Ius., 1902 no. 9, pp. 209-14.

redeem patrimonial land sold by her sister to the respondent. Both the Vilnus District Court and the Vilnus Court of Appeal rejected her petition on the grounds that people of Polish origin were prohibited by law from acquiring _pomeshchichie_ estates in the nine Western Provinces by means other than inheritance by law.[1] In her appeal to the Civil Cassation Department the plaintiff argued that the right of redemption was an integral part of inheritance by law and did not constitute a separate legal institution. Any patrimonial property alienated to another clan continued to remain in the vendor's clan for a period of three years, and any member of this clan retained the right of redemption for this period. Hence exercise of the right was not a new acquisition of rights, but only a realisation of existing rights. The court rejected this argument, stating that 'despite the opinion of the petitioner, it is necessary to recognise that the redemption of patrimonial property is a special, independent institution of law and not one of the means of realising the right of inheritance by law'.[2] This was not altered by the fact that both the right of redemption and that of inheritance were based on ties of kinship with the vendor. The acquisition of rights by redemption was not equal to the acquisition of rights by inheritance, and consequently under the law people of Polish origin had no right to redeem patrimonial _pomeshchichee_ property located in the nine Western Provinces.

Thus although the court recognised that the clansmen of the owner of patrimonial property had an independent interest in this property apart

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1. _SZ_, X, pt. 1, art. 698 _prim_. 2, _pril_.: 1.

2. _SRGKD_ 1903 no. 51.

from the right of inheritance, and hence this property somehow was identified with the clan and therefore ought to be preserved within it, nevertheless it considered this link to be very weak and was not willing to grant it much protection. By preserving property within the clan the court meant primarily the determination of the clan in which property was patrimonial and the preservation of the property in this clan in the case of dispute over an inheritance by members of different clans, which was a major source of litigation,[1] and the protection of the heirs against illegal or fictitious acts disposing of patrimonial property without consideration, thereby depriving the heirs of their inheritance. Even in these instances the court was not inclined to show any favour to the protection of clan interests. For example, property could not be assumed to be patrimonial, even if the circumstances of the case strongly suggested this; documentary evidence both that the property was patrimonial and that the petitioner was a member of the proper clan was required.[2] In cases seeking to invalidate an alleged fictitious or illegal act, in addition to proving that the property was patrimonial in his clan, the petitioner had to prove that the act was fictitious or illegal, which could be quite difficult in the case of registered, notarised, or other written acts.[3]

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1. See, e.g., SRGKD 1872 no. 1288; 1874 no. 804; 1875 no. 302; 1876 no. 214; 1880 no. 1; 1881 no. 30; 1883 no. 32; 1891 no. 61; 1897 no. 72; 1899 no. 11; 1902 no. 98; 1908 no. 13.

2. See, e.g., SRGKD 1872 no. 1288; 1875 no. 302; 1899 no. 11; 1902 no. 98.

3. See refs. above, note 2, p. 105, and SRGKD 1889 no. 83; 1892 no. 80; 1896 no. 93; 1902 no. 120; A. E_v, 'Baryshnikovskoe nasledstvo', Mos. Ved., 1899 nos. 326, 328, 330, 333 (26, 28, 30 Nov., 3 Dec.), all p. 2; Mrts. (S. A. Muromtsev), 'Simulirovannyia sdelki kasatel'no nedvizhimykh imenii', Iurid. Vest., 1880 bk. 5, pp. 158-9; Gorodyskii, op. cit., no. 5 pp. 116-18, no. 6 p. 112.

This attitude of the court, and its emphasis on the protection of the heirs' material welfare as the chief justification of the institution of patrimonial property, is perhaps best illustrated in the case of Shanshieva v. Lapteva in 1910.[1] Petr Laptev had devised all his property, which included several thousand desiatin of patrimonial land, to his wife Aleksandra. Their son Dmitrii failed to contest the provisions of the will dealing with his father's patrimonial property, despite the fact that they obviously were illegal. Several years after Dmitrii's death his now remarried widow, Anna Shanshieva, both in her own right and as guardian of Dmitrii's children, contested these provisions on the grounds that the land, being patrimonial, was not subject to testamentary disposition and therefore could not have been included in the general phrases by which the deceased had expressed his will. The court obviously had misinterpreted the will, and consequently this land now should revert to the heirs of the deceased's legal heir Dmitrii, i.e. the plaintiffs. The Riazan District Court denied the suit, but the Moscow Court of Appeal reversed this decision, essentially agreeing with the plaintiffs. It would be illogical and contradictory, the court argued, to assume that the law would permit by the use of general phrases allowed under article 1027, SZ, X, I, the circumvention of the prohibition against the testamentary disposition of patrimonial property. The Civil Cassation Department disagreed and vacated the decision, inter alia, on the grounds that article 1027 was concerned with the form in which a will was expressed and not with its substantive content, and therefore the courts could not assume that the content of a

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1. SRGKD 1910 no. 51.

testamentary provision expressed in the correct form had or was intended tobe legal. This was particularly relevant to dispositions concerning patrimonial property.

> The law does not deny the testator's right of ownership of patrimonial property, it only limits his right to dispose of it in the event of his death in violation of the rights of the legal heirs. Any private right lies in the complete disposition of its owner, who is free to use it or not use it, and if the person, in this instance the heir by law, in favour of whom the testator's will (volia) concerning property is limited wishes not to use his right or to lose it by non-exercise within the period established by law, then obviously the limitation collapses and the freedom of the testator to dispose of his property is restored in full measure.[1]

Thus an illegal devise of patrimonial property became unassailable if not contested within the two year period established by law for contesting wills. In other words, the court would uphold the institution of patrimonial property in order to protect the legal heir. However, it would not extend this protection to other clansmen, and if the heir was satisfied and chose not to exercise his right, then the court was not overly concerned that the patrimonial property would pass from the clan.[2]

II. Limitation of Extent

If the Civil Cassation Department was ambiguous in its support of the primary objectives of patrimonial property, it showed much less

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1. Ibid., emphasis added.

2. See also in this respect SRGKD 1876 no. 246; 1881 no. 30, 1900 nos. 8, 73; 1906 no. 15; from which it is clear that only the heir presumptive was protected. See also I. Davidenko, 'Zametka po delu o zaveshchanii kuptsa Gruzinova', Spb. Ved., 1862 no. 220 (10 Oct.), p. 939.

hesitation in limiting the extent and effects of the institution in other ways. Two primary methods by which it did this were to classify objects or certain bundles of rights as movable property, which as such could never become patrimonial property and therefore subject to its restrictions, and to limit narrowly the instances in which acquired immovable property could become patrimonial.

In a series of early decisions, the court confirmed that all movable property was considered acquired and that no action claiming its patrimonial origin or nature was permitted, although it allowed that the origin of such property could be properly investigated in certain cases, such as when determining where the right of ownership lay or the right of parents to the acquired property of their children predeceasing them.[1] This was expressed most forcefully in Silin v. Krivorotov in 1881.[2] Hereditary honoured citizen Aleksandr Krivorotov had died possessed of trading merchandise and 36,610 rubles in capital which he had inherited from his father. His paternal half-brother Vladimir was confirmed as his sole heir, but the guardian for his minor maternal half-brother Ivan Silin soon brought suit to have his ward confirmed as coheir on the grounds that the estate consisted of movable and therefore acquired property and that under article 1140, SZ, X, 1, paternal and maternal half-brothers had an equal right to the acquired property left by any deceased half-sibling dying without issue. The respondent argued that article 1140 referred only to the acquired property that a deceased half-sibling had acquired

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1. SRGKD 1869 nos. 16, 865; 1873 no. 334; SZ, X, pt. 1, arts. 1141-7.

2. SRGKD 1881 no. 3.

by his own labour and resources, and not to that acquired by any other means, in particular by inheritance. Thus as the deceased had inherited the property from his father, only his paternal half-brothers had any right to it; maternal half-brothers were excluded. Both lower courts found for the plaintiff. In upholding this decision the Civil Cassation Department stated that under article 398 all movable property was considered acquired regardless of its origin. Thus the lower courts not only were not obligated to determine the origin of such property, they were prohibited positively from doing so by law. The only permissible exception to this rule was in the event of determining the parents' right to the property of their deceased children. Hence the court declared its unwillingness to subject any form of movable property to the restrictions embodied in the law of patrimonial property.

The court then extended the effect of this decision by classifying various objects or bundles of rights as movable property. In many instances, such as money, bank deposits, mortgage and loan certificates, leaseholds, and the right to civil actions, this merely confirmed statutory law and made clear the owner's unhindered power to dispose of such objects or rights.[1] However, the court also included in this category the many new forms of property which were appearing as the economy developed and assets became more liquid and property relationships more complex, thereby ensuring the mobility of such assets or rights and providing various means for circumventing the restrictions imposed even on more traditional

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1. SZ, X, pt. 1, arts. 401-3, 417; SRGKD 1869 nos. 14, 816; 1880 no. 302; 1881 no. 3; 1903 no. 133 (money, deposits, loan certificates); 1881 no. 45; 1886 no. 67; 1893 no. 92 (leaseholds); 1878 no. 256 (civil actions).

objects of property by the institution of patrimonial property.

The first instance of this concerned the liquidation of patrimonial property. In 1862 the State Council had approved a proposal by the chief administrator of the Second Department of His Imperial Majesty's Own Chancery, supported by the Main Committee on the Organisation of Village Life, that the periodic payments to be made by former serfs and the state redemption bonds to be paid to pomeshchiki for the land to be redeemed by former serfs be considered movable property, thereby indicating a general desire that these assets be in the complete disposition of their owners and not subject to the restrictions incumbent on patrimonial property. This was emphasized by directly contrasting the payments and bonds received by owners in general to those received by the owners of reserved hereditary estates, which became part of the inviolable capital of such estates. The State Council refined this in two subsequent decisions in private cases in 1871 and 1875, so that only those payments actually made or bonds already received were considered movable property in the unlimited disposition of the owner, while all such payments or bonds due to be paid still were considered inseparable from the land.[1] The Civil Cassation Department followed these guidelines exactly in its own decisions.[2] However, the court extended the principle involved and denied the claim that the proceeds received from the sale of patrimonial property, or any assets subsequently purchased with these proceeds, were also patrimonial property.

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1. 2PSZ, xxxvii, pt. 2, no. 38966 (17 Jan. 1863), pp. 426-7; SRGKD 1890 no. 19. The Main Committee was one of the special government bodies created to draft the emancipation legislation.

2. SRGKD 1879 no. 364; 1890 no. 19; 1899 no. 56.

This latter extension of the rule underlay the court's decisions in de Kampello v. Logvinova and Andruzskaia in 1879 and was stated explicitly in the court's decision concerning the private petition of the Volkonskie in 1899.[1] In the former case, Lieutenant Nikolai Vartel'iak, by two separate acts of gift, had conveyed 3127 desiatin and 70 revision souls to each of his two eldest daughters, Ekaterina Andruzskaia and Varvara Logvinova, on condition that on his death an equal amount from his remaining estate would pass to his youngest daughter Aleksandra, later Countess de Kampello, with any remaining property to be divided equally among all three daughters. However, during his life, Vartel'iak later gave his youngest daughter 1082 desiatin and the proceeds from the sale of a further 1400 desiatin, so that on his death he still owned only 2267 desiatin. The Countess de Kampello claimed the entire remaining estate on the grounds that all the land concerned was patrimonial, that therefore she was entitled to an amount of land equal to that received by her two sisters, and that the amount of land received by her during the deceased's life plus that left by him at his death, after deduction of his widow's statutory share, still was less than that received by her two sisters. The sisters contested this claim, arguing, inter alia, that the plaintiff had received an equal share of the patrimonial estate during the deceased's life because in addition to a smaller amount of land she had been given the proceeds from the sale of another part of the estate. In rejecting this argument, the Odessa Court of Appeal stated, and the Civil Cassation Department agreed, that the sale of patrimonial property and transfer of

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1. SRGKD 1879 no. 178; 1899 no. 56.

the proceeds to an heir presumptive would not satisfy that heir's right by law to an equal share of the donor's patrimonial property because an owner had the right to sell such property, and the proceeds, being money and therefore movable and thus acquired property, were at his complete disposition.

In its decision in the Volkonskie case, the court stated that all capital was considered acquired property and consequently no discussion of its patrimonial origin was permitted, a house purchased from a person who was not a member of the same clan as the purchaser was considered acquired property for the latter, regardless of the origin of the funds used to make the purchase, and redemption bonds already received by their owner were considered movable, and therefore acquired, property, even though the land with which they originally were concerned had been patrimonial. Thus the owner of such property had complete freedom to dispose of it by will, even if she happened to be under a spendthrift trust and the property consisted of the proceeds of the sale of her patrimonial property by her trustees and of property purchased with such proceeds. This was true even despite the fact that the trust originally had been established to protect her heirs.

The decision in this case also reveals the court's attitude toward perhaps the most important new form of property with which it had to deal, that is, stocks and shares and the immovable assets of companies. The court confirmed its previous decisions that shares[1] inherited by the deceased from her mother were movable, hence acquired, property. Thus again

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1. The court ruled that there was no difference at law between '<u>aktsii</u>' and '<u>pai</u>'. <u>SRGKD</u> 1898 no. 31.

there could be no question of their patrimonial origin or nature and they could be disposed of freely by the owner.

The court initially had enunciated this doctrine in 1878 in its decision in Anan'ev v. The St. Petersburg Curtain-Lace Co.[1] Ol'ga Spet had deposited forty nominal share certificates in the company with Adolf Glints, one of the firm's directors and a relative of hers. Glints sold the shares allegedly without Spet's knowledge, and later committed suicide. One of the purchasers of the shares, the merchant Anan'ev, presented thirty of these to the company's managers for registration in his name. As Spet had requested the return of her shares, the company's managers refused Anan'ev's request. Arguing that the possessor and _bona fide_ purchaser of the shares must be considered their owner, Anan'ev brought suit against the company to have them recognised as his. Both St. Petersburg lower courts denied the plaintiff's action. In upholding this decision, the Civil Cassation Department ruled that nominal share certificates were a form of movable property, although their transfer required a formal written act. Thus, although by implication shares warrant to the bearer were not subject to the latter restriction, neither type of share, as movable property, could become patrimonial property and thus neither would be subject to any restrictions on disposition by their owner.

The court developed this principle in its decision in Koniukov v. The _Iaroslavskaia Bol'shaia Manufaktura_ in 1898,[2] in which it also distinguished between the owners of shares and the coowners of some particular

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1. _SRGKD_ 1878 no. 81.

2. _SRGKD_ 1898 no. 31.

thing. The latter had a direct personal interest in a specific share of the object itself, whereas the former did not. Company shareholders had only a limited right to the total assets and limited responsibility for the total obligations of the company. Thus the personal identity of shareholders could be of no interest to the company, and consequently a company had no legal basis to limit the free disposition of shares by their owners. Being movable property, such shares could be disposed of freely by their owners.

This distinction was important because it enabled the court to exclude entirely from the purview of patrimonial property not only shares and stocks, but all the assets owned by a company or partnership as well. In a series of decisions, themselves important for restricting patrimonial property by excluding certain forms of property rights from this category altogether, the court had ruled that only objects held in complete ownership could become patrimonial.[1] Thus objects held only by right of possession and use, even if hereditary, could never become patrimonial. This would include hereditary tenements of land not held in ownership, former possessional factories, structures erected on leased land, immovable assets held under a lien, and so on. It also would include all assets owned by a company or partnership because these would be owned by a juridical person, i.e. the company or partnership, whereas the shareholders or partners would own only their shares, which were movable property. As a juridical person obviously could not be a member of any clan, the assets owned by it could not be patrimonial, even though all

1. SRGKD 1874 no. 126; 1878 no. 164; 1880 no. 217; 1896 no. 28; 1897 no. 11; 1898 no. 99; 1899 no. 56.

the shares belonged to members of the same clan or even to the same person and the shares descended in inheritance to clan members.[1]

This was stated explicitly by the court in Bashkirovy v. Bashkirovy and Piatovaia in 1907.[2] In 1871, by notarised contractual agreement, merchant Emel'ian Bashkirov and his sons Nikolai, Iakov, and Matvei established a trading firm in full partnership in Nizhnii-Novgorod. During the next several years, fourteen immovable properties in the city of Samara were acquired in the firm's name. Emel'ian Bashkirov died in 1891, and in November of that year his three sons divided his personal estate and dissolved the firm and divided its assets, with Nikolai receiving all fourteen of the above properties in full ownership. Several years later he too died, leaving a will by which he devised these properties to his two sons Aleksandr and Nikolai and to Aleksandra Piatovaia. The testator's remaining legal heirs contested the will on the grounds that one-quarter of the property had been inherited by Nikolai Emel'ianovich from his father and therefore was patrimonial and not subject to testamentary disposition. Both the district court and the St. Petersburg Court of Appeal denied the suit.

In upholding this decision, the Civil Cassation Department reiterated the distinction drawn between coowners and shareholders or partners in Koniukov v. The Iaroslavskaia Bol'shaia Manufaktura and stated that that

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1. SRGKD 1873 no. 1179; 1907 no. 61.

2. SRGKD 1907 no. 61; described approvingly in K. P. Zmirlov, 'Mozhet li byt' priznana rodovym imushchestvom chast' imushchestva torgovago doma polnago tovarichestva, pereshedshaia posle smerti polnago tovarishcha k ego zakonnomu nasledniku, esli do smerti oznachennago tovarishcha eta chast' ne sostavliala sobstvennosti umershago?', Zh. Min. Ius., 1907 no. 7, pp. 129-39.

part of the property of a full trading partnership passing in inheritance to the legal heirs of one of the partners did not become patrimonial if prior to the deceased partner's death this property was not held in his personal ownership. Every partnership was recognised as an independent person, distinct from private, physical persons, and as such it had special rights to property and was distinct from the persons composing it.[1]

> Thus, while a trading firm exists which holds its own property by right of ownership, this property cannot be considered to be owned by the individual people composing the trading firm. Therefore, although. . . prior to the termination of a full partnership constituting a trading house in the event of the death of one of the partners his legal heir may assume his rights for the continuation of the trading house's operations, nevertheless the property of the trading house does not cease to belong to the latter, and only those rights with respect to the trading operations which belonged to the deceased pass to his heir.[2]

Thus, as the property of the firm came to the partners or their heirs at the dissolution of the firm not by right of inheritance, but on the basis of the agreement founding the firm, this property could not be considered patrimonial. For property to become patrimonial, it had to pass by right of inheritance from one person to his direct heir by blood relationship. Obviously, property passing from the ownership of a juridical person to that of the separate physical persons composing the juridical person did not conform to these demands and consequently could not become patrimonial.

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1. SRGKD 1907 no. 61; 1887 no. 42; SZ, X, pt. 1 (1900), arts. 415, 698 pt. 10; XI, pt. 2 (1903), Ust. Torg., arts. 59, 60, 62, 70, and Ust. Sud. Torg., art. 58; XVI, pt. 1, Ust. Grazh. Sud., arts. 35, 220-222.

2. SRGKD 1907 no. 61, emphasis added. And see SZ, X, pt. 1 (1900) art. 1238 prim. 1 and pril.; XI, pt. 2 (1903), Ust. Torg., arts. 64, 66, 67, 70.

Thus neither the firm's assets nor the shareholders' or partners' shares in these could be patrimonial property, and therefore neither was subject to any limitation in disposition.

Thus incorporation could be used to circumvent the restrictions and disadvantageous effects of patrimonial property, and there is evidence that this was employed both by merchants and industrialists and, on a lesser scale, in agriculture. From the mid-nineteenth century this appeared to be a general practice among the larger merchant and industrialist families, particularly in the older industries such as textiles and food processing.[1] Shares, often of large denominations, would be held by clan members, who could distribute them among their heirs as and on such conditions as they chose. Although an attempt was made to prevent such shares from passing from family ownership by establishing such conditions as rights of preferential purchase, the decision in Koniukov v. The Iaroslavskaia Bol'shaia Manufaktura shows that these were not always successful.[2] That incorporation sometimes was resorted to also by landowners as a means to avoid the disabilities created by the institution of patrimonial property can be seen from the comments made by some of the delegates from the provincial landowners at the sixth annual session of the Agricultural Council of the Ministry of Land Affairs and State Domains held in 1901.[3] During a discussion of the problems arising from the law,

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1. Crisp, Studies, p. 113; L. E. Shepelev, op. cit., p. 135, note 6; Iatsunskii, 'Kap. razvitie', p. 334; Sel. Khoz. i Les., ccii, no. 8 (1901), p. 301. Iatsunskii specifically mentions the Morozov, Konovalov, and Riabushinskii clans.

2. SRGKD 1898 no. 31; see above, pp. 116-17.

3. Sel. Khoz. i Les., ccii, no. 8 (1901), pp. 301-2. On the Council, see Brokgauz and Efron, Entsiklopedicheskii slovar' (Spb., 1900), xxix (lvii), 414.

several delegates from the government had proposed incorporation as one means of avoiding this. B. I. Khanenko, a landowner from Podolia province, supported this and observed that there were many successful examples of the practice found in the south-western regions of the Empire.

The only exception to this general trend of excluding objects or rights from the category of patrimonial property was that concerning the appurtenances of patrimonial estates established in Cherepovy v. Pishchevich discussed above.[1] However, in these decisions it is clear that the court was as much concerned with economic issues and preventing any harmful economic effects which might be caused by the disruption of landed estates through the loss of their necessary inventory as it was with protecting the material welfare of the legal heirs. Thus it discussed the economic issue at length and ruled that any object linked to some primary object by an economic bond and essential to the economic function of that object was appurtenant to it and 'must follow the fate of the primary thing in all instances in which there is no special disposition concerning it or right of a third party to it'.[2] By this it established that the entire economic inventory not only of land, both patrimonial and acquired, but of any economic enterprise, was appurtenant to the land or enterprise and generally would not be separated from this by some general disposition referring to 'all movable property' unless specifically provided for. The court could not prevent the owner of acquired property from breaking this link by his will and from thereby disrupting the operations of an estate, but it could,

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1. SRGKD 1884 nos. 75, 108; see above, pp. 98-9.

2. SRGKD 1884 no. 75.

and would, with respect to the owner of patrimonial property.[1]

The second method by which the court limited the effect of the institution of patrimonial property was to restrict narrowly the instances in which acquired immovable property could become patrimonial. This concerned chiefly the transfer of property to the owner's heirs presumptive by way of gift, devise, or allotment and dowry. The court had to confront this issue very early, and it was one that recurred frequently. In resolving it, the court developed a doctrine, never clearly articulated, which was based on its conception of the owner's presumed intention and the purpose of the institution of patrimonial property, taken in conjunction with the heir's rights.

The question first arose in Retivyi v. Alifanova and Tabunikova in 1867.[2] Meshchanka Agaf'ia Efimova had devised a house and land located in St. Petersburg which she had inherited under the will of her sister, who had purchased it originally, to her niece Alifanova and her grand-daughter [more likely grand-niece] Tabunikova. The testatrix's brother, meshchanin Efimov Retivyi, contested the will primarily on the grounds that the property was patrimonial and therefore not subject to testamentary disposition. He argued that acquired immovable property received by will by a relative entitled to inherit it by law became patrimonial, that by 'a relative entitled to inherit by law' the law meant any relative of the owner and not merely the heir presumptive, and thus that in this case the property concerned had become patrimonial for Efimova when she inherited it under her

1. See also SRGKD 1912 no. 71, in which the court again stressed the necessity of an economic link.

2. SRGKD 1867 no. 144.

sister's will. Thus her own will was invalid and the property should pass to the plaintiff as her direct legal heir.[1] Both St. Petersburg lower courts concurred with the respondents' argument that the law referred solely to the heir presumptive, and that therefore acquired immovable property devised to a relative who was not the heir presumptive remained acquired. As the testatrix would have been excluded from her sister's inheritance by the presence of brothers, she was not the heir presumptive, and consequently the property remained acquired.

Upholding this decision, the Civil Cassation Department stated that neither article 397 nor article 399 provided a definition of either patrimonial or acquired property or a complete enumeration of the instances in which one type of property was transformed into the other. Thus the question in this case had to be resolved on the basis of the general meaning of the laws. However, having said this, the court then formulated a general rule of law which in fact was based on the narrowest possible literal reading of these articles, which took no account of the general objectives that the institution of patrimonial property was intended to serve, and which would limit to the least possible the number of instances in which acquired immovable property became patrimonial. Hence the court ruled that acquired property could become patrimonial only when it was <u>inherited</u> by the <u>heir presumptive</u>, whether by intestacy or will, whereas patrimonial property could become acquired only when it passed into the ownerhsip of another clan by whatever means. In all other instances of transfer the property retained its existing classification. Thus in the present case,

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1. <u>SZ</u>, X, pt. 1, arts. 399 pt. 2, 1134-5, 1137.

'by the literal meaning of article 399 pt. 2, vol. X, 1, acquired property devised to a relative becomes patrimonial for him if at the time the inheritance opens with the death of the testator this relative would have had the right to inherit after the testator by law; on the contrary, if at the time of the opening of the inheritance after the testator the right of inheritance by law did not belong to him, and he inherited only by the strength of the will, then the devised property does not come under the literal meaning of article 399 pt. 2',[1] and consequently it remained acquired.

The court adhered to this general principle until overtaken by the events of the Revolution.[2] The legal rule contained two principal elements: first, that the property must pass to the heir presumptive, and second, that it must pass in inheritance. The implication of this was that acquired immovable property passing even to the heir presumptive, but by means other than inheritance, for example by gift, allotment, or dowry, would not become patrimonial. If this were true, it would allow parents to transfer property to their heirs by one of these means and thereby avoid encumbering it with the limitations entailed in the institution of patrimonial property, while simultaneously allowing it to descend through the family. This also would have the effect of limiting the extent of patrimonial property.

In 1877, in its decision in Pototskii v. Baidakova, the court

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1. SRGKD 1867 no. 144.

2. SRGKD 1876 no. 214; 1877 nos. 186, 286; 1879 nos. 3, 58; 1880 nos. 1, 183; 1892 no. 80; 1902 no. 98.

confirmed that this was indeed its intention.[1] Maria Grigor'evna Pototskaia by domestic will had left to her husband Semen Pototskii in life possession and use immovable property that she had received as dowry from her father, for whom it had been acquired. Pototskii brought suit for possession against the deceased's legal heir, Olimpiad Baidakova. The latter contested the action on the grounds that the property had become patrimonial when it passed as dowry from the deceased's father to the deceased, and consequently a life estate in it could be devised to the deceased's husband only by a registered or notarial will or a domestic will appropriately deposited.[2] The Kherson District Court and the Odessa Court of Appeal denied the suit. Both based their decision on the argument that given the nature and purpose of a dowry and the fact that property received as dowry was reckoned as part of the recipient's share of the donor's inheritance, the transfer of property to the heir presumptive by dowry was similar to that by intestate inheritance, and therefore acquired immovable property given as dowry to an heir presumptive became patrimonial. The Court of Appeal added that this decision was within the spirit of Retivyi v. Alifanova, as that had established that acquired immovable property passing by will to the heir presumptive became patrimonial, and transfer by dowry resembled this. Thus the lower courts were attempting to broaden the rule by which acquired property became patrimonial on the basis of a consideration of the nature of the latter and its purpose. However, the Civil Cassation Department refused to accept this extension of its previous decision and vacated the

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1. SRGKD 1877 no. 168. See also 1877 no. 286.

2. SZ, X, pt. 1 (Prod. 1864), art. 116 pril.: 1 (1887, 1900 edns., art. 1070).

decision of the Court of Appeal. Reiterating its position in Retivyi v. Alifanova, the court stated that,

> Acquired property is transformed into patrimonial in only one instance: when it passes from one person to another of the same clan by inheritance, and not only inheritance by law, but even inheritance by will, providing only that it is devised to that person who would have inherited it by law even in the absence of a will. By contrast, patrimonial property becomes acquired when it is transferred into another clan by any type of act, including a gift. Under prevailing law, only in these two instances does property alter its character. . . Consequently, apart from these two instances, however, and to whomever property may be transferred, it must preserve its previous character. . .[1]

This proved to be the first of several instances in which the lower courts clashed with the Civil Cassation Department over this issue, and one suspects that the latter's position was determined chiefly by its general reluctance to increase the incidence of patrimonial property.[2] Legal opinion likewise was divided on the issue, although most jurists agreed with the position taken by the lower courts.[3] In their case it would seem that, in addition to purely juridical considerations, their desire to provide some security, however weak, for descendant heirs

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1. SRGKD 1877 no. 168, emphasis added.

2. See, e.g., SRGKD 1878 nos. 3, 58; 1880 no. 183. In an earlier case, the Tiflis District Court and Court of Appeal also held such property to be patrimonial, but the Civil Cassation Department did not discuss the issue. 1874 no. 126.

3. Zamechaniia grazh. zak., Nos. 320-22; K. N. Annenkov, Sistema russkago grazhdanskago prava (2nd edn., Spb., 1912), iv. 109-11; Kasso, op. cit., p. 18; Pobedonostsev, Kurs, i. 66-70; Shershenevich, Uchebnik, pp. 134-5, 625; Davidenko, op. cit.; A. Liubavskii, 'Vydel imushchestva', in Iurid. mon., iv. 28-32; D. Dovnar-Zapol'skii, 'Prevrashchaetsia-li posredstvom vydela blagopriobretennoe imenie v rodovoe?', Zh. Gr. i Ug. Pr., 1880 no. 3, p. 106; A. Brandt, 'O rodovykh imushchestvakh', Zh. Gr. i Ug. Pr., 1888 no. 6, pp. 9-11; Dufour, op. cit., pp. 105-111.

prevailed over their general hostility to the institution of patrimonial property. Yet the court maintained its position for some time, holding that allotment and dowry more closely resembled a gift than inheritance, and as such could not be subject to the provisions in article 399.[1]

Gifts had been specifically excluded from the effects of the law by the court's decision in Miasoedov v. The Riazanskii Obshchestvennyi Sergiia Zhivogo Bank in 1879.[2] Aleksandra Miasoedova had devised immovable property given to her as a gift by her father, for whom it had been acquired property, to her husband Petr Miasoedov for life. In an obvious attempt to clear the estate of debt and defraud the Riazan bank, Miasoedov remortgaged the estate to the bank and used the proceeds to pay off the previous mortgage debt owed to the local sokhrannaia kazna, and then renounced his life interest. His son, Sergei, took possession of the estate as the deceased's legal heir and brought suit to have the mortgage debt declared invalid on the grounds that as the property, having been given to the deceased by her father, was patrimonial, the provision in the deceased's will allowing her husband as life tenant to mortgage the estate was illegal and therefore the mortgage was not binding on the reversioner.[3] Holding the property to be patrimonial, both the Riazan District Court and the Moscow Court of Appeal found for the plaintiff. In its decision, the Court of Appeal stated that a gift was analogous to a will, and thus acquired immovable property given as a gift to the heir

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1. E.g., see SRGKD 1880 nos. 150, 183.

2. SRGKD 1879 no. 58. See also E_v, op. cit.

3. A testator could grant the life tenant of acquired property the right to mortgage it. SZ, X, pt. 1, art. 1629 pt. 2.

presumptive became patrimonial. In vacating this decision, the Civil Cassation Department held that the court of appeal's ruling that a gift was analogous to a will had no basis in law and that in fact the two were substantially different, and it held the property to be acquired under the principle ennunciated in Retivyi v. Alifanova and Pototskii v. Baidakova.

Extending this principle even further, the court used it to limit even the amount of acquired immovable property devised to the heir presumptive which became patrimonial. In Prostiakov and Simagin v. Solodovnikov in 1879, the court ruled that not all such property became patrimonial, but only that amount which the devisee would have inherited in the absence of a will.[1] If, as in the present case, there was more than one heir presumptive and one of these was devised more property than was due him by law, the additional amount remained acquired property. Thus, contrary to the opinions of the Moscow District Court and Court of Appeal, given the presence of the son of a second brother, only one-half of the interest in a house and factory received in ownership by honoured citizen V. Solodovnikov by the will of his brother became patrimonial, and consequently his own will devising this property to the plaintiffs was invalid only with respect to one-half of the property interest. Both lower courts had argued that as the law did not refer to the sole heir presumptive and did not specifically provide for the event of several such heirs, some of whom had received by will more than the amount due them by law, all property coming by will to a person having a right to inherit any part of it

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1. SRGKD 1879 no. 3; defended by Pobedonostsev, Kurs, i. 71-4; Mrts. (S. A. Muromtsev), 'Kassatsionnoe reshenie po voprosu o rodovykh imushchestvakh', Iurid. Vest., 1880 no. 3, pp. 560-68.

by law became patrimonial. Even after it had retreated on the issue of allotment and dowry, the Civil Cassation Department reaffirmed the rule established in this case on several occasions.[1]

The court finally succumbed to the weight of legal opinion and partially reversed its previous position in 1888.[2] In Sokolovskaia v. Mogil'nitskaia,[3] the plaintiff, Mariia Sokolovskaia, relied on the argument embodied in the court's previous decisions to assert her right to land left by the deceased, dvòrianin Mikhail Orlovskii. Orlovskii had inherited the land from his brothers, who had received it in allotment from their mother, for whom it had been acquired property. Under the court's previous rulings, the property would have been patrimonial in the deceased's paternal clan, because it would have remained acquired property after the allotment and become patrimonial only when inherited by Orlovskii from his brothers. On the other hand, basing her claim on an analogy between allotment and inheritance, the respondent, Valentina Mogil'nitskaia, argued that the property was patrimonial in the deceased's maternal clan, as it became patrimonial when alloted by the deceased's mother to his brothers. Both the Zhitomir District Court and the Kiev Court of Appeal followed the precedent established by the Civil Cassation Department and found for the plaintiff. The high court, however, took the opportunity to

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1. SRGKD 1897 no. 68; 1907 no. 90; 1909 no. 90. See also 1875 no. 695, where the situation arose, but the issue was not discussed by either the parties or the courts.

2. SRGKD 1888 nos. 74, 91. A change in the composition of the court may have contributed to this; none of the principal judges or procurators taking part in the earlier decisions took part in those of 1888.

3. SRGKD 1888 no. 74.

review its position and, partially abandoning its previous practice, vacated the decision.

The fundamental question was whether property received by a child from a parent in allotment or dowry was considered as obtained 'by right of legal inheritance' and therefore came within the terms of article 399 pt. 1, SZ, X, 1. The court held that this was unquestionably true with respect to patrimonial property, as the amount of such property which could be alloted was based on the recipient's right of inheritance and was considered as part of his eventual share of the inheritance.[1] 'If, therefore, an allotment of patrimonial property constitutes an anticipated inheritance (predvarennoe nasledstvo), then such significance must be accorded to it even with respect to acquired property.'[2] Even though a child could be allotted any amount of his parent's acquired property, this was included when calculating his share of the parent's eventual inheritance, provided that he had not renounced his right to this prior to its opening. Thus an allotment of acquired property had the same effect as an allotment of patrimonial property, that is it was given at the expense of the recipient's future share of the inheritance. 'Given such consequences, an allotment of acquired property, identically with an allotment of patrimonial property, acquires the significance of an anticipated inheritance, and consequently the character of property received in this manner must be determined on the same basis as if it had been received by right of legal

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1. SZ, X, pt. 1, arts. 996-7, which limited the allotment of patrimonial property to the legal heirs in the amount due by law and reckoned any allotted patrimonial property in the heirs eventual share of the inheritance.

2. SRGKD 1888 no. 74, emphasis added.

inheritance'.[1] Thus such property must be considered patrimonial in the clan of the person making the allotment, in this case of the deceased's mother.

This decision, although partly an attempt to clarify the nature of allotment and dowry, clearly was based on a consideration of the nature and purpose of patrimonial property and of the owner's presumed intentions. As shown above, the court considered the purpose of the institution of patrimonial property to be the protection of the clan's, and by this it meant chiefly of the heirs', material welfare. Immovable property that had passed to the heirs by right of intestate inheritance was considered as intended to serve this purpose. Implicit in the decision in this case was the assumption that by allowing or consciously directing that his acquired immovable property pass to his legal heirs by right of legal inheritance, an owner intended it too to serve this purpose and thus to be limited by the restrictions designed to ensure that it achieved this end. That this presumption of the owner's intention in combination with a consideration of the purpose of the institution underlay the court's reasoning is shown more clearly when the decision in Sokolovskaia v. Mogil'nitskaia is compared to later decisions in which the court narrowly limited the application of the principle established in it to cases of allotment and dowry and reaffirmed its earlier decisions with respect to all other forms of

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1. Ibid., emphasis added. The court confirmed the principles involved here in SRGKD 1888 no. 91; 1906 no. 15.

conveyance.[1] Thus, for example, the court held that acquired immovable property given as a gift to one's child or other heir presumptive remained acquired property because it had not passed by right of inheritance. Implicit in this decision is the assumption that the donor had the option of conveying his property either by gift or allotment, and by choosing the former he intended it to pass to the donee for reasons other than those connected with the objectives of patrimonial property, and thus without the limitations embodied in this type of property.[2] Whether this ever had been the intention of the law or a distinction of which proprietors previously had been aware, this certainly was the option now created by the court's decisions.

This process is indicative of the court's generally hostile attitude toward the institution of patrimonial property. Clearly the court considered it an institution to be constricted rather than defended and expanded. Thus, aside from the single limited and juridically sound exception with respect to allotment and dowry, the court consistently restricted the avenues by which property could become patrimonial. Simultaneously, it broadened those by which it became acquired. For example, patrimonial property purchased at public auction by a clansman or forming the statutory share of a spouse who also happened to be a clansman became acquired

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1. SRGKD 1897 no. 68; 1899 no. 30; 1901 no. 97. Also its decision in the celebrated Baryshnikov case, E_v, *op. cit*. This included the rule concerning the devise of acquired immovable property to the heir presumptive in an amount exceeding that due by law.

2. The court explicitly recognised this option in SRGKD 1901 no. 97. See also Pobedonostsev, *Kurs*, i. 67-8, 77. The legal profession generally agreed with the court's revised position. *E.g.*, see the discussion in the Kiev Juridical Society reported in *Zh. Min. Ius.*, 1900 no. 10, pp. 168-9.

property;[1] patrimonial property sold to a non-clansman and then resold or returned to a clansman became acquired property and was not subject to redemption, even though a petition to redeem the property had been submitted prior to the resale or return of the property;[2] the court interpreted the note to article 399 concerning the sale of patrimonial property to clansmen between 1823 and 1835 in the way most restricting patrimonial property;[3] the court normally was very lenient with regard to fictitious acts seeking to convert patrimonial into acquired property or to circumvent the restrictions on the disposition of patrimonial property.[4] The effect of both of these tendencies was to reduce the amount of property with respect to which disposition was limited and to increase the owner's flexibility in arranging a settlement, for example through the medium of a gift.

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1. SRGKD 1892 no. 80; 1905 no. 96. The former was important, as it provided one main type of fictitious act by which patrimonial property was transformed into acquired property or disposed of illegally.

2. SRGKD 1905 no. 82; 1908 no. 13. This likewise (note 1 above) was important to protect collusive acts altering the character of property. See also Dufour, *op. cit.*, pp. 134-5.

3. SRGKD 1871 no. 1256; 1901 no. 97; but cf. 1876 no. 246. See also Pobedonostsev, *Kurs*, i. 77-9.

4. See above, pp. 105,108, and SRGKD 1892 no. 80 (probably a fictitious act), 1896 no. 93 (mortgage loan); 1908 no. 13 (sale and repurchase); 1872 no. 474, 1889 no. 83, 1902 no. 120 (unsecured loan, default, and collusive recovery); 1881 no. 187 (possibly fictitious act); 1890 no. 41, 1905 no. 82 (probably fictitious act); (sale); E_v, *op. cit.*, (division and gift); 1876 no. 246, 1906 no. 38 (an agreement to alter the character of property was held invalid).

III. Expansion of Control over Patrimonial Property

Given existing statutory law, the courts could not directly expand the owner's power over patrimonial property to any considerable extent. Nevertheless, they did allow some expansion of the owner's power of disposition, particularly with respect to testamentary disposition and the conditions under which patrimonial property could be the object of a gift, allotment, or dowry. As the latter is the subject of a separate chapter,[1] the present discussion will be confined to the expansion of testamentary power.

The decision in Osadskaia and Nikiforova v. Khristoforov in 1878[2] indicated that the Civil Cassation Department was not prepared to challenge directly the statutory prohibition against the testamentary disposition of patrimonial property, whatever the testator's intention and irrespective of whether in his will he had made alternative provision for his legal heirs. The testator had sought to leave his patrimonial landed estate intact to his grand-son, while providing compensation of equal value to his two surviving daughters. When contested by the latter, both the lower courts and the Civil Cassation Department held the provisions of the will concerning the deceased's patrimonial property to be illegal and therefore invalid. Yet the courts were prepared to weaken this prohibition indirectly, by narrowly limiting the period within which such testamentary provisions could be contested and the persons who had a right to such actions.

It will be recalled that the court had ruled that the heirs of

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1. See chapter 7.

2. SRGKD 1878 no. 235.

patrimonial property had an independent right to this property which was distinct from that of the owner. Normally, the owner of an independent property right had ten years from the time of its violation in which to bring an action in its defence,[1] and in most instances the courts were fairly lenient when calculating this period. Moreover, in its decision in Fedorovy and the Princes Engalychevy v. Isakov in 1876 and in several subsequent cases the court ruled that the owner of a property right could not be deprived of it by the will of a person not entitled to so dispose of it.[2] 'The rights of third parties cannot depend on the validity or invalidity of testamentary dispositions, since for the realisation of these rights it is sufficient to prove their existence and their violation by the actions of the testator or his heirs by will, without touching the strength of the will itself.'[3] Thus, the owner of the rights so violated need not even contest the will in order to recover them. Yet despite all this, when considering cases of the illegal testamentary disposition of patrimonial property, the court did not treat the legal heir's right as an independent property right subject to the protection of legal defence within the normal ten-year period of prescription, but instead adhered strictly to the two-year period allowed by law for the contesting of wills[4] and held that such dispositions not contested by the direct legal heir within two years of the confirmation of the will were no longer open to dispute

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1. SZ, X, pt. 1, arts. 692, 694 prim.; pril.

2. SRGKD 1876 no. 302; 1878 nos. 60, 138; 1883 no. 16.

3. SRGKD 1876 no. 302.

4. SZ, X, pt. 1 (1857), art. 1098 (Prod. 1876, art. 1012 pril.: 35; 1887, 1900 edns., art. 1066^{12}).

on these grounds.

This rule and the reasoning underlying it were stated in the decision in Shanshieva v. Lapteva cited above,[1] but were even more clearly expressed by the court in its decision in Koval'skaia v. Koval'skaia in 1900.[2] By a domestic will confirmed for execution in May, 1893, Actual State Councillor Nikolai Koval'skii left all his property, including certain patrimonial estates, to his daughter Varvara Koval'skaia. His son Anton, who by law had an unconditional right to 13/14th of the deceased's patrimonial property, failed to contest the will and died nearly three years later, in April, 1896. Whereupon Anton's widow, Mariia Koval'skaia, in her own right and as guardian of their daughter Liubov', brought suit against Varvara Koval'skaia to have those parts of her father-in-law's will dealing with his patrimonial property declared invalid and to recover possession of 13/14th of such property for herself and her daughter. Rejecting the claim, the respondent argued that by failing to contest these provisions of the will within the two-year period prescribed by law, the testator's son, Anton, had lost his right to bring an action on these grounds, and consequently his heirs had no right of action either. Both the District Court and the St. Petersburg Court of Appeal agreed with this argument and denied the suit.

Appealing to the Civil Cassation Department and clearly relying on several of its previous rulings, the plaintiff argued that the possessor of patrimonial property was not its unlimited owner, as his rights of

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1. SRGKD 1910 no. 51; above, pp. 109-10.

2. SRGKD 1900 no. 73. See also Davidenko, op. cit.

disposition were limited in the interests of the clan. Patrimonial property belonged to the entire clan, and therefore legal heirs bringing suit against a person to whom such property had been devised illegally did so on the basis of their own property rights, which were unaffected by the possessor's death. Thus, as the two-year period established by article 1066[12] concerned only contesting a will as a testamentary act, the general ten-year period of prescription should be applied to cases concerning the recovery of patrimonial property or the determination of a property's character.

The Civil Cassation Department, while not denying that the legal heirs of patrimonial property had an independent right to it, nevertheless rejected the plaintiff's argument and upheld the decision of the court of appeal. The court stated that the two-year period established for contesting wills applied to all cases, whatever their subject. Thus it was irrelevant to refer to the independent property rights of the legal heir or the clan. Any dispute concerning a will could rest solely on those rights of the plaintiff which were violated by the testator, and if the latter should dispose of patrimonial property and in this way violate the rights of his relatives, then the latter had the right to seek recovery of these rights, as of any other rights violated by the testator in his will, only within the two-year period established by law. Passage of this period extinguished the legal heirs' right of action, and thus made the testamentary disposition binding. Nor, the court added, could the right of action be revived for a minor if it had expired for the relevant parent.[1]

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1. A minor retained a right of action if the parent's right had not expired. SRGKD 1872 no. 1049.

Taken in isolation, this decision could be considered stern but unexceptionable. However, in a series of decisions dealing primarily with substitutions and conditional devises, the court had interpreted the two-year rule much more flexibly, so that in these cases the period began to run not from the time that the will was confirmed, but rather from the time that the legal heir's right was held to be violated, which could extend considerably the period during which an action might be brought or the legal heirs made aware of their right of action.[1] The decisions concerning the illegal devise of patrimonial property could be considered as being within the spirit even of this rule were it not for the fact that in certain of the above instances the two-year period was replaced altogether by the general ten-year period of prescription.[2]

This discrepancy in the court's treatment of different forms of illegal testamentary disposition is most evident when the decisions in Koval'skaia v. Koval'sakaia and Shanshieva v. Lapteva are compared to that in Berkolova _et al_. v. Zakorkova in 1913.[3] In the latter case, Mariia Zakorkova had devised her immovable property to her daughters Mariia and Antonina, with the provision that on the death of one daughter her share would pass to the other. The daughters held possession of their respective shares until Mariia died eleven years later, at which time Antonina took possession of Mariia's share under the terms of their mother's will. _Four_ years after this the heirs of Antonina's brother, Aleksandra Berkolova,

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1. _SRGKD_ 1875 no. 695, 1876 no. 246; 1886 no. 20; 1891 no. 112; 1913 no. 62; 1872 no. 1233; 1907 no. 11; 1900 no. 85.

2. _SRGKD_ 1891 no. 112; 1906 no. 11; 1913 no. 62.

3. _SRGKD_ 1913 no. 62.

Mariia Sidorenko, and Liudmila Pandratova, brought suit against Antonina for recovery of the property received by her from her sister Mariia under the terms of their mother's will, claiming that the above provision of the will constituted a form of substitution prohibited by law. Thus, they argued, this property must pass to Mariia's legal heirs, which, in the collateral lines, would be the descendants of her brother to the exclusion of her sister. In the initial hearing, both the Vladikavkaz District Court and the Tiflis Court of Appeal denied the suit on the grounds that, although the provision of the will did constitute an illegal substitution, the plaintiffs had lost their right of action by not bringing suit within two years of the deceased's death. However, the Civil Cassation Department vacated this decision, and on referral the Court of Appeal reversed its decision. The high court upheld this new decision, arguing that no one should be deprived of his right to bring a legal action in defence of his property rights simply because the two-year period for contesting testamentary provisions had elapsed, and that the expiration of this period could not give obligatory force to an illegal testamentary disposition. Clearly, this is directly contrary to the decisions of the same court in Koval'skaia v. Koval'skaia and Shanshieva v. Lapteva.[1]

The reason for this apparent inconsistency is to be found in the difference in subject between the three cases. Continuing with its decision in Berkalova et al. v. Zakorkova, the court stated that testamentary substitution had been prohibited in the interests of the social order, as otherwise every owner would be able to entail his estate, which would be

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1. The court's composition does not appear to have changed significantly, particularly between the decisions in 1910 and 1913.

extremely undesirable with respect to state economic interests.[1] Entail was permitted only as an exception in rigidly defined circumstances and due to compelling needs of state. Thus any testamentary provision attempting to establish an order of succession through several generations was automatically illegal, and could not serve as a barrier to the legal heirs' realisation of their inheritance rights. To rule otherwise, the court concluded, would be to establish a rule whereby a testamentary disposition designating an order of succession in a manner similar to an entailed estate would become binding on all future heirs if not contested within two years of the will's confirmation. This the court refused to allow. Consequently it ruled that in this case the legal heirs need not even contest the relevant provisions of the will when seeking recovery of the inheritance, but that they could rely solely on the violation of their property rights.

Thus, due to considerations of general state, chiefly economic, interests, the two-year period for contesting a will could be replaced by the general ten-year period of prescription. From the above citation from the decision in Shanshieva v. Lapteva,[2] it is clear that in the case of the illegal devise of patrimonial property not only was there no such reason of state compelling extension of this period, but, if anything, the opposite was the case. The limitations of disposition embodied in patrimonial property constituted an impediment to the free transfer of resources necessary in a modern commercial society and existed solely to protect the legal heir. As such they deserved only minimal protection. If the heir chose not to

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1. <u>SRGKD</u> 1913 no. 62.

2. See above, p. 110.

avail himself of this protection within the prescribed period, the court would not extend it, either for him or for other members of the clan. Indeed, the two cases show both that the court was prepared to extend testamentary power, and the limits to which it was prepared to extend it.

For the same reasons, the court accorded a similar limited measure of security to the otherwise illegal devise of patrimonial property by narrowly enforcing the rule that in the absence of a dispute by the heirs by law the court itself could not examine the question of the character of property disposed of by will or invalidate an obviously illegal devise of patrimonial property.[1] By 'the heirs by law' the court generally meant only those heirs whose rights had been violated directly by the provisions of the will.[2] Thus in the case of Dan'kovskii v. Prince Vadbol'skii and the Church of St. Stanislaus in St. Petersburg discussed above,[3] the court acknowledged that the property devised to the respondents was patrimonial and consequently the testamentary disposition was technically illegal, but nevertheless the court refused to invalidate the disposition because the plaintiff, not being a member of the proper clan, had no right of action. This rule was stated even more explicitly by the court in its

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1. SZ, X, pt. 1 (1857), art. 1102 (Prod. 1876, art. 1012 pril.: 22; 1887, 1900 edns., art. 1066[2]); SRGKD 1880 no. 243; 1881 no. 30; 1900 no. 73; 1906 no. 15; 1910 no. 51; A. Liubavskii, 'O vneshnei forme zaveshchanii', in Iurid. mon., ii, 104-8, 189-92; see also SRGKD 1875 nos. 27, 695, in which the court allowed such illegal dispositions to stand even when the legal heirs contested the will, but on different grounds.

2. SRGKD 1876 no. 302; 1878 no. 60; 1881 no. 30; 1900 no. 73; 1901 no. 105; 1906 no. 15; 1911 no. 14. But cf. 1910 no. 15, where the court allowed a more remote relative who was not an heir presumptive to contest a will.

3. SRGKD 1881 no. 30; above, pp. 102-3.

decision in Shanshieva v. Lapteva:

> Thus the law itself allows the possibility of testamentary dispositions which are illegal in content but are expressed in legal form, and which, not having been contested within the designated period, acquire legal force. In particular, such are wills concerning patrimonial properties composed irrespective of article 1068, SZ, X, 1. Article 1102 of the same volume and part (1857 edition) reiterated and replaced in general form by article 1066[3], directly prohibits the court at the presentation of a will from examining the question of the patrimonial origin of the property devised, which question may be raised only under adversary procedure (decision 1900 No. 73).[1]

However, previously the high court had ruled that, in the case of claims to an inheritance under the rules of intestacy, a court could examine the character and origin of property composing the inheritance, even in the absence of a dispute from another party, in order to establish that the petitioner was entitled to the inheritance. Thus the court had the power to determine whether the property composing an inheritance was patrimonial, and if so, whether the petitioner was a member of the proper clan.[2]

This apparent inconsistency in the court's interpretation of the lower courts' power to examine the origin and character of property in the absence of dispute, depending on whether the case concerned a will or intestate succession, again can be explained by the court's conception of the nature and purpose of patrimonial property. As noted above, in the case of claims to an inheritance the court was quite prepared to protect patrimonial property from the pretensions of persons not belonging to the

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1. SRGKD 1910 no. 51; above, pp. 109-10.

2. SRGKD 1872 no. 1288.

proper clan. However, it was more reluctant to enforce the limitations on the owner's power to dispose of patrimonial property, particularly in the absence of dispute by the person whom those limitations were intended to protect, i.e. the legal heir.

This can be seen as well in the court's treatment of legacies imposed by the owners of patrimonial property on their heirs, the strength of which was unclear. The court admitted that the payment of such legacies was not binding if it would result in the loss of any patrimonial property, but then argued that not all legacies would result in such losses, and therefore the restriction in article 1086, SZ, X, 1, did not constitute an absolute prohibition of such testamentary dispositions. For example, assignment to a third party of the right to reside in a patrimonial home or of the right to receive termly payments which could be met from the income of the patrimonial estate were not considered to cause any loss of the patrimonial property itself and therefore were held to be binding on the heir.[1] In general, the court took the attitude, supported by several prominent jurists, that in each particular case the lower courts had the power to decide whether a given testamentary disposition would result in loss of patrimonial property and therefore whether the disposition was to be recognised as obligatory or not.[2] Moreover, in Podgornaia

1. SRGKD 1880 no. 1; 1899 no. 11.

2. This appears to be the thrust of the previous cases and of SRGKD 1907 no. 11, which might appear at first glance to be a slight retreat from this principle. K. Annenkov, 'Otkazy po dukhovnym zaveshchaniiam', Zh. Gr. i Ug. Pr., 1892 no. 1, pp. 58-9; Pobedonostsev, Kurs, i. 86-7, ii. 567-8; Kavelin, op. cit., cols. 1221, 1315; Shershenevich, Uchebnik, p. 775; but see Pravo, 1915 no. 40, sud. otch., cols. 2510-11.

v. Serdiukov in 1880 the court ruled that in the event that the legal heir had received both patrimonial and acquired property in inheritance, he was obligated to pay the full amount of any legacies assigned by the deceased, even if the amount of acquired property that he had received was insufficient for this purpose.[1] Obviously, in the latter case the heir would have to provide the balance from his own property or from the patrimonial property that he had received in inheritance. As most heirs received a combination of both types of property, this ruling would greatly reduce the effect of the restriction in article 1086. Finally, in its decisions in Kabanskaia v. Kabanskie in 1872 and elsewhere, the court ruled that the deceased's heirs were obligated by a promissory note given by him to a third party even if the deceased had received nothing from this party in return and the heirs would have to dispose of part of his patrimonial property in order to pay the debt.[2] Such notes would not be binding only in the event that they had a fraudulent objective, e.g. the defrauding of creditors. Thus the restriction in article 1086 could be circumvented easily by the issue of such notes, and in general legacies imposed on the heirs of patrimonial property became more secure.

Thus throughout the period concerned the Civil Cassation Department exhibited a tendency to expand the individual owner's power to dispose of his patrimonial property by weakening the limitations on this

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1. The Civil Cassation Department twice heard this case. SRGKD 1878 no. 54 and 1880 no. 78.

2. SRGKD 1872 no. 474; N. A. Poletaev, 'Darenie', Vest. Pr., 1899 no. 5, pp. 99-101; Pravo, 1914 no. 5, sud. otch., cols. 370-71.

power imposed by law.[1]

IV. Limitation of the Right of Redemption and the Definition of 'Settled Land'

Perhaps that aspect of the institution of patrimonial property most criticised by jurists and most severely limited by the courts was the relatives' right of redemption. The post-emancipation definition of settled and unsettled land was of critical importance for this issue because unsettled land sold to a nonclansman belonging to a different social estate than the vendor was not subject to redemption.[2] As after the emancipation most transactions involving the sale of land were between persons of different social estates and most of the land sold likewise was to persons of a different social estate than the vendor,[3] this rule had the potential effect of nullifying the relatives' right of redemption with respect to most sales of patrimonial property.

Although statutory law was unclear, at the time of the emancipation settled land generally was understood to be only land inhabited by serfs, and it was assumed that once the former serfs had begun to redeem their land and hence ceased to be temporarily-obligated, the land remaining to the pomeshchik would cease to be considered settled at law. The legislation concerning the right to own settled land after the emancipation

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1. For other examples, see SRGKD 1883 no. 16; 1880 no. 1; 1879 no. 16; 1891 no. 82; 1909 no. 101; also 1875 no. 27.

2. SZ, X, pt. 1, art. 1350. See above pp. 46-8 , and note 1, p. 147 below.

3. V. V. Sviatlovskii, Mobilizatsiia zemel'noi sobstvennosti v Rossii (1861-1908) (2nd edn., Spb., 1911), pp. 93-5, 107-8, 115-16; P. I. Liashchenko, 'Mobilizatsiia zemlevladeniia v Rossii', Rus. Mysl', 1905 no. 1, p. 54 and Table IV, p. 52.

seemed to support this interpretation, as did a decree of 1862 confirming the decision of the Committee on the Organization of Jews allowing Jews to acquire pomeshchichee land after the former serfs had received their allotment and ceased to be temporarily-obligated.[1] Nevertheless, none of this legislation specifically stated that once pomeshchichee land ceased to be 'settled' it would become 'unsettled', and certainly none of the legislators involved had considered the effect of their decisions on the right to redeem patrimonial property. Thus it was left to the courts to determine both the status of pomeshchichee land in the post-emancipation period and the implications of emancipation for the limitation of the right of redemption contained in article 1350.

The Civil Cassation Department first reviewed the issue in the case of the private petitioner Andrei Shcherbinin in 1869.[2] Shcherbinin had petitioned the Kharkov District Court to redeem patrimonial property consisting of 217 square sazhen and a tavern located in the village of Zhikhar that had been sold by his sister, hereditary dvorianka Sofia fon-Menzenkampf, to peasant Petr Kirichenko. Although Kirichenko did not contest the action, the District Court denied the petition on the basis of the rule contained in article 1350. On appeal, Shcherbinin argued that

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1. SZ, IX (1899), art. 88 prim. pril. (1876 edn., Prod. 1890, art. 330 prim. pril.), which was based primarily on 2PSZ, xxxvi, pt. 1, no. 36674 (19 Feb. 1861), pp. 399-402; xxxvii, pt. 1, no. 38214 (26 Apr. 1862), pp. 372-3 (later SZ, X, pt. 1 (1887, 1900), art. 385 prim.). The former limited the ownership of settled land to hereditary dvoriane, but stated that once the peasant allotment redemption operation had begun, this limitation no longer would apply to the land remaining to the pomeshchik.

2. SRGKD 1869 no. 138. Petitions for redemption were submitted under conservation procedure (okhranitel'noe sudoproizvodstvo).

as article 386, SZ, X, 1 defined the appurtenances of settled land as any man-made structure located thereon, and given the definition of unsettled land and its appurtenances contained in articles 385 and 387, any land on which man-made structures were located must be considered settled. Thus any inhabited land must be considered settled, whereas only vacant land could be considered unsettled. In his cassation appeal, Shcherbinin further tried to support this argument with a unique interpretation of article 1350. He claimed that the wording of the article made it clear that patrimonial settled land sold by a person of one social estate to a person belonging to another was subject to redemption, which implied that persons of different social estates could own settled land. As land inhabited by serfs, now temporarily-obligated peasants, could be owned solely by hereditary dvoriane, there must be other settled land that was not inhabited by serfs which persons of other social estates could own. Thus settled land was not limited only to land inhabited by serfs,[1] but comprised all inhabited land.

In its decision, with which the Civil Cassation Department concurred, the Kharkov Court of Appeal rejected the petitioner's arguments and upheld the decision of the District Court. The court stated that statutory law contained no precise definition of settled land, and therefore it had to resolve the issue by reference to the general meaning of the law. On this basis, the court argued, from the statutes limiting ownership of serfs to hereditary dvoriane it was clear that by settled

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1. Article 1350 read, 'Unsettled lands sold by a person of one social estate to persons of another are not subject to redemption.'

land the law meant only land inhabited by serfs.[1] Thus after the emancipation, settled land where the peasants had received their allotments in ownership or where they had begun to redeem their allotments lost the characteristic of being settled and, under the emancipation legislation, could be acquired by persons of any social estate. Only those lands with respect to which the peasants' temporary obligations continued, and to which therefore the peasants were temporarily bound, remained settled land at law and consequently could be acquired solely by hereditary *dvoriane*. Thus, the court concluded, with the termination of all the temporary obligations of all former serfs, the category of settled land would disappear. In support of its decision the court referred to the above-mentioned 1862 decision of the Committee on the Organization of Jews, which explicitly stated that with the termination of all temporary obligations, *pomeshchichee* land ceased to be settled land and was assimilated into the general category of immovable property. As all land had to be either settled or unsettled, and the land involved in the present case was not settled at law, it had to be legally unsettled land. Therefore, as it had been sold by a hereditary *dvorianka* to a peasant, it was not subject to redemption. To this the Civil Cassation Department added only that Shcherbinin's unique interpretation of article 1350 was purely arbitrary and had no basis in law.

The argument that the distinction between settled and unsettled land was merely the fact of habitation reappeared on several occasions, and in each instance all the courts adhered to the interpretation of the law given

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1. *SZ*, IX (1857), arts. 208-9, 229, 232-3, 235.

in the Shcherbinin case.[1] Indeed, the courts could hardly have acted otherwise with respect to this particular line of argument. Given the continued restriction on the ownership of settled land, to have accepted it would have meant either that the ownership of all inhabited land in Imperial Russia would have been restricted to the hereditary dvorianstvo, which clearly would have been impossible, or that the ownership of all the land remaining to the pomeshchiki after the peasants had received their allotments would have been limited to hereditary dvoriane, which would have been clearly contrary to the emancipation legislation, opposed by most dvoriane, and also quite impracticable.

On the other hand, the effect of the court's decision was to reduce considerably the possibility of exercising the right to redeem patrimonial property. Given the conditions existing immediately after the abolition of serfdom, this would be largely to the detriment of the hereditary dvorianstvo and to the benefit of all other social estates, because the former owned the vast majority of marketable non-urban land in Russia during this period. In addition, the court's decision meant that the category of settled land eventually would disappear entirely as former serfs began to redeem their allotments and ceased to be temporarily obligated. This occurred finally in European Russia in 1881 with the decree mandatorily terminating all temporary obligations and beginning redemption for all former serfs in Great and Little Russia who had not yet done this voluntarily, and in Transcaucasia, the last part of the Empire where these

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1. SRGKD 1870 no. 772; 1895 no. 59; 1904 no. 88. See also Pobedonostsev, Kurs, ii. 445; Liubavskii, 'Vykup', pp. 415-17; 'Obozrenie spets. zhur', Otech. Zap., op. cit.; I. E. Il'iashenko, 'Institut rodovogo imushchestva s tochki zreniia budushchago grazhdanskago ulozheniia,' Zh. Min. Ius., 1900 no. 2, pp. 101-2.

conditions existed, in 1912 with a similar decree affecting that area.[1]

However, at the end of the nineteenth century, when the decline of dvorianstvo landownership had become a controversial political issue, the courts were presented with a more subtle argument which challenged the rule in article 1350 itself rather than the classification of particular land. In 1898, Guards' Lieutenant P. I. Nazimov petitioned the Tver District Court to redeem 274 desiatin of patrimonial land located in Tver province that had been sold by his brother nearly three years earlier to meshchanin Chukhlin.[2] As the vendor had been a hereditary dvorianin, the District Court followed existing precedent and denied the petition, whereupon Nazimov appealed to the Moscow Court of Appeal.

Nazimov accepted the Civil Cassation Department's ruling that the distinction between settled and unsettled land lay in the presence of serfs or temporarily-obligated peasants. Likewise, he agreed with the court's propositions that with the abolition of serfdom this distinction became meaningless and that with the mandatory termination of the temporary-obligated status in European Russia in 1881 all settled land disappeared and the category itself became defunct. However, he then extended the court's own argument and reasoned that given this change of

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1. 3PSZ, i., no. 575 (28 Dec. 1881), pp. 372-4; SUz no. 260 (25 Dec. 1912), law no. 2302 (20 Dec. 1912).

2. The Cassation Department chose not to report this case, but instead made a detailed statement of its position in a similar case heard at the same time. See below, petition of Shcherbacheva, SRGKD 1900 no. 11. The Nazimov case is described in Nov. Vr., 1899 no. 8361 (9 June), p. 4; 1900 nos. 8600 (5 Feb.), p. 5, 8624 (1 March), p. 2, 8630 (7 March), p. 2; 1901 no. 9194 (8 Oct.), p. 2; Mos. Ved., 1899 no. 129 (12 May), p. 5; 1900 nos. 117 (29 Apr.), p. 2, 131 (12 May), p. 2, 340 (9 Dec.), p. 2.

conditions, the category of unsettled land also became meaningless, and that therefore after 1881 there was neither settled nor unsettled land, but simply land in general. He claimed that this interpretation was supported by the regulations concerning ownership of settled land promulgated in 1861, the above-mentioned 1862 decision of the Committee on the Organization of Jews, and the provision of the law of 25 May 1899 establishing the provisionally-reserved hereditary estate that exempted hereditary _dvoriane_ from the payment of tax when redeeming patrimonial property.[1] None of these laws mentioned unsettled land, but referred only to land or immovable property in general. In addition, the former two did not state that land where the temporary-obligations of the former serfs had terminated became unsettled, but simply stated that land where such obligations continued to exist was settled. Thus there was no legal basis not to conclude that with the ending of all temporary obligations both categories of land disappeared and were replaced by the single general category of immovable property. Given this, Nazimov argued, the content of article 1350 likewise became meaningless, and therefore the limitation of redemption contained therein became inoperative, even if not formally legislatively repealed.

This limitation, Nazimov continued, was fully commensurate with the conditions that had existed under serfdom. Prior to the emancipation, most land held by the _dvorianstvo_ had been settled and therefore covered by the protection afforded to each individual clan's interests by the

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1. See above, note 1, p. 146; 3_PSZ_, xix., pt. 1, no. 16949, sec. iv. (25 May 1899), p. 528. Support for this argument can be found in the comments of Senator Shul'ts to the Commission compiling a new civil code, _Zamechaniia grazh. zak._, No. 301.

institution of patrimonial property, in particular by the right of redemption. The limitation of this right expressed in article 1350 had been introduced as an exception in order to enable persons belonging to social estates other than the hereditary dvorianstvo to acquire land after 1801.[1] However, in the conditions created by the abolition of serfdom, with all land owned by hereditary dvoriane eventually becoming unsettled, this exception no longer was necessary. Therefore it should be eliminated. Otherwise, Nazimov argued, hereditary dvoriane largely would be unable to exercise their right of redemption, and consequently their clans would be deprived of this protection. As this protection, which was extended to clans of all social estates, was the primary objective of the right of redemption, and as the right itself was not in any way connected with the institution of serfdom, the ability to exercise the right should not be affected by the abolition of serfdom. Thus, given the conditions created by the emancipation, this limitation of the right should fail, and all patrimonial property, to whomever sold, be subject to redemption.

The Moscow Court of Appeal reversed the decision of the District Court and granted Nazimov's petition, although it is not clear whether it in fact accepted his argument. At the same time it had denied a similar petition by hereditary dvorianka Zinaida Shcherbacheva, and thus it is possible that by granting Nazimov's petition the court was asking the Civil Cassation Department to rule on his argument.[2]

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1. Non-serfs belonging to social estates other than the hereditary dvorianstvo had been granted the right to acquire ownership of land located outside of municipalities in 1801. 1PSZ, xxvi., no. 20075 (12 Dec. 1801), pp. 862-3; Vladamirskii-Budanov, op. cit., pp. 586-7.

2. Nov. Vr., 1900 no. 8624 (1 March), p. 2; SRGKD 1900 no. 11.

Although the Civil Cassation Department vacated the court of appeal's decision in the Nazimov case, it refrained from including this case among those that it published for general guidance. However, in its decision upholding the court of appeal's decision in the Shcherbacheva case, it addressed the issues raised by Nazimov and in general reformulated its position on this issue, stating that the divergent practices of the lower courts had made this necessary.[1]

The court began by again defining settled land as it had in the Shcherbinin case, both with respect to the pre- and post-emancipation periods. Further, it agreed with Nazimov that under the emancipation legislation and in accordance with the 1862 decision of the Committee on the Organization of Jews, land on which the temporary obligations of the former serfs to the pomeshchik had been ended ceased to be settled land and entered the general category of immovable property. From this it drew two conclusions: first, that the basis for the difference between 'settled' and 'unsettled' land had disappeared, and second, this difference disappeared with the elimination of all that land on which peasants lived in a dependent relation with a pomeshchik. Thus, the court concluded, the category of settled land had been eliminated because the object of that category had ceased to exist, and therefore the category of unsettled land had fallen into disuse solely because it had become superfluous.

The court then noted that article 1350 had been neither repealed nor amended after the abolition of serfdom. Thus the question lying before it was whether land remaining in the complete disposition of owners

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1. SRGKD 1900 no. 11.

with whom the former serfs retained no dependent relations and which consequently had ceased to be settled land and had transferred to the general category of immovable property was subject to the limitation of the right of redemption expressed in article 1350.

Addressing this question, the court argued that the legislative sources of article 1350[1] made it clear that the distinction between land subject to redemption and land not so subject lay in the presence of serfs. Thus,

> . . .the unsettled lands not subject to redemption in the event of their sale to a person of another social estate are lands on which no peasants standing in dependent relations to the owner are settled. The lands referred to in the note to article 385, vol. X, pt. 1, that is estates having lost the characteristic of settled /estates/ as a consequence of the collapse of the above-mentioned substantive and sole characteristic of the so-called "state of being settled" (naselennost'), that is the settling on them of peasants dependent on the owner, seem now to be indistinguishable from the "unsettled" lands referred to in article 1350, and as a result in all respects must be considered as having entered this category, without any necessity of their being so reclassified by a special act of law. Thus this article, previously relating to a particular part of all lands in general, now has acquired the significance of a rule general for all lands.[2]

The court added that this decision did not eliminate the right of redemption, but merely limited its exercise. If it was thought desirable to re-extend this right to those lands whose character had been altered as a result of the emancipation, this could be done solely by legislation. Again, the

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1. 1PSZ, xxix., no. 22519 (20 Apr. 1807), pp. 1171-2; xxxiv., no. 26647. (21 Jan. 1817), pp. 46-7.

2. SRGKD 1900 no. 11, emphasis added.

court adhered to this interpretation in all subsequent decisions.[1]

In rejecting Nazimov's argument, and thus greatly reducing the possibility of the exercise of the right of redemption, the court had resisted considerable political pressure.[2] As Nazimov's argument presented it with a plausible opportunity to rule to the contrary, in rejecting this opportunity the court clearly was influenced as much by its general desire to limit the institution of patrimonial property and particularly the right of redemption as it was by purely juridical considerations. This consideration is evident as well in a series of subsequent decisions in which the court had to determine what constituted membership of a different social estate for the purposes of article 1350. In each instance the court ruled in the way most restricting the exercise of the right of redemption, so that the rule was held to be applicable in the sale of patrimonial property between a hereditary and a personal dvorianin, between a person of any social estate and a clergyman, even if the latter previously had belonged to the same social estate as the former, between a person of one urban social estate and a person of another such estate, e.g. between a meshchanin and an hereditary honoured citizen, and between any living person and a juridical person.[3]

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1. SRGKD 1903 nos. 52, 62, 75; 1904 no. 88; 1911 no. 40. See also Il'ianshenko, op. cit., no. 2 pp. 101-2, no. 3 p. 137, no. 4 pp. 123-31; Pobedonostsev, Kurs, ii. 445.

2. The chapter which was to have dealt with this issue unfortunately has had to be omitted due to considerations of length. The question was bound up with the broader political question of the decline of the dvorianstvo at the end of the nineteenth century, for which see Solovev, op. cit., in general, and Wagner 'Legisla. Reform', pp. 155f. The articles in Mos. Ved., Grazh., and Nov. Vr. cited in notes 2, p. 150 and 1, p. 157 give some flavour of conservative feeling on this issue. See also Il'iashenko, op. cit., no. 4 pp. 123-31; Grazh. Ulozh., bk. 4, intro., pp. 74f.

3. SRGKD 1903 nos. 52, 62, 75; 1911 no. 40.

This general tendency of the court thus makes its decision in the case of the private petition of Baron Vasilii Antonovich Schmidt in 1881 seem somewhat remarkable.[1] Schmidt had petitioned the St. Petersburg District Court to redeem a house located in that city that had been sold by the guardians of his niece, a hereditary dvorianka, to the peasant Aleksei Kornilov. Kornilov opposed the petition by arguing, in line with the court's previous practise, that the house was located on unsettled land and therefore was not subject to redemption because he belonged to a different social estate than the vendor. However, both the District Court and the St. Petersburg Court of Appeal granted Schmidt's petition on the grounds that the categories of settled and unsettled land applied only to rural land. Urban immovable property constituted a category of immovable property distinct from either of these. Thus the restriction did not apply to urban realty.

The Civil Cassation Department upheld this decision, arguing on the basis of the original sources that the right of redemption extended to persons of all social estates and the property owned by them, wherever located, and was not limited solely to settled land owned by hereditary dvoriane.[2] The limitation of this right contained in article 1350 was an exception to the general right of redemption and as such was not subject to expansive interpretation. The legislative sources of this article clearly indicated that the limitation contained therein referred solely to rural realty. Thus, the court concluded, it did not apply to urban

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1. SRGKD 1881 no. 136; later confirmed, 1900 no. 11; 1911 no. 40.

2. SZ, X, pt. 1, arts. 399 pt. 4, 1346; 1PSZ, xvii., no. 12782 (13 Nov. 1766), pp. 1045-7.

realty, which therefore was subject to redemption irrespective of the social estate to which the vendor and the vendee belonged. In so ruling, the court created the separate categories of rural and urban realty, a distinction previously unknown to Russian law.

As a result of the court's decisions, the paradoxical situation was created whereby the land to which the institution of patrimonial property originally primarily had referred and with respect to which the right of redemption had developed, i.e. rural land owned by the dvorianstvo and its predecessors, largely was excluded from the effect of redemption, whereas the full rigour of the law was applied to land with which it originally had been largely unconcerned. This turn of events did not escape political conservatives and reactionaries at a time when the issue of dvorianstvo land-ownership had become acute, and they were, perhaps understandably, incensed.[1]

Another effect of the court's decision was to make the acquisition of urban realty more vulnerable to the threat of redemption, which was a matter of some concern for persons wishing to develop such property. The purchaser from whom patrimonial property was redeemed received as compensation only the purchase price stated on the deed of transfer and a court-assessed reimbursement for proven expenses on maintenance and improvements. Thus he did not receive any compensation for the enhanced value and income

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1. E.g., see the references to Nov. Vr. and Mos. Ved. in note 2, p. 150 above; Grazh., 1900 nos. 18 (9 March), p. 8, 20 (16 March), p. 13; Nov. Vr., 1900 no. 8884 (19 Nov.), p. 3, letter from 'M.'; Mos. Ved., 1894 no. 39 (8 Feb.), p. 2; Pr. P. N. Tsertelev, 'Podderzhanie dvorianskago zemlevladeniia i zapovednost' imenii', Mos. Ved. 1897 nos. 110-12 (23-5 Apr.), all p. 2; P. (A. D. Pazukhin), 'Zapovednyia imeniia', Mos. Ved., 1889 nos. 26 (26 Jan.), p. 2, 31 (31 Jan.), p. 2.

of the property which might result from his efforts, nor for the interest lost on the capital that he had invested.[1] Furthermore, the purchaser's capital could be tied up for several years while the courts determined the amount that he was due. Frequently in these conditions relatives of the vendor, sometimes in collusion with the vendor himself, would attempt to use the law for speculative purposes, either by attempting to redeem the property and thereby gain ownership of it themselves, or by only threatening to redeem it, thereby extorting a further payment from the purchaser.[2] Indeed, several members of the provincial judiciary in the 1880s noted that the right was used primarily for such purposes, and even the Civil Cassation Department took cognizance of the problem in its decision in Bogomolov v. Khlopotovy _et al_., when it stated that this right must not be abused for speculative purposes or become a source of unjust enrichment for the vendor's relatives.[3]

In such conditions it is only natural that astute purchasers of patrimonial property would develop various legal devices to prevent the redemption of their acquisitions and thereby protect their investment, and indeed certain regular methods relying on various fictitious acts appear to have been employed to achieve this end. These chiefly consisted of a fictitious sale or mortgage for a highly inflated sum, usually to the

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1. _SZ_, X, pt. 1, arts. 1367-8; Il'iashenko, _op. cit._, no. 4 p. 125. In _SRGKD_ 1913 no. 31, the respondent in a case concerning redemption specifically demanded compensation for the interest lost. The lower courts denied this claim, and the high court did not discuss the issue.

2. Daragan, _op. cit._; _Nov. Vr._ 1900 no. 8879 (14 Nov.), p. 2, letter from 'L.'; _Nov. Vr._, 1901 no. 9039 (29 Apr.), p. 4, letter from 'G.' See also Kasso, _op. cit._, p. 148; Il'iashenko, _op. cit._, no. 4 pp. 130-31; ch. 4 below.

3. _Zamechaniia grazh. zak._, Nos. 720-25, _SRGKD_ 1891 no. 40.

original purchaser's spouse, a relative, or friend.[1] In such instances, any person wishing to redeem the property would have to pay or deposit with the court the amount stated in the new act of sale or mortgage. Normally, this now would be prohibitive. The Civil Cassation Department generally would recognise such acts, provided that all the necessary legal formalities had been observed. Yet the court did not appear to be particularly sympathetic to any of the parties involved in such cases. This may have been due to a general belief that both parties were using the law improperly or to the fact that parties to a sale of realty frequently understated the actual price on the deed of sale in order to reduce the tax levied; hence the court could not always be sure with which type of fraud it was dealing.[2]

The Civil Cassation Department also restricted the vendor's relatives' ability to exercise their right of redemption in a number of other ways, again being guided largely by its conception of the nature and purpose of the institution of patrimonial property. For example, in its decision in the case of the private petition of Bronislava Przhetsishevskaia

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1. E.g., see SRGKD 1903 no. 52; 1904 no. 12; 1906 no. 17; 1907 no. 90; Zamechaniia grazh. zak., No. 723; Gussakovskii, op. cit., p. 4. A false mortgage apparently was more popular because it involved less risk, was less costly, and made the relative redeeming the property liable for the mortgage debt with the property in the event of default. Shershenevich, Uchebnik, pp. 343, 351, 353f.; SZ, X, pt. 1, art. 694 pril.: 3.

2. Indeed, prevention of this practice was one reason given by the government for retaining the right of redemption. Nevolin, op. cit., v, 111; 1PSZ, xxi, no. 15724, art. 15 (3 May 1783), p. 909; xxii, no. 16453 (4 Nov. 1786), p. 706. For a typical example of the problems confronting the court, see SRGKD 1906 no. 17.

in 1913,[1] the court expanded the rule whereby any relative of the vendor taking part in or witnessing the act of sale of patrimonial property was deprived of the right to redeem it. The vendor, the petitioner's brother, had offered to sell the property to Przhetsishevskaia prior to selling it to the eventual purchaser, and the latter claimed that he had obtained the petitioner's renunciation of her right of redemption prior to making the purchase. The Kovno District Court and the Vilnus Court of Appeal, adhering to a strict literal interpretation of the law, refused to determine whether Przhetsishevskaia in fact had renounced her right and found in her favour.

The Civil Cassation Department vacated this decision and ruled that any relative in any way expressing agreement to the sale of patrimonial property lost the right to redeem it. The court argued that at the basis of the right of redemption lay the assumption that the vendor was selling the property against the wishes of other members of the clan. However, this assumption would be proved false with respect to any particular clansman if it could be shown that at the time of sale he did not wish to retain ownership within the clan. Agreement to the sale as evidenced by participation in the formal act of conveyance was considered one form of positive proof of this, hence the provisions of article 1362 pt. 2, SZ, X, pt. 1. But the instances described in this article were not the sole means of such proof, and consequently it was not exhaustive. Direct renunciation of the right of redemption prior to the sale of patrimonial property to

1. SRGKD 1913 no. 31. See also I. G. Orshanskii, 'O zakonnykh predpolozheniiakh i ikh znachenii', Zh. Gr. i Ug. Pr., 1874 no. 5, p. 54.

a non-clansman also would constitute acceptable proof. Thus the court was bound to examine any action of a clansman which could be construed as an agreement to the sale or a renunciation of the right of redemption. The court thus enabled the purchaser of patrimonial property to protect himself by seeking agreement to the sale from the vendor's relatives.

This time narrowly interpreting the law, the court also restricted the relatives' right of redemption by holding that the three-year period during which the right of redemption might be exercised was not analogous to the period of prescription and therefore was not interrupted for any cause, including the minority of any relative.[1] In the case establishing this principle, the petitioner, merchant Vera Kashkina, had sought to redeem patrimonial property sold by her uncle Nikolai Vel'iashev to his wife Mariia fourteen years earlier. Kashkina claimed that, by analogy with the general rules of prescription, for any particular clansman the term for redemption could begin to run only from the time of attainment of the age of majority, which in her case had been less than three years prior to the submission of her petition to redeem the property concerned. Both the Tula District Court and the Moscow Court of Appeal denied her petition, and the Civil Cassation Department upheld this decision. All three courts reasoned that in the event of sale of patrimonial property to a nonclansman, any of the vendor's nearest relatives without regard to age enjoyed the right to redeem this property within three years, and therefore this term could not be interrupted by the minority of any one or more of

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1. SRGKD 1882 no. 48. SZ, X, pt. 1, art. 1363.

them.[1] The right of redemption constituted a special privilege which was not subject to expansion, and the term established for its exercise had nothing in common with the general ten-year period established for the defense and recovery of proprietary, contractual, or personal rights. The court might have added that acceptance of Kashkina's interpretation would have meant extending the purchaser's vulnerability to redemption until the twenty-fourth birthday of any minor relative of the vendor alive and enjoying the right at the time of sale, which was a situation that it is unlikely the court would have been willing to accept.

Finally, the court also ruled that patrimonial property sold to a non-clansman was no longer subject to redemption if it had been returned or resold by the purchaser to any member of the clan in which it had been patrimonial before an action to redeem it brought by another clan member had been completed.[2] The court stated that as the condition necessary for the exercise of the right no longer existed, the right could no longer be exercised, and therefore any actions for redemption already begun were terminated automatically. However, as such property would become acquired property for the person to whom it was resold, it would be in the complete disposition of the latter and not subject to the right of redemption in any future transactions.

Thus, the courts always were seeking to limit the institution of patrimonial property and to reduce or mitigate the restrictions on the owner's powers imposed by it. They never sought to expand the institution

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1. SZ, X, pt. 1, art. 1361. Obviously, the court felt that a minor's interests could be safeguarded by his guardians.

2. SRGKD 1905 no. 82. See also Mrts., 'Simulir. sdelki'.

or to broaden its meaning. At the least, this reflects the courts' generally negative attitude toward this institution as a thing somewhat anachronistic, and in itself seems adequate proof that the institution no longer was appropriate to the social and economic conditions that had been developing since the emancipation, if not before.

The institution had developed in and was appropriate to a traditional agrarian society in which land and serfs had been the primary form of wealth. However, it was difficult to adapt it to the new and more mobile forms of property rights and wealth and ways of organising proprietary power that were appearing in Russia during the nineteenth century as the market economy developed. It also presented certain difficulties for the movement of resources and the greater individual power to dispose of resources that are characteristic of and necessary to a more modern commercial society. Faced with these conditions, the courts constantly interpreted the law in such a way as to remove property from the purview of the law of patrimonial property, to increase the individual owner's flexibility and power of disposition with respect to his patrimonial property, and to reduce what were thought to be the most negative features of the law, particularly the right of redemption. Even in those few instances when the court extended the effect of patrimonial property, as for example when it defined the appurtenances of landed estates, it based its decisions at least partly on economic considerations.

Yet the court did not limit the law to the extent that it could have or to the extent that most jurists would have wished. This was due both to the fact that the court had to deal with the reality of the cases coming before it, which compelled it to be more moderate than the more radical jurists outside the judiciary, and to its conception of the nature and

purpose of the institution in existing social and economic conditions. While the identification of the property with the clan, as expressed in terms of the protection that the court was willing to extend to the interests of the broader clan, was weak, the institution was perceived as the sole, if imperfect, means in Russian law for protecting the interests of legal heirs and of ensuring that parents observed their moral obligations to their children when distributing their property in inheritance. Clearly the court considered this now to be the law's primary function, and consequently it enforced more rigorously those provisions of the law which it believed to achieve this end. Even here, though, the court's protection was limited.

Chapter 4

The Legal Debate over Patrimonial Property and Obligatory Shares

In general, legal commentators were even more antagonistic toward the institution of patrimonial property than were the courts. In many ways this was due as much to the development of the professional study of law in Russia from the second quarter of the nineteenth century and the consequent growing familiarity of Russian jurists with foreign, particularly continental Civilian, law and legal theories as it was to the problems arising from the growing inadequacy of the institution itself in changing social and economic conditions.[1] To the practical difficulties created by the law were added newly perceived theoretical and moral deficiencies and the knowledge of seemingly more appropriate and just alternative legal arrangements. This led the majority of Russian legal commentators to condemn the institution of patrimonial property as a harmful anachronism that ought to be replaced by a more equitable and effective institution similar to those, such as the French _réserve héréditaire_, that existed in other continental European states.

It is difficult to determine precisely when the attitude of those professionally concerned with law toward the institution of patrimonial property began to change, because until the mid-nineteenth century the Russian legal profession was not well developed, monographs on civil law were few, and there were no law periodicals. Certainly, as the _nakazy_ and

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1. See above, pp. 10-12, 14, 17, 38-40.

other material reveal, there was no lack of criticism of particular aspects of the law. However, in the memoranda of Speranskii and Bludov cited above,[1] neither author questioned the existence of the institution itself, but each only proposed certain changes intended to eliminate particular practical difficulties or perceived inequities arising from various aspects of the law. This was true also of a report on inheritance law and testamentary power composed in 1865 by the Ministry of Justice.[2] Likewise, legal commentators up to mid-century generally seemed to accept the institution's existence.[3] However, beginning in the 1850s, criticisms of particular features of the law turned into general condemnation of the institution itself and calls for its abolition, and at the First Congress of Russian Jurists, held in Moscow in 1875, speakers were evenly divided between those favouring outright abolition of the institution and those advocating only more or less extensive reform.[4] A decade later, the

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1. Pp. 83,92-5.

2. Pril. Gos. Duma (1911) iii. no. 212, pp. 5-6; Grazh. Ulozh., bk. 4, intro., p. 27, explanas., pp. 35-9.

3. E.g., see Kukol'nik, op. cit., pp. 132-3, 138-9, 150-52, 200-201; Nevolin, op. cit., iv. 26-36, v. 94-111; compare the uncritical attitude of Pobedonostsev in 'Imenie rodovoe i blagopriobretennoe', Zh. Min. Ius., viii(1861), II. Ch. neoff., pp. 3-74, with his comments in Kurs, i. 53-65.

4. Meier, op. cit., pp. 110-12; Daragan, op. cit.; Liubavskii, 'Unichtozhenie'; idem, 'Ob uravnenii nasledstvennykh prav muzhchin i zhenshchin', Zh. Min. Ius., 1864 no. 5, II. Ch. neoff., pp. 399-424; 'Obozrenie'(Otech. Zap., 1865 bk. 1); P. Tsitovich, Iskhodnye momenty v istorii russkago prava nasledovaniia (Kharkov, 1870), especially pp. 87-169; V. D. Spasovich, 'Sledovalo by razreshit' svobodnoe rasporiazhenie po dukhovnym zaveshchaniiam rodovymi imushchestvami', in Pervyi s'ezd russkikh iuristov v moskve v 1875 godu, eds. S. I. Barshev, N. V. Kalachov, S. A. Muromtsev, and A. M. Fal'kovskii (Mos., 1882), pp. 151-64.

overwhelming majority of members of the judiciary responding to the request for comments on the existing civil law made by the Commission established to compile a new civil code severely criticised the institution and advocated its abolition and, in most cases, replacement by a system of obligatory shares.[1] This was also the position taken by nearly all legal commentators from the early 1880s, who often would add that in the interim the court ought to interpret the law in the manner that would most restrict the institution and its effects.[2]

The institution's critics advanced a number of historical, theoretical, moral, and practical arguments in an attempt to discredit the law. However, while these apparently were put in all sincerity, they nevertheless often were based on certain underlying political assumptions and had more far-reaching political objectives.

First, partly in response to the defense of the law mounted by nationalist conservatives, it was argued that the institution of patrimonial property was not peculiar to Russia, but was a phenomenon common to nearly all European states.[3] It arose at an early stage in the

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1. Zamechaniia grazh. zak., Nos. 292-4, 305-18, 324, 486, 501, 720-25.

2. E.g., see Dovnar-Zapol'skii, op. cit.

3. Zamechaniia grazh. zak., Nos. 1, 293-4, 305-6, 309-10, 314, 317-18, 486, 573; Tsitovich, op. cit., pp. 2-9, 75-8, 91f.; Spasovich, op. cit., pp. 153-7; Liubavskii, 'Unichtozhenie', pp. 9-13; Il'iashenko, op. cit., no. 3, pp. 112-13; Meier, op. cit., pp. 110-12; K. P. Zmirlov, 'Otmena il preobrazovanie nashikh zakonov o rodovykh imushchestvakh?', Zh. Min. Ius., 1898 no. 4, pp. 75-90, 111-12, 120-24; V. G. Demchenko, Sushchestvo nasledstva i priznanie k nasledovaniiu po russkomu pravu (Kiev, 1877), pp. 26-30, 51-78; Grazh. Ulozh., bk. 4, intro., pp. 40f.

development of the institution of property, when the rights of the individual began to encroach on and eventually replace those of the family group. As the prominence of the individual grew, the property rights of the clan correspondingly declined. Eventually and inevitably the institution became a mere remnant of the previously existing social order, in which the clan had been the primary focus of proprietary rights and social activity. Thus it was but a transitional stage in the development of the institution of individual private property and would disappear naturally in Russia, as it already had done elsewhere in Europe, as a result of social and economic progress, in which the growing ascendancy of the individual was the primary motive force.

Most critics dated the beginning of this process in Russia to the mid-sixteenth century, when the right of redemption first received legislative expression and was limited to patrimonial and service lands.[1] The subsequent legislative restriction of this right and corresponding expansion of individual proprietary power, by which the current concepts of patrimonial and acquired property were formed, were then meticulously described in an effort to establish both the institution's decline and its increasing incongruity with changing social and economic conditions. The innumerable attempts to circumvent the law presently encountered in the courts were referred to in conclusion as proof that the stage of social development had been reached at which the institution had become a glaring and harmful, and it might be added, embarrassing, anachronism. Hence the

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1. Il'iashenko, op. cit., no. 3 pp. 112-35; Vladamirskii-Budanov, op. cit., pp. 548-56; Pobedonostsev, Kurs, ii. 293-302, 441-3; Grazh. Ulozh., bk. 4, intro., pp. 51f.

institution's continued existence was not a symbol of national uniqueness and pride, but a sign of backwardness. It therefore needed to be replaced entirely by an institution more in conformity with prevailing social conditions and attitudes, one that would contribute to, and not retard, further progress.

More subtle critics would add that not only had the focus of proprietary rights shifted from the clan to the individual, but the focus of social organization had narrowed from the clan to the nuclear family.[1] Consequently, the very concept of the clan no longer was socially functional and should not provide the foundation for such important social institutions as property and inheritance. By protecting the interests of the clan, the law necessarily deprived certain members of the family from adequate protection while ensuring provision for persons who meant little, and even may have been unknown, to the deceased. Such a result clearly was contrary

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1. In Russian, from the '_rod_' to the '_sem'ia_'. _Zamechaniia grazh. zak_., Nos. 1, 310, 573; Tsitovich, _op. cit_., 91f; M. Ia. Pergament, '"Predely nasledovaniia" v grazhdanskom prave', _Vest. Pr._, 1906 no. 3, pp. 293-312; _Grazh. Ulozh_., bk. 4, intro., pp. 64-6, 68-9, 74; Liubavskii, 'Unichtozhenie' and 'Ob uravnenii' in general; Zmirlov, 'Otmena', pp. 93, 108-9; _idem_, 'Znachenie instituta rodovykh imushchestv dlia budushchago grazhdanskago ulozheniia', _Zh. Gr. i Ug. Pr_., 1889 no. 3, pp. 69-78; V. I. Kurdinovskii, 'Vymorochnyia imushchestva', _Zh. Min. Ius_., 1902 no. 8, pp. 134-40, 145-7; Orshanskii, 'Nasled. prava', no. 2 pp. 6f., no. 3 pp. 27-30; Daragan, _op. cit_., pp. 2-3; D. I. Azarevich, 'Semeinyia imushchestvennyia otnosheniia po russkomu pravu', _Zh. Gr. i Ug. Pr_., 1883 no. 4, pp. 122f.; _idem_, 'Svoboda i ogranichenie dukhovnykh zaveshchanii', _ibid_., 1889 no. 8, pp. 64-82; N. Reinke, 'Dvizhenie zakonodatel'stv ob imushchestvennykh pravakh zamuzhnei zhenshchiny', _ibid_., 1884 no. 3, pp. 71-2; V. Ia. Stoiunin, 'Nasha sem'ia i eia istoricheskiia sud'by - ocherki', _Vest. Ev._, 1884 bk. 1, pp. 20-22, 28, 30-34; A. N. Gedda, 'Obiazatel'naia dolia v nasledstve po proektu novago grazhdanskago ulozheniia', _Zh. Min. Ius_., 1904 no. 2, pp. 58-60, 65-6, 73-4; Gussakovskii, _op. cit_., pp. 31-3.

to existing social needs and desires, was harmful to the state, as it weakened the family, and was inequitable. Thus not only did the institution of patrimonial property conflict with the principle on which property currently was based, i.e. individualism, but it also conflicted with the existing fundamental unit of society. It therefore needed to be replaced by a more appropriate institution.

Second, and related to the above, many critics sought to identify the institution with the formal political ascendancy of the dvorianstvo, its previous obligation to serve the state, and the conditional system of land tenure, the pomest'e, to which these had given rise.[1] On little more evidence than coincidence in time, several argued that the various acts and decrees forming the basis of the law had been promulgated with the direct political purpose of ensuring that each particular clan whose members bore the obligation to perform state service would retain land sufficient to enable them to fulfill this obligation.[2] While this corresponded to the needs of that time, now that the pomest'e system had disappeared, the dvorianstvo's obligation to perform state service had been abolished, and the system of social division into formal estates had

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1. Zamechaniia grazh. zak., Nos. 1, 294, 305, 308, 311-12, 318, 486, 573-4; Spasovich, op. cit., pp. 161-2; Il'iashenko, op. cit., no. 3 pp. 110-111, 133-5; Zmirlov, 'Znachenie', pp. 51, 54-65, 83-4, 98; idem, 'Otmena', pp. 75-81, 117-19; Gurliand, op. cit., no. 210 pp. 417-18; Shershenevich, Uchebnik, pp. 131-3; 'K voprosu ob uravnenii nasledstvennykh prav muzhchin i zhenshchin', Sud. Gaz., 1893 no. 14 (4 Apr.), pp. 1-4; Liubavskii, 'Unichtozhenie', pp. 18, 20; Gedda, op. cit., p. 67; Pobedonostsev, Kurs, i. 64-5, 131-9, ii. 293-302, whose attitude was one of cautious ambiguity; Grazh. Ulozh., bk. 4, intro., pp. 61-2.

2. Zamechaniia grazh. zak., Nos. 1, 294, 305, 308, 211-12, 573-4; the references in note 1 above to Zmirlov, Liubavskii, Spasovich, Gurliand, Shershenevich, Pobedonostsev, and Sud. Gaz.

been all but eliminated by the emancipation of the serfs, the introduction of the zemstva, and the admission of persons of all social estates into government service, the political objective for which the institution had been introduced was no longer relevant. Therefore the institution ought to be abolished. Moreover, the institution initially had developed solely with respect to land held by the service estate, and only recently and quite improperly had been extended to immovable property owned by non-dvoriane.[1] Thus the institution was not the expression of deep-seated national legal conceptions, but was a political device limited in application to a single class.

Other advocates of abolition, believing this view to be historically inaccurate and perhaps realising that it was not likely to win their cause much support in some influential government circles, denied any political basis to the institution.[2] Nevertheless, they agreed that its development was strongly identified with that of the dvorianstvo. However, they argued that this was due to the nature of social and political organisation in Muscovite Russia, in which ownership of land had been virtually monopolised by the higher service estates[3] and legislation on

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1. Some claimed this was as late as the introduction of the Svod Zakonov in 1833; Zamechaniia grazh. zak., Nos. 305, 573; Zmirlov, 'Znachenie', pp. 54-9; idem, 'Otmena', pp. 117-19; Gurliand, op. cit., no. 209 pp. 392-4; 'K voprosu'(Sud. Gaz. 1893 no. 14); 'O nasledovanii zhenshchin po zakonu', ibid., 1891 no. 8 (24 Feb.), pp. 1-3.

2. Il'iashenko, op. cit., no. 3 pp. 113f., no. 4 pp. 111f.; Tsitovich, op. cit., pp. 136f., Grazh. Ulozh., bk. 4, intro., pp. 51-69; Spasovich, op. cit., p. 162; Vladamirskii-Budanov, op. cit., pp. 548-61; Daragan, op. cit., pp. 2-3; V. I. Kurdinovskii, Ob ogranicheniiakh prava sobstvennosti na nedvizhimyia imushchestva po zakonu. (po russkomu pravu) (Odessa, 1904), pp. 316-17.

3. Here was meant votchiny held by individuals. Thus the vast holdings of the church were not included.

matters of civil law had concerned largely their interests and affairs. Indeed, throughout this period all legislative acts concerning redemption and patrimonial property had referred solely to these estates. Consequently, when at the end of the seventeenth and beginning of the eighteenth centuries the right to own realty was extended to other classes and the state began to regulate these aspects of their civil affairs more closely, property institutions developed solely with respect to the _dvorianstvo_ and their land were gradually and almost unconsciously extended to these other classes without consideration of whether they would be appropriate to their particular customs, circumstances, and needs.[1] This process was accelerated by Catherine II's Municipal Charter, which clearly extended these institutions to the entire urban population, and Alexander I's decree of 1801, allowing non-_dvoriane_ to acquire rural realty.[2] Thus these critics likewise concluded that the institution of patrimonial property did not represent an ancient and fundamental Russian legal conception, but was something peculiar to the development of a single class that had been extended only recently and without proper consideration to other classes. Moreover, the circumstances under which the institution had developed no longer existed.

Third, it was argued that, given existing social conditions, the order of inheritance dictated by the nature of the institution was extremely

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1. Il'iashenko, _op. cit._, no. 3 pp. 139-42; _Grazh. Ulozh._, bk. 4, intro., pp. 66-71; Vladamirskii-Budanov, _op. cit._, pp. 585-8; Daragan, _op. cit._, p. 3; although cautious about abolition of the law, Pobedonostsev followed this interpretation, _Kurs_, i. 64-5, ii. 293-4, 297-302, 441-3, 445.

2. 1_PSZ_, xxii., no. 16188, arts. 4, 88 (21 Apr. 1785), pp. 359, 367; xxvi., no. 20075 (12 Dec. 1801), pp. 862-3.

unjust.[1] To preserve property within the clan, it was necessary to discriminate against women, particularly daughters, and the surviving spouse. The former were considered to have left the clan on marriage and their offspring were primarily members of their husband's clan; the surviving spouse obviously was never a member of the deceased spouse's clan. Thus inheritance by either would cause property to pass to another clan. As a result, daughters received only a meagre share in the presence of a son, in the collateral lines a female was excluded entirely by a male of equal degree, and the surviving spouse received only a modest share. This was extremely unfair to daughters, who, being largely excluded from employment, were more in need of provision than sons, meant that often the surviving spouse, who was closest to the deceased and frequently helped in the improvement of a property's value, received little while a distant and unknown relative inherited the bulk of the estate, and produced such peculiar and inequitable results as a sister or aunt being excluded entirely by some more distant female descendant of a brother or uncle. While such a system corresponded to the needs of a society in which the males were obliged to serve the state and required land in order to do so, it

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1. Zamechaniia grazh. zak., Nos. 294, 305-6, 309-10, 313-14, 318, 486, 573-9, 586-604, 623-34; Liubavskii, 'Ob uravnenii'; Zmirlov, 'Znachenie', pp. 69-80; idem, 'Otmena', pp. 93-4, 108-9; idem, 'O nedostat.', 1883 no. 3, pp. 105-6, 1884 no. 5, pp. 72-4; Il'iashenko, op. cit., no. 4 pp. 116-117, 120-22; Poletaev, op. cit., p. 91; 'O nasled. zhen.' (Sud. Gaz. 1891 no. 8); 'K voprosu' (ibid., 1893 no. 14); Gurliand, op. cit., no. 208 pp. 360-61, no. 209 pp. 393-5, no. 210 pp. 418-21, no. 213 pp. 520-21; A. M. Evreinova, 'Ob uravnenii prav zhenshchin pri nasledovanii (Protokoly grazhdanskago otdeleniia s.-p.-b. iuridicheskago obshchestva. XLI i XLII. Zasedaniia 1 i 15 maia)', Zh. Gr. i Ug. Pr., 1884 no. 3 (Pril.), pp. 133-6; Kavelin, op. cit., cols. 1251-4; Gussakovskii, op. cit., pp. 1-3, 10f., 31-6; Iurist-Praktik, 'Zhelatel'nyia izmeniia v russkom nasledstvennom prave', Sud. Gaz., 1892 no. 7 (16 Feb.), pp. 4-5.

became extremely inequitable when this obligation no longer existed. Justice demanded equal shares for all children and a greater share for the surviving spouse, particularly when the deceased was survived only by collateral relatives. The innumerable cases of attempts to circumvent the law with precisely this purpose reported by judicial personnel were cited as evidence that society in general shared this belief.[1]

Fourth, critics maintained that the institution in general, and particularly the right of redemption, was economically harmful.[2] The law made division of the deceased's estate in kind practically unavoidable. With respect to land, this meant that holdings would become progressively smaller and eventually uneconomical and incapable of supporting the owner and his family. Even if division in kind could be avoided, the heir who retained the land would be burdened with an enormous debt in order to compensate his coheirs. In either case, improvement of the land was discouraged or prevented, due to the knowledge that an estate would be divided

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1. Zamechaniia grazh. zak., Nos. 3, 292-4, 305-6, 308-17, 324, 486, 501, 565, 574, 586-604, 632, 724.

2. Ibid., Nos. 293-4, 306-7, 309-10, 312-13, 507, 573, 605, 720-25; Liubavskii, 'Unichtozhenie', pp. 34-6; idem, 'Ob uravnenii', pp. 400, 418, 423; Daragan, op. cit., pp. 2-3; Il'iashenko, op. cit., no. 4 pp. 113-17, 131-3; A. Lykoshin, 'Rodovyia imushchestva i dvorianskoe zemlevladenie', Spb. Ved., 1900 no. 213 (6 Aug.), pp. 1-2; Shershenevich, Uchebnik, p. 137; Grazh. Ulozh., bk. 4, intro., pp. 68-9, 71-2, 81-4, 96-103, 141-3, explanas., pp. 49, 282-3, 444; Gussakovskii, op. cit., pp. 3-8. Even most of those who favoured retention of the institution of patrimonial property recognised this. E.g., see Brandt, op. cit., no. 6 p. 21, no. 7 pp. 13, 42, 49-50; A. A. Bashmakov, 'Institut rodovykh imushchestv pered sudom russkoi iurisprudentsii', Zh. Min. Ius., 1897 no. 8, pp. 44-7, 55-8; idem, 'Institut rodovykh imushchestv nakanune ego otmeny ili preobrazovanii', Zh. Spb. Iurid. Ob., 1897 no. 9, pp. 127-8; the views of Malyshev and Saburov in Grazh. Ulozh., bk. 4, intro., pp. 105-8, 125-9, 132-3. Here I am concerned solely with the opinion of the legal profession. For the wider public debate on this issue, see Wagner, 'Legisla. Reform', pp. 157f.

and thus that it was senseless to reorganise it into a more efficient economic unit, the necessity of duplicating capital stock and inventory once division had occurred, and the necessity of using available credit to compensate coheirs. The result was to retard the development of agriculture and thereby reduce the general prosperity of the state. The law had a similar effect on commercial and industrial enterprises, so that it was rare for them to survive more than a generation or two. Such instability hampered the growth of Russian trade and industry and limited the spread of commercial expertise. Thus the overall effect of the law was disastrous both for individual families and the state economy in general.

The right of redemption was even more harshly condemned on these grounds.[1] Even most conservative defenders of patrimonial property agreed that the right no longer served any useful function and was widely abused for speculative and fraudulent purposes.[2] It discouraged or raised the cost of acquisition of property for development, discouraged investment at least for the three-year period during which patrimonial property was liable

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1. Zamechaniia grazh. zak., Nos. 309, 720-25; Liubavskii, 'Unichtozhenie', pp. 34-5; Daragan, op. cit.; Il'iashenko, op. cit., no. 4 pp. 123-31; Zmirlov, 'O nedostat.', 1885 bk. 3 p. 51; Gussakovskii, op. cit., pp. 3-4; Grazh. Ulozh., bk. 4, intro., pp. 74-80.

2. E.g., Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 55-8; idem, 'Instit. rod. imushch. naka. otmeny', pp. 123, 127, 98-101; Brandt, op. cit., no. 7 pp. 48-9; Kasso, op. cit., p. 148; Pobedonostsev, Kurs, ii. 443; Malyshev in Grazh. Ulozh., bk. 4, intro., pp. 103-4. Saburov agreed, but believed that the right should be retained only for the descendants of the original owner: ibid., pp. 130-31. Among jurists, only the Kurmysh Congress of Justices of the Peace argued for the complete retention, and even extension, of the right; Zamechaniia grazh. zak., No. 727. In contrast, conservative and reactionary political commentators favoured extension of the right, at least for the dvorianstvo.

to be redeemed, and undermined respect for the law by encouraging resort to fictitious acts in an attempt to prevent exercise of the right. Thus both defenders and detractors of the law agreed that the right should be abolished.

Fifth, it was claimed, or perhaps more accurately with respect to the remarks made by members of the judiciary, complained of, that the law led to considerable protracted and complicated litigation as more distant relatives attempted to establish the character of property, the identity of the clan in which it was patrimonial, and their membership of this clan in order to establish their claim to an inheritance, disprove another relative's claim, or dispute the provisions of a will.[1] Such litigation was time-consuming and costly and caused considerable animosity. Abolition of the institution would eliminate the source of much of this litigation.

Finally, it was argued that the institution had never successfully achieved the objective of securing the material welfare, let alone the social preeminence, of the clan.[2] Quite the contrary, the fragmentation of estates caused by the law led directly and inevitably to the clan's impoverishment and decline into insignificance. Moreover, the protective

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1. Grazh. Ulozh., bk. 4, intro., pp. 92-3; Shershenevich, Uchebnik, p. 137; Zmirlov, 'O nedostat.', 1883 no. 3, pp. 96-105.

2. Zamechaniia grazh. zak., Nos. 292, 313-14, 318, 486, 501-502; Poletaev, op. cit., pp. 91-101; Spasovich, op. cit., pp. 151-4, 163; Il'iashenko, op. cit., no. 4 pp. 113-15; Gurliand, op. cit., no. 210 pp. 419-20; Grazh. Ulozh., bk. 4, intro., pp. 71, 82-4, 93; Liubavskii, 'Unichtozhenie', pp. 27-9, 31, 35-6; idem, 'Ob uravnenii', pp. 413-14, 418-21, 423; Kaminka, 'Proekt', cols. 2644-5; Lykoshin, op. cit.; Zmirlov, 'Otmena', pp. 91-4.

restrictions provided by the law were easily and frequently circumvented.[1] Thus the law was neither practical nor effective, and consequently it ought to be replaced. This argument received greater emphasis from the mid-1890s as the political issue of the diminishing ownership of land by the dvorianstvo became more acute and the institution of patrimonial property became a rallying point for political conservatives and reactionaries.[2]

However, perhaps the fundamental motivation of most advocates of abolition was the belief that the institution was an integral part of the traditional serf-owning corporate state and that it therefore was basically incompatible with what they believed were the new conditions of post-emancipation Russia, in which the organization of society into formal social estates and the limitations of the individual's actions in accordance with the level of his social estate had given way to a society of free and equal individuals. The law of patrimonial property placed too

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1. Zamechaniia grazh. zak., Nos. 292-3, 305-6, 308-13, 315-17, 324, 486, 501, 724; Poletaev, op. cit., pp. 87f.; Liubavskii, 'Unichtozhenie', pp. 11-12, 27, 29, 35; Il'iashenko, op. cit., no. 4 pp. 116-17, 120-21; Grazh. Ulozh., bk. 4, intro., pp. 71-2, 78, 93, 104, 114; Kavelin, op. cit., col. 1217; Lykoshin, op. cit.; Gorodyskii, op. cit., no. 5 pp. 116-18, no. 6 pp. 112-13; Zmirlov, 'Otmena', pp. 92-3. Some argued that this was a reason to strengthen, not abolish the law: Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 51-3; Zamechaniia grazh. zak., No. 323.

2. E.g., see Il'iashenko, op. cit., no. 4; Gussakovskii, op. cit., pp. 2-8; Grazh. Ulozh., bk. 4, intro., pp. 71, 73, 81-92.

great a restraint from a bygone age on the individual's freedom to act.[1] This was the basic political bias underlying the arguments of most critics of patrimonial property. Seen in this context and given the realities of the existing Russian social and political structure, it is clear that their proposals were based as much on an image of what they wanted society to be as on a reflection of what they thought society already was. Thus their use of comparative legal history frequently had a polemical objective. Desiring the restructuring of society on more liberal lines and yet writing in an age dominated by historical jurisprudence, they felt it essential to prove that the concept of patrimonial property was not a deeply rooted Russian legal institution that had been developing continuously over time, but was an institution peculiar to a particular time and particular conditions. Hence many attempted to identify it exclusively with specific, now defunct institutions such as the pomest'e and the obligation to perform state service in order to prove that it no longer could have any basis in popular legal conceptions, and therefore ought not to be included in any future civil code.[2] This in turn was used to justify proposals for the introduction of legal institutions designed to promote a more liberal

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1. Spasovich, op. cit., pp. 151-3, 164; Liubavskii, 'Unichtozhenie', pp. 10-11, 28-31; Grazh. Ulozh., bk. 4, intro., pp. 68-9, 71-4, 87-9; Zamechaniia grazh. zak., Nos. 1, 292, 294, 305, 307-13, 316-18, 324, 507; Meier, op. cit., pp. 110-12; Zmirlov, 'Otmena', pp. 75-6, 98-9, 101, 120-21, 124. For a reaction against this by those who believed the principle of individualism to be pernicious and by no means accepted by Russian society see Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 40-43; idem, 'Instit. rod. imushch. naka. otmeny', p. 127; G. Dormidontov, K voprosu o vliianii zakonov o nasledstve na raspredelenie nedvizhimoi sobstvennosti (Kazan, 1885), pp. 36-9, 61-4, 73-7.

2. The formation of a committee in 1882 to review existing civil law and draft a civil code acted as a catalyst to the debate by raising the prospect of imminent reform.

social and political order.

This caused such critics to deny that any genuine sentiment for the clan survived or that even given the primacy of the nuclear family, a belief that the broader clan still had some right to inherited property and deserved preference before other members of society at large and a sense of justice based on this could still exist. Whereas it is clear that even among jurists many continued to hold such beliefs.[1]

Defenders of the institution generally recognised the need to reform it in order to adapt it to changed social and economic conditions, and most agreed that the abolition of the right of redemption was necessary for economic reasons.[2] Nevertheless, they believed that the concept of patrimonial property was a part of the body of fundamental legal conceptions that had developed in Russia from earliest times, even though the present *form* of the law might have been of recent origin, and therefore the

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1. *Zamechaniia grazh. zak.*, Nos. 320-23, 583; Spasovich, *op. cit.*, pp. 158-9, 163-4; A. I. Zagorovskii, 'K voprosu o zakonoi nasledstvennoi dole', *Zh. Min. Ius.*, 1896 no. 5, pp. 118-20, no. 6, pp. 33-40; Tovstoles, 'Svoboda zaveshch.', pp. 109-14; Bashmakov, 'Instit. rod. imushch. pered sudom', no. 7 pp. 13-18, no. 8; *idem*, 'Instit. rod. imushch. naka. otmeny'; Brandt, *op. cit.*, no. 6 pp. 11-12, no. 7 pp. 31-55 (but see *Pravo*, 1903 no. 43, cols. 2439-40); Kasso, *op. cit.*, pp. 19, 149; Pobedonostsev, *Kurs*, i. 64-5, ii. 487-8; the views of Malyshev, Karnitskii, and Saburov in *Grazh. Ulozh.*, bk. 4, intro., pp. 103-44; V. N. Nikol'skii, *Ob osnovnykh momentakh nasledovaniia* (Mos., 1871), pp. 73-80, 127-54; the views of Prof. V. G. Demchenko in *Pravo*, 1903 no. 46, cols. 2617-19; *Pril. Gos. Duma* (1911) iii. no. 212, pp. 8-10.

2. Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 13-14, 30-58; *idem*, 'Instit. rod. imushch. naka. otmeny', pp. 98-9, 121-30; Brandt, *op. cit.*, no. 7 pp. 31-55; *Grazh. Ulozh.*, bk. 4, intro., pp. 103-44; Kasso, *op. cit.*, p. 19; Pobedonostsev, *Kurs*, i. 64-5, ii. 443, 487-8.

distinction had to be retained in the future.[1]

The most eloquent defence of the institution was made by Aleksandr Aleksandrovich Bashmakov, a graduate of the Juridical Faculty of Odessa University, sometime government official and justice of the peace, and aid to the Editing Commission established to compose a new civil code, and somewhat of a conservative romantic nationalist in his political attitude. In a speech to the St. Petersburg Juridical Society in March 1897, later expanded in another article, he dealt at length with the arguments levelled against the institution of patrimonial property.[2] Meticulously examining the same legislative and other historical material that his opponents had used, Bashmakov concluded that the institution had existed in Russia in some form since before the _Sudebnik_ of 1550, and indeed had been weakening under the pressure of the growth of individual property rights from the sixteenth century. However, such pressure had led only to the transformation of the institution into an aspect of the individual right of property. Also, in the sixteenth and seventeenth centuries the Muscovite government had strengthened and regulated certain aspects of the law that were politically useful to it, and as the government's interests had differed from those of the clan, this legislation had somewhat distorted the natural course of development of the institution. Moreover, as the government's interest lay primarily with its service estate, this legislation also had given these

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1. _Zamechaniia grazh. zak._, Nos. 322-3; Zagorovskii, _op. cit._, no. 6 pp. 33-40; Pobedonostsev, _Kurs_, i. 64-5; _idem_, 'Imenie rod.', pp. 3-4; Brandt, _op. cit._, no. 7 pp. 31-45; Kasso, _op. cit._, pp. 19, 149; _Grazh. Ulozh._, bk. 4, intro., pp. 103-8, 111-44; Bashmakov, 'Instit. rod. imushch. naka. otmeny', pp. 98-9, 111-12, 123-6, 128-30.

2. _Ibid._, These drew a caustic response in Zmirlov, 'Otmena'.

institutions a class tinge.[1] Nevertheless, prior to the sixteenth century these institutions had applied to persons of any social estate who could own realty,[2] and this continued to be the case in customary law, which governed most civil relations, even afterwards. Although during this period the right of non-service estates to own realty was severely restricted, it was never eliminated and it began again to expand in the eighteenth century.[3] By this time, the government no longer needed to use the institution of patrimonial property as part of its policy with respect to land and service, and the institution reacquired a purely private character. Thus the institution did not arise solely with respect to the service estates and due to political considerations in the sixteenth century, but was a fundamental Russian legal institution that applied to all social estates. Various legislative acts and judicial decisions in the eighteenth and early nineteenth centuries only confirmed this. Moreover, intrinsically, the institution had neither political nor class content, but exclusively concerned property relations within the clan. However, the legislation of the sixteenth and seventeenth centuries had distorted the institution, and it was necessary to rectify this.[4]

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1. Bashmakov, 'Instit. rod. imushch. pered sudom', no. 7 pp. 16-18, no. 8 pp. 17-27; idem, 'Instit. rod. imushch. naka. otmeny', pp. 111-12, 123-6. See also Zagorovskii, op. cit., no. 6 pp. 34-5.

2. That is, persons who held land or other immovable property as a votchina or under similar tenure. This would include urban inhabitants.

3. Bashmakov, 'Instit. rod. imushch. pered sudom', no. 7 pp. 13-18, no. 8 pp. 22-7.

4. Ibid., no. 7 pp. 13-18, no. 8 pp. 1, 17-27, 30-32, 52-3; idem, 'Instit. rod. imushch. naka. otmeny', pp. 111-12, 123-30, 98-101.

The fundamental principle of the Russian legal heritage that Bashmakov and like-minded jurists believed the institution of patrimonial property to embody was the distinction between property acquired by the owner's own labour and that acquired without consideration solely as a result of the fortuitous relationship of kinship.[1] It would violate the absolute right of ownership and be unjust to limit the owner's power to dispose of the former, which corresponded to acquired property in current law. However, it was not unjust to restrict the owner's power to dispose of the latter; on the contrary, it would be unjust not to. Such property was passed down from one generation to the next with the objective of securing the future of the clan of the person who first acquired it. Each succeeding generation developed the property and added to its value. Thus, while it would be impractical and unjust with respect to the owner and contrary to the state's economic interests to restrict the owner's ability to dispose of such property for consideration, it was not unjust to prohibit him from disposing of it without consideration, thereby wasting the efforts of many previous generations and jeopordising the heirs' future security without having received anything in return. Several authors claimed that the 'labour principle' believed to determine property relations in peasant customary law was but a manifestation of this fundamental

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1. Ibid., pp. 112, 121-3, 128-30; idem, 'Instit. rod. imushch. pered sudom', no. 7 pp. 13-15, 18, no. 8 pp. 1, 10-14, 36-7, 47-51; idem, 'Opyt kriticheskoi otsenki instituta obiazatel'noi doli', Zh. Spb. Iurid. Ob., 1897 no. 7, pp. 36-69; Brandt, op. cit., no. 6 pp. 10-12, no. 7 pp. 31-4, 36-45; Nikol'skii, op. cit., pp. 74-80; Demchenko in Pravo, 1903 no. 46, cols. 2617-19; Grazh. Ulozh., bk. 4, intro., pp. 104-8, 116-17, 121-5; Pril. Gos. Duma (1911) iii. no. 212, pp. 8-10; Liubavskii, 'Unichtozhenie', pp. 22-3; Zamechaniia grazh. zak., Nos. 320-23; Zagorovskii, op. cit., no. 5 pp. 118-20, no. 6 pp. 33-6; Tovstoles, 'Svoboda zaveshch.', pp. 109-14.

legal concept and therefore proved that the latter was fundamental to Russian law, an assertion hotly denied by advocates of abolition.[1]

While certainly there was more than a trace of a perhaps too idealistic perception of reality in this argument, it nevertheless was based solidly on a particular concept of justice. Consequently it was unassailable in the minds of those who shared this view. Thus the fundamental differences between those favouring preservation of the institution of patrimonial property and those advocating its abolition were irreconcilable because in the final analysis they concerned primarily matters of belief: whether or not it was just for an individual to have unlimited power to dispose of property inherited from his forbears, and whether or not the concept of distinguishing between property that was acquired by one's own labour and that which was inherited was a basic tenet of Russian law. Proof could not be a consideration with respect to the former, and clearly was extremely difficult, if not impossible, with respect to the latter.

Nevertheless, defenders of the institution did agree that it needed to be adapted to take account of changed social and economic conditions, in particular the displacement of the clan by the nuclear family and the necessity of preserving economic units intact.[2] Indeed, the legal profession

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1. Brandt, op. cit., no. 7 pp. 43-5; Bashmakov, 'Instit. rod. imushch. naka. otmeny', p. 112; Nikol'skii, op. cit., pp. 74-5, 132-3; Zmirlov, 'Otmena', pp. 81-90; idem, 'Znachenie', pp. 81-3; Grazh. Ulozh., bk. 4, intro., pp. 70-71.

2. Zamechaniia grazh. zak., Nos. 320, 322; Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 10-14, 28-31, 44-7, 51-8; idem, 'Instit. rod. imushch. naka. otmeny', pp. 120-23, 127-8, 98-101; idem, 'Opyt'; Zagorovskii, op. cit., no. 5 pp. 108-20, no. 6 pp. 33-44; Brandt, op. cit., no. 7 pp. 31-55; Grazh. Ulozh., bk. 4, intro., pp. 104-8, 112-41; Pobedonostsev, Kurs, i. 64-5, ii. 487-8.

was nearly unanimous in its recognition and condemnation of the pernicious economic effects of the existing law and its call for reform to eliminate these. Bashmakov argued that, aside from the right of redemption, which he proposed to abolish, the only economically damaging aspect of the law was mandatory and equal division, which was not a necessary characteristic of patrimonial property. He cited French law and the controversy over the division of inheritance raging there as evidence that the problem was not limited to Russia or to systems of inheritance based on patrimonial property. The law, he claimed, easily could be adjusted to avoid this, although he offered no specific remedies. To adapt the institution to the altered conditions of the clan and the family, he proposed that only that property which had descended through two generations be considered patrimonial, and then only among the descendants of the person who first had acquired it. In addition to existing constraints on disposition, the owner would be prohibited from selling or mortgaging more than half of the property without the clan's permission. The nuclear family, defined as the owner's children, spouse, and parents, would be protected against the arbitrary disposition of his acquired property by a system of obligatory shares based on the French model.[1]

Believing the clan to be a dead institution but the limitation of the right to dispose of inherited property still to be just, State Secretary S. A. Saburov, a former Senator in the Civil Cassation Department, likewise proposed that property be patrimonial only among the descendents of the

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1. Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 10-14, 44-58; idem, 'Instit. rod. imushch. naka. otmeny', pp. 120-23, 127-8, 98-101; idem, 'Opyt'; see also a similar proposal by Zagorovskii, op. cit., no. 6 pp. 36-44.

original owner within the clan. He believed that inheritance law should be based on the family, but was reluctant to abolish the institution of patrimonial property for fear of unforeseen social and political consequences. Thus the clan was to be retained as a legal fiction to support the existing limitations on the owner's rights. To avoid the economic disadvantages of the law, he proposed granting the owner unlimited testamentary power among his legal heirs, with other heirs being protected by the right to the value of a specified share of the estate.[1] This latter proposal in fact was the one most frequently resorted to by those wishing to preserve the institution of patrimonial property.[2] In this way the owner could preserve an economic enterprise or agricultural estate intact and pass it on to the most capable heir without inordinately burdening it with debt in order to compensate the remaining heirs. This would benefit the national economy while also ensuring both the clan's prosperity and maintenance of patrimonial property within the clan.

However, it is clear from the arguments employed by both sides in the debate that in the opinion of nearly all concerned the focus of social organisation had shifted from the clan to the family, and that as a result the law must be adjusted accordingly. What separated the various groups was their attitude toward the individual and the question of whether the broader clan still merited consideration. There were some jurists who thought that the proprietary powers of the individual were inviolable and

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1. Saburov, in Grazh. Ulozh., bk. 4, intro., pp. 112-41; see also Zamechaniia grazh. zak., No. 320.

2. Ibid., Nos. 564-5, 590; Brandt, op. cit., no. 7 pp. 38-45, 49-50; Spasovich, op. cit., pp. 151-4, 163-4; Malyshev and Pobedonostsev in Grazh. Ulozh., bk. 4, intro., pp. 86-7, 104-8.

hence should not be limited in any way, although these appear to have been a minority.[1] Similarly, the view that although the first priority of the law was to protect the members of the immediate family, the clan still retained some right to patrimonial property, however defined, and therefore should be preferred in inheritance to non-clansmen and that restrictions on the owner's power to dispose of property inherited from a clansman were just, also was shared by only a minority of jurists, although its support among the public at large probably was much greater. The majority of jurists believed that the law must provide some protection to other members of the family against the arbitrary actions of the individual. The degree of protection proposed varied with the political predilections of the particular jurist, and ranged from a relatively moderate form of obligatory share to what amounted to little less than family ownership. But common to all three groups was the belief that the primary function of the present law, as well as of any law that might replace it, was the provision of material security to the owner's heirs, particularly his descendant heirs and spouse, and their protection from arbitrary acts that might leave them destitute. It will be recalled that this was the fundamental precept by which the Civil Cassation Department interpreted and developed the law of patrimonial property.

Most critics of the institution advocated the introduction of a system of obligatory shares to provide the necessary protection for family

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1. Zamechaniia grazh. zak., Nos. 305, 309-10, 313, 317, 324, 507 (possibly Nos. 308, 316); 'O nasled. zhen.' (Sud. Gaz. 1891 no. 8), pp. 1-3; the comments of I. I. Karnitskii in Evreinova, 'Ob uravnenii', no. 7 (Pril.), p. 166; Gedda, op. cit.

members.[1] To them, such a system appeared to be more just and to have sound practical and legal advantages as well as important political significance . First, it would base the system of inheritance on the family rather than on the now irrelevant clan. By guaranteeing a specified portion of the deceased's entire estate to his descendant heirs, males and females equally, his surviving spouse, and his parents, it would provide more secure and equitable protection to the people who were closest to the deceased and towards whom he had a moral obligation.[2] Their security no longer would depend on the fortuitous circumstance of whether the deceased's estate happened to consist of patrimonial or acquired and movable or immovable property. Nor would it be as susceptible to any arbitrary acts by

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1. Zamechaniia grazh. zak., Nos. 1, 14, 109, 123, 125, 292, 313-14, 318, 486, 501-2, 504-5, 562-3, 623; Poletaev, op. cit., pp. 90-91; Il'iashenko, op. cit., no. 4 pp. 133-6; Grazh. Ulozh., bk. 4, intro., pp. 95-103, 141-4, explanas., pp. 271-309; Spasovich, op. cit., pp. 153-7, 161-2, 164; Gurliand, op. cit., no. 210 pp. 419-20; Beliaev, 'Ist. osnovy', no. 6 p. 69; Dormidontov, op. cit., pp. 27-8, 36-9, 61-4, 73-7; Liubavskii, 'Unichtozhenie', pp. 9, 21-6, 38; Zmirlov, 'Znachenie', pp. 69-80; idem, 'O nedostat.', 1883 nos. 9 p. 49, and 10 pp. 59, 70, and 1884 no. 5 p. 83; Demchenko, Sushch. nasled., pp. 29-30, 74-8; Azarevich, 'Svoboda dukh. zav.'; Gussakovskii, op. cit., pp. 14-18; the Spb. Jurid. Society, in 'S.-Peterburgskoe iuridicheskoe obshchestvo', Pravo, 1903 no. 43, cols. 2439-40, no. 44 cols. 2506-7, no. 45 cols. 2557-8. For Bludov's proposals in this regard, see 'Zakonodatel'nyia raboty po izmeneniiu zakonov o dukhovnykh zaveshchaniiakh', Mos. Ved., 1870 no. 224 (18 Oct.), p. 3; Grazh. Ulozh., bk. 4, intro., pp. 8-19; Goikhbarg, Zakon, pp. 6-8.

2. Zamechaniia grazh. zak., Nos. 1, 14, 109, 309, 313-14, 501, 504-5, 562, 573-9, 584, 623-34; Poletaev, op. cit., pp. 90-101; Il'iashenko, op. cit., no. 4 pp. 116-17, 120-21, 133-6; Grazh. Ulozh., bk. 4, intro., pp. 64-6, 68-9, 93, 95-100, explanas., pp. 271-84; Gussakovskii, op. cit., pp. 14-18; Dormidontov, op. cit., pp. 27-8, 36-9, 61-4, 73-7; Liubavskii, 'Unichtozhenie', pp. 9, 21-6, 38; idem, 'Ob uravnenii', pp. 399-400, 412f.; Zmirlov, 'Znachenie', pp. 69-80; Spasovich, op. cit., pp. 153-7, 161-2, 164; Kavelin, op. cit., cols. 1263-70; Azarevich, 'Svoboda dukh. zav.'; see also ch. 5 below.

the owner, who easily could thwart what little security the existing law provided by transforming his patrimonial into acquired property. More distant relatives, toward whom the deceased had no obligations and probably no close feelings and whom he even may not have known, no longer would displace the surviving spouse and parents, whose bond with the deceased was much greater. The law would retain sufficient flexibility by allowing the owner full testamentary power over a certain proportion of his property. In this way an adequate balance between the owner's rights of ownership and his moral obligations to his family would be achieved. Thus the law would provide real protection to the persons most deserving it and would conform to prevailing social conditions and attitudes and the dictates of justice. Second, the harmful economic effects of the right of redemption would be eliminated. However, as their opponents were quick to point out, advocates of obligatory shares generally avoided the issue of the economic effect that the division of inheritances under the proposed system would have.[1] Third, likewise would disappear the innumerable lawsuits over the character of particular property and the determination of the clan in which it was patrimonial, and the frequent resort to fictitious acts in order to evade the law, which undermined respect for the law in general.[2] Finally, although this was never stated directly, symbolically, the replacement of patrimonial property by obligatory shares would signify Russia's transition

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1. E.g., see Brandt, op. cit., no. 7 pp. 39-43; Malyshev and Saburov in Grazh. Ulozh., bk. 4, intro., pp. 96-8, 104-8, 121-9, 131-4; Zamechaniia grazh. zak., No. 605; S. F. Platonov in Evreinova, op. cit., no. 7 (Pril.), p. 165; Pobedonostsev, Kurs, ii. 487-8; Gedda, op. cit., pp. 58, 72-4, 81.

2. Grazh. Ulozh., bk. 4, intro., pp. 71-2, 78, 93; see above, note 1, p. 177.

from a traditional serf-owning society dominated by a legally privileged social estate to a more modern and progressive society, and would bring Russian civil law institutions more into line with continental Civilian law. Indeed, some defenders of the existing law even accused the advocates of its abolition of being too uncritically attracted to Western legal theories and too quick to adopt Western legal institutions which might be inappropriate in Russia.[1]

Ultimately, what the advocates of reform were seeking amounted to nothing less than the restructuring of the entire system of inheritance on a new basis thought to be more modern, progressive, and in accord with what were taken to be prevailing social attitudes. In essence this was a change in the definition of the primary social unit, with the extended clan based solely on blood relationship and in which the role of the male was paramount being replaced by the nuclear family in which blood relationship was of much less importance than the mutual obligations and rights arising from the family's existence as a social unit and the presumed special relationships existing between parent and child and between spouses.[2] Not only was there a stronger emotional bond between parents, children, and spouses, but there also was a strong interrelationship of moral obligations arising out of the family's existence as a unit. Therefore parents had a moral obligation to provide for their children which included as adequate a

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1. Bashmakov, 'Instit. rod. imushch. pered sudom', no. 8 pp. 17-30; _idem_, 'Instit. rod. imushch. naka. otmeny', pp. 123-7; Pobedonostsev, _Kurs_, i. 64-5, ii. 487-8; Malyshev and Saburov in _Grazh. Ulozh._, bk. 4, intro., pp. 96-8, 114-15, 131-5.

2. Pobedonostsev, _Kurs_, ii. 488. This attitude influenced even the courts. _E.g._, see the lower court decision in _SRGKD_ 1908 no. 13.

provision as possible in inheritance, male and female children had a right to inherit equally from their parents, children owed a greater debt to and were closer to their parents than to their siblings, hence parents ought to be preferred to the latter should a child die without issue, and spouses had a moral obligation to provide for each other and a right to sufficient maintenance from each other's estate.[1] Also, as the family was now paramount and the ties with collateral relatives thought to be weak and irrelevant, demands for reform frequently were accompanied by proposals to limit narrowly the circle of collateral relatives entitled to inherit, with property otherwise escheating to the state.[2]

Thus although the arguments of those advocating the introduction of a system of obligatory shares often were expressed in terms of the necessity of making the law conform to the social realities created by the transformation of the basis of the property structure from the clan to the individual, in fact they rested as much on this perceived transition from clan to family as the basic social unit. While the primary objective of certain people seeking the abolition of the institution of patrimonial property was to extend the proprietary rights and powers of the _individual owner_, this was not true of most proponents of a system of obligatory shares. On the contrary, the latter wished to limit the _owner's_ proprietary rights and powers in order to protect _the individual members of his_

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1. See the references in notes 1, p. 169 and 1, p. 173, and ch. 5.

2. _Zamechaniia grazh. zak_., Nos. 10, 14, 109, 584, 642; Iurist-Praktik, _op. cit_.; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 132-47; Pergament, 'Predely'; Zmirlov, 'O nedostat.', 1883 no. 3, pp. 105-6; Demchenko, _op. cit_., pp. 74-8.

immediate family from possible harmful effects of his actions.[1] Under a system of obligatory shares as normally proposed, the individual owner's powers of disposition would not have been increased, and often would have been more limited than under the existing law, as opponents of the proposals were quick to point out.[2] The limitations would extend over all the owner's property, movable as well as immovable, self-acquired as well as inherited; there would be no possibility of conversion into acquired or movable property to gain greater control. This, these critics claimed, would violate the fundamental rights of the owner of acquired property and thus be contrary to the spirit of Russian law, would increase physical division of property in inheritance and thus the resulting economic harm, and would weaken the family by undermining parental authority, which would be the result of absolutely guaranteeing each child's share of the inheritance.

Most advocates of obligatory shares proposed the introduction of a system similar to those existing in many European states, under which

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1. *E.g.*, see *Zamechaniia grazh. zak.*, Nos. 1, 14, 109, 123, 125, 292, 313-14, 318, 486, 501-2, 504-5, 562-3, 573; Poletaev, *op. cit.*, pp. 90-91; Il'iashenko, *op. cit.*, no. 4 pp. 133-6; *Grazh. Ulozh.*, bk. 4, intro., pp. 68-9, 93, 95-103, 142-3, explanas., pp. 30f., 271-84; Spasovich, *op. cit.*, pp. 153-7, 161-2, 164; Gurliand, *op. cit.*, no. 210 pp. 419-20; Dormidontov, *op. cit.*, pp. 27-8, 36-9, 61-4, 73-7; Liubavskii, 'Unichtozhenie', pp. 9, 21, 23-6, 31-2, 38; Zmirlov, 'O nedostat.', 1883 no. 9, pp. 49, 53, no. 10 pp. 59, 70, 1884 no. 5, p. 83; *idem*, 'Znachenie', pp. 72-80; *idem*, 'Otmena', pp. 93-4, 108-9; Kavelin, *op. cit.*, cols. 1190-92, 1241-5, 1260-70; *idem*, 'Russkoe grazhdanskoe ulozhenie', *Zh. Gr. i Ug. Pr.*, 1882 no. 9, pp. 1-24; V. Rozanov, 'Synov'ia i docheri pri nasledovanii', *Nov. Vr.*, 1903 no. 9752 (30 Apr), p. 3; also the proposals of Bashmakov and Zagorovskii, note 1, p. 184 above.

2. Brandt, *op. cit.*, no. 7 pp. 41-2; V_v, 'Voskresnaia beseda', *Grazh.*, 1892 no. 246 (6 Sept.), p. 1; Malyshev and Saburov in *Grazh. Ulozh.*, bk. 4, intro., pp. 105-8, 121-3, 131-5; Liubavskii, 'Unichtozhenie', pp. 22-3 (Min. of Jus. report of 1865); Pobedonostsev, *Kurs*, ii. 487-8; Gedda, *op. cit.*, pp. 58, 61, 64, 66-8, 70-74, 82-3.

certain of the owner's relatives were assured a greater or lesser proportion of his estate and the owner was free to dispose of the remainder at his discretion.[1] Most saw this as the only acceptable compromise between the owner's moral obligation to his family and his absolute right of individual ownership. Some jurists, however, were prepared to go even further. For example, the prominent radical jurist and publicist Konstantin Kavelin argued that inheritance law lay in the province of public as well as private law because it involved the transmission of property rights to future generations and thus the prosperity of future generations and the continuance of society in general.[2] Thus inheritance law, and property law in general, should be structured in accordance with the needs of society, and not subordinated to the personal considerations of private individuals. As the family constituted the primary foundation of society, the protection of the family constituted society's principal task. Thus inheritance law ought to be structured to protect the family. With this objective, he proposed that families be organised on the basis of a council, which would manage the family's affairs and property and determine the distribution of property in inheritance.[3] I. M. Tiutriumov, a prominent jurist and later

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1. The codes most frequently cited were those of France and Italy. E.g., see Zamechaniia grazh. zak., Nos. 292, 318, 486, 501-2; Poletaev, op. cit., pp. 90-91; Spasovich, op. cit.; Il'iashenko, op. cit., no. 4 pp. 133-6; Grazh. Ulozh., bk. 4, intro., pp. 95-103, 141-4, explanas., pp. 271-309; Gurliand, op. cit., no. 210 pp. 419-20; Dormidontov, op. cit., pp. 27-8, 36-9, 61-4, 73-7; Liubavskii, 'Unichtozhenie', pp. 9-11, 21, 23-6, 38.

2. Kavelin, 'Pravo nasled.', cols. 1182-92, 1197-8, 1216, 1241-5, 1260-70; idem, 'Rus. grazh. ulozh.', 1882 no. 8, pp. 1-28, 1883 no. 2, pp. 85-7.

3. Ibid., 1882 no. 9, pp. 12-13, 19-20; idem, 'Pravo nasled.', col. 1270; supported in Zamechaniia grazh. zak., Nos. 504, 562. A similar proposal was made by Rozanov, op. cit.

an ober-procurator in the Senate, appeared to favour similar, if less extensive, restrictions when he argued that peasant customary law was more just with respect to property and inheritance than was Imperial law and therefore ought to provide the basis for the latter's reform,[1] although he was a strong advocate of a system of obligatory shares as well.

The proponents of obligatory shares generally opposed any increase in testamentary power,[2] contrary to what might have been expected if their interest really had been to consolidate the rights of the individual against the group. In fact, their concern was to control the actions of the individual for the good of the group, i.e. the immediate family, and in this way of society in general.[3] Indeed, they seem to have had an extremely pessimistic view of human nature and to have believed that any extension of testamentary power would result in widespread disinheritance of family members. This would appear to conflict at least in part with one of their basic justifications of the necessity of reform, the presumed bond of love between members of the family, although none was led into quite so obvious a contradiction as Tiutriumov. He argued strongly that

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1. Zamechaniia grazh. zak., Nos. 1, 14, 109, 180, 501, 573, 623.

2. E.g., see Zmirlov, 'Znachenie', pp. 74-80; Dormidontov, op. cit., pp. 38-9, 61-4; Gussakovskii, op. cit., pp. 23-7; Azarevich, 'Svoboda dukh. zav.'; and in general the references cited in note 1, p. 191.

3. Zmirlov, 'Znachenie', pp. 69-80; idem, 'Otmena', pp. 93-4, 108-9; Kavelin, 'Rus. grazh. ulozh.', 1882 no. 9; idem, 'Pravo nasled.', cols. 1190-92, 1216, 1241-5, 1260-70; Zamechaniia grazh. zak., Nos. 1, 14, 109, 123, 125, 292, 313-14, 318, 486, 501-2, 504-5, 562, 573; Poletaev, op. cit., pp. 90-101; Il'iashenko, op. cit., no. 4; Grazh. Ulozh., bk. 4, intro., pp. 93, 95-103, 141-4, explanas., pp. 271-84; Dormidontov, op. cit., pp. 27-8, 36-9, 61-4, 73-7; Rozanov, op. cit.; Liubavskii, 'Unichtozhenie'.

the rules of intestacy should be based on the presumed will of the deceased and that this will presumably would be based on the deceased's affection for his family and desire to secure their future; he then concluded that the deceased could not be trusted to exercise his will in accordance with what his presumed will ought to be and therefore the law should intervene to ensure that he did.[1]

Thus the basis of the criticisms directed at the existing law of patrimonial property by those jurists who also advocated a system of obligatory shares could not have been the limitations that the former imposed on the owner's power of disposition _per se_ or the economic disabilities resulting from such limitations in general, as the system which they sought to introduce by and large also would perpetuate these limitations and disabilities. Their criticisms appear to be based primarily on moral considerations and the presumed anachronistic and political foundation of the existing law and its apparent ineffectiveness in securing the welfare of the family in general and its injustice with respect to certain members in particular. In brief, the existing system appeared to them to be unjust and out of step with the modern urban conditions which they believed were beginning to prevail in Russia. To them, all assets were merely values that were highly mobile and infinitely partible. As a result, they had little sympathy for the traditions and particular practical problems presented by land and agriculture in what was still an overwhelmingly rural and agrarian society painfully trying to adapt itself to more competitive market conditions. Many of them agreed with the views expressed

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1. _Zamechaniia grazh. zak._, Nos. 109, 501, 573, 623.

by the prominent legal commentator and later Senator Konstantin Zmirlov, who, in a reply to an article defending the institution of patrimonial property and urging an expansion of testamentary power for economic reasons, stated that all economic considerations must yield to the parents' moral obligation to provide for their children.[1] No child should be favoured or excluded purely due to economic considerations, for the parents' moral obligation was too great and extended equally to each child and the importance of the family for the state far exceeded that of trade and industry.

From the last decade of the nineteenth century such views increasingly conflicted with those of most conservative and reactionary, and even many moderate, political commentators, as the reform of property and inheritance law became inextricably bound with the issues of the landholding and socio-political position of the dvorianstvo, the political structure of society in general, and economic development. To conservatives and reactionaries, the institution of patrimonial property became a symbol of support for the old régime, and even after many of them became convinced of its inimical effect on their welfare and social position, most continued to prefer reform to outright abolition. To many moderates and those interested primarily in economic growth, the principal consideration was the impact of the law on the economy. Thus they favoured a system of inheritance which, while not leaving the owner's heirs destitute, would allow him considerable flexibility in disposing of his property

1. Zmirlov, 'Znachenie', pp. 79-80, replying to Brandt, op. cit. See also Kavelin, 'Rus. grazh. ulozh.', 1882 no. 9; Tiutriumov in note 1, p. 194 above; ibid., Nos. 292, 505; Azarevich, 'Svoboda dukh. zav.', pp. 80-82, 90-97; Gussakovskii, op. cit., pp. 23-7.

and thus avoid the economic disadvantages of the existing law.[1]

The Editing Commission of the special committee formed within the Ministry of Justice in 1882 to review the existing civil laws and draft a new civil code[2] had to consider all three factors, juridical, political, and economic, when formulating its proposals for inheritance law. It reviewed its final draft of this section of the proposed code in 1901, at a time when the political controversy over the dvorianstvo and its landholding was reaching a peak.[3] As a result, most of the introduction to this volume of the code was devoted to convincing conservatives and reactionaries that the institution of patrimonial property was not an essential support of the traditional social and political order, that it in fact endangered these, and that therefore its replacement by a system of obligatory shares as envisaged by the Commission would assist the dvorianstvo in

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1. Wagner, 'Legisla. Reform', pp. 155-78; Solovev, Samoderzh., especially pp. 199-216, 316-26. See also, e.g. Sel. Khoz. i Les., ccii(1901), no. 8, pp. 294-310; B. N. Chicherin, 'O sovremennom polozhenii russkago dvorianstva', Spb. Ved., 1897 no. 28 (29 Jan.), p. 1; K. Golovin, 'Dvorianskii vopros', Nov. Vr., 1, 1898 nos. 7937-9 (2-4 Apr.), all p. 2; E_v, op. cit.; 'O zakonoproekte kommissii N. S. Abazy', Mos. Ved., 1894 no. 72 (14 Mar.), pp. 1-2; 'Eshche o trudakh kom. N. S. Abazy', ibid., 1894 no. 79 (21 Mar.), p. 1; P., 'Zapoved. imeniia'; Navrotskii, 'Po povodu khodataistv o podderzhanii dvorianskago zemlevladeniia', Grazh., 1892 nos. 63-4 (3-4 Mar.), both p. 1.

2. Brokgauz and Efron, Ents. slovar', 'Kodifikatsiia', xv(xxx), 549-50; ibid., 'Ulozhenie grazhdanskoe', xxxiv(lxviii), 692-4; 3PSZ, ii., no. 872 (12/26 May 1882), pp. 206-7; Druzhinin, op. cit., pp. 55-9; Z., 'Trudy kommisii po sostavleniiu novago grazhdanskago ulozheniia', Zh. Gr. i Ug. Pr., 1887 no. 2, pp. 157-75; idem, 'Trudy kommisii po sostavleniiu grazhdanskago ulozheniia', ibid., 1890 no. 10, pp. 109-19; 'Redaktsionnaia kommisiia po sostavleniiu proekta grazhdanskago ulozheniia', ibid., 1885 no. 8, pp. 122-65.

3. Grazh. Ulozh., bk. 4, intro., pp. 147-8.

maintaining its social, political, and economic position.[1] In addition, it is clear that the Commission was strongly influenced by economic considerations, and that it thought that these demanded the greatest possible freedom of testamentary disposition.[2] Given these conditions and considerations, the draft law proposed by the Commission achieved a remarkable balance.

First, the Commission proposed to abolish the institution of patrimonial property.[3] In general, it agreed with all the arguments made against the institution by its critics. The Commission maintained that the institution was not peculiar to Russia, but was merely a stage in the development of the institution of individual private property that would disappear under the pressure of the growth of individual rights and the economy.[4] Examining the historical development of the law in Russia, it concluded that prior to the reign of Peter I the law generally had been under the control of the church, and that the secular courts and legislation chiefly had been concerned with the _pomest'ia_ and _votchiny_ of the higher service estates and the latter's ability to fulfill their service obligation.[5] Thus existing statutory law was based on legislation appropriate only to a single social estate and conditioned by its members' obligation to serve

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1. See also the articles by two of the Commission's members: Il'iashenko, _op. cit._, no. 4; Lykoshin, _op. cit._

2. _Grazh. Ulozh._, bk, 4, intro., pp. 63-4, 68-9, 71-92, 95-103, 141-4, explanas., pp. 49, 282-4.

3. _Ibid._, intro., pp. 74, 95, and 40-95 in general.

4. _Ibid._, intro., pp. 40f., 68-9.

5. _Ibid._, intro., pp. 1-7, 51-63, 70-71, 141-2.

the state. It therefore was inappropriate for members of other social estates or other forms of property. Nevertheless, it had been extended to these from the early eighteenth century due to the lack of any alternatives.[1] Yet already in that century the institution was disintegrating under the pressures of modern developments, and by the early nineteenth century its economic disadvantages were becoming more apparent. By the late nineteenth century, the economic and social effects of the law had become extremely pernicious.[2] Nor, the Commission added, did the law correspond even to the present needs of the dvorianstvo, as recent agitation by many of the provincial assemblies over the law attested.[3] Rather than helping to secure the landholdings of dvoriane, the law led directly to their fragmentation and loss.

The Commission also agreed that the family had supplanted the clan as the basic unit of social organisation and therefore as the institution in need of the law's protection.[4] The trend of current judicial practise and legislation already was in this direction. 'Thus, current legislation, which gives unconditional force to the prohibition against testamentary disposition of patrimonial property only to protect the inheritance rights of the owner's children and in general his direct descendants, and likewise his spouse, in this way gives preference to the family principle before

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1. Ibid., intro., pp. 7, 66-8.

2. Ibid., intro., pp. 63-4, 68-9, 71-2, 74-82, 141-3, explanas., pp. 282-4.

3. Ibid., intro., pp. 71, 82-4, 89, 143. See also Wagner, 'Legisla. Reform', pp. 157-67; Solovev, op. cit., pp. 199-216, 316-26.

4. Grazh. Ulozh., bk. 4, intro., pp. 64-6, 68-9, 141-2.

that of the clan'.[1] It therefore was necessary to adjust inheritence law to recognise this social reality completely and consistently.

Finally, the Commission argued that the present law conflicted with the independence of the individual. Yet this independence constituted the currently dominant social principle and was the source of considerable economic and social progress. Thus it was not in the state's interest to limit this independence in favour of the clan; any limitation could be justified only in the interests of society.[2]

Also agreeing with the other criticisms levelled against the institution, the Commission concluded that it was necessary '<u>to abolish the laws of patrimonial property as unnecessary and even harmful remnants of the past</u>'.[3]

However, having made this decision, 'the Editing Commission came to the unanimous decision that the elimination from the future code of all limitations on the freedom of testamentary disposition and the granting to the testator of the right, in the presence of descendants, a spouse, or parents, to dispose of his property in favour of third parties would not correspond to that natural close bond that exists between members of the family and which is expressed in law by their mutual right to sustenance'.[4] It would be contrary to prevailing moral principles and the interests of the state to allow the unjustified disinheritance of such heirs which

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1. <u>Ibid</u>., intro., p. 66, emphasis original.
2. <u>Ibid</u>., intro., p. 69.
3. <u>Ibid</u>., intro., p. 95, emphasis original.
4. <u>Ibid</u>., intro., p. 95.

judicial practice unfortunately showed too often occurred when the owner had unlimited testamentary power. Thus the Commission concluded that it was necessary to allow the owner as much testamentary freedom as possible while simultaneously protecting the justified interests of the persons nearest to him. In the opinion of the Commission's majority, a system of obligatory shares was the best way to achieve this.[1]

Mindful of the economic disadvantages of the existing law, the Commission was careful to ensure that the proposed law would not unduly restrict the owner's rights and powers nor lead inevitably to the division of agricultural estates and economic enterprises.[2] It stated,

> There is no doubt that freedom to dispose of landed property, which is the first and most important source of popular wealth, is extremely important for the proper development of the economic life of the state. Only with such freedom can land pass into the control of the people capable of using it with the greatest benefit for themselves and the state. From this point of view, restricting the transfer of landed property is generally an impediment to the natural development of the productive forces of the country.[3]

Thus obligatory shares were to be based on the net value of the deceased's estate. The 'necessary heirs', that is the owner's children and their issue, or in their absence his parents, and his spouse, would have the right only to a particular value, equal to one-half the value of the share they would have received under the rules of intestacy. The Commission

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1. Ibid., intro., pp. 87-9, 95-103, explanas., pp. 271-84. The other restrictions on disposition, etc. embodied in the institution of patrimonial property would disappear with the abolition of that institution.

2. Ibid., intro., pp. 81-2, 87-92, 96-8, 101-3, explanas., pp. 49, 282-4.

3. Ibid., intro., p. 77.

ensured that this would never exceed half the net value of the entire estate, and often would be considerably less. The owner would have complete freedom of testamentary disposition over his entire estate. Thus he would be able to distribute his property in the economically or otherwise most advantageous manner, preserving economic enterprises or agricultural estates intact, passing them on to the most capable heirs, and so on. If he failed to provide for his necessary heirs in any way not equal to the value of their obligatory share and if the value of the undevised portion of the estate was insufficient for this, then such heirs had a right to bring an action against the beneficiaries of the will only for the payment of a sum equal to the deficiency. But payment of such compensation would not place an excessive strain on the person receiving an economic enterprise or agricultural estate because it could never exceed half the value of the enterprise or estate itself.[1] The owner also was given the right to disinherit any necessary heir for just cause.[2]

Thus the Commission claimed, with considerable justification, to have achieved a reasonable balance between the competing juridical, economic, social, political, and moral factors which it had had to consider. It had adapted the law to the principle of the nuclear family and protected

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1. Ibid., intro, pp. 95-103, 141-4, explanas., pp. 282-4; arts. 121-9, 132-3, 136. The donee of any gift made by the deceased within one year of his death also could be liable to the necessary heirs if the remaining estate was insufficient; ibid., arts. 128, 132, 135, and explanas., pp. 290-91.

2. Ibid., arts. 137-40, and explanas., pp. 303-9. Such causes included a criminal act against the testator, his spouse, or ascendant or descendant relatives or a false criminal accusation against any of them, leaving the testator in a helpless condition, wasteful living, gross disrespect on the part of children or their marriage without parental permission, and infidelity by a spouse.

the members of the latter while simultaneously extending the individual's proprietary rights and powers. It had eliminated the economically and politically debilitating effects of the existing law while ensuring that the owner did not neglect his moral obligations to his family. However, it had not, nor in the circumstances could it have, satisfied those jurists or others who continued to believe that the institution of patrimonial property represented a deeply rooted Russian legal institution that embodied the just limitation of the owner's power to dispose of inherited property. Nor, of course, had it satisfied those who believed the institution to be an essential feature of the traditional social and political order. Thus, given the machinery of the Russian legislative process, acceptance of the Commission's proposals was far from certain. They had not been adopted by the time that the Empire collapsed.

Chapter 5

Intestate Succession and the Position of Parents, Spouses, and Women: Judicial Development and Legal Debate

Statutory law offered the courts little opportunity to alter the existing order of intestate succession in any fundamental way. Irrespective of this, the courts appear to have been generally satisfied with the law and content only to mitigate its effects in a few areas and clarify a number of vague points of law. Nevertheless, there were some contentious issues which the courts could influence, and which represented merely another aspect of the controversy over the transition from the clan to the individual and family as the basic units of society and locus of property rights. Again, proponents of the view that this transition had occurred passionately advocated that inheritance law be restructured by legislative or judicial action to conform to this alleged change in social conditions and attitudes and to provide adequate security for those members of the family most deserving it. Such proposals encountered considerable opposition from those jurists and others who adhered to more traditional views, and from people chiefly concerned with the political and economic effects of inheritance law. While sometimes being influenced by arguments for reform, the Civil Cassation Department too generally pursued a more traditional course. In part this was due to the constraints on the court's ability to alter the law by judicial interpretation that followed from the statutes themselves. However, the court also was guided by the respect for individual rights of ownership, the considerations for the deceased's descendant heirs, and the lingering respect for the continued limited interests of the clan that

strongly influenced its treatment of the institution of patrimonial property.

I. The Parents' Rights to Succession

It will be recalled that in the event that a child died without issue, his parents had a right to the possession and use of his acquired property for life and the return in ownership of property that he had received from them as a gift. While clarifying these rights, the Civil Cassation Department treated them with considerable sympathy, yet adamantly refused to recognise them as rights of inheritance. In a series of decisions the court enunciated the doctrine that ascendant relatives were barred entirely from the inheritance, and that consequently, in the absence of descendants, a person's heirs were his nearest collateral relatives. The parents' rights in this instance constituted an exception established by law which, as such, could not be extended beyond the limited instances defined by law.[1] This ruling had the perhaps unforeseen advantageous consequence for parents of limiting their liability for the deceased's debts and obligations to the value of property received by them from the estate. Not being heirs, the parents were not bound by the extended liability of heirs for the deceased's debts and obligations established by law.[2]

The foundation of the court's position is perhaps best revealed in

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1. SRGKD 1868 no. 25; 1869 no. 16; 1872 no. 16; 1880 no. 183; 1881 no. 3; 1893 no. 12; 1908 no. 69. For a contrary view, see G., 'O stolknovenii prav roditelei i supruga na imushchestvo umershago', Zh. Gr. i Ug. Pr., 1871 no. 1, pp. 173-4.

2. SRGKD 1872 no. 16; 1873 nos. 436, 758; 1875 no. 821; 1876 no. 274.

its decision in The Chernigov Provincial Dvorianstvo v. Il'enko in 1893.[1] The respondent, Evgenii Il'enko, claimed that the parents' right was a true right of inheritance. Thus, he argued, if a parent predeceased a child who subsequently died without issue, and in Chernigov and Poltava, without siblings,[2] the heirs of the deceased parent would represent him or her with respect to the deceased child's inheritance, and consequently would enjoy the same rights to the inheritance as the deceased parent. It might seem at first glance that this argument was somewhat superfluous, as in the absence of siblings or their issue, the collateral relatives of the deceased's parent would be the same as those of the deceased, and hence the direct heirs would be identical in either case. However, maternal collateral relatives, such as Il'enko in this case, had no right to inherit the deceased's acquired property; thus Il'enko stood to be excluded from this part of the inheritance altogether.

Both the Kiev Court of Appeal and the Civil Cassation Department rejected Il'enko's argument, the latter stating that a parent enjoyed the limited rights to his child's estate only if he survived the child. With respect to property received by the child from the parent, the parent's right of reversion was the expression of the law's recognition that the parent, as donor, had a continuing interest in this property. However, this interest was not transmitted to the parent's heirs. Thus, if the parent predeceased a child who subsequently died without issue, succession

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1. SRGKD 1893 no. 12.

2. The law was slightly different in Chernigov and Poltava, where the parents received the deceased's acquired property in ownership, but were excluded from this by full or half-siblings of the deceased or their issue. SZ, X, pt. 1, art. 1143.

to such property was determined by the general rules of succession in the lines collateral to the deceased child and not by reference to the heirs of the deceased parent. It therefore was all the more proper that this rule should be applied to property acquired by the deceased child himself, as the parents had no independent interest in such property, 'and the law grants them this property not on the strength of any general principle of civil law, but, on the contrary, in the form of an exception to these general principles in view of the fact that in the absence of the deceased's own children or brothers or sisters, his parents must be considered the persons nearest to him; this consideration indeed cannot be applied to the heirs of these parents in the collateral lines; such heirs would be able to inherit the deceased's acquired property only on the strength of their independent rights to inherit after him.'[1] Being a maternal collateral relative of the deceased, Il'enko had no such right.

That the court really believed that parents retained an interest in the property given by them to their children is doubtful, as the parents' right of reversion appears to have been the sole expression of this alleged interest, which also in no way constrained the children's power over the property they had received. It is more likely that the justification given by the court for the parents' right to their children's acquired property, that is the close familial bond and implied moral obligation between parent and child, in fact formed the basis for the parents' rights in both instances. Indeed, the court provided no other reason why the parents alone among the general class of donors should be considered to have retained a continuing

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1. SRGKD 1893 no. 12, emphasis added.

interest in the property which had formed the object of the gift. While parents were not heirs of their children, neither were they to be left in need while the property acquired by their children and thus not yet limited by the rights of any particular clan passed in inheritance to more distant collateral relatives with whom the deceased had weaker ties and towards whom he had no moral obligations. Echoing the sentiments expressed in the nakazy of a century before, the court clearly felt that the parents' right to security provided by their children's property was even stronger if the property originally had been given by the parents to their children to help the latter provide security for their own families. As will be shown, this latter consideration was sufficiently compelling to override the collateral heirs' right to inherit even patrimonial property. But as the parents' right was based on the purely personal bond between parent and child, it could not inhere in anyone but the parent, and thus, as the court ruled, was a personal right which could not pass to the parents' heirs.

The relative weakness of the parents' right and the fact that it represented no more than a special right of preference to collateral heirs in the event of intestate inheritance which in no way constrained the powers of the deceased owner can be seen in the court's decision in Sudzilovskaia v. Sudzilovskaia in 1913.[1] Nikolai Sudzilovskii had received immovable property as a gift from his parents, and, subsequently dying without issue, had devised it to his wife Anna. Nikolai's mother brought suit against his widow, claiming one-half of the devised property on the grounds that the

1. Reported in Pravo, 1913 no. 12, sud. otch., cols. 754-8, no. 35, cols. 2037-40.

parent's right to the reversion of property given to a child subsequently dying without issue was absolute and overrode any testamentary disposition of that property made by the child. The respondent replied that the donee received such gifts in ownership, and consequently had full power of disposition over any property so acquired. Thus the parents' right of reversion was limited by the owner's power of disposition, and consequently applied only to the undevised property of their children dying without issue. Although the Starodub District Court found for the plaintiff, the Kiev Court of Appeal reversed this decision, and this was upheld by the Civil Cassation Department, which concurred with the respondent's arguments.[1] Thus, as the owner of acquired property had unlimited powers of disposition, and as even the owner of patrimonial property had some testamentary power over it, particularly if he had no descendant heirs, this meant that the parents' right to provision was extremely limited.

However, having thus defined the nature and limitations of the parents' right, the court was fairly generous in determining the property to which this right applied. For example, the court established the rule that the parents' right of reversion applied to any property of whatever type, movable or immovable, acquired or patrimonial, that the child had received from his parents by any form of gratuitous act, and was not limited narrowly to acquired property or property received by a formal act of gift.[2] This would appear to have been the intention of the original

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1. Ibid. However, the procurator, in his opinion to the Cassation Department, agreed with the plaintiff.

2. SRGKD 1867 nos. 279, 314; 1869 no. 16; 1872 nos. 16, 872; 1880 no. 183; 1893 no. 12.

legislation and the interpretation given it by the Senate even in the pre-reform period, but the editing of the relevant articles in the Svod Zakanov made the issue far from clear.[1] Thus in Chelyshev v. Pligin, decided in 1867,[2] the respondent, honoured citizen Ivan Pligin, inter alia argued that the plaintiff, commercial councillor Pavel Chelyshev, had no right to seek recovery of 15,000 rubles that he had given as dowry to his daughter, who subsequently died without issue, because the right of reversion referred solely to property given by the parent to the child as a gift. At law dowry constituted a form of allotment and was not a gift. Therefore, Pligin maintained, the plaintiff had no right to the property under this provision of the law. Nor, he argued, could Chelyshev bring an action based on a right of inheritance, as parents could not be the heirs of their children.

Both Moscow lower courts and the Civil Cassation Department rejected Pligin's interpretation of the law. The Cassation Department stated that in defining the parents' rights to the property of their children dying without issue, the law distinguished property acquired by the children independently of their parents from that acquired by them as a gift from their parents. The extent of the parents' rights varied in accordance with this distinction in the means by which the children acquired the property. Capital received by a daughter as a dowry at the time of her marriage nowhere was excluded from the latter category, giving the parents more extensive rights,

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1. 1PSZ, xxxviii, no. 29511 (14 June 1823), pp. 1039-40; 2PSZ, ii., no. 1250 (18 July 1827), pp. 617-18; SRPS, I, no. 77; SZ, X, pt. 1, arts. 1141-2.

2. SRGKD 1867 no. 279.

and, on the contrary, specifically was included in it.[1] Therefore the parents had a right to demand the return of such property in ownership should the daughter die without issue.[2] When later the specific issue of property received in allotment arose, the court likewise held it to be included within the purview of this rule.[3]

In two subsequent decisions the court further clarified the parents' right to reversion to their advantage by ruling that it applied to all forms of immovable and movable property, including capital, as well as to patrimonial property.[4] Indeed, the only qualification that the court seemed to impose on the parent's exercise of his right was in demanding that he be able to prove that he had been the donor of the gift, which admittedly often could be quite difficult to do, particularly in the case of capital or other forms of movable property.[5] And in the case of Nikitina v. Nikitina in 1869 the court rejected the plaintiff's argument that, as the law specifically prohibited an investigation to determine the patrimonial origin of capital, such property reverted to either surviving parent, irrespective of which had been the donor.[6] The court held that, on the contrary, property received by a child as a gift did not revert to

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1. SZ, X, pt. 1, art. 398 prim.

2. See also SRGKD 1867 no. 314.

3. SRGKD 1880 no. 183; 1893 no. 12.

4. SRGKD 1869 no. 16; 1872 no. 16. See also 1867 no. 314; 1872 no. 872.

5. E.g., see SRGKD 1867 no. 314; 1869 no. 16; 1872 no. 872, all of which concerned members of the merchantry. However, in the case of capital or other forms of movable property, inability to prove that the property had been a gift led only to a diminution of the parent's right; being acquired property, it could be claimed in possession and use for life.

6. SRGKD 1869 no. 16. SZ, X, pt. 1, arts. 398, 1144.

either parent indiscriminately, but rather reverted only to that particular parent who had made the gift. In the event of dispute, therefore, the court was obliged to determine the origin of any property claimed by a parent, even though this consisted of movable property, and likewise it was incumbent on the parent to prove that he or she had been the donor of the gift. This did not violate the law, because the court was not trying to determine the patrimonial character of such property, but merely its origin in order to establish the validity of the parent's claim.

The court adopted an equally benevolent attitude toward the parents' right to possession and use for life of property acquired independently by their children. Although it firmly maintained that the parents' right extended only to property legally classified as 'acquired,' and therefore did not concern patrimonial property, however acquired, it held that the right embraced all forms of acquired property, again irrespective of how such property had been acquired. Thus, for example, acquired property inherited by a child from one parent could pass to the possession and use of the other parent for life if the child died without issue and without having disposed of the property by will. Furthermore, both parents enjoyed an equal right to the life estate, so that all the deceased's acquired property was affected irrespective of whether both or only one of the parents survived.[1]

As is clear from its decision in Matsneva v. /Izmalkova?/ in 1872, the court's refusal to allow a surviving parent the right to a life interest

1. SRGKD 1869 no. 16; 1872 nos. 16, 872; 1881 no. 3; 1903 no. 133. N. N., 'Po voprosu o primenenii st. 1141-1145 t. X ch. 1 zak. grazhd.', Zh. Gr. i Ug. Pr., 1892 no. 4, zam., pp. 1-17.

in his or her child's patrimonial property was based on the conflict between the rights of the clan and the interests of the parents.[1] Varvara Izmalkova had died, leaving a landed estate that she had inherited from her father. If it had not been so previously, the estate thus became patrimonial in the deceased's father's clan. The deceased's mother, dvorianka Aleksandra Matsneva, claimed possession and use of the estate for life, on the grounds that the property to which the parents had a right was not limited to the child's 'acquired' (in the legal sense) property, but included all property acquired by the deceased during his or her life, irrespective of the legal classification of the property or the means by which it had been obtained. Her argument relied primarily on a narrow literal reading of article 1141, which indeed did not mention either acquired or patrimonial property, but referred solely to property acquired by the children themselves.[2] Although the original legislative source[3] might imply the contrary, the plaintiff argued, this no longer was applicable, as with the promulgation of the Svod Zakonov the articles contained therein superseded the original legislation. Thus the parents' rights had been expanded by the wording accepted in the Svod Zakonov.

Acceptance of Matsneva's interpretation would have expanded the parents' rights considerably, as it would have meant that any of the child's

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1. SRGKD 1872 no. 16.

2. The relevant part of article 1141 read: 'Parents do not inherit after their children the property acquired by the latter themselves; but if the children die without issue, then such property of theirs is given in possession for life to the father and mother jointly,. . .', emphasis added.

3. 1PSZ, xxxviii., no. 29511 (14 June 1823), pp. 1039-40.

property which did not revert to the parents in ownership would have passed to them in possession and use for life. Consequently, both the Elets District Court and the Kharkov Court of Appeal denied Matsneva's suit. In upholding this decision, the Civil Cassation Department reviewed the parents' position generally. It held that parents did not inherit from their children; the heirs of children dying without issue were their nearest collateral relatives. Thus when parents acquired a life estate in their children's property, they did not enter into all the rights and obligations of the deceased as heirs. Even when the parents received their children's property in ownership, it was not as inheritance, but in the form of a gift. However, the court added, the law did not make sufficiently clear over which property the parents' rights extended. In such cases, the court was bound to turn to the original legislative sources for clarification. Turning to the _ukaz_ of 14 June 1823, the court argued that there was no doubt that the legislator intended to distinguish patrimonial property inherited by a child from acquired property obtained by the child's own efforts. Any other interpretation would violate the principle of patrimonial property. 'Thus,' the court concluded, 'under article 1138, Volume X, part 1, patrimonial property remaining after a person dying without issue passes into the collateral lines, . . . even if one of the /deceased's/ parents is surviving, _providing this property was not granted by the latter to the deceased as a gift_'.[1] In short, the court established that in the event of a conflict between the rights of the clan and the interests of the parent, the former took precedence, unless the parent concerned originally

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1. _SRGKD_ 1872 no. 16, emphasis added.

had owned the property. In that case the moral obligations arising from the bonds between parent and child could be observed and the property returned to the parent without transgressing the rights of the clan because the parent would be a member of the clan in which the property was patrimonial.

Perhaps because the law and the courts did accord the parents fairly substantial rights to their children's property and because their rights did not seem as unjust as those accorded to women and spouses, the question of the parents' right of inheritance did not receive as much attention as some other aspects of the law of inheritance. Nevertheless, there was a significant movement among jurists demanding that parents and other ascendant relatives be admitted to the inheritance as true heirs and that their rights be expanded.[1] The arguments advanced in favour of such reforms in many ways were similar to those used against the institution of patrimonial property. Thus, it was claimed that the existing law was antiquated and was but the unjust remnant of a previous age that had been structured on the institution of the clan and the obligations of male clan members to serve the state.[2] However, the latter had been abolished and

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1. E.g., see Zamechaniia grazh. zak., Nos. 573-4, 577-9, 609, 618-21; Iurist-Praktik, op. cit.; Kurdinovskii, 'Vymor, imushch.', no. 8 pp. 138-9; Gussakovskii, op. cit., pp. 19, 28-33; Vest. Ev., 1903 bk. 11, vn. obozr., p. 364; L. F. Snegirev, 'O prave nasledovaniia v bokovykh liniiakh edinokrovnykh i edinoutrobnykh brat'ev i sester', Iurid. Vest., 1871 no. 9, pp. 18-22; Grazh. Ulozh., bk. 4, intro., pp. 19, 95-6, 108-9, explanas. 45-9, 271-2, Kavelin, 'Rus. grazh. ulozh.', 1882 no. 9, pp. 19-23; Demchenko, Sushch. nasled., pp. 74-8.

2. Zamechaniia grazh. zak., Nos. 573-4; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 133-8, 145-7; Gussakovskii, op. cit., pp. 1-3. On the historical development of the rule, see Pobedonostsev, Kurs, ii. 301; Nikol'skii, op. cit., pp. 73-9, 126-7, 152-4.

the family had replaced the clan as the primary social unit. As a result, the law now conflicted with prevailing social attitudes and conditions.[1] Thus it was necessary to reform the law on a more relevant and equitable basis. Roman Law and existing practice in most Western European jurisdictions were cited as proof of both the equitableness of such reform and its correspondence to contemporary social conditions.[2]

Such critics argued that the basis of inheritance law ought to be the love, respect, and mutual bonds and obligations that existed within the family.[3] These ties were closest between parent and child. The parents were responsible for their children's development and often accepted considerable sacrifice and expense to ensure their children's welfare and education. It therefore was only natural that children would wish to repay their parents and, in the absence of their own children, would want their property to pass to their parents as the persons with whom they were most closely bound. Excluding parents in favour of more distant collateral relatives, existing law thus was extremely unjust.[4] Therefore, it was

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1. Zamechaniia grazh. zak., Nos. 577-9; Iurist-Praktik, op. cit.; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 135-40, 145-7; Gussakovskii, op. cit., pp. 1-3, 14-19, 28-33.

2. Snegirev, op. cit., pp. 18-22; Iurist-Praktik, op. cit.; Tiutriumov in Zamechaniia grazh. zak., No. 573; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 133-44.

3. Snegirev, op. cit., pp. 18-22; Tiutriumov in Zamechaniia grazh. zak., No. 573; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 133-47; Gussakovskii, op. cit., pp. 1-3, 14-24, 28-36; Kavelin, 'Rus. grazh. ulozh.', 1882 no. 9; Grazh. Ulozh., bk. 4, intro., pp. 64-6, 68-9, 93, 95-103, explanas., pp. 30-49, 72-9, 272-78.

4. Zamechaniia grazh. zak., Nos. 573-4, 577-9, 609, 618-21; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 133-40, 145-7; Vest. Ev., 1903 bk. 11, vn. obozr., p. 364; Iurist-Praktik, op. cit.; Gussakovskii, op. cit., pp. 19, 28-9; Zmirlov, 'O nedostat.', 1884 no. 5, pp. 72-4; Grazh. Ulozh., bk. 4, intro., pp. 95-6, explanas., pp. 45-9.

proposed, parents should be given a proper right to inherit their children's property and, in the absence of descendant heirs and jointly with a surviving spouse, should be preferred to collateral relatives.[1]

That in this case such proposals did reflect sentiments held by a wider spectrum of the population finds at least limited support in the provisions of the law of 1882 amending the tax on property transferred without consideration which concerned inheritance.[2] It is clear from the debate in the State Council that both the ministerial architects of the law and the members of the State Council sought to establish the various tax groups in accordance with the equitableness of the claims of each particular category of persons to the deceased's inheritance, and that the criterion adopted for classification was the closeness of the familial bond. The closer the family tie, the more equitable was the receipt of property in inheritance, hence the less it ought to be taxed. On this basis, the lowest tax group consisted of the deceased's surviving spouse, children and their spouses and issue, parents, and adopted children. Collateral relatives were placed variously in the higher tax groups.[3]

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1. Snegirev, op. cit., pp. 18-22; Zamechaniia grazh. zak., Nos. 574, 609, 618-21; Iurist-Praktik, op. cit.; Kurdinovskii, 'Vymor. imushch.', no. 8 pp. 138-9, 145-7; Vest. Ev., 1903 no. 11, vn. obozr., p. 364; Gussakovskii, op. cit., pp. 14-19, 28-36.

2. 3PSZ, ii, no. 972 (15 June 1882), pp. 306-11, especially polozh., art. 3; later SZ, V (1903) Ust. o Poshl., arts. 201-33, especially 203.

3. Ibid.; Otchet Gos. Sov. 1882, pp. 79-106.

II. The Spouse's Right to Succession

The nature and extent of the share due to the deceased's surviving spouse likewise were the subjects of considerable controversy. In this instance, however, the court's attitude was more complex than in the previous case, possibly because any expansion of the spouse's rights generally would have had to have been made at the expense of the deceased's children and would have infringed the proprietary powers of the deceased himself. Consequently, even in those instances where it might have done so, the court was less willing to expand the rights of the surviving spouse than it had been with respect to the deceased's parents.

As in the latter case, the courts did not consider the statutory share due the surviving spouse a form of inheritance, nor was it part of a matrimonial _régime_. Rather, it was held to be merely an entitlement to provision for maintenance, which the surviving spouse could demand but which was not received automatically.[1] The right of inheritance was based exclusively on the existence of a blood relationship between potential heirs and the deceased.[2] As generally no such link existed between spouses, the surviving spouse could not be the heir of the deceased spouse, but

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1. _SRGKD_ 1868 no. 563; 1871 no. 1224; 1879 no. 2; 1888 nos. 71, 95; 1905 no. 96; 1913 no. 41. See also 1868 no. 25. On the obligation to demand the share: _SRGKD_ 1867 no. 279; 1869 no. 16; 1882 no. 101; 1888 nos. 71, 95; 1904 no. 23. For a dissenting view, see N. N. Tovstoles, 'Nasledovanie suprugov po russkomu pravu, v sviazi s proektom grazhdanskago ulozheniia', _Zh. Min. Ius._, 1911 no. 5, pp. 33-41; _idem_, 'Ukaznaia chast' supruga v imushchestve svekra (testia)', _ibid_., 1914 no. 5, pp. 152-5; I. Lavrov, 'Vopros Meiera o prave nasledovaniia vdovy i otvetstvennosti eia v dolgakh muzha', _Iurid. Vest_., 1863 no. 9, pp. 76-84; Liubavskii, 'Pol. vdóviu'. For a perhaps more balanced historical account, see I. E. Il'iashenko, 'O prave nasledovaniia suprugov s tochki zreniia budushchago grazhdanskago ulozheniia', _Vest. Pr_., 1902 no. 4-5, pp. 70-90.

2. _SRGKD_ 1868 no. 25.

instead was granted an exceptional right to a prescribed share of the deceased's property. Thus in rejecting the petition of titular councillor Nil Tomarov for the possession, in the absence of any other heirs, of the remainder of his deceased wife's estate above the amount due him by law, the Civil Cassation Department ruled that 'the husband is not an heir of his wife, but has only the right to the allotment of a statutory part of her estate'.[1] Tomarov had relied on the rule in article 1241, SZ, X, 1, that six months after the public summons of heirs, the deceased's property passed into the possession of those heirs who were present, which, however, did not deprive any absent heirs of the right subsequently to claim their share of the estate. Acceptance of this argument would have enlarged the surviving spouse's right such that the more limited statutory shares would have applied only in the presence of other heirs, while in their absence, the surviving spouse would inherit the entire estate. All three courts held that this rule did not apply to Tomarov because it referred solely to heirs; being only the surviving spouse, Tomarov was not an heir. Hence, if no heirs appeared, the remaining property would escheat.

As with the deceased's parents, one advantageous effect of this doctrine was limitation of the surviving spouse's liability for the deceased's debts and obligations to an amount commensurate with the value of the property actually received from the deceased's estate.[2] However, this also lent to the surviving spouse's régime some peculiar characteristics which clearly reveal the conflict between the desire to provide adequately

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1. SRGKD 1871 no. 1224. See also 1901 no. 41.

2. SRGKD 1868 no. 563; 1877 no. 373; 1888 no. 71.

for the surviving spouse and the desire to preserve landed property within the clan. These characteristics are perhaps most evident in the court's decisions in Popova v. Azarevich in 1881 and Poliakova v. Lapkiny in 1888.[1]

In the first, dvorianka Varvara Ivanovna Begichev died, having submitted to the local guardianship council a claim for the statutory share due her from her deceased husband's estate, but without this claim having been satisfied. Her sole daughter Nadezhda also had died after her father, and the estate passed ultimately to Maria Azarevich and her children as the deceased daughter's nearest paternal heirs. Whereupon dvorianka Ekaterina Popova, the nearest heir of the mother Varvara Begichev, brought suit against Azarevich for one-seventh of the sizable immovable property of the estate on the grounds that Begichev's request to the guardianship council was sufficient to establish her right to ownership of the property due her from her deceased husband's estate. At her death, the right to this property thus passed to her relatives, even though her title had not been confirmed by that time. Azarevich rejected the claim on the grounds that the surviving spouse did not automatically receive his or her statutory share in ownership, but had to request this formally. As the only established procedure for this was by petition to the appropriate court, Begichev's petition to the guardianship council was insufficient to establish her title in ownership. Hence Begichev never acquired the right to ownership of the property due her from her deceased husband's estate, and consequently this right could not pass to her heirs. Therefore the entire estate must pass to her daughter's heirs, which would exclude the plaintiff.

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1. Respectively, SRGKD 1882 no. 101 and 1888 no. 95. See also the reasoning of the Kharkov Court of Appeal in 1877 no. 373.

Both the Saratov District Court and Court of Appeal agreed with Azarevich and denied the plaintiff's suit. However, the Civil Cassation Department vacated the decision, and on rehearing, the Kharkov Court of Appeal found for the plaintiff. Azarevich then appealed to the Civil Cassation Department, adding the further argument that the surviving spouse had to be childless either at the time of his or her spouse's death or at the time the request for the statutory share was made in order to receive a right to ownership of the share and to pass this right on to his or her heirs.[1] As Begichev had not been childless on either occasion, her heirs had no right to the statutory share due her.

Although vacating the court of appeal's decision with respect to the identity of the land in dispute, the Civil Cassation Department upheld the court's decisions on the main legal points at issue. The court confirmed the rule that the surviving spouse's statutory share was not received automatically, but had to be requested formally in order to be received in ownership and to establish the rights of the surviving spouse's heirs to it.[2] However, the court added that the law prescribed no formal procedure for making this request, and consequently almost any form of public declaration of intent to take the share in ownership would be sufficient to realise this right. Thus Begichev's petition to the local guardianship council was considered adequate by the court, and indeed in

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1. SRGKD 1882 no. 101. The new argument rested on a literal reading of article 1152, X, 1: 'If a childless wife dies without having requested during her life the allotment to her of a statutory share, then her heirs do not have the right to demand this share, and it passes to the heirs of the husband;. . .'.

2. SRGKD 1867 no. 279; 1869 no. 16; 1877 no. 373. For later decisions see 1888 nos. 71, 95.

the future it granted wide latitude in determining what constituted a formal request.[1] Furthermore, the court held that, irrespective of whether there were any children of the marriage, the surviving spouse had the right to claim the statutory share in ownership from the moment of the deceased spouse's death until his or her own death, and only failure to make such a request within this period could deprive the surviving spouse's heirs of the right to inherit this property. The law merely defined the consequences of the surviving spouse's failure to make such a request by the time of death, and hence, contrary to the respondent's contention, use of the term 'childless' referred solely to the moment of the surviving spouse's death and to the circumstance in which there were no children surviving from the marriage in question.[2] The law had no need to define the result if children did survive, because in that instance the heirs of both parents would be identical and no conflict would arise.

In Poliakova v. Lapkiny, however, the court held that mere posession of the deceased spouse's property by the surviving spouse was insufficient to establish his or her intention to take the share in ownership.[3] After the death of his wife, Ivan Lapkin and his children had remained in co-possession of a house owned by the deceased in Moscow. At his own death, Lapkin devised the one-seventh share of the house due him by law to his daughter Olga Poliakova, who thereupon brought suit against her brothers Ivan, Sergei, and Nikolai for individual possession of three-fourteenths

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1. E.g., see the decision reported in Pravo, 1910 no. 48, sud. otch., col. 2925.

2. SZ, X, pt. 1, art. 1152. See note 1, p. 220.

3. SRGKD 1888 no. 95; reconfirmed in 1904 no. 23.

of the house.[1] These latter disputed their father's right to dispose of the property by will on the grounds that, never having formally requested the allotment of the share due him from his wife's estate, he never acquired ownership of this property. Thus ownership of the house was retained by the deceased wife's heirs, who consequently also retained the sole right to dispose of it.

Although the Moscow District Court found for the respondents, the Moscow Court of Appeal reversed the decision. The court of appeal ruled that the surviving spouse did not merely receive a provision for maintenance, but was a true heir of the deceased, and consequently, as with any heir, factually realised his or her rights to the inheritance without formal judicial confirmation of this by possession and use. Failure to demand allotment of the share did not by itself extinguish the surviving spouse's right to own it. By possessing part of the house, Lapkin had effectuated his rights as heir and acquired ownership of his statutory share of the house. Hence he had full power to dispose of this share.

In vacating this decision, the Civil Cassation Department, based on an historical review of the law's foundations, confirmed the principle that spouses did not inherit from one another, but received only the right to a provision for maintenance. As the purpose of the law was to provide for the surviving spouse for his or her life, he or she could hold the property due either in possession and use for life or in full ownership. The latter could be the case only if the surviving spouse formally requested ownership. Thus the mere fact of possession, in the absence of such a request,

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1. Two-fourteenths under her father's will, and one-fourteenth as heir of her mother.

signified only that the surviving spouse was holding the property as a life tenant and did not intend to claim the share in ownership.

The unique nature of the surviving spouse's statutory share emerges clearly from these decisions. The primary objective of the law was to ensure that the surviving spouse continued to have some means of support after the death of the husband or wife. It was possible that this support would be provided voluntarily by the deceased's heirs or that the surviving spouse would continue to live harmoniously with his or her children and be supported in this way. If such were the case, there would be no need to separate physically the spouse's share from the rest of the deceased's estate, which thus could be preserved intact for his or her heirs. Only if adequate support was not forthcoming would it be necessary for the surviving spouse to exercise the right to demand the statutory share in ownership, with the consequence that the deceased's estate would be divided physically and part of it would pass to another clan.[1] To protect the surviving spouse, he or she could exercise this right at any time during the remainder of his or her life. Of course, the court readily granted any such demand, and was fairly lenient in defining what constituted such a demand.

Unquestionably the court was being influenced in this attitude by the traditional, if then receding, view of the spouse within the clan structure as basically an outsider who remained a member of his or her

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1. This view is most forcefully expressed in Vol'tke, 'Ob ukaz. dole'; see also Nikol'skii, op. cit., pp. 141-52.

original paternal clan.[1] Adherents of this view frequently reconciled the need to provide for the surviving spouse with the desire to retain property intact for the deceased's heirs by the medium of a life estate for the former,[2] and the apparent frequency with which owners availed themselves of the power to offer their surviving spouse a life estate in place of the statutory share due them suggests that this attitude was held more generally.[3] While it would be difficult to argue that the court subscribed fully to this view, it is clear that it was not without considerable influence.[4]

This attitude is manifest in the court's treatment of the surviving spouse's right to a share of his or her father-in-law's property.[5] Nowhere was the nature of the spouse's share as only a provision for maintenance more evident than in these rights, by which the spouse was granted a claim to the property of a person after whom, not being related by blood, they had no right of inheritance and with whom the only connection was the

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1. E.g., see Vol'tke, op. cit.; Pobedonostsev, 'Imenie rod.', pp. 10, 18-9; idem, Kurs, i. 56-9, ii. 297-8, 300, 309, 337, 341-3; Nikol'skii, op. cit., pp. 127-52; certain of the remarks of jurists in Zamechaniia grazh. zak., Nos. 624-34; Malyshev, Saburov, and Karnitskii in Grazh. Ulozh., bk. 4, intro., pp. 105-6, 108-9, 135-6, explanas., pp. 83-4. Proposals, such as those of Speranskii and Bludov, that the surviving spouse receive only a life estate generally had this as their basis: ibid., explanas., pp. 74-5.

2. See note 1 above, references to Vol'tke, Malyshev, Karnitskii, the jurists in Zamechaniia, and the proposals of Speranskii and Bludov. See also Brandt, op. cit., no. 7 pp. 36-7, 51-2. It is clear that when discussing the 'surviving spouse' most jurists and publicists meant primarily the widow.

3. Dumashevskii, 'Zaveshchanie'; Kasso, op. cit., p. 218; Orshanskii, 'Nasled. prava', no. 3 pp. 3-4.

4. E.g., see SRGKD 1876 no. 214, and in general section III below.

5. See above, pp. 56-7.

fortuitous and involuntary one of marriage to a son or daughter. Because the right, particularly to the father-in-law's immovable property during his life if the deceased had failed to leave such property to his surviving spouse, seemed to violate the basic principles of Russian, and indeed natural, inheritance law, it was roundly condemned by nearly all jurists of all shades of opinion.[1] As several pointed out, by granting the right to claim a share of the father-in-law's immovable property during his life, the law granted the surviving spouse of a son or daughter greater rights than the father-in-law's own children, who had no claim on their father's property during his life. Already in the pre-reform period the General Meeting of the Senate, the Minister of Justice, and the State Council had rejected an attempt in a private case to extend these rights to the mother-in-law's property, with the State Council even rejecting a proposal to do this legislatively on the grounds that the existing right to the father-in-law's property, having no moral basis and contravening the clan principle, was undesirable and ought to be limited.[2] This the Civil Cassation Department proceeded to do.

In Gruzdev v. Sokolov in 1868 the court restricted the surviving

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1. E.g., see Il'iashenko, 'O prave nasled.', pp. 89-90; Kavelin, 'Pravo nasled.', cols. 1256-7; A. Liubavskii, 'Ukaznaia chast' iz nedvizhimago imushchestva testia ili sverkra', Zh. Min. Ius., 1864 no. 8, pp. 209-18; 'K voprosu o poriadke nasledovaniia suprugov', Sud. Gaz., 1891 no. 44 (3 Nov.), pp. 2-3; Zmirlov, 'O nedostat.', 1884 no. 6, pp. 113-15; I. M. Tiutriumov, 'Po povodu peresmotra i kodifikattsii grazhdanskikh zakonov', Rus. Bogatstvo, 1884 no. 5-6, pp. 465-70; Pobedonostsev, Kurs, ii. 338-41; Grazh. Ulozh., bk. 4, intro., pp. 19-20, explanas., pp. 88-95. For a contrary opinion see Tovstoles, 'Ukaz. chast supruga', who uses these rights to argue that spouses had a full right of inheritance after one another and to represent their deceased spouse in inheritance in general.

2. Zh. Min. Ius., vii(1861 no. 1), pp. 118-25.

spouse's right to claim a share of his or her father-in-law's immovable property during the latter's life to only his patrimonial property,[1] which later was narrowed even further to only that patrimonial property owned by the father-in-law at the time of his son or daughter's death.[2] Gruzdev had claimed that the surviving spouse's right in this instance embraced both patrimonial and acquired immovable property, because the law[3] made no distinction between the two categories, but referred solely to immovable property in general. If the compilers of the Svod Zakonov had wished to limit this right to only one category of immovable property, he argued, they would have stated so explicitly. 'When the literal meaning of current legislation is so clear that no doubts remain as to the true will of the legislator there cannot be even a question as to /the/ application /of the court's power to interpret the general meaning of the laws/ to a particular case'.[4] Thus the court must adhere to the literal meaning of the law. The Moscow District Court agreed, and found for Gruzdev.

The Moscow Court of Appeal, however, with whose decision the Civil Cassation Department concurred, disagreed and reversed the decision. The court argued that during the father-in-law's life his child's surviving spouse could have a right only to a share of that property that necessarily would have come to the deceased as inheritance from his or her father. As

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1. SRGKD 1868 no. 869. See also 1884 no. 23.

2. SRGKD 1897 no. 68. This was identical to the position adopted by the Senate in a private case in 1850: SRPS, I, no. 356.

3. SZ, X, pt. 1, art. 1151.

4. SRGKD 1868 no. 869

the law granted the owner of acquired property an unfettered right to dispose of such property during his life or at death, and as children could not demand an allotment of acquired property from their parents, such property did not necessarily have to pass to a child in inheritance. Only patrimonial property unavoidably would do so. Thus the surviving spouse could demand only this property from his or her father-in-law during the latter's life. To rule otherwise, the court held, would violate the proprietary rights of the owner of acquired property. The Civil Cassation Department added that this had been the position adopted by the Senate in its decision in the Matskevich case in 1850, which decision had been circulated for general guidance, and the court saw no reason to alter this rule.[1] The court of appeal maintained that even the historical sources supported this interpretation, as the decree creating the surviving spouse's right had been promulgated in 1731, before the law had drawn a clear distinction between patrimonial and acquired property. Thus the grant of complete power to dispose of acquired property in 1785 limited the right created by the earlier act.

Despite the historical reference, it is clear that the primary basis of the courts' decisions was the belief that the law as written constituted an unjustified violation of the rights of ownership. Thus the above ruling, which was criticised even by sympathetic legal commentators as being arbitrary and unsupported by the law,[2] was intended to protect the owner's

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1. Ibid.; SRPS, I, no. 356.

2. Kavelin, 'Pravo nasled.', cols. 1256-7; Zmirlov, 'O nedostat.', 1884 no. 6, pp. 113-15; Tovstoles, 'Ukaz. chast' supruga', pp. 152-5; Shershenevich, Uchebnik, pp. 745-7; Tiutriumov, 'Po povodu', pp. 469-71; Pobedonostsev, Kurs, ii. 338-41. See also Kalachov, 'Otvet 1149'.

rights from this encroachment, as was the subsequent ruling that after the father-in-law's death the surviving spouse of a deceased son or daughter was entitled to a share only of his undevised acquired property.[1] For the same reason the court also rejected any attempt to limit in favour of the surviving spouse the deceased's right to devise his own acquired property.[2]

Perhaps the most novel attempts to do this occurred in two cases in St. Petersburg at the end of the 1860s.[3] In both cases the plaintiff, both merchant's widows, argued that the husband's right to devise his acquired property was limited by his obligation to love and provide for his wife.[4] Thus the husband's power of testamentary disposition did not allow him to deprive his wife of the statutory share of his acquired property due her by law, as had occurred in each case and which would be a violation of the husband's Christian duty toward his wife, but on the contrary this was intended to enable him to increase this share if he so desired. All three courts rejected this interpretation. They ruled that the owner of acquired property had an unlimited power to dispose of it by will, and consequently the share of such property due his surviving spouse was based only on the amount of such property remaining undevised after his death. The husband's duty to provide for his wife was a purely personal

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1. SRGKD 1884 no. 23.

2. SRGKD 1870 no. 1599; 1873 no. 1074; 1884 no. 23; 1890 no. 42; 1897 no. 68; N. S., 'Po povodu st. 1148 i 106 Zakonov Grazhdanskikh', Iurid. Vest., 1869 no. 12, pp. 74-7. See also SRPS, I, no. 356.

3. SRGKD 1870 no. 1599; N.S., op. cit.

4. SZ, X, pt. 1, arts. 106, 1148.

obligation which terminated with his life.[1]

Thus the court was more reluctant to expand the statutory rights of the deceased's surviving spouse than it had been with respect to his parents. Indeed, it even slightly contracted these rights. However, the considerations causing this were identical to those which determined the ultimate limitations on the parents' rights and which strongly influenced the court's treatment of patrimonial property. These were, first, a desire to free the rights and powers of the individual owner from constraint, and, second, a lingering, albeit weak respect for the clan's interest in patrimonial property which led the court to prefer clansmen to nonclansmen in the succession to such property. However deserving the surviving spouse was of provision, he or she still was not a member of his wife's or her husband's clan.[2]

This was an attitude clearly not shared by the majority of legal commentators. Believing the family to have supplanted the clan, they forcefully argued that the deceased's surviving spouse should become a true and major heir. The arguments used to support this contention to a

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1. However, the court later ruled that in Chernigov and Poltava provinces, and for Mohammedans in Transcaucasia, the husband's power was so limited. SRGKD 1911 no. 14; 1884 no. 8.

2. This attitude contributed to the proprietary independence of wives in Russia, a situation unique in continental European law. By law, the wife's property, including her dowry, was completely separate from that of her husband, and he in no way limited her proprietary powers. SZ, X, pt. 1, arts. 109-10, 112, 114-17, 397 pt. 6; X, pt. 2 (1857) Zak. Sud. Grazh., arts. 2270-72, 2274 (1876 edn., Zak. o Sud. i Vzy. Grazh., arts. 1482-84, 1486; 1892 edn., Pol. o Vzys. Grazh., arts. 415-17, 419); XI, pt. 2 (1857) Ust. Torg., arts. 1932-37 (1893 edn. Ust. Sudoproiz. Torg., arts. 554-8, 624; 1903 edn., ibid., arts. 460-65, 531). SRGKD 1867 no. 279; 1869 no. 16; 1875 no. 101; 1876 no. 214; 1905 no. 96. For an historical comparison of Russian law with other jurisdictions, see Reinke, 'Dvizh. zakon.'.

large extent parallelled those employed with respect to the rights of the deceased's parents. Once again a blend of historical and moral arguments were deployed in an attempt to discredit the existing law and prove the necessity of reforming it in a manner corresponding to what were believed to be prevailing social conditions and attitudes. Thus, as with nearly every effort to reform inheritance law, it was argued that the present rights of the surviving spouse were derived from the social structure and needs arising from the system of limited service tenure of land and obligatory state service for males which had long since disappeared.[1] The demise of that system and the reorientation of social organisation from the clan to the family and the individual necessitated a corresponding change in the law of inheritance, as in the new social conditions the law developed for the conditions of a previous age produced extremely unjust results and conflicted with prevailing social attitudes.[2] The law should be based on the natural affection existing between family members, among whom the relationship between husband and wife was paramount. Spouses voluntarily chose each other as the person with whom they wished to pass

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1. Zamechaniia grazh. zak., Nos. 109, 309, 573-5, 623; Il'iashenko, 'O prave nasled.', pp. 70-75, 81; Kavelin, 'Pravo nasled.', cols. 1256-7; idem, 'Rus. grazh. ulozh.', 1882 no. 9, pp. 13-19; Tovstoles, 'Nasled. suprugov', pp. 3-34, 38-41, 48-9; idem, 'Ukaz. chast' supruga', pp. 144-9; A. Goikhbarg, 'K reforme nasledovaniia po zakonu', Pravo, 1909 no. 38, cols. 2023, 2026; Grazh. Ulozh., bk. 4, intro., pp. 1-7, explanas., pp. 72-4, 88-91.

2. Zamechaniia grazh. zak., Nos. 3, 10, 14, 109, 309, 573-9, 623-4; Il'iashenko, 'O prave nasled.', pp. 74, 81-2, 85; Iurist-Praktik, op. cit.; N.S., op. cit.; Zmirlov, 'O nedostat.', 1884 no. 5, pp. 72-3; idem, 'Znachenie', pp. 67-8, 94-5; Goikhbarg, 'K ref. nasled.', no. 38 cols. 2023-6, no. 39 cols. 2081, 2084-7; Gussakovskii, op. cit., pp. 1-3, 20-23, 31-3, 36; Grazh. Ulozh., bk. 4, explanas., pp. 74-9, 87-8; Tovstoles, 'Nasled. suprugov', pp. 48-9, 51-8.

their life, and usually the property left by one spouse, if not mutually acquired, was preserved and improved by the mutual efforts of both.[1] Thus it was only just that spouses have a true right to inherit from one another, and that the surviving spouse should receive a much larger share of the deceased spouse's property, particularly if no children survived.[2] Alleged frequent attempts to circumvent the law in order to improve the spouse's share were cited as proof that society in general favoured such reform, and it was claimed that failure to introduce this reform consequently would breed disrespect for the law.[3] Moreover, as the family formed the foundation of the state, and hence provided the basis for the state's stability, it was in the state's interest to ensure the family's welfare and stability, to which this particular reform of the inheritance law would contribute.[4]

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1. Zamechaniia grazh. zak., Nos. 3, 10, 14, 109, 573, 623; Azarevich, 'Semei. imushch.', pp. 122f.; Il'iashenko, 'O prave nasled.', pp. 74, 81-2; Kavelin, 'Pravo nasled.', col. 1266; idem, 'Rus. grazh. ulozh.', 1882 no. 9, pp. 2-9, 15-17, 19-20; Zmirlov, 'O nedostat.', 1884 no. 5, pp. 72-3; Goikhbarg, 'K ref. nasled.', no. 39; Gussakovskii, op. cit., pp. 10-13, 31-6; Tovstoles, 'Nasled. suprugov', pp. 51-8; idem, 'Ukaz. chast' supruga', pp. 154-5; Grazh. Ulozh., bk. 4, intro., pp. 64, 68-9, 71-2, 95-103, 142-3, explanas., 87-8, 276-7; Iurist-Praktik, op. cit.; N.S., op. cit.

2. Azarevich, 'Semei. imushch.', pp. 122f.; Goikhbarg, 'K ref. nasled.', no. 39; Il'iashenko, 'O prave nasled., pp. 81-8; Iurist-Praktik, op. cit.; Kavelin, 'Pravo nasled.', col. 1266; idem, 'Rus. grazh. ulozh.'; 1882 no. 9, pp. 12-13, 19-23; Vest. Ev. 1903 bk. 11, vn. obozr., pp. 366-7; Gussakovskii, op. cit., p. 36; Tovstoles, 'Nasled. suprugov', pp. 51-8; Grazh. Ulozh., bk. 4, arts. 28-32, 121-2, explanas., pp. 72-88, 276-7.

3. Ibid., intro., pp. 71-2; Zamechaniia grazh. zak., Nos. 3, 574, 576, 624-34.

4. Tiutriumov in ibid., Nos. 109, 573, 623; Kavelin, 'Rus. grazh. ulozh.', 1882 no. 9; idem, 'Pravo nasled.', cols. 1183-91, 1216, 1241-5, 1260-70.

It is clear that neither the court, traditionalists, nor reformers disagreed over the moral justification and hence obligation of providing for the surviving spouse from the deceased spouse's estate, especially in the case of the widow. What divided them was the form that such provision should take and the extent to which it should constrain the individual owner's proprietary powers. Traditionalists and the court appeared to favour granting the surviving spouse rights less than ownership in order to prevent the division of property and its transfer to the heirs of another clan, a view still anchored in the attitudes of traditional landed society. Moreover, these groups appeared less willing to transgress the 'traditionally unlimited' rights of ownership of acquired property. The owner of such property, after all, could use his power to benefit his spouse, and if he chose not to do so, so the argument ran, there probably was a good reason. The advocates of reform, on the other hand, were more willing to impose statutory limitations on the owner's proprietary powers in order to ensure that he fulfilled his moral obligations, and manifested an intellectual concept of property as an infinitely divisible value that had broken free of the land and emigrated to the cities.

III. The Position of Women

The aspect of the rules of intestate succession provoking the harshest condemnation from reformist jurists, however, was the unequal treatment of women.[1] In a sense, this involved two separate issues: the position of women in descendant lines and their position in collateral

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1. See above, pp. 57-60.

lines. With respect to the former, given the clarity of statutory law defining the smaller share due to female descendants in the presence of their brothers, there was little the courts could have done to improve this position, even assuming that they had been so inclined. In fact, their attitude appears somewhat ambiguous. On the one hand, the Civil Cassation Department proclaimed its support for the traditional doctrine that females did not inherit in the presence of males of equal degree, and that the statutory share due to females in the descendant lines was merely an exception granted comparatively recently to ensure their maintenance.[1] On the other hand, when not constrained by the clear dictates of statutory law, the court exhibited sympathy for the daughters' cause as well. For example, in its decision in Krasnianskaia and Petrova v. Kosorotov in 1881[2] it vacated the ruling of the Kharkov Court of Appeal that in the event that a testator bequeathed all his acquired property to his direct descendant heirs without having stipulated the share due to each, these shares must be based on the amount due each heir under the rules of intestacy, which ruling would have favoured the testator's son to the detriment of his daughters. In contrast, the high court held that any dispute over the precise distribution of property under a will had to be resolved on the basis of the testator's intentions as determined by the general meaning of the will. It further implied that the very act of

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1. SRGKD 1872 no. 88, 505; 1874 no. 123. See also 1900 no. 8; Zh. Min. Ius., 1860 no. 3, sud. prakt. pp. 123-4; Kunitsyn, 'O prave'; Nilol'skii, op. cit., pp. 77-9, 127-41; Pobedonostsev, Kurs, ii. 309, 312-13; Otchet Gos. Sov. 1879, pril., pp. 126-8; G. Motovilov, 'Eshche o prave plemianits na ukaznyia chasti', Zh. Min. Ius., 1866 no. 4, pp. 47-52. But see SRGKD 1913 no. 41.

2. SRGKD 1881 no. 52.

composing a will indicated the testator's desire to alter the shares due his heirs under the rules of intestacy in favour of those who would have received a smaller amount in the absence of a will, such that, in this case, the inheritance should be divided equally.

Such decisions, however, bear only indirectly on the issue and hence are not entirely satisfactory for establishing the court's position. Unfortunately, statutory law did not allow the public much scope to challenge in one direction or the other the descendant female's inheritance rights, and this correspondingly limited the court's opportunity to affect the law and thereby reveal its opinion. However, with respect to the female's position in the collateral lines and, related to this, the relative rights of full- and half-siblings, the law was less clear and the court had greater room for maneuver, a situation which neither potential heiresses nor advocates of reform were slow to exploit.

On the question of women's position in the collateral lines, the high courts in both the pre- and post-reform period refused to budge from the traditional interpretation excluding female lines in the presence of equal male lines and women within each line in the presence of males of equal degree or their representatives, although the lower courts were more prepared to accord such women at least a share equal to that of women in

the descendant lines.[1] Potential heiresses and reformist jurists sought to achieve this latter expansion of rights primarily in two ways.

The first, and most common, line of argument proceeded from an extremely narrow reading of article 1135, SZ, X, 1, which stated: 'In collateral lines, in the presence of full brothers or their descendants of both sexes, sisters do not have a right to the inheritance'. It was argued that the terms 'sisters' and 'brothers' referred solely to the sisters and brothers of the deceased and not to the heirs themselves, thus the rule in the article applied only to the first circle of collateral relatives and not to their descendants or to those of heads of other more distant collateral lines. These latter cases were governed by the rules for the descendant lines. Consequently, in these cases women received the statutory share due to female descendants in the presence of brothers or their representatives. This argument rested on the conception of these more distant collateral relatives inheriting not directly from the deceased as his nearest surviving collateral heirs, but indirectly, as the descendant heirs of the deceased's nearest collateral relative. Despite having pre-deceased the deceased, this relative nevertheless was considered to have possessed a realised right to the deceased's inheritance which he passed

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1. See Zh. Min. Ius., 1860 no. 3, sud. prakt., pp. 113-24; SRGKD 1868 no. 25; 1872 nos. 88, 505; 1874 no. 123; 1875 nos. 199, 854; 1880 no. 210; 1888 no. 74; 1905 no. 24; 1912 no. 46; 1913 no. 62; Otchet Gos. Sov. 1879, pp. 443-6, pril., pp. 123-8. On the varying practise of lower courts, see G. Motovilov, 'O prave plemianits na ukaznyia chasti iz nasledstva', Zh. Min. Ius., xxvi(1865), 425; 'Protokol ocherednago zasedaniia moskovskago iuridicheskago obshchestva aprelia 26 dnia 1871 goda', Iurid. Vest., 1871 no. 4, p. 3; Iurid. Vest., 1871 no. 2, sud. prakt. pp. 96-105 (SRGKD 1872 no. 505); SRGKD 1872 no. 88; Otchet Gos. Sov. 1879, pp. 443-6, pril., pp. 123-8; Pobedonostsev, Kurs, ii. 316-18.

on to his descendants and which provided the foundation for their rights.[1] The jurist and Senator Georgii Motovilov added that this interpretation was not inconsistent with the original legislation, and argued further that this result was only just, as the exclusion of the deceased's sisters from the inheritance of his property was based on the assumption that he in turn had inherited it from his parents and that consequently his sisters already had received their due share of the property directly from their parents. Thus it was consistent with the spirit of the law that the deceased's property should pass to his brothers. However, this consideration did not apply to the descendants of these brothers, the daughters of whom would have received a share of the property but for the fortuitous fact that their father happened to predecease his brother, or to more distant collateral relatives.[2] Thus, he concluded, the rule in article 1135 had to be confined solely to the deceased's sisters.

This dubious legal logic was accepted by both Moscow lower courts in the case of Liamin and Khomutinnikov v. Podkovshchikovy and Latysheva and by the First Section of the Third Department of the Senate and the Combined Meeting of the First Three Departments and the Heraldry Department of the Senate in the Revenskiia case in the 1870s, whose decisions were overturned, respectively, by the Civil Cassation Department and the

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1. Zh. Min. Ius., note 1, p. 235; SRGKD 1872 no. 88; 1874 no. 123; Otchet Gos. Sov. 1879, pp. 443-6, pril., pp. 123-8; Motovilov, 'O prave plem.'; idem, 'Eshche o prave'; Kunitsyn, op. cit.; Pobedonostsev, Kurs, ii. 316-18; M_', 'Zametki o russkoi grazhdanskoi sudebnoi praktike', Zh. Min. Ius., 1866 no. 2, pp. 267-74; idem, 'Otvet na predydushchuiu stat'iu', ibid., 1866 no. 4, pp. 53-60.

2. Motovilov, 'O prave plem.', pp. 430-34; idem, 'Eshche o prave', pp. 50-51.

State Council.[1] Of course, it may be true that the courts actually were convinced of the juridical soundness of this interpretation. But it is more likely that their primary motivation was the same as that of the four dissenting State Councillors in the Revenskiia decision, who, in opposition to the majority of 41, agreed with the Senate's decision because they thought the law as it stood was too severe and unjust and in urgent need of reform; therefore until such reform could be introduced it was necessary to find a way of applying the law in such a way that its severity would be reduced.[2] Motovilov, too, was charged by a critic with having this objective, and one suspects that, despite his protestation to the contrary, it also underlay A. M. Fal'kovskii's arguments for a similar reinterpretation of the law at a meeting of the Moscow Juridical Society in April, 1871.[3]

The Civil Cassation Department emphatically rejected this interpretation of the law.[4] The court argued that the deceased's nearest surviving collateral relatives inherited directly from him and by their own right. Never having possessed the deceased's property, a collateral relative who predeceased the deceased never had enjoyed any right to it, and

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1. SRGKD 1872 no. 88; Otchet Gos. Sov. 1879, pp. 443-6, pril., pp. 123-8 (also reported in Vest. Ev., 1880 bk. 2, vn. obozr., pp. 823-8).

2. Otchet Gos. Sov. 1879, pril., pp. 124-5. The Senate and State Council were hearing this case because the pre-reform process of appeal still was used in areas where the judicial reform had not yet been introduced.

3. Kunitsyn, op. cit., pp. 34-5; 'Protokol'(Iurid. Vest. 1871 no. 4), pp. 3-5, 11-12. Orshanskii expressed a similar desire that women's inheritance rights be improved via judicial interpretation, 'Nasled. prava', no. 3 pp. 14-16.

4. SRGKD 1872 no. 88. See also 1872 no. 505; 1874 no. 123.

therefore had no rights to pass on to his heirs. Thus the terms 'brothers' and 'sisters' in the law referred to the heirs themselves and not to the deceased's siblings. If only the latter had been meant, the law would have stated this explicitly, but on the contrary, the phrase 'in collateral lines' was used specifically to distinguish the order of inheritance in these lines from that in the descendant lines. To interpret the law otherwise would have been to contradict the very basis of Russian inheritance law, under which females always were excluded by males. Even in the descendant lines daughters inherited only in the absence of sons, and in the latter's presence received only a statutory share of the deceased's property. The State Council in its decision essentially followed this reasoning and added that the case at hand involved a judicial and not a legislative question, and therefore had to be decided solely on the basis of the law.[1] In the opinion of the majority, a legal proceeding was not the appropriate forum in which to review the deficiencies or merits of the existing law, and the law with respect to inheritance by women in the collateral lines was clear: at every level, females were excluded by males of equal degree or their representatives.

The second attempt to reform the law by judicial action was really only a more sophisticated variant of the first. The argument was developed by attorney A. F. Markonet in Muravleva and Vasil'eva v. Patrikeevy in 1870-1872, in which the Moscow Court of Appeal reversed the Moscow District Court's decision accepting the argument, and by Markonet and a colleague,

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1. Otchet. Gos. Sov. 1879, pril., pp. 123, 126-8. Motovilov's critics made the same point: M_', 'Zametki'; idem, 'Otvet'; Kunitsyn, op. cit.

A. M. Fal'kovskii, at a meeting of the Moscow Juridical Society in April 1871.[1] In making his argument, Fal'kovskii took care to avoid the main objections that had been raised against Motovilov. He lamented the fact that women generally were treated comparatively poorly under Russian inheritance law, but, referring to the district court's decision, stated,

> The attempt of our new court to breath new life into the law by an interpretation of its meaning favourable to women is in accord with the current attitude of the most educated part of society and deserves special attention. But however desirable the extension of the inheritance rights of women, nevertheless it is necessary above all to determine the true sense of existing laws, which must serve as the basis for the practical resolution of the questions concerning women's right of inheritance.[2]

Having thus disclaimed any intent to reform the law for extra-juridical reasons, he turned to an analysis of the existing statutes and their legislative origin in which he agreed that more distant collateral relatives who inherited from the deceased as representatives of a nearer collateral relative who had predeceased the deceased did so by their own right as direct heirs of the deceased. Nevertheless, when referring to persons representing a previously deceased collateral relative in the deceased's inheritance, the law did so collectively, without distinguishing between males and females. Thus such representatives inherited together, regardless of sex. However, as the original legislation stated that the preference for

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1. SRGKD 1872 no. 505 (also in Iurid. Vest., 1871 no. 2, sud. prakt., pp. 96-105); 'Protokol'(Iruid. Vest. 1871 no. 4). Alferov was the respondents' attorney. See also Pobedonostsev, Kurs, ii, 316-18.

2. 'Protokol'(Iurid. Vest. 1871 no. 4), pp. 3-4. Fal'kovskii's later comments, however, suggest that he was fully aware that what he proposed was a change in the law to adapt it to new social conditions and attitudes. Ibid., pp. 11-12.

males that existed in the descendant lines existed also in the collateral lines, in the case that representatives of both sexes survived, females were entitled only to the statutory share due descendant females in the presence of brothers.[1]

Markonet had offered this interpretation to the court, but again the Civil Cassation Department rejected the attempt to change the law and decisively upheld the traditional interpretation.[2] The court held that the issue of representation did not arise in this case,[3] and therefore the respondents excluded their sisters, the plaintiffs, from the inheritance. Nevertheless, the court decided to rule on the issue of women and inheritance by right of representation. From a literal reading of article 1135, SZ, X, 1, confirmed by article 1137, the court argued that the rule by which males excluded females applied 'not only in all collateral lines in general, but even in all degrees of relationship within the collateral lines, and moreover the action of the aforementioned article extends both to instances of direct, independent inheritance and to instances of inheritance by right of representation'.[4] This was supported by the rule in article 1126, according to which females enjoyed the right of representation only in the absence of males of equal degree. 'This conclusion finds confirmation',

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1. Ibid., pp. 4-5.

2. Ibid., pp. 13, 14; SRGKD 1872 no. 505; Iurid. Vest., 1871 no. 2, sud. prakt. pp. 96-105.

3. The court held that inheritance by right of representation occurred only when the inheritance was divided among heirs of equal lines but of different degrees. As in this case all claimants were of equal degree and in the same line, the heirs would take directly and not as representatives.

4. SRGKD 1872 no. 505.

the court added, 'in the history of Russian inheritance law, from which it can be seen positively that in the presence of males, females never were called to the inheritance. The sole exception to this was the establishment with respect to inheritance in the descendant lines of an allotment of a share to females; with respect to the collateral lines, the equality of inheritance rights of males and females never was admitted; on the contrary, the legislative power constantly confirmed the principle that given equality of lines, females are excluded from the inheritance by males. . . .'.[1]

The court's reluctance to alter by judicial action what it understood to be a traditional and fundamental principle of Russian inheritance law paralleled the sentiments expressed later in the State Council in the Revenskiia case and previously by Fal'kovskii's and Markonet's colleagues at the meeting of the Moscow Juridical Society, which rejected the proposed interpretation by a vote of 13 to 2.[2] It may be that personally the members of the court did sympathise with the women's cause and that consequently their reluctance to mitigate the law was solely the result of a combination of the constraints imposed by the statutes and professional conscience. If so, the decisions are significant as an indication of the limit beyond which the judiciary was reluctant to use its power of judicial interpretation for legal reform. Certainly the court does not appear to have been motivated by an attitude exclusively favourable to males, as when given the opportunity it did not use its power to further improve the position

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1. Ibid.

2. 'Protokol'(Iurid. Vest. 1871 no. 4), pp. 5-15.

of males in respect to females. For example, it consistently upheld the rights of more distant female collateral relatives in male collateral lines against nearer male collateral relatives in equal male or female collateral lines, in some cases against the opinions of the lower courts;[1] in contrast to both lower courts, it ruled that the mere existence of a brother or his representatives did not exclude his sisters from the inheritance, but that this occurred only if the brother claimed the inheritance or otherwise factually effectuated his right;[2] it held that in the case of brothers and sisters inheriting indivisible property, an elder sister had a greater right to possession than her younger brother;[3] it ruled that in Poland the daughter of the deceased's third brother had preference to the son of his fourth brother in the inheritance of an entailed estate, despite indications in the act of foundation which suggested the contrary.[4] On the other hand, at least some lower court judges were prepared to expand women's inheritance rights by judicial action. As on occasion the high court itself was not averse to amending the law by liberal interpretation of the statutes or original legislation, even when this proved to be quite controversial, it seems likely that for practical or other reasons the court was basically in sympathy with the law as traditionally interpreted or that it believed that to expand women's inheritance

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1. SRGKD 1877 no. 132; 1879 no. 264; 1888 no. 74.

2. SRGKD 1880 no. 210.

3. SRGKD 1913 no. 41; N. N. Tovstoles, 'Iuridicheskoe polozhenie zhenshchiny pri sudebnom razdele nasledstvennago nerazdrobliaemago imushchestva (St. 1324 t. X ch. I Sv. Zak. v primenenii na praktike)', Zh. Min. Ius., 1913 no. 3, khron., pp. 210-26.

4. SRGKD 1894 no. 72.

rights in this way would be too controversial and an abuse of its power of interpretation. In either event, it would seem that at least at this time the existing law was not as contrary to prevailing social attitudes as reformist jurists claimed.

This suspicion is reinforced by the court's initial treatment of the issue of the relative rights of full and half-siblings to the inheritance of acquired property. Due to the wording of the relevant statutes, the courts were compelled to prefer either paternal half-brothers to full sisters of the deceased or vice versa, with the one preferred entirely excluding the other.[1] Thus, in effect, the courts were asked to choose between the traditional system of male preference based on the concept of the clan on the one hand and the increasingly advocated concept of the family on the other. Statutory law, even after reference to the original legislation, was extremely ambiguous and as easily supported either interpretation.

The issue was extensively debated by jurists in the early 1860s as a result of two Senate decisions favouring full sisters that appeared in the Zhurnal Ministerstva Iustitsii.[2] Critics of the Senate's decisions based their arguments firmly on the primacy of the clan. They argued that the right of inheritance in Russian law was based on the clan, formed by a blood union stemming from a single clan head, who could only be the father.

1. SZ, X, pt. 1, arts. 1135, 1138, 1140; see above, p. 60 . There was no dispute with respect to patrimonial property, as full and half-siblings were equal members of the clan of their common natural parent; thus a half-brother would exclude a full sister. SRGKD 1874 no. 804; 1876 no. 214; 1881 no. 30; 1908 no. 13; especially the latter.

2. Zh. Min. Ius., 1860 bk. 3, sud. prakt., pp. 116-17; ibid., vii(1861), 613-16.

The fact that the latter's children may have proceeded from unions with different wives did not alter this blood relationship and therefore was irrelevant to the children's membership of the clan and consequently to their rights within it.[1] Hence, as both full and paternal half-brothers stood in an identical blood relationship to their father, they were equal members of the paternal clan, and had equal rights of inheritance. Thus they had an equal right to inherit the acquired and paternal patrimonial property of one of their number or of a full or paternal half-sister, and consequently either of the former would exclude either of the latter from this inheritance.[2] This was the general rule of inheritance in the collateral lines, and the exception to it noted in article 1138 and described in article 1140 concerned solely the grant of a right to maternal half-siblings of the deceased to inherit his acquired property in the event that he was not survived by full siblings or their issue. In this event, these maternal relatives, normally excluded from the inheritance, were given a right equal to that already existing for paternal half-

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1. G., in N. V. Kalachov, 'Otvet g. G. na vopros: "ne dolzhny li edinokrovnye brat'ia vladel'tsa, umershago bezdetnym i bez zaveshchaniia, nasledovat' emu v imushchestve blagopriobretennom vmeste s rodnymi ego brat'iami i iskliuchat' brat'ev ego edinoutrobnykh?"', _Iurid. Vest._, vyp. 2(1860-61), 56-7; -n, 'Vozrazhenie Redaktoru na otvet ego g. G. po stat'e 1140 t. X Zak. Grazhd.', _Iurid. Vest._, vyp 4(1860-61), 38-40; _idem_, 'Oproverzheniia i zashchita mneniia Redaktora po stat'e 1140 Zakonov Grazhdanskikh', _Iurid. Vest._, vyp 9(1860-61), 15-17; I. F. Zhukov, _ibid._, pp. 19-30; _idem_, 'Iuridicheskiia zametki, pri chteniia statei, pod zaglaviem: "Oproverzheniia i zashchita mneniia Redaktora po stat'e 1140-i Zakonov Grazhdanskikh", v 9-m vypuske "Iuridicheskago Vestnika" 1860-1861 g.', _Iurid. Vest._, vyp. 18(1860-1861), 2-10.

2. _SZ_, X, pt. 1, art. 1138; -n, 'Vozrazh. Redak.'; _idem_, 'Oproverzheniia'; the plaintiff Gerakova in _SRGKD_ 1872 no. 1188; the plaintiff Demidov in _SRGKD_ 1876 no. 102.

siblings.[1] Thus, it was argued, the rule in article 1140 did not concern the relations between full and paternal half-siblings, but only those between paternal and maternal half-siblings and between both of these and more distant collateral relatives, and then only in a particular situation.[2] A later adherent of this view argued on the basis of an analysis of the law's origins that the State Council had had no intention of altering the previously existing equal inheritance rights of full and paternal half-siblings in its decision in 1818.[3] Hence the rule in article 1140 could not arise in the event that both full and paternal half-siblings survived the deceased, but was applicable only in the absence of full siblings.[4]

A second, and much less substantial, line of attack was the claim that the term '*edinokrovnye brat'ia*' in article 1140 referred to paternal

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1. -n, 'Vozrazh. Redak.'; *idem*, 'Oproverzheniia'; Zhukov, *ibid*., pp. 19-30; A. A. Vershchagin, 'O nasledovanii nepolnorodnykh vo bokovykh liniiakh po deistvuiushchemu russkomu pravu', *Zh. Min. Ius*., 1898 no. 10, pp. 48-100, who, although writing considerably later, summarised and reinforced the arguments for this interpretation; the plaintiff Gerakova in *SRGKD* 1872 no. 1188; the plaintiff Demidov in *SRGKD* 1876 no. 102; 2*PSZ*, lii., pt. 1, no. 56832 (11 Jan. 1877), pp. 55-7 (*SZ*, X, pt. 1 (1887, 1900), art. 1140 *prim*.).

2. -n, 'Vozrazh. Redak.'; *idem*, 'Oproverzheniia'; A. Liubavskii, 'Spornye voprosy grazhdanskago prava. I. Nasledovanie edinoutrobnykh i edinokrovnykh brat'ev i sester', *Zh. Min. Ius*., 1865 no. 11, pp. 238-42; Vershchagin, *op. cit*., pp. 76-90.

3. *Ibid*., pp. 54-76; 1*PSZ*, xxxiv., no. 26867 (16 May 1817), pp. 313-14; xxxv., no. 27579 (25 Nov. 1818), p. 620.

4. -n, 'Vozrazh. Redak.'; *idem*, 'Oproverzheniia'; Liubavskii, 'Spor. voprosy', pp. 238-42; Vershchagin, *op. cit*., pp. 77-8, 92-4, 100; the plaintiff Gerakova in *SRGKD* 1872 no. 1188; the plaintiff Demidov in *SRGKD* 1876 no. 102.

cousins rather than to paternal half-brothers.[1] This was based on the argument that prior to and in the ukaz of 1817 paternal half-brothers had been included in the term 'rodnye brat'ia', and that in 1818 the question before the State Council had concerned the relative inheritance rights of paternal cousins and maternal half-siblings. Thus in its decision of 1818 the State Council did not depart from the Senate's decision of 1817 and reduce the rights of paternal half-brothers, but instead had granted maternal half-siblings a right of inheritance equal to that of paternal cousins.

It is clear, however, that fundamentally both arguments were based on a belief in the primacy of the male-originated clan and consequently on the conviction that a paternal half-brother of the deceased had a greater right to inheritance than the deceased's full sister.[2]

In contrast to this, those supporting the Senate's decision, led by the eminent jurist N. V. Kalachov, believed that the closer familial bond of a full sister with the deceased also should be considered. Easily refuting by reference to the historical sources the contention that the term 'edinokrovnye brat'ia' referred to paternal cousins, they argued that in its ukaz of 1818 the State Council had wished to redefine the relative inheritance rights of full and all half-siblings and to introduce the moral

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1. G., in Kalachov, 'Otvet g. G.', pp. 56-7; Zhukov, 'Iurid. zametki', pp. 2-8, 16-18; idem, 'Oproverzheniia', pp. 21-6; N. T., ibid., pp. 17-19; 1PSZ, note 3, p. 245 above. In Russian, 'edinokrovnyi' merely means 'of the same blood', and so could refer to all or any members of a particular blood union.

2. G., in Kalachov, 'Otvet g. G.', pp. 56-7; Zhukov, 'Iurid. zametki', pp. 6-8, 15-18, 23; idem, 'Oproverzheniia', pp. 20, 27-30; -n, ibid., pp. 15-17; idem, 'Vozrazh. Redak.'.

considerations arising from the family union as a second factor in determining inheritance rights.[1] On this basis, full sisters had a preferential right to the inheritance because, sharing both parents in common with the deceased, they were closer to him than any of his half-siblings, with whom he shared only one common parent. In turn, paternal and maternal half-siblings, sharing a single common parent with the deceased, had an equal right to the inheritance and a greater right than more distant collateral relatives. Thus, by defining the deceased's half-siblings' inheritance rights in the absence of full siblings and declaring the rights of paternal and maternal half-siblings to be equal in this situation, the rule in article 1140 implied that in general the inheritance rights of paternal and maternal half-siblings with respect to acquired property were equal and that either inherited _only_ in the absence of full siblings.[2] It was admitted that this did conflict with the principle of inheritance based

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1. It was clear that the State Council sought to resolve the specific question by issuing a general rule governing the relations of all half-siblings to more distant collateral relatives. Kalachov, 'Otvet g. G.'; _idem_, in -n, 'Vozrazh. Redak.', pp. 41-2; _idem_, 'Oproverzheniia', pp. 34-7; Ia. A. Lebedev, _ibid_., pp. 31-4; A. Truvorov, 'Zakliuchitel'noe slovo o stat'e 1140-i zakonov grazhdanskii'kh', _Iurid. Vest_., vyp. 18 (1860-1861), 27-65; Liubavskii, 'Spor. voprosy', pp. 234-7; Snegirev, _op. cit_.

2. Kalachov, 'Otvet g. G.'; _idem_, in -n, 'Vozrazh. Redak.', pp. 41-2; _idem_, 'Eshche zametka po stat'iam 1138-i i 1140-i Zak. Grazhd.', _Iurid. Vest_., vyp. 14(1860-1861), 29-31; Snegirev, _op. cit_.; Truvorov, _op. cit_., pp. 27-31, 64-5; Pobedonostsev, _Kurs_, ii. 324-30; P. Kititsyn, 'Zametka o tolkovanii 1140 st. 1 ch. X t. sv. zak.', _Zh. Min. Ius_., 1865 no. 9, pp. 399-404; the respondents Demidova and Stoikovich in _SRGKD_ 1872 no. 1188 and 1876 no. 102. Liubavskii pointed out that this interpretation rested solely on this unsupported assumption and not on a strict literal reading of the law, which gave no conclusive guidance to the result if both full and half-siblings survived. Thus the question could be resolved only legislatively. 'Spor. voprosy', pp. 238-42.

on the paternal clan. However, it was argued that this contradiction was morally justified by considerations of familial unity and obligations.[1]

When first called upon to rule on the issue, the Civil Cassation Department accepted entirely the first argument favouring the male-originated clan.[2] When explicitly presented with the contrary interpretation by the respondents in the cases of Gerakova v. Demidova and Stoikovich in 1872 and Demidov v. Dimidova and Stoikovich in 1876, the court repeated this decision even more emphatically.[3] In the former, both the Moscow District Court and Court of Appeal had accepted Kalachov's 'literal' interpretation of article 1140 and held that the respondents Demidova and Stoikovich, full sisters of the deceased, excluded the daughter of the deceased's paternal half-brother from the inheritance. Vacating this decision, the high court essentially restated the argument outlined above, holding that 'article /1140/ in no way concerns the relative inheritance rights of full brothers and sisters with respect to the rights of paternal and maternal half-brothers and sisters; on the contrary, it has in view that instance when there are no full brothers and sisters, and only paternal and maternal half-brothers and sisters are surviving, and <u>in this instance only</u> defines the preference of these latter to all other collateral relatives of more distant lines'. When <u>both</u> full and half-siblings survived, their relative inheritance rights had to be

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1. Kalachov, 'Oproverzheniia', pp. 36-7; <u>idem</u>, in -n, 'Vozrazh. Redak.', pp. 41-2; <u>idem</u>, 'Eshche zamet. 1138'; Truvorov, <u>op</u>. <u>cit</u>., pp. 27-31, 64-5; Snegirev, <u>op</u>. <u>cit</u>., pp. 18-22, 36-9.

2. <u>SRGKD</u> 1868 no. 25.

3. Respectively, <u>SRGKD</u> 1872 no. 1188; 1876 no. 102.

determined in accordance with the rules governing the general order of intestate succession, which were based on the principle of the clan. The clan consisted of all persons stemming from a single clan head, and thus 'within this definition of the clan or blood kin-group are included both full brothers and paternal half-brothers. . .And as they belong to one and the same clan, both must have an identical right of inheritance in all those intances when the inheritance passes to that clan to which they belong'. Thus 'it is impossible not to conclude that in the order of succession in collateral lines, children of the paternal half-blood must enjoy rights identical with those of the full blood, that between one and the other the law makes no distinction, and that with respect to the order of inheritance they all are recognised as full members of the clan'.[1] Hence, under the general rules of intestate succession, the deceased's paternal half-brother or his issue excluded the deceased's full sister from the inheritance.

Thus, at least initially, when faced with a direct choice between clan and family and with the weight of legal opinion on the specific issue involved leaning toward the latter, the Civil Cassation Department decided in favour of the clan. This, together with the journalistic support for the interpretation adopted by the court, suggests that the concept of the clan, or at least the belief in the necessity of male preference which partially underlay it, still had some vitality within Russian society at this time. However, most jurists and at least some lower courts remained unconvinced,[2] and under their pressure the court reversed its position in

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1. SRGKD 1872 no. 1188, emphasis added.

2. *E.g.*, see SRGKD 1876 no. 515, in which the Zhidrinsk Congress of Justices of the Peace thought the interpretation accepted by the high court was 'incorrect' and 'impossible'.

its decision in Zinov'ev v. Shchulepnikovy and Novitskii in 1887.[1]

In this case the Kursk District Court had conformed to previous cassation practice and granted the deceased's inheritance to the plaintiff, the son of the deceased's paternal half-brother, and excluded the respondents, the sons of the deceased's full sisters. However, relying largely on Kalachov's interpretation of article 1140 and an historical investigation of the law's origins, the Kharkov Court of Appeal reversed this decision and stated that although its decision differed from the current practice of the Civil Cassation Department, the high court's decisions were unconditionally binding only in the case in which they were rendered, and moreover 'the practise of the Senate sometimes changes its views on various juridical questions under the influence of changing conditions of life'.[2]

The attitude of the high court, or at least of the judges now composing it, toward the relative merits of clan and family had indeed altered under the impact of social developments. Ignoring completely the considerations that had formed the basis of its previous decisions, the court adopted the interpretation urged by the court of appeal. Although it based its new decision almost exclusively on an historical analysis of the original legislation, the court clearly was influenced largely by other considerations:

> In conclusion, the Governing Senate cannot but recognise that the interpretation of article 1140 now established by it corresponds more closely to those moral ties which usually exist between children of

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1. SRGKD 1887 no. 106.

2. Ibid., emphasis added.

> one or of different marriages. There is no doubt that brothers and sisters originating from a common father and mother stand incomparably nearer to one another than children from different marriages; the law of inheritance in general must correspond to the moral bond between those seeking the inheritance and the deceased.[1]

It is quite clear from this statement that the court now considered the moral bonds and obligations arising from the family union to be the proper basis of inheritance law in Russia, even if, despite some urging by jurists and the decisions of some lower courts, it still did not feel able to extend the effect of its decision to cases concerning patrimonial property.[2] And while the court was now in agreement with reformist jurists on the proper basis of inheritance law, it was not, as we have seen, prepared to translate this belief into any substantial amelioration of women's meagre rights of inheritance.

It was precisely this aspect of inheritance law, however, that to nearly every jurist who wrote on the subject and to many other members of society as well seemed the most outdated and iniquitous. Criticisms of the law had been voiced before,[3] but beginning in the 1860s jurists and later even the popular press directed a constant stream of invective

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1. Ibid., emphasis added.

2. V. Katsnel'son, 'O nasledovanii edinokrovnykh brat'ev pri polnorodnykh sestrakh', Pravo, 1903 no. 8, cols. 531-4. The lower courts in SRGKD 1908 no. 13. See also Pobedonostsev, Kurs, ii., 324-5, 330-34.

3. E.g., see the references to the proposals of Speranskii and Bludov and other critics in Grazh. Ulozh., bk. 4, intro., pp. 8-10, 19-20, 27, explanas., 30-39; Pril. Gos. Duma (1911) iii. no. 212, pp. 3-6; Goikhbarg, Zakon, pp. 5-10; but also cf. Speranskii, 'O rod. imen.'. See also the views of a member of the Commission for the Compilation of Laws under Alexander I, 'Iz zapisok N.S. Il'inskago', Rus. Arkh., no. 12(1879), 431-2.

against the law and demanded that the inheritance rights of women be made equal to those of men. Their criticisms largely paralleled those made against the institution of patrimonial property and were based on a number of moral, historical, and practical considerations, in which a sense of justice and the moral obligations arising from the family union appear to have been most important.

Indeed, it is difficult to convey the tone of moral outrage that pervades much of the writing on the subject. It was claimed that the law was extremely unjust, particularly to the deceased's daughters, and that it violated the basic tenets of natural law.[1] The right of inheritance was based on the moral bond and nearness of blood relationship between the deceased and the potential heir. Hence, as both sons and daughters were loved equally by their parents and stood in equal blood relationship to them, they ought to have an equal right to their inheritance. Moreover, as it could be assumed that for these same reasons a parent would want to provide equally for his sons and daughters in his will, the rule of equal rights in intestacy would conform to the deceased's presumed will as well.

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1. Liubavskii, 'Ob uravnenii', pp. 399-400, 412-13, 423; 'Obozrenie' (Otech. Zap. 1865 bk. 1); 'Prava zhenshchin po nasledovaniiu', Spb. Ved., 1893 no. 73 (16 Mar.), p. 1; Gussakovskii, op. cit., pp. 10, 20-24; Zamechaniia grazh. zak., Nos. 573-9, 586-604; Evreinova, op. cit., no. 3 pp. 133-5, no. 7 pp. 165-6; Gurliand, op. cit., no. 203, p. 195, no. 205 p. 263, no. 207 pp. 329-30, no. 208 pp. 360-63, no. 209 pp. 393-5, no. 213 pp. 520-21; Kavelin, 'Pravo nasled.', cols. 1251-4; idem, 'Rus. grazh. ulozh.', 1882 no. 9, pp. 2-10, 14, 20; L. I. Petrazhitskii, 'Obychnoe pravo i zhenskoi vopros', Pravo, 1899 no. 18, cols. 901-3, 910-11; Rozanov, op. cit.; Tovstoles, 'Iurid. polozh. zhen.', pp. 77-9; Zmirlov, 'O nedostat.', 1884 no. 5, pp. 72-4; Rus. Mysl', 1890 bk. 3, vn. obozr., pp. 231-2; ibid., 1899 bk. 10, vn. obozr., pp. 222-3; 'O nasled. zhen.'(Sud. Gaz. 1891 no. 8); 'K voprosu' (Sud. Gaz. 1893 no. 14). See also Zagorovskii, 'K vop. o zak. nasled. dole', no. 6 p. 39.

Preservation of the existing inequality thus violated society's moral conscience and frustrated the parent's will, was an insult to Russian women, and only resulted in family disharmony. Some authors even likened it to legal theft.[1]

In addition, critics argued that the historical and social conditions on which the law was based had long since disappeared and that the law no longer served any compelling state or social purpose that might justify its retention.[2] The law derived from a form of social organisation based on the clan stemming from and normally headed by a male. In this system, the male was considered responsible for providing for the clan's welfare and for perpetuating the clan; women were basically subordinate and unproductive and lost to the clan after marriage, as was any property that they might receive. Thus the male was in greater need of the clan's resources, while the female required only an adequate dowry. The later obligation of males to serve the state and the system of land tenure arising from this reinforced the existing custom. Indeed, in these circumstances,

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1. Evreinova, _op_. _cit_., no. 3 pp. 133-5, no. 7 pp. 161-3; 'K voprosu' (_Sud. Gaz_. 1893 no. 14), pp. 3-4.

2. Liubavskii, 'Ob uravnenii'; Motovilov, 'O prave plem.'; Fal'kovskii, in 'Protokol'(_Iurid. Vest_. 1871 no. 4); Tsitovich, _Iskh. momenty_, pp. 104-8, 136-44, 153-68; Zmirlov, 'O nedostat.', 1884 no. 5, pp. 72-4; _idem_, 'Otmena', pp. 76-80, 91-3; Spasovich, _op_. _cit_., pp. 161-3; 'Prava zhen.'(_Spb. Ved_. 1893 no. 73); Gussakovskii, _op_. _cit_., pp. 1-3, 20-24, 31-3; _Zamechaniia grazh. zak._, Nos. 1, 305, 309, 320, 573-9, 586-604, 609-12; Evreinova, _op_. _cit_., no. 3 pp. 133, 149-60, no. 7 pp. 165-6; Gurliand, _op_. _cit_., no. 203 pp. 193-7, no. 206 pp. 302-7, no. 207 pp. 329-32, no. 208 pp. 360-63, no. 209 pp. 392-5, no. 210 pp. 420-21; Kavelin, 'Pravo nasled.', cols. 1251-4; Orshanskii, 'Nasled. prava', nos. 2, 3; Tovstoles, 'Iurid. polozh. zhen.'; _Rus. Mysl'_, see note 1, p. 252; I. V. Gessen, 'Vliianie zakonodatel'stva na polozhenie zhenshchin', _Pravo_, 1908 no. 51, cols. 2833-40; 'O nasled. zhen.'(_Sud. Gaz_. 1891 no. 8); 'K voprosu'(_Ibid_. 1893 no. 14); _Vest. Ev._, 1880 bk. 2, _vn. obozr_., pp. 823-30; _ibid_., 1903 bk. 11, _vn. obozr_., pp. 360-62.

to have granted women a right of inheritance equal to that of males clearly would have been detrimental to the clan's interests. However, both the _pomest'e_ and the obligation to render service to the state had disappeared in the eighteenth century, and the basis of social organisation had shifted from the clan to the family and the individual. Women were full and equal members of the family and, at least with respect to property law, were equal and independent members of society. Thus there no longer was any basis or necessity for discriminating against them in inheritance. On the contrary, being independent members of society and yet barred by convention from most avenues of earning a livelihood, they were more in need of provision from inheritance than males, as otherwise they often were compelled to marry to obtain security. Thus the law did not conform with existing social conditions and conflicted with prevailing social opinions.[1]

The evidence adduced for this last contention included references to the numerous attempts to circumvent the law by various fictitious or other acts encountered in the courts, the complaints expressed in the _nakazy_ sent to Catherine II's Legislative Commission in the eighteenth century and in later petitions to the Crown, and previous legislative attempts to reform the law. Judging by the remarks of the judiciary and others involved in the daily exercise of the law, the former undeniably

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1. Tsitovich and Evreinova tried to prove that originally the law had been based on the family rather than the clan, with women having a full, and according to Evreinova, equal right of inheritance. Women's rights subsequently had deteriorated due to, in Tsitovich's opinion, the development of the clan, or, in Evreinova's opinion, the perversion of naturally equal Slavic law by West European influences. Tsitovich, _op. cit._, pp. 70f.; Evreinova, _op. cit._, no. 3 pp. 149-60.

occured on a significant scale, although it would be impossible to determine its exact magnitude.[1] However, references to the nakazy are somewhat misleading, as not one of the nakazy sent by either the dvorianstvo or the merchantry advocated equal inheritance rights for sons and daughters, and only six of 124 nakazy from the dvorianstvo favoured increasing the daughter's share to an amount still less than that received by the son.[2] Several did express a desire for greater testamentary power, but this generally was for economic reasons or intended to increase parental control over children.[3] On the other hand, the nakazy from the dvorianstvo exude an overwhelming support for the institution of patrimonial property and a fear of property being lost to the clan as a result of inheritance by women or spouses. Similarly, in the course of the entire nineteenth century the Crown apparently received only three petitions to equalise women's inheritance rights, again all from assemblies of the provincial dvorianstvo.[4] With respect to the previous attempts at legislative reform, that by Speranskii in the early nineteenth century and by Bludov in the 1840s,

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1. Zamechaniia grazh. zak., Nos. 574, 576, 586-604; Liubavskii, 'Ob uravnenii', pp. 418-19; L., 'Vykup'; Il'iashenko 'Instit. rod. imushch.', no. 4 pp. 116-17, 120-21; Orshanskii, 'Nasled. prava', no. 3 pp. 2-3; Spasovich, op. cit., pp. 158-60, 163.

2. SIRIO, viii(1871), 508-9, 519; xiv(1875), 446-8, 459-60, 487-8; lxviii(1889), 488-9; also xxxxiii(1885), 177 (from the Votch. Kolleg.). In contrast, six specifically declared their satisfaction with the existing shares: iv(1869), 283, 326, 369; viii(1871), 456; xiv(1875), 397-8; lxviii(1889), 342, 345.

3. Ibid., iv(1869), 242, 369-70, 403, 462; viii(1871), 444, 482, 488, 496-7, 508-9; xiv(1875), 397-8, 446-8, 459-60; lxviii(1889), 6, 342, 345, 385-7, 622-4.

4. The dvorianstvo from Smolensk in 1864, Kursk in 1890, and Kostroma in 1899: Grazh. Ulozh., bk. 4, intro., p. 27, explanas., pp. 35-9; Pril. Gos. Duma (1911) iii. no. 212, pp. 3-6; Rus. Mysl', see note 1, p. 252.

neither proposed full equality of inheritance for females, as males still would have received a considerably larger share of the deceased's immovable property, and neither was successful, suggesting a certain amount of influential opposition in each case.[1] Thus the evidence cited was hardly overwhelming proof that, even though the basis of the social structure had changed, the majority of society supported complete equality of males and females in inheritance, and it is difficult to avoid the conclusion that most advocates of reform were motivated primarily by moral principles and the same political beliefs and objectives as the critics of patrimonial property.

Finally, it was argued that the unequal rights of women in inheritance contradicted their equal rights in property law in general and placed them in a poorer and more backward position than women in West European jurisdictions, in comparison to which Russian property law normally treated women more favourably and progressively.[2] However, this argument clearly rests solely on a progressivist view of law and society in which particular legal institutions are held to be characteristic of societies at specific stages of advancement along a more or less linear path of development. Otherwise, it does not logically follow that because men and women have an

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1. See the references in note 3, p. 251 to Grazh. Ulozh., Pril. Gos. Duma, and Goikhbarg; see also Gurliand, op. cit., no. 207 pp. 330-31; Wagner, 'Legisla. Reform', pp. 168f.

2. Liubavskii, 'Ob uravnenii', pp. 415-16; 'Prava zhen.'(Spb. Ved. 1893 no. 73); Rus. Ved., 1903 no. 97 (10 Apr.), p. 2 (on publication of proposed civil code); Gurliand, op. cit., no. 203 pp. 193-4, no. 205 pp. 266-7, no. 208 pp. 360-61; Evreinova, op. cit., no. 3 pp. 133, 135-6, no. 7 pp. 161-3; Orshanskii, 'Nasled. prava', no. 2 pp. 1-5, 10-11; Gessen, 'Vliianie zakon.', col. 2837; Tovstoles, 'Iurid. polozh. zhen.', pp. 77-80; 'O nasled. zhen.'(Sud. Gaz. 1891 no. 8); 'K voprosu' (ibid. 1893 no. 14).

equal right to use and dispose of that property which they own, they should have an equal right to acquire property by inheritance in a given situation. Thus it is clear that exponents of this argument believed that as Russia was achieving a level of social and cultural development equal to that of West European countries, its law should be reformed to reflect this, as 'of all the jurisdictions of civilized peoples there is not one in which women are in a more disadvantageous position relative to men with respect to intestate succession than in our fatherland'.[1]

In contrast to this journalistic onslaught, hardly a word was printed in defense of the existing law, which suggests that perhaps those unwilling to agree to its fundamental reform for practical or other reasons nevertheless felt somewhat uncomfortable with it. However, it is clear from an article by the eminent jurist Aleksandr Liubavskii that the arguments supporting the law had been formulated already by the early 1860s,[2] and the practise of the Civil Cassation Department described above suggests that these were sufficiently compelling, or the people who advanced them sufficiently powerful or numerous, to discourage the court from altering the law in even a relatively modest way.

First, obviously, there was support for the law as the reflection of a deeply rooted Russian legal tradition and, related to this, continued belief in the clan and hence in the concept of daughters leaving it on marriage and male preference in inheritance to which it gave rise.[3] Peasant

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1. Liubavskii, 'Ob uravnenii', p. 412, emphasis added.

2. Liubavskii, 'Ob uravnenii', pp. 416-23; see also Nikol'skii, op. cit., pp. 73-9, 123-56.

3. Ibid., pp. 73-9, 123-56; Zamechaniia grazh. zak., Nos. 606-7; Spb. Ved., 1892 no. 227 (22 Aug.), p. 1 (cols. 4-5); Malyshev, Karnitskii, and Saburov in Grazh. Ulozh., bk. 4, intro., pp. 103-9, 112-41, explanas., pp. 83-6.

custom, under which the position of women in inheritance generally was even worse than under Imperial law, was cited as proof that the law constituted a fundamental Russian legal institution and still corresponded to the practical needs of the people.[1]

Second, it was argued that males were in greater need of inheritance because they bore the greater burdens and responsibilities for founding and providing for the family's welfare, serving the state, and conducting the social and economic affairs of the country.[2] Having fewer responsibilities, women were in less need of the material resources provided by an inheritance, and consequently received adequate security from marriage and their dowry. The reformers' response to this was that while perhaps bearing the greater burden, males also had far greater political rights, access to material rewards, and opportunities to earn a livelihood than did women, whose material welfare, in addition, often was by no means adequately secured by marriage or a dowry.

Third, and perhaps most important, the fear was expressed that women's inheritance rights would increase the fragmentation of estates

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1. Nikol'skii, op. cit., pp. 132-3. Paradoxically given this fact, some advocates of reform claimed that the 'more just' customary law of the peasants should provide the basis for Imperial law. E.g., see Tiutriumov in Zamechaniia grazh. zak., Nos. 1, 10, 14, 109, 180, 501, 573, 623; Evreinova, op. cit., no. 3 pp. 149-54, 159-60; Orshanskii, 'Nasled. prava', no. 2 pp. 32-8, no. 3 pp. 6-10, 27-30, although his argument is inconsistent. For a criticism of these views see N. Brzheskii, Ocherki iuridicheskogo byta krest'ian (Spb., 1902), pp. 59-102; Petrazhitskii, 'Obych. pravo i zhen.'; I. Tabashnikov, 'Zhelatel'noe otnoshenie budushchago grazhdanskago ulozheniia k nashemu obychnomu pravu', Zh. Gr. i Ug. Pr., 1885 no. 3, pp. 67-107.

2. Zamechaniia grazh. zak., Nos. 605, 607; Nikol'skii, op. cit., pp. 127, 135. In rebuttal, see Liubavskii, 'Ob uravnenii', pp. 416-18; Gurliand, op. cit., no. 208 pp. 360-61; Tovstoles, 'Iurid. polozh. zhen.', pp. 77-8.

belonging to the dvorianstvo, thereby further weakening the position of that social estate and producing undesirable political effects.[1] To this later was added the charge that for the same reason it would increase the disruption already caused to economic units by the inheritance laws and thus be detrimental to the economic development of the state. As we have seen, both Speranskii and Nicholas I shared the first apprehension, and the larger share of land for males proposed in both Speranskii's and Bludov's projects was a reflection of this.[2] Thus even some of those who agreed that on moral grounds women deserved equal treatment in inheritance nevertheless for practical political and, later, economic reasons were not prepared to support equality in all respects.[3]

Attempting to refute the political argument, Liubavskii agreed that support of a landed class for political reasons could be a valid objective of the law, but argued that this could be achieved only by entail. Yet this institution had been rejected in Russia in the early eighteenth century and estates continued to be divided equally among the male heirs. Thus the law could not achieve and did not have any political objective. Hence, he concluded, there was no political reason to perpetuate such a

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1. Speranskii, 'O rod. imen.'; the views of Nicholas I in Grazh. Ulozh., bk. 4, explanas., pp. 32-5, and in Goikhbarg, Zakon, pp. 5-10; Pril. Gos. Duma (1911) iii. no. 212, pp. 8-10; Wagner, 'Legisla. Reform', pp. 169-75.

2. Grazh. Ulozh., bk. 4, explanas., pp. 30-35; Pril. Gos. Duma (1911) iii no. 212, p. 8; Wagner, 'Legisla. Reform', pp. 169-75; Speranskii, 'O rod. imen.'.

3. The references cited in notes 1 and 2 above; Zamechaniia grazh. zak., Nos. 596, 605; Spb. Ved. 1892 no. 227 (22 Aug.), p. 1 (cols. 4-5); 'Prava zhen.' (ibid., 1893 no. 73). Even Rus. Mysl' expressed slight reservations, 1890 bk. 3, vn. obozr., pp. 231-2.

gross injustice.[1]

By the turn of the century the fears voiced on economic grounds clearly had attained equal importance. However, as in the case of patrimonial property, critics refused to accept such economic considerations as sufficient justification for the violation of a basic principle of justice and morality. Some even added that the further division of landed estates would be socially and economically beneficial. Reviewing the proposals of the Editing Commission for the composition of a new civil code, the jurist and Senator Petr Gussakovskii commented:

> The thought running through these considerations, that in formulating the extent of women's inheritance rights legislation must retreat from the demands of justice in order to achieve general economic or social advantages, is untrue in its very basis. Legislation establishing the norms of private property relations must not defer from the demands of justice in the interests of the general good, because the very concept of the general good, embracing the interests of the whole population, excludes the possibility of allowing any sort of injustice with respect to particular of its groups. . . .Finally, the greater fragmentation of properties to which the equalisation of women's inheritance rights unavoidably will lead is not such a harmful phenomenon in the economic life of the state that for its prevention the institution of legislative measures recognised to be unjust in principle would be necessary. On the contrary, the concentration in a few hands of large sums of capital in general exerts a disadvantageous influence on the development of the general welfare of the state, and therefore inheritance laws enabling the fragmentation of this capital and its more even distribution among a larger number of people can only be recognised as desirable. . . .[2]

Writers such as Gussakovskii clearly had in view the small minority

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1. Liubavskii, 'Ob uravnenii', pp. 419-23. See also Gurliand, op. cit., no. 208 pp. 362-3, no. 209 pp. 392-3; Tovstoles, 'Iurid. polozh. zhen.', p. 79

2. Gussakovskii, op. cit., pp. 23, 25. See also Tovstoles, 'Iurid. polozh. zhen.', p. 79.

of large landowners and industrialists, and thus ignored the difficulties that the law presented to the more numerous small and middle landowners.[1] Even so, the proposal for equality might have been acceptable to these latter and others concerned chiefly with economic issues had its supporters been willing to accept an expansion of testamentary power and not insisted on the introduction of a system of obligatory shares as well. Thus, once again, the views and priorities of the urban and intellectual jurists advocating reform of the law diverged not only from those held by traditionalists, but also from those held by many who would be affected significantly by the law or who were concerned with its political and economic effects. Both the courts and the Editing Commission compiling a new civil code were caught in the middle of this controversy.

As described above, the Editing Commission attempted to defuse the political and economic issues while still ensuring that the deceased's moral obligations to his family were fulfilled by proposing that the owner have complete testamentary power over his property and certain family members a right to recover the value of a specified share of the estate should the owner fail to provide for them in at least this amount.[2] In addition, the Commission hoped that these proposals would allay the fears of most of those opposed to extending the inheritance rights of women and spouses, as in designating the order of intestate succession and the deceased's 'necessary heirs' it had accepted entirely the arguments of those advocating reform based on the family union.[3] Thus, the right of inheritance was made

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1. See Wagner, 'Legis. Reform', pp. 157f.

2. Above, pp. 196-202.

3. Grazh. Ulozh., bk. 4, intro., pp. 68-103, explanas. 30-49, 72-95, 271-84.

dependent on relationship to the deceased by birth in marriage (article 14); the surviving spouse was to receive in ownership one-quarter of the deceased's estate if he was survived by children or their descendants, one-half of the estate if he was survived by parents or grand-parents or their descendants, and the entire estate in all other circumstances (articles 28-30); otherwise the estate was to pass first to the deceased's children equally and their descendants per stirpes, then to his parents equally and their descendants per stirpes,[1] i.e. the deceased's parents were to be preferred to his siblings, then to his grand-parents and their descendants, and so on up to his ascendants in the fifth degree (articles 16-21); the deceased's spouse and children and their descendants, and in the absence of the latter, his parents, were designated his 'necessary heirs' (articles 121, 123).

Although perhaps less controversial than the abolition of the institution of patrimonial property and the introduction of obligatory shares, these proposals, as part of the general projected code of inheritance law, never were submitted for legislative approval. Thus, at least until after the creation of the State Duma, Imperial law never moved beyond the uneasy compromises worked out by the courts between family and clan and between morality and justice on the one hand and political and economic expediency and the principle of the unlimited power of the owner on the other.

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1. This solved the problem of half-siblings as well, as they would receive the appropriate share as a descendant of the deceased's parent.

Chapter 6

Judicial Development of Testamentary Power

The primary means by which an owner could control the devolution of property to his successors and thereby pursue whatever objectives he thought important, perhaps even despite the opinions of his heirs, was through his exercise of testamentary power. In Russian law, this power had two aspects. The first concerned the definition of property which the owner had the right to dispose of by will. By their treatment of patrimonial and acquired property, the courts consistently and considerably expanded this aspect of the owner's power. The second concerned the actual substantive content of this power, that is, the various ways in and conditions under which an owner could devise his property. Obviously, the greater the power and flexibility accorded the owner in this respect, the better able he would be to arrange a settlement designed to achieve his own ends. In this far more than in other areas of property and inheritance law, it was the courts that determined what the law was, and hence the extent of testamentary power.

This state of affairs arose from the fact that statutory law was concerned chiefly with the rules governing the composition of various types of wills and the restriction of testamentary power with respect to certain categories of property, and defined only very vaguely the substantive content of testamentary power, devoting only a few rather general articles to this subject.[1] Understandably, this resulted in considerable uncertainty

1. See above, pp. 64-70.

and confusion over the limits of testamentary power, which in turn was reflected both in the cases coming before the courts and in the legal literature on the subject. Legal commentators in particular, often while acknowledging the extreme deficiencies of statutory law, nevertheless attempted to provide a clear and consistent description of the law, and in so doing were compelled to a greater or lesser extent to supplement the Russian statutes with what generally turned out to be a distillation of current Civilian law modified by each author's personal conceptions of the 'general spirit of Russian law' and of equity. This was admitted by some authors, particularly toward the end of the nineteenth century when the use of foreign legal examples and general legal theory to develop Russian law was becoming more of a contentious political issue, but nevertheless was justified on the grounds that, in view of the statutes' deficiencies, such borrowing both was necessary and could be beneficial, provided that the general principles of Russian law were adhered to faithfully.[1] Other authors either ignored the issue altogether or denied that such borrowing was necessary or possible in an area of law such as inheritance, yet nevertheless clearly relied on Civilian jurisprudence in

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1. E.g., see A. A. Bashmakov, 'Byt' ili ne byt' poniatiiu zaveshchatel'nago otkaza v russkom zakonodatel'stve', Zh. Min. Ius., 1901 no. 7, pp. 71-3, 97-101; Annenkov, 'Otkazy', especially pp. 3-4; Liubavskii, 'O vnesh. forme', pp. 192-4, 198; N. G. Vavin, 'O nekotorykh vazhneishchikh momentakh legatarnago prava', Zh. Min. Ius., 1914 no. 3, pp. 52-4; A. I. Zagorovskii, 'O podstave naslednika (substitutsii)', Rus. Mysl', 1906 bk. 10, pp. 112-30, bk. 11 pp. 1-29.

their development of the law.[1] In either event, as the statutes were so vague and each author consequently was relying as much on his own conception of the general spirit of Russian law, general legal principles, and equity as on these statutes themselves, the inevitable result was disagreement and confusion. If this was the state of affairs within the legal profession, the state of knowledge and confusion among the lay public must have been even worse. Therefore it is little wonder that as late as 1870 the State Council could note that the largest number of private civil cases reviewed by it in that and previous years concerned disputes over wills.[2]

To dispel this confusion and thereby provide greater security for testamentary arrangements became the task of the courts, a task that was

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1. E.g., Demchenko, Sushch. nasled., pp. 1-30, 79-87; Kukol'nik, op. cit., pp. 86-167 in general; Meier, op. cit., pp. 634-43; N. Sbitnev, 'O dukhovnykh zaveshchaniiakh po russkomu pravu', Zh. Min. Ius., viii (1861), 181-244; Shershenevich, Uchebnik, pp. 698-716, 772-6; Zmirlov, 'O nedostat.', 1883 no. 10, pp. 52-98. The practise of borrowing was severely criticised in N. Poletaev, 'O zaveshchatel'nykh otkazakh v nashikh deistvuiushchikh i budushchikh zakonakh', Zh. Min. Ius., 1902 no. 6, pp. 175-98. Other authors who mentioned the law's deficiencies and tried to develop a purely Russian doctrine, but who nevertheless had to rely on Civilian jurisprudence to a certain extent, include Beliaev, 'Ist. osnovy'; L. Rudnev, O dukhovnykh zaveshchaniiak po russkomu grazhdanskomu pravu v istoricheskom razvitii (Kiev, 1894); Kavelin, 'Pravo nasled.'; idem, 'Rus. grazh. ulozh.', 1882 nos. 8, 9, 1883 no. 1; N. G. Vavin, 'Poniatie zaveshchatel'nago otkaza po deistvuiushchemu russkomu pravu', Zh. Min. Ius., 1913 no. 10, pp. 118-41; A. Grinevich, 'O substitute ili o podnaznachenii naslednika po russkomu pravu', Iurid. Vest., 1867-1868 no.4, pp. 3-27; N. Moiseenko, 'O substitutsii v zaveshchanii po russkomu polozhitel'nomu pravu', Izvest. i Uchen. Zap. Imp. Kazan. Univ., 1874 no. 5, pp. 763-812; Pobedonostsev, Kurs, ii. 564f.; Zamechaniia grazh. zak., Nos. 502, 504. This result would seem to be almost inevitable from the way in which most Russian jurists approached the question, i.e. from the position of comparative Civilian jurisprudence. Thus the analytical framework that they used to examine and describe Russian law was drawn from Civilian jurisprudence and encouraged them to analyse Russian law in terms of Civilian categories and concepts.

2. Otchet Gos. Sov. 1870, pp. 187-8.

complicated by the appearance of new and more sophisticated forms of property and the greater mobility of property rights that resulted from the development of financial and commercial institutions that occurred after the emancipation of the serfs. With such broad scope to develop the law, the courts clearly had considerable power not only to affect the individual owner's ability to pursue personal objectives through his will, but also to affect broader social, economic, and political issues. In discharging their task, the courts, while relying on what were believed to be fundamental principles of Russian law and drawing heavily on Civilian jurisprudence and the doctrine of unlimited individual ownership, nevertheless showed themselves to be aware of these broader social issues and formulated their decisions accordingly. Thus in general it would appear that they sought to grant the individual owner the maximum degree of testamentary power thought to be consistent with state economic, social, and other interests and the individual's familial obligations.

I. The Nature and Basic Characteristics of the Will

Central to any definition of the extent of the owner's testamentary power was a determination of the very nature of the will and, consequently, of its basic characteristics. While this question really only arose formally as a result of the growth of the formal study of law in the early nineteenth century and particularly from the strong influence of Civilian jurisprudence on Russian jurists, even certain basic practical questions, such as when a will took effect or whether it could be revoked or ambulatory, still were

unresolved at the time of the judicial reforms.[1] Obviously, the resolution of such practical questions would be affected by the courts' conceptions of the nature of the will and the status of its beneficiaries.

In agreement with most Russian jurists, and relying on a literal reading of article 1010, SZ, X, 1, the Civil Cassation Department repeatedly held the will to be nothing more than the distribution of property by the owner in the event of his death.[2] Thus it appeared to reject the Roman law principle advocated by some jurists that the function of the will was to appoint an heir.[3] The court never varied from this position, and the doctrine helped provide the basis for the wide latitude in testamentary power it accorded property owners.

Although this doctrine does not appear ever to have been challenged directly in the courts, there were occasions when the Civil Cassation Department had to restrain attempts by the lower courts to introduce a

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1. Mid-century accounts of the law can be found in P. V. Polezhaev, 'O zaveshchaniiakh', Arkhiv ist. sved Kalachovym, 1859 bk. 1, pp. 21, 53-4, 67-104; Sbitnev, op. cit.; Nevolin, op. cit., iv., v.; Meier, op. cit., pp. 634-55; Fride, op. cit. Later analyses, most of an historical nature, include Pobedonostsev, Kurs, ii. 453f.,; Kavelin, 'Pravo nasled'; Rudnev, op. cit.; Tovstoles, 'Svoboda zaveshch.; Beliaev, op. cit.

2. E.g., see SRGKD 1868 no. 110; 1870 no. 917; 1875 no. 91; 1876 no. 302; 1878 no. 274; 1880 no. 56; 1881 no. 131; 1888 no. 63; 1904 no. 85. V. I. Kurdinovskii, Dogovory o prave nasledovaniia (Odessa, 1913), pp. 307f.; Rudnev, op. cit., pp. 171-82; Tovstoles, 'Svoboda zaveshch.', p. 108; Kavelin, 'Pravo nasled.', cols. 1313-15; Nikol'skii, op. cit., pp. 73-4, 79-87, 169-71; Meier, op. cit., p. 638; Pobedonostsev, Kurs, ii. 488, 564; Grazh. Ulozh., bk. 4, explanas., p. 114.

3. Zmirlov, 'O nedostat', 1883 no. 10, pp. 52-3, 78-80; Demchenko, Sushch. nasled., pp. 1-25. Beliaev, op. cit., no. 5 pp. 103f., no. 6 pp. 60-65; Tovstoles, 'Svoboda zaveshch.', pp. 108-9; Rudnev, op. cit., pp. 181-2, all argued that although this was not current law, it ought to become so.

somewhat broader and more Roman conception of the will. For example, this is evident in Ovchinikova v. Ovchinikov, decided in 1880.[1] By a will confirmed in April 1868, merchant Grigorii Ovchinikov devised a house in the town of Gatchina to Feodor Ovchinikov and an adjacent house to Ekaterina Ovchinikova. In January 1878, the latter brought suit against the former for recovery of a tiny sliver of land that Ovchinikova claimed, on the basis of the testator's original deed of purchase, formed part of the property devised to her. However, the St. Petersburg District Court established that the testator himself had divided the two properties by constructing a fence between them, and therefore the question at issue was whether the testator meant to devise the respective properties on the basis of this division or in accordance with the original deeds of purchase. Not unreasonably, the court held that he intended the former, and found for the respondent. The plaintiff appealed, and the St. Petersburg Court of Appeal reversed the decision on the grounds that a will was not an act establishing title, and therefore could not alter the composition of any property devised, which therefore must depend on the original act of title. Implicit in the court's decision was the argument that the owner by his will was not distributing various property rights among particular persons and creating new sets of rights thereby, but only designating succession to an already established title that could not be altered.

The Civil Cassation Department vacated this decision. The high court argued that a will was a disposition of property by the owner in accordance with his will (volia), and therefore it obviously served as an

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1. SRGKD 1880 no. 56.

act transferring title, by which the court meant creating a new title for the devisee. Thus the owner/testator determined the composition of the property to be transferred and, consequently, by his will could alter the boundaries of immovable properties owned by him if he so desired. In other words, in his will the owner was not primarily designating a successor to an already existing bundle of rights, but was disposing of his property rights in a manner of his own choosing, and in so doing he could alter and rearrange those rights in any way that he chose, providing of course that his dispositions were not contrary to law.[1] Hence followed the frequent analogies between a gift and a will made by the court.

Likewise in its decision in Sergeev v. The Executors of the Will of Z. Shibalkin in 1870 the high court rejected an attempt by the St. Petersburg Court of Appeal to give the will a more universal character.[2] In his will Shibalkin had made various bequests and other dispositions and charged his executors to use particular properties for the benefit of certain churches and charities and for other good works. However, no mention of certain other properties, particularly of bank certificates worth 31,400 rubles, was made in the will. In 1868 A. Shibalkina was granted the right as legal

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1. In earlier decisions the court had stated that a will could contain other binding provisions, such as the appointment of childrens' guardians or funeral arrangements and so on, that were not necessarily connected with the disposition of property (SRGKD 1876 no. 302) and might be able to contain binding directions for the division of the testator's acquired property among his legal heirs (SRGKD 1867 no. 518). Also the court had ruled on several occasions that the testator by his will could not create a title in the sense of transferring a property right that he did not himself possess. SRGKD 1876 no. 302; 1878 nos. 60, 138; 1883 no. 16.

2. SRGKD 1870 no. 917.

heir to all the testator's undevised property, which right she bequeathed on her death to peasant Vasilii Sergeev. Sergeev then brought suit in the St. Petersburg District Court against Shibalkin's executors for recovery of the above bank certificates and certain other properties the use of which had not been specified in Shibalkin's will on the grounds that any property not clearly devised to some specified beneficiary either in ownership or in possession and use must be considered as undevised and therefore as lying outside the will, and thus must pass to the testator's legal heirs. The respondents contested the suit, claiming that before he died Shibalkin had instructed them to use this property for good works, and this they had done after confirmation of his will.

The district court found for the plaintiff, but the St. Petersburg Court of Appeal reversed the decision. In effect, the court ruled that it must be assumed that, unless certain property specifically was excluded, by the very act of making a will the testator intended to devise all his acquired property, which therefore must pass to his executors for disposition in accordance with his will. Thus there could be no property to be inherited under the rules of intestacy. Furthermore, as the owner had the right to dispose of his acquired property by will to whomever and under whatever conditions he chose, whether in unrestricted ownership or in limited possession and use or disposition, he could grant his executors the power to dispose of property designated by him for particular charitable, publicly beneficial, or other purposes. The right of disposition so granted could approach that of ownership, with the grantee having the right to any of the testator's property remaining after all charges imposed on him by the testator had been executed. In the court's opinion, a grant of

unaccountable disposition to the executor was an instance of this, and therefore after executing all bequests and other charges made in the will, the executor took any and all of the testator's remaining property as a 'quasi-owner', even though no grant of ownership had been made to him directly in the will. The court held the devise to Shibalkin's executors to have constituted such a grant, and therefore they were responsible solely to the will's other beneficiaries and only for the bequests made in the will, but not to anyone else for any of the testator's remaining property. Clearly, the court of appeal here was strongly influenced by Roman law doctrines, particularly in its assumption that a will must embrace all the testator's property subject to testamentary disposition unless specific exclusion was made and in its treatment of the executor, by apparently giving him all residual rights to the inheritance, as a type of heir appointed by the testator.

Needless to say, the Civil Cassation Department was not persuaded by the court's reasoning and vacated the decision. The high court asserted that a will constituted a distribution of property by its owner in the event of his death, and while by the use of general phrases the owner could dispose of all his property, he need not necessarily do so. Thus the court of appeal had erred in ruling that any devise of acquired property signified a devise of all such property unless certain property specifically was excluded. The high court's decision meant that only that property specifically included in the will, whether particularly or generally, was subject to its provisions; all the testator's remaining property was considered as lying outside the provisions of the will. Hence it passed to the testator's

legal heirs.[1] Thus the will established no universal successor of the deceased, but merely distributed property rights in a particular way, and the rights so distributed could constitute all or only part of the deceased's estate. The Cassation Department also rejected the other points made by the court of appeal, holding that: as the right of disposition was an inseparable part of the right of ownership, it could not be transferred apart from the latter except in certain instances specifically allowed by law; the power of the executor of a will was strictly limited to the exact fulfillment of the will's provisions and could not be extended to include the free disposition of any property remaining after such fulfillment, nor did the executor receive the right of ownership, either of property to be disposed of under the will or of any property remaining after this had been done; there was no such institution as 'quasi-ownership' in Russian law.

Thus the main proposition of the Civil Cassation Department was that a will concerned chiefly the distribution of property and not the appointment of heirs or successors. As such, it was a supplement and not an alternative to or identical with inheritance by law.

This principle found further reflection in the court's treatment of the power to disinherit legal heirs by will. The high court apparently did not have to rule directly on this issue until its decision in Gladilina v. Gladilin in 1903,[2] although its attitude was strongly suggested by statements in earlier decisions. For example, in decisions in 1874 and 1902 the

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1. See also SRGKD 1874 no. 583; 1902 no. 104; 1903 no. 28.

2. SRGKD 1903 no. 28.

court had implied that formal disinheritance was not permitted, but had failed to address the question directly because in each case the testator had devised all his property to other persons.[1] However, in Gladilina v. Gladilin the court had to decide the issue because the testator had declared his legal heir to be excluded from his inheritance but had not disposed of all his property in his will. In this instance the court stated unequivocably that an owner could not exclude his legal heirs from the inheritance of acquired property[2] not specifically disposed of by him in his will to anyone else. The legal heir's right of inheritance, as opposed to actual rights to the deceased's estate in any given case, was established by law, and therefore in the absence of any specific legal provision allowing it, he could not be deprived of this right by the arbitrary act of any individual; he could lose his right only in the cases provided for by law.[3] Thus the owner's power to exclude his legal heirs from his inheritance was exhausted by his right to devise his acquired property to whomever he chose, and if he failed to exercise this right, even by designating the devisees in general terms,[4] the property remaining undevised passed to his heirs by law.

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1. SRGKD 1874 no. 583; 1902 no. 104. This was the factual position in 1881 no. 16, so again the issue was not discussed, and in 1868 no. 25 the court held such a provision illegal, but primarily on the basis that it constituted an illegal substitution.

2. There could be no question, of course, of any power to disinherit the heirs of patrimonial property.

3. *E.g.*, conviction of a crime the punishment for which included deprivation of civil rights, taking holy orders, etc. SZ, X, pt. 1, arts. 1107, 1109.

4. The right to use general terms to designate the devisees had been confirmed in SRGKD 1875 no. 199.

Some jurists, basing their arguments largely on the principle of the unfettered rights of individual ownership, disagreed strongly with this decision.[1] They claimed that 'the power to disinherit the heir is implied by itself and emerges from the very concept of the will as an act of free will by the testator'.[2] Statutory law neither expressly allowed nor prohibited this power, thus resolution of the question had to rest on the general spirit of the laws. This must be held to allow formal disinheritance, as the law granted the owner free and unlimited power to dispose of his acquired property, any heir factually could be deprived of the inheritance of such property anyway, and any heir could reject any inheritance. Thus the court's formulation of an inviolable right of inheritance resting with the legal heirs was an empty legal fiction that should not be used to deprive the owner of his right to disinherit an heir. It was argued that this in fact was only the obverse of the positive power to devise property to a specified beneficiary.

However, whatever the strength of the criticisms levelled at the court's decision, it is clear that the court merely was holding to its primary proposition that the will concerned only the distribution of property and not the designation of heirs. Of course, as the court itself recognised, an owner factually both could appoint and disinherit heirs, but this was only the secondary result of his disposition of his property.

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1. S. B. Gomolitskii, 'Dopuskaiut li russkie grazhdanskie zakony zaveshchatel'noe rasporiazhenie o lishenii nasledstva?', Zh. Min. Ius., 1903 no. 5, pp. 221-8; /S. A. Beliatskin/, 'S.-Peterburgskoe iuridicheskoe obshchestvo', Pravo, 1913 no. 12, cols. 770-78; see also Ch-vu, 'Vopros'.

2. /Beliatskin/, op. cit., cols. 770-71.

Again, this principle appears to have lain behind the court's treatment of accretion. The court's position was that while the testator could create this right for any of his devisees, this too could not be assumed. Thus in the absence of such a specific provision, any devise to a person predeceasing the testator failed automatically and the share assigned was considered undevised. Hence it passed to the heirs by law under the rules of intestacy and not to any of the other beneficiaries of the will. The sole exception to this rule was, quite naturally, in the event that the testator had devised general or even particular rights to several persons collectively.[1]

Thus the court's position seems to be clear. The will was primarily a vehicle by which the owner could distribute his property rights at death, and was not concerned with the creation of heirs. These latter were established by law, as were their rights and obligations, which consisted of all the undisposed of transmissible rights and obligations of the deceased and which were received unconditionally by force of law. In contrast, the devisee had only those rights actually given him by the testator and held them only subject to the conditions laid down in the will. As the high court stated in Aliavkiny and Razumovskaia v. Dobrovol'skii, 'the will is nothing other than a grant to the heir to enjoy the inheritance left by the testator not on the basis of the law, but on the basis of the special dispositions made by the testator.'[2] Thus the primary practical difference

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1. See SRGKD 1871 no. 274; 1877 no. 291; 1886 no. 23. On the exception for collective beneficiaries, 1873 no. 1530; 1886 no. 23. For a contrary view see Zmirlov, 'O nedostat.' 1883 no. 10, pp. 70-71.

2. SRGKD 1881 no. 16. In general, this is one of the chief themes developed by Nikol'skii, *op. cit.*

between the legal heir and the beneficiary of a will was that the former retained all the residual rights to the deceased's estate, while the latter had only those rights specifically created by the will. Given the frequently informal nature, imprecise terminology, and strict formal requirements of Russian wills, this distinction was not unimportant, as it meant that any bequest that failed for whatever reason would pass to the legal heirs unless the testator had made some specific provision for this. This basic principle also suggests that the court's principal orientation and concern were the rights and powers of the individual owner. In an important sense, the court saw testamentary power as only one aspect of the right of individual ownership.

However, as some legal commentators pointed out, the court's attitude was not quite so simple or, perhaps, consistent as might at first seem.[1] While from the principles enunciated by the Civil Cassation Department it could be inferred that the testator could not create an heir in the true sense, the status of the devisee still remained to be defined. This task was complicated by the fact that there appeared to be no specific provision in the Svod Zakonov defining the responsibility of any beneficiary of the will for the testator's debts and obligations, whether or not secured by the property devised, although a study at the twilight of the Imperial period suggested that this was a problem created largely by poor editing and misguided borrowing from French law by Speranskii

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1. Beliaev, *op. cit.*, no. 5 pp. 103f., no. 6 pp. 25f., 60-65; Tovstoles, 'Svoboda zaveshch., pp. 108-9; Rudnev, *op. cit.*, pp. 179-82.

and his colleagues.[1] The only rule possibly applicable was that in article 1259, SZ, X, 1, which, though suitably ambiguous in terminology,[2] was in the section of the digest devoted to inheritance by law and therefore appeared to refer only to legal heirs.

That this was a primary consideration in defining the status of beneficiaries of wills is suggested both by the legal literature and by the fact that nearly all the cases in which the Civil Cassation Department dealt explicitly with this question concerned responsibility for the deceased's debts and obligations. It is clear from the former that there were two major concerns: protecting the interests of the deceased's creditors, especially from fraudulent evasion of debts, and avoiding the perceived injustice of different recipients of the deceased's estate or beneficiaries of a will being held unequally responsible for the deceased's debts and obligations.[3] For example, as in his will the owner was merely disposing of particular property rights and therefore did not have to deal with the whole of his estate, it was quite possible, and unavoidable if the estate included patrimonial property, that some of his property would pass to his legal heirs under the rules of intestacy while other property would pass to beneficiaries of his will. To adhere to a strict interpretation

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1. N. N. Tovstoles, 'Otvetstvennost' naslednika pered kreditorami voobshche i pered legatariem v chastnosti', Zh. Min. Ius., 1915 no. 7, pp. 77-81, 89; Beliaev, op. cit., no. 6 pp. 25f.; Rudnev, op. cit., pp. 171-81; Bashmakov, 'Byt' ili ne byt', pp. 74-6.

2. The phrase used was: '. . .the person accepting the inheritance. . .'.

3. E.g., see Beliaev, op. cit., no. 6, pp. 43-5, 55-6; Nikol'skii, op. cit., pp. 88-9, 169-74; Bashmakov, 'Byt' ili ne byt'', pp. 89-93; S. A. Beliatskin, 'Naslednik i legatarii', Pravo, 1909, especially no. 46 and the discussion of his paper following, cols. 2518-22; Poletaev, 'O zaveshch. otkaz', especially pp. 175-80, 187-90, 195-7.

of article 1259 and hold only the legal heirs liable for the deceased's debts and obligations with their own as well as the deceased's property would mean either that they would bear the whole of this burden while the beneficiaries of the will were excused from any liability, if these beneficiaries were held to be akin to the recipients of a gift,[1] or that they would bear a disproportionate share of the burden if these beneficiaries were held liable only to the extent of the value of the property actually received. In the first instance the freeing of some of the deceased's property from liability for his debts and obligations after his death was thought to be unjust, unfair to his creditors, and conducive to abuse and fraud, while in both instances the unequal responsibility of the legal heirs was thought to be unjust. Some jurists sought to solve the problem by distinguishing between different beneficiaries of a will, such that those receiving general and unspecified shares were held to be universal successors and hence heirs of the testator fully liable for his debts and obligations, whereas recipients of particular and precisely identified rights or objects were held to be only legatees and consequently not liable under article 1259. However, apart from the fact that no such distinction existed in Russian statutory law, this left the practical and moral problems still largely unresolved: for example, would the devisee of an entire but particular landed estate that happened to constitute the bulk of the deceased's property be an heir or a legatee?[2] There was no simple and consistent way to differentiate between recipients of large

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1. E.g., see Rudnev, op. cit., pp. 179-80.

2. See Beliaev, op. cit., no. 6 pp. 40, 49-56, 72; the other references cited in note 3, p. 277; Pobedonostsev, Kurs, ii. 635-43.

and of small particular bequests.

Thus the problem facing the courts in defining the status of the beneficiary of a will was to find a solution that both was equitable and safeguarded the interests of the deceased's creditors. As the noted jurist and legal historian P. I. Beliaev, reflecting on the provisions of the proposed civil code, stated in 1903, 'the tendency of /the history of Russian wills/ is to put the successor by will in the position of the heir and, by recognising his responsibility for debts, create a guarantee for creditors . . . . Thus the legislator, by creating special privileged successors with no responsibility for debts, would conflict with the basic tendency of the Russian will. . . .scarcely anyone at the present time would support the unconditional unlimited responsibility of the heir for the deceased's debts. . .But the legislator who did not acknowledge the responsibility of a certain class of heirs by will for debts would conflict even with. . . the view that the property left by the deceased was responsible for his debts. This property is connected with the deceased's debts and his creditors are his most direct heirs; not a single part of this property. . .can be freed from this burden'.[1]

As Beliaev's remarks indicate, the Civil Cassation Department resolved the issue by holding any beneficiary of a will, except in some cases charities, churches, and such like, to be identical to the legal heir, at least as concerned responsibility for the testator's debts and

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1. Beliaev, op. cit., no. 6 pp. 55-6.

obligations,[1] and indeed such beneficiaries normally were referred to as 'heirs by will'. While perhaps conflicting with the court's definition of the nature of the will, this at least seemed to be functional and equitable.

This doctrine was first enunciated by the high court in two decisions in 1868, Nikitina v. Moskvichev and Saltykova v. The Executor of the Will of Hereditary Honoured Citizen Butorin.[2] In the former, Ivan Moskvichev, retired master at the Peterhof paper mill, had died in August 1857 leaving a will under which all his immovable property passed to his children, Petr, Vasilii, and Anna, with the provision that after settling his debts, they were to deposit a total of 100 silver rubles in the _sokhrannaia kazn'_ to be paid with accumulated interest to the testator's granddaughter, Varvara Nikitina, on her marriage. The money was not deposited, and subsequently Petr Moskvichev acquired his father's entire estate through purchase of his brother's share and receipt of his sister's share under the provisions of her will. In July 1867, Nikitina brought suit against Moskvichev for payment of the entire sum, and the Peterhof Congress of Justices of the Peace found the latter liable for his own share and that of his sister, as her heir. Moskvichev appealed to the Civil Cassation Department, arguing that article 1259 referred solely to heirs by law, not to beneficiaries of a will. Therefore, as his sister had not obligated him directly in her will to pay her debts, he could not be held responsible for them. However, the high court upheld the J. P. Congress's decision and

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1. _E.g._, see _SRGKD_ 1868 nos. 610, 777; 1871 nos. 392, 675, 781; 1872 no. 624; 1875 no. 91; 1877 no. 373; 1878 no. 274; 1879 no. 294; 1907 no. 11. When the legatee finally was recognised by the high court, his liability was limited. _SRGKD_ 1909 no.40.

2. Respectively, _SRGKD_ 1868 nos. 610, 777.

ruled that the heirs' responsibility for the deceased's debts and obligations was identical regardless of whether they were heirs by law or by will and, in the latter case, irrespective of whether the testator had explicitly imposed this obligation on them in the will.[1] In the second, similar, case, the high court stated:

> A person receiving property by testamentary disposition enters into possession of this property in the capacity of the heir of the testator. With the realization of the right of inheritance the heir, having become the owner of the property included in the inheritance, simultaneously accepts responsibility for the obligations incumbent on it in proportion to the share of the inheritance received, and in the event of its insufficiency, is responsible even with his own property.[2]

In a later decision the court added that this liability applied equally to the debts and obligations of the deceased already existing at his death and to those created by him in his will.[3]

In the high court's opinion, then, any beneficiary of a will, though not identical with an heir by law in all respects, nevertheless was akin to the heir by law in the sense that together with the rights and benefits of the property devised to him, he acquired a proportionate and extended liability for all the testator's debts and obligations. The court subsequently made clear that this principle applied to all beneficiaries of a will, regardless of whether they received property directly or only mediately through another heir under the will or received ownership

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1. This principle was reconfirmed in SRGKD 1872 no. 624.

2. SRGKD 1868 no. 777, emphasis added.

3. 1871 no. 675. As the court, at least until 1909, also held that there was no distinction in Russian law between an heir by will and a legatee, this rule caused considerable confusion.

or only limited rights of possession and use.[1] Thus, while the court held the will to be only a vehicle for distributing property rights that therefore could not be used formally either to appoint or disinherit an heir, it is clear that, probably for the considerations of practicality and equity already mentioned, it held acquisition of property under a will to constitute much more than, say, acquisition of property as a gift.

This was stated explicitly and the court's conception of the will made much clearer in the court's decision in Amirov v. Amirov in 1878.[2] Miron Amirov had died in October 1874, leaving a will composed in June 1857 by which he devised numerous shops and trading stalls, land, a house and all his remaining immovable property located in Tiflis, several serf families, and 10,000 rubles to his son Grigorii, and all his immovable property located in Gori, several serf families, and 10,000 rubles to his second son Vasilii. Although Vasilii contested certain provisions of the will, the Tiflis District Court confirmed it in March 1875 and later granted Grigorii possession of all the deceased's property located in Tiflis. In October 1876 Vasilii brought suit against Grigorii for possession of one-half of the deceased's commercial immovable property located in Tiflis on the grounds that the deceased had acquired this property in full ownership only after having written his will and therefore it could not be considered as included in the provisions of the will. Hence it had to pass to the deceased's legal heirs under the rules of intestacy. Reviewing the deceased's interests in the disputed property in great detail,

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1. E.g., see SRGKD 1877 no. 373; 1879 no. 294; 1907 no. 11.

2. SRGKD 1878 no. 274.

the Tiflis District Court found that he had acquired it in joint-ownership long before composing his will, and it was only the conversion of this joint title into an individual title as a result of a legal dispute and subsequent division with the other co-owner that had occurred after the composition of the will. Hence, as Amirov had full power to dispose of this property by will, the court denied the plaintiff's suit.

On appeal, the Tiflis Court of Appeal reversed this decision and granted the suit. In addition to clearly distorting and misrepresenting several of the important facts of the case, in reaching its decision the court applied to the transfer of property by will by analogy a number of rules in statutes dealing solely with the transfer of property _inter vivos_. On this basis, the court argued that only the owner, even of disputed property _in possession_, could transfer property.[1] Thus a person disputing the ownership or possession of property _not_ in his possession could transfer only his right of action and not the property itself. Therefore, the court reasoned, as a will was merely a transfer of property, the testator had to have unlimited ownership of any property that he intended to transfer by will at the time both of composition of the will and of death. The juridical relation between the owner and the object at both points of time had to be identical. It should be noted here that, if correct, the court's decision would mean that a will could not be ambulatory. Applying this rule to the case in hand, the court found that at the time of the composition of the will, possession and ownership of the property mentioned in it were in

1. The court referred to arts. 780, 782, 1384-5, 1389-90 _SZ_, X, pt. 1, and art. 168 _Pol. o Not. Ch._, which concerned the purchase and sale of property. _SRGKD_ 1878 no. 274.

dispute and the testator had only a right of action. Thus the testator could not devise the property itself to anyone, but could dispose only of his right of action. Therefore, the court concluded, a testamentary disposition of the property itself, not having the requisite legal force at the outset, could not be considered valid, even though the testator later acquired full and undisputed individual ownership of the property concerned. For good measure, the court added that the law required precise designation of any property devised. In his will, the testator had referred to the property devised as jointly owned and subject to division, whereas by the time of his death this property already had been divided. Thus its character had changed and there was no property remaining that fitted the description in the will. Moreover, while an owner by the use of general phrases might have been able to devise all his property owned at the time of his death, his qualification of such phrases with references to specific property excluded this possibility and meant that any property acquired subsequent to the composition of the will could not be considered as included within its provisions. Thus the court held the deceased's commercial property to be undevised and subject to the rules of intestate succession.

The Civil Cassation Department vacated this decision and appeared to give the court of appeal a mild rebuke in the process. The high court stated that the court's omission, distortion, and misrepresentation of much of the evidence was by itself sufficient to vacate the decision. However, in addition it agreed that the court had misapplied rules concerned with the *inter vivos* alienation of property to the disposition of property by will and incorrectly related the testator's right to devise property to

the time of the composition of a will rather than to the time of the testator's death. Examining the nature of the will under Russian law more closely than heretofore, the high court stated that,

> . . .a testament is the legal declaration of the will of the owner concerning his property in the event of his death. Thus, a testamentary disposition, flowing from the right of the owner to dispose of his property in the event of his death to another, the heir by will, is for the latter a means for the acquisition of rights, but, in accordance with the meaning of article 1010, volume X, by its nature the will is an act acquiring strength only with the death of the testator, and by close analogy with inheritance by law, in many respects is distinguished from those means of alienation which are undertaken by the owner during his life with the agreement of the person to whom he is alienating property, as for the transfer of property by will on the one hand the prior consent of the heir is not demanded, and on the other hand the latter, replacing the previous owner, is the person to whom passes the totality of the testator's rights and obligations with respect to the property devised. Therefore only defined property can be sold or in general alienated during life, whereas transfer by will is not limited to specific property (art. 1027, X, pt. 1); alienation of disputed property is permitted conditionally during life (art. 1392, X, pt. 1), but unconditionally by will; the sale or other alienation during life of property under distraint is not permitted without the appropriate guaranty and permission (arts. 768, 774, 1456-8, X, pt. 1), but the transfer of such property by will is permitted freely. Since the time determining the transfer of property by will is the death of the testator and not at all the time of composition of the will. . .with respect to the will it is important not what property belonged to the testator at the time the will was composed, but that which remained after his death and what the testator's will was concerning his property in the event of death. And as acquired property of any type can be the object of a will (art. 1067, X, pt. 1) and in accordance with articles 416-19, 1104, and 1254, volume X, part 1, to the totality of a person's property belongs not only that already confirmed as his, but also that to which he has a right, as the Governing Senate repeatedly has explained (decisions 1875 no. 432, etc.) the law does not prohibit transferring to other persons by will even

> rights revealed though not yet realised during the testator's life, for example the right to an inheritance opening during his life but not yet accepted.[1]

Again, with respect to the court of appeal's apparent disallowance of ambulatory provisions in a will, the high court stated that 'the time of the will's composition is not important, since by the use of general expressions property can be devised which did not belong to the testator at the time the will was composed. . . .'.[2]

It is clear, then, that the Civil Cassation Department held the will to be a special institution, analogous with but not identical to inheritance by law. It was a disposition of property by the owner that flowed from his right of ownership but that nevertheless was unique and therefore distinct from other such dispositions. Thus some, but not all, rules concerning the alienation of property during life could be applied to testamentary dispositions by analogy. For example, in its decision in Aleksandrova v. Salovy in 1906[3] the high court held that rules concerning gifts could be applied to cases of testamentary disposition in the absence of a specific rule governing the situation, and thus upheld lower court decisions ruling that a will in favour of a person who murdered the testator in order to prevent her from altering her will to his detriment automatically was invalid. As we have seen, rules for intestate succession likewise were applicable to testamentary dispositions. Similarly, the beneficiary was both heir and alienee of a special kind. As a result of these decisions the court perhaps

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1. Ibid., emphasis added.

2. Ibid.

3. SRGKD 1906 no. 88.

was open to criticisms of theoretical inconsistency and confusion in its formulation of the law. However, it must be remembered that theoretical consistency was not its main concern. Its task was to provide practicable rules within the context and general meaning of Russian statutory law that both were equitable and as much as possible safeguarded the interests of all the parties affected.

The other basic characteristics of the will finally settled by the Civil Cassation Department followed from the court's conception of the will's nature. Thus, because the will was a free act of disposition of property by the owner in the event of his death, it could take effect only at the time of his death. Hence, as the court made clear in Amirov v. Amirov and elsewhere, it was the ownership and status of property and the legal capacity of potential beneficiaries at this time, and not at the time of the will's composition, that determined the validity of any particular provision of the will.[1] Furthermore, as the testament was an act of the owner's free will that acquired force only at the time of his death, it could be altered or revoked freely by the owner at any time prior to then. Indeed, the court held that for this reason any contract by which an owner limited his right to make, alter, or revoke his will was not actionable.[2] Although most of these points seem to have been accepted by most jurists, if perhaps not widely known by the lay public, during the second third of the nineteenth century, they still were not entirely settled by the time of the judicial reforms, and the new courts often encountered

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1. E.g., see SRGKD 1869 no. 72; 1872 no. 624; 1878 no. 274; 1882 no. 83; 1883 no. 16; 1888 no. 63; 1899 no. 66. See also the references to the court's decisions on the possibility of ambulatory provisions cited below. The legal capacity of the testator, of course, related to both points of time. SRGKD 1877 no. 289; 1878 no. 92; 1899 no. 56.

2. SRGKD 1899 no. 66; 1904 no. 85.

arguments to the contrary.[1]

The resolution of these questions enabled the Civil Cassation Department to establish that a will could be ambulatory, which was not at all clear by the time of the judicial reforms and appeared to be largely a creation of the high court. As a result, this was challenged frequently in the 1870s both by litigants and sometimes lower courts.[2] The court's position and underlying reasoning on both sides of the issue, that a will could be, but was not automatically, ambulatory, already have been described.[3] Suffice it to say here that the court held that as the owner had the right to dispose of all his acquired property by will and this will could take effect only at the time of his death, and as the law specifically allowed the use of general phrases to describe the property devised,[4] there was no impediment to the owner's using general phrases to devise all acquired property owned by him at the time of his death. This naturally would include any property acquired and exclude all property disposed of between the time of the will's composition and the owner's death.[5] The effect of

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1. See the cases cited in note 1, p. 287 above, and those cited below with respect to the possible ambulatory nature of a will. Also, Beliaev, op. cit., no. 5 pp. 74-5, 79-81, 85-102; Zmirlov, 'O nedostat.', 1883 bk. 10, pp. 54-5, 79-80.

2. SRGKD 1870 no. 917; 1872 no. 624; 1875 nos. 27, 429; 1876 no. 302; 1877 nos. 191, 289, 291; 1878 nos. 169, 274. Uncontested examples also can be found in 1875 nos. 199, 854. Also, Beliaev, op. cit., no. 5 pp. 96-7, 101-2.

3. Decisions in Sergeev v. The Executors of the Will of Z. Shibalkin, SRGKD 1870 no. 917, and Amirov v. Amirov, 1878 no. 274, above.

4. SZ, X, pt. 1, art. 1027.

5. See the cases cited in note 2 above, especially 1870 no. 917; 1872 no. 624; 1875 nos. 27, 429; 1878 nos. 169, 274.

these decisions was to enable the owner to arrange in good time a settlement that could include the whole of his estate subject to testamentary disposition remaining at the time of his death.

II. The Substantive Content of Testamentary Power

Russian statutory law dealt with the substantive content of testamentary power only in the very vaguest way. Thus the burden and power of developing the law in this area fell almost entirely on the courts, and primarily on the Civil Cassation Department. In formulating the law, the court quite naturally was guided strongly by its conception of the will as principally a form of disposition of property rights by the owner. Thus it approached the problem largely from the point of view of the individual owner/testator, and after some perhaps inevitable initial confusion, consistently pursued a policy that allowed him the broadest possible testamentary power within a field strictly circumscribed by time.

As the will constituted a free act of disposition of property by the owner based on his right of ownership, the court allowed him to devise any of his acquired property on whatever terms and subject to whatever conditions he wished, provided only that these were not contrary to law.[1] While appearing to grant the owner extremely broad power, this formulation still was not exceptionally clear. The latter qualification especially was conveniently vague and could be used to cover, or perhaps better, exclude a

1. This seems to have been a standard formulation of the court, generally used preparatory to deciding any specific issue. E.g., see SRGKD 1869 nos. 816, 1334; 1876 no. 460; 1881 no. 16; 1901 no. 111; 1902 no. 112.

multitude of sins. However, the Civil Cassation Department made clear that it understood this qualification in its narrowest sense, for example stating in its decision in Kikiny v. Shirov in 1875 that 'instances in which the testators' freedom of action is limited are an exception from the general rule granting discretion to the owners of the property devised when making testamentary dispositions, and are positively defined by law.'[1] Thus the only limitations on the owner's testamentary power were those specifically established by law, which meant that any form of devise, condition, and so on not specifically prohibited by law was allowed. Given the general silence of the statutes, this did indeed allow the testator considerable power and flexibility, and placed the burden of proving that any particular testamentary provision was contrary to law squarely on the shoulders of any disgruntled legal heirs, beneficiaries, or other parties affected. Even if this could be proved, it did not invalidate the entire will, but only the specific provision concerned and any others that were directly dependant on it.[2] The Civil Cassation Department also granted the lower courts extraordinarily broad power to interpret the general meaning of a will as well as the meaning of any specific provisions in order to ensure that the testator's will (volia) was carried out.[3] Thus the court's general inclination was to allow a testamentary provision unless there was

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1. SRGKD 1875 no. 429, emphasis added.

2. SZ, X, pt. 1, art. 1029. SRGKD 1869 no. 1334; 1871 no. 643; 1875 no. 302; 1878 no. 235; 1882 no. 130.

3. This is clear from many of the cases cited in this chapter. But see especially SRGKD 1870 no. 1856; also 1878 no. 235; 1881 no. 62; 1882 no. 63; 1902 no. 112; 1907 no. 26. For instances when the high court felt compelled to intervene on a question of interpretation of a will, see 1878 no. 274; 1892 no. 76.

a specific legal or, as shall be shown, compelling social-political reason to disallow it.

As in the court's opinion the beneficiary of a will acquired and held the property devised only on the strength of the will and not, as in the case of the legal heir, on the strength of the law itself, the court held that the devisee's tenure was subject to any terms, conditions, or obligations imposed by the testator, that acceptance of the bequest also signified acceptance of all such conditions, etc., not contrary to law, and that failure to observe these conditions gave any party affected a right to recover damages or to specific relief and could cause loss of the property devised.[1] For example, in 1869 the court held that a devise of capital with the devisee having no power of disposition until his 28th birthday was legal, and therefore granted the bankruptcy administration established to manage the devisee's affairs and satisfy his creditors the right to recover this capital from the heir of the person to whom the devisee had sold the account certificates prior to his 28th birthday.[2] In another decision, the court held that beneficiaries unsuccessfully contesting a will on the grounds of the testator's mental irresponsibility failed to satisfy a condition against contesting the will and therefore lost their right to the bequests made to them.[3] Thus the court considered

1. This is clear from the decisions cited in the following sections, but in general see, e.g., SRGKD 1869 no. 816; 1876 no. 460; 1881 no. 16.

2. SRGKD 1869 no. 816. In a similar case, 1907 no. 26, the courts denied the claims of both the purchaser and a creditor of the devisee, but it is not clear that in this case the devisee was insolvent.

3. SRGKD 1881 no. 16.

observance of the deceased's will and the conditions under which the property was devised as important as the fact of succession itself. Indeed, by the end of the century the court in some instances was beginning to compare a will to a contract, with the devisee being akin to a contracting party who, by accepting the inheritance, also accepted all the contractual obligations and conditions contained therein.

A. Limitations on the content of the rights and powers devised

Statutory law stated that an owner had an unlimited right to devise his acquired property, and could do so either in full ownership or in limited possession and use,[1] but said little else. The note to article 1011, SZ, X, pt. 1, mentioned limitations with respect to the order of management and the obligation of the devisee to make certain dispositions with respect to the property devised, but these references were extremely vague and provided little guidance. Thus, *inter alia*, it was not clear whether and to what extent the heir's powers of disposition or management could be restricted or the life or other limited tenant's rights of use and possession embellished or further circumscribed, what other limited rights could be devised, or whether a devisee could be obligated to take or refrain from taking certain actions, and, if so, within what limits. As noted above, legal commentators tried to fill this gap by resort to various combinations of Civilian jurisprudence, the 'general meaning of Russian law', and personal standards of justice and morality, but, as one can imagine, the results varied widely depending on each author's predilections. For example, in his critique of Russian civil laws in the early 1880s the

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1. SZ, X, pt. 1, arts. 1011, 1067.

noted jurist and future Senator Konstantin Zmirlov allowed almost no restrictions on the devisee's powers of disposition and management or obligations on the devisee concerning the performance of particular actions because of his conception of the heir as the universal successor and representative of the juridical personality of the deceased who therefore did and must receive the deceased's property precisely as held by the deceased at his death, and his consequent belief that such restrictions and obligations violated the new owner's absolute right of ownership.[1] On the other hand, the equally noted legal commentator Aleksandr Liubavskii likewise argued against restricting the devisee's power of disposition, as it violated his right of ownership, and also, largely for moral reasons, opposed obligations concerning performance of actions, but otherwise allowed the testator much greater power than Zmirlov.[2] Again, such prominent jurists as Nikolai Kalachov, Konstantin Pobedonostsev, and others supported even wider testamentary power, drawing the limit in each case at different points.[3] In this situation, the Civil Cassation Department steered its own course through these uncharted waters and generally allowed almost any limitation on the rights and powers of the devisee, whether owner or only life tenant, any obligation concerning the performance of specified actions, and the grant of various forms of otherwise limited rights for the achievement of particular objectives.

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1. Zmirlov, 'O nedostat.', 1883 bk. 10, pp. 59-70.

2. Liubavskii, 'O vnesh. forme', pp. 192-202.

3. Kalachov, 'Otvet Ch.'; _idem_, 'Otvet B.'; Pobedonostsev, _Kurs_, ii. 571f.; Moiseenko, _op. cit_.

With respect to limited use and possession, the court on several occasions stated that the specific content and duration of such rights depended entirely on the act creating them, and thus on the will of the testator, which was unconstrained with respect to the specific content of the rights but restricted to no more than the life of the recipient with respect to time.[1] Thus the life or other limited tenant's rights of use and possession could be further restricted in various ways, for example by controlling the amount of income from the property to be received by the tenant or otherwise restricting or specifying the use of this income; or these rights could be expanded, for example by granting the tenant the right of sale or mortgage, with the obligation to use the proceeds in a particular way or preserve them and enjoy only the resulting interest.[2] The testator also could grant even more limited rights, such as the right to reside for life in the family home.[3] In addition, the court confirmed that a bequest of limited rights in movable property was allowed, so that, *inter alia*, it was possible to deposit a sum of capital, leaving ownership to one person, but the right to receive the income for life or a lesser period to another.[4] As 'the duration of this period of possession or use

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1. *SRGKD* 1868 no. 25; 1875 no. 322; 1890 no. 42; 1892 no. 76. For the rules regarding life tenancies in the absence of more specific instructions from the testator, see *SZ*, X, pt. 1, arts. 533^{1}- 533^{13}, and 1692^{1}, which, by decisions 1878 no. 7 and 1879 no. 248 (1867 no. 275 held the reverse), were applied to all life tenancies. See also 1892 no. 11.

2. On further limitations, see *SRGKD* 1875 no. 322; 1890 no. 42; 1892 no. 76. On the right of sale, see 1868 no. 25; 1874 no. 583.

3. *SRGKD* 1874 no. 155; 1876 no. 577.

4. *SRGKD* 1874 nos. 583, 709.

of the property can be made dependent either on the passage of a particular point in time or the occurrence of a fortuitous or conditional event',[1] the devisee's tenure obviously could be made subject to any of the resolutive or other conditions discussed below. Finally, the court held that there was no prohibition against creating more than one simultaneous limited estate for the same property.[2]

The court likewise allowed a wide range of restrictions and impositions to be placed on the powers of disposition and management of the devisee in ownership.[3] This appears to have been done frequently, generally in order to secure the maintenance and education of the testator's children or other relatives until they attained the age of full majority (21), to provide daughters with an adequate dowry, or to preserve property from dissipation until, it was hoped, the heir reached a more responsible age. The testator's right to impose such limitations was challenged on the grounds both that the power of disposition was so integral to the right of ownership that any restriction of it constituted too fundamental a violation of the new owner's right of ownership to be permissible and that statutory law allowed a devise only in full and unrestricted ownership or in limited possession and use, but nothing else.[4] However, the Civil

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1. SRGKD 1875 no. 322.

2. SRGKD 1879 no. 21; 1892 no. 76.

3. E.g., see SRGKD 1868 nos. 25, 78; 1869 nos. 816, 1334; 1870 no. 1856; 1879 nos. 78, 205; 1881 no. 116; 1890 no. 42; 1901 nos. 105, 111; 1902 no. 112; 1907 no. 26. See also Grazh. Ulozh., bk. 4, explanas., pp. 201, 202-3.

4. See especially the arguments in SRGKD 1870 no. 1856; 1881 no. 116; also 1869 nos. 816, 1334; 1902 nos. 104, 112. See also Liubavskii, 'O vnesh. forme', pp. 195-6; Zmirlov, 'O nedostat.', 1883 bk. 10, pp. 60-65.

Cassation Department dismissed these arguments with its own analysis of the composition of the right of ownership and by reference to the testator's own and precedent right of ownership. For example, in Kadmina v. Malikovy in 1869 the court ruled that a provision devising immovable property to the testator's grandson, with the latter having no right to sell, mortgage, or otherwise transfer the property for 25 years, constituted a grant of ownership with limited right of disposition, and that such grants were legal. The court stated,

> the right of ownership in actuality is formed from three separate rights: possession, use, and disposition. However it is impossible to conclude from this that the right of ownership ceases in the event of the separation of one of its constituent parts. On the contrary, the law distinguishes between complete and incomplete rights of ownership of property. According to article 423 of the Civil Laws, the right of ownership is considered complete when possession, use, and disposition are united with consolidation of the property in a single person, without the participation of any third parties. But when the right of ownership is limited in use, possession, or disposition by the rights of third parties to this same property, or when the rights of possession and use or disposition have been separated from the right of ownership, then, under article 432 of the Civil Laws, it is incomplete. The meaning of the articles referred to in volume X, part 1 shows that the right of ownership in property can be limited even with respect to its disposition, without by this losing its substantive significance. . . the right of possession and use alone, without the right of disposition, does not constitute the right of ownership, for the right of disposition, signifying the right of ownership, is inseparably linked with it. However, the court of appeal found that Shliapina did not deprive her grandson of the right of disposition over the property devised to him, but, together with possession and use, transferred to him disposition of it, however only limited, for the course of 25 years; such limited disposition, in conjunction with possession and use,

> constitutes, in accordance with the meaning of article 432, the right of ownership.[1]

As the will was a disposition of property by the owner at the time of his death, with the owner having the right to devise any of his acquired property in ownership or in limited use and possession and to impose on the devisee any restrictions or conditions not contrary to law, and as the court held ownership with limited powers of disposition both possible and not contrary to law, the court concluded that the owner had the right and power to devise his property in ownership with disposition limited for a definite or indefinite term not exceeding the life of the devisee.[2] Thus full or partial deprivation of the devisee's power of disposition for a definite or indefinite term was allowed, and testators appear to have used this power often in order to establish a capital fund or limited trust to ensure the maintenance and education of the surviving spouse and minor children and payment of dowries for daughters.[3] The court accorded such provisions substantial protection by allowing the annulment of any premature transfer or other disposition, and apparently even creditors of the devisee generally could not recover the debt from this property unless the devisee had become bankrupt.[4]

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1. SRGKD 1869 no. 1334, emphasis added. In such cases the court generally rested its analysis on arts. 420, 423, 432, 541 SZ, X, pt. 1.

2. SRGKD 1902 no. 112.

3. E.g., see SRGKD 1868 nos. 25, 78; 1870 no. 1856; 1879 no. 205; 1881 no. 116; 1890 no. 42; 1907 no. 26.

4. On the former point, see SRGKD 1869 no. 816; 1907 no. 26; 1901 no. 105 (in which the court held that only persons whose rights had been violated by premature transfer could contest the action). On the latter point see 1869 no. 816; 1901 no. 111, where recovery by creditors in the event of bankruptcy was allowed; 1907 no. 26, where, in the absence of bankruptcy, it was not.

Nor did the court allow only limitations on the devisee's power of disposition, whether or not accompanied by an obligation to use the property's income in a particular way. It also permitted the establishment of a positive régime of management and disposition in conjunction with or even apart from ownership. Such provisions generally were encountered when the testator wished to make some donation for charitable or social purposes, but also were used for more personal objectives.[1] For example, in Chernov v. Chernov in 1879, all three courts held as valid the will of merchant D. Chernov, who had devised his trading and manufacturing operations to his ten grandsons equally in ownership, but had stipulated that, due to the nature of these operations and the necessity of agreement and unanimity in their management for continued growth and prosperity, the property remain indivisible and the eldest grandson, to the exclusion of the others, have sole power of management and disposition with respect to commercial matters. The Civil Cassation Department stated that the eldest grandson managed the property not as executor of the will, but as a co-owner who had a greater right of disposition than the remaining co-owners but who nevertheless remained accountable to these latter for his actions.[2]

The high court, however, enunciated its doctrine on this point most fully in its decision in Novitskaia v. Filimonov in 1881.[3] The testator,

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1. For charitable or similar purposes, etc., e.g. see SRGKD 1874 no. 583; 1875 nos. 27, 322; 1883 no. 86; 1902 no. 104. For personal objectives, see 1879 no. 205; 1881 no. 116.

2. SRGKD 1879 no. 205. Apparently, the eldest grandson could be removed and replaced by another of the heirs by their unanimous agreement.

3. SRGKD 1881 no. 116.

the merchant Maksim Vinogradov, had devised the bulk of his property, including a factory, to the minor children of his deceased son Nikolai, such that during their minority all commercial and manufacturing operations were to be continued under the direction of his executor, Feodor Filimonov, who from the income was to pay designated monthly sums for the maintenance of the children and their mother Pelageia Novitskaia and provide for the children's education. All remaining income was to be deposited in the children's name for equal division among them upon their reaching the age of majority. Novitskaia challenged these provisions, inter alia on the grounds that such a separation of the rights of management and disposition from that of ownership was illegal and that such broad and undefined powers of management could not be given to a will's executor, whose power was confined narrowly to the execution of the precise will of the testator. Thus the plaintiff sought control of the property for herself as personal guardian of her children, the owners. Both the Ekaterinburg District Court and the Kazan Court of Appeal denied the suit. The latter stated that the plaintiff, as the children's guardian, had the right to seek an accounting from the respondent and bring actions in defense of her wards' interests, but that the positions of personal guardian of the heirs and executor of the deceased's estate were distinct and could reside in different persons. The court further noted that as the value of the estate had doubled during the six years of the respondent's management, he hardly could be accused of maladministration.

The Civil Cassation Department upheld the main points of the court's decision, and in the process defined the nature and powers of the executor of a will. It argued that management was not one of the constituent parts

of ownership, as were use, possession, and disposition, but only was realised in the exercise of each of these aspects of ownership and subsumed a multitude of actions undertaken in the factual exercise of these rights. Thus a grant of powers of management was not equivalent to a grant of a separate property right, such as disposition, but could be only an assignment of narrowly defined powers by the owner to the assignee for the achievement of particular objectives, for example as in agency. Thus the court neatly circumvented its own interdiction against the separate devise of ownership and disposition. The court stated that the powers given to the executor of a will also constituted an example of this. The appointment of an executor could be due to the necessity, arising from the nature of the deceased's property, of having an especially knowledgeable person carry out the dispositions of the will as well as to any distrust of the heirs. In any event, the executor did not have an independent right to the property, but was bound by the deceased's will, and could take only those actions necessary for its fulfillment. This could consist merely in distributing the property among the heirs, but also could extend much further, and in any case the executor's powers continued until the deceased's will was fulfilled. Moreover, the court continued, when disposing of his property by will, the owner had the right to impose temporary limitations on the rights bequeathed to the heirs, on the order of management of the property devised, etc., although these could not extend beyond the life of the heir. Thus,

> if, on the one hand, the testator has the right to express his will <u>on the form of use and management</u> of the property devised for the course of a specified period, and, on the other hand, the testator can lay the execution of his will as expressed in his testament not on the heir but on the executor, then it is impossible not to recognise <u>the right of the testator to entrust the temporary management of property to the</u>

> executor, despite the grant in the will of ownership to the heir designated. Managing the property, the executor remains only the executor of the testator's will (article 1084, vol. X, pt. 1) until the factual transfer of property to the heir in agreement with the testamentary disposition.[1]

Since, as we have seen, the heir's rights could be limited for the whole of his life, this decision meant that it became possible to establish a trust in the heir's or other beneficiaries' favour, at least for one generation, and possibly for a second if a life estate in the same property was created as well. This was the reasoning used to justify testamentary donations to various organizations and sometimes to individual executors of the use of property for charitable or other similar purposes, in some cases in perpetuity.[2]

Although, strictly speaking, the situation in the preceding case was not identical to that in Chernov v. Chernov, as in the first the powers of management resided in an independent executor of the will, whereas in the second they lay with one of the owners, from the point of view of the testator's ability to achieve particular objectives by his will, the principal effect was the same. In either case the testator could ensure that the benefit of his estate was enjoyed by his heirs or whomever else he chose to name, while its management was controlled by someone perhaps more competent, thus, it was hoped, providing the heirs with even greater security.

Finally, despite the opinion of some legal commentators, the court ruled that the testator was able to obligate the devisee to use some or all

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1. Ibid., emphasis added.

2. See especially SRGKD 1875 nos. 27, 322; 1902 no. 104.

of the property devised for particular purposes or to perform or refrain from performing certain actions.[1] In a decision in 1871, the court stated that 'the testator can. . .obligate the heirs selected by him to execute <u>any disposition</u> concerning his acquired estate or to make periodic payments from it to other persons', and thus held valid a will requiring the heirs to use part of the testator's estate to found a school in Tiflis for Armenian girls.[2] Subsequent decisions reaffirmed this principle, and held that the testator even could obligate the devisee to transfer some of his own property to a third party.[3] Later, the court included in this doctrine any provision obliging the devisee to perform or refrain from performing specified actions, such as not contesting the will, withdrawing or not submitting lawsuits against the testator or his heirs, and so on.[4] The court based this doctrine on the argument that the devisees held the property devised to them only on the strength of the testator's will (<u>volia</u>),

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1. Requirements to pay dowries, maintenance, and so on have been noted above. For examples of other types of such directives see <u>SRGKD</u> 1868 no. 25; 1871 nos. 643, 863; 1874 no. 583; 1875 nos. 302, 322; 1876 no. 460; 1880 no. 70; 1881 nos. 16, 62, 131; 1904 no. 85. Criticisms were made by Liubavskii, 'O vnesh. forme', pp. 197-200; Zmirlov, 'O nedostat.', 1883 bk. 10, pp. 68-70.

2. <u>SRGKD</u> 1871 no. 643, emphasis added.

3. In this case, the testator's widow, who had received a life estate in her husband's property, was obligated to transfer one of her own landed estates to her daughter as a dowry in lieu of the latter's share in her father's estate. <u>SRGKD</u> 1881 no. 131. See also 1871 no. 863; 1874 no. 583; 1875 nos. 302, 322; (in which the heirs were obligated to sell property, mostly for charitable purposes); 1880 no. 70; 1881 no. 62 (which concerned an obligation to pay the testator's debts).

4. <u>E.g.</u>, see <u>SRGKD</u> 1871 no. 945; 1876 no. 460; 1881 no. 16; 1904 no. 85.

and that the testator was allowed to impose on his devisees any condition not contrary to law. Thus the devisees held the property devised only subject to any conditions imposed, and could retain it only by strict observance of these conditions. They had the right to reject the bequest on the conditions offered, but, on the other hand, its acceptance signified acceptance of the conditions as well, and thus created an obligation to fulfill them.[1]

The only testamentary provision concerning the content of the devisee's powers generally proscribed by the Civil Cassation Department was a devise of unlimited or arbitrary powers of disposition apart from the right of ownership. This issue generally arose in connection with definition of the powers of executors and the apparently very common grant to them of a 'complete and unaccountable' right to dispose of the testator's property.[2] This formula probably was developed as a means to try to limit the executor's liability for his actions, and thus induce the desired people to accept the position, and to prevent quarelling heirs and particularly semi-official and government agencies from interfering with the execution of the testator's dispositions. However, as indicated by the above arguments of the St. Petersburg Court of Appeal in Sergeev v. The Executors of the Will of Z. Shibalkin, by the mid-nineteenth century these powers had

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1. This is most clearly expressed in SRGKD 1876 no. 460; 1881 no. 16; the court's decision reported in Pravo, 1915 no. 47, sud. otch., cols. 3020-22. See also the discussion of legacies below.

2. The phrase commonly used was 'polnoe i bezotchetnoe rasporiazhenie'. Statutory law stated only that the executor executed the will. Thus the entire doctrine on executors had to be developed by the courts. SZ, X, pt. 1, art. 1084: 'Wills are executed by: 1) the executors, and 2) the heirs themselves, according to the will of the testator'.

expanded to the point where the lower court treated the executor almost as an heir, who by a grant of unaccountable disposition had acquired 'quasi-ownership' of the testator's property.[1] The Civil Cassation Department, on the other hand, both in that decision and in Kadmina v. Malikovy and elsewhere[2] had declared the power of disposition to be an essential element of the right of ownership that therefore, though it could be limited, could not be separated from the latter, by will or any other means, except in particular circumstances and for very limited purposes. The intolerable situation and inevitable conflicts that would arise if one party were given ownership and another full powers of disposition of the same property undoubtedly underlay the court's position. To maintain it, however, the court was compelled to define the powers and function of the will's executor.

The court began from the premise that ownership rested either with the devisee given this right in the will or, in the absence of such a provision, with the heirs by law. Thus it became necessary to define the relationship between this owner and the executor of the will, particularly if the latter had been given 'full and unaccountable' powers of disposition. This was the situation in Miansarova v. Shanshiev and Ruadze, decided by

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1. SRGKD 1870 no. 917. This also might be inferred from the arguments in 1868 no. 78, as the implication was that if the testator had not specified particular uses or beneficiaries in his will, the executor's powers would have been enhanced correspondingly. See also SRPS, II, no. 539, and Moiseenko, op. cit., pp. 774, 798-806.

2. Kadmina v. Malikovy, SRGKD 1869 no. 1334, was described above. See also 1868 no. 25; 1875 no. 322; 1879 no. 1; 1886 no. 42; 1902 no. 112. See also 1881 no. 116.

the court in 1868.[1] The plaintiff, a beneficiary of the will, had sued the respondents, the executors, for exact execution of the will and a full and final accounting of their actions. The respondents had rejected the suit and appealed the decision against them of the St. Petersburg Court of Appeal on the grounds that the appointment and powers of executors of wills were governed solely by the will (volia) of the testator, who had free and unlimited powers of disposition over his acquired property. Thus he had the power to grant his executors full and unaccountable powers of disposition, and in the event that he did, the executors were not obligated to render an account of their actions to anyone. If this were true, it would have rendered much of any testator's will meaningless and resulted in unlimited power for the executors, as, not being accountable in any way for their actions, the latter could have disposed of the testator's property as they chose. The Civil Cassation Department rejected this argument and upheld the decision of the court of appeal. The court stated that 'the precise literal meaning of /articles 1010, 1067, 1068, 1084 SZ, X, pt. 1/ shows that the right of the executor with respect to the disposition of property left by the testator is limited by the will of the latter. From this it follows that the real right of the executor consists in executing exactly the will of the testator in all aspects, without any abrogation, insofar as it does not conflict with the provisions of the law,. . .the executor /is/ the person empowered to execute the will of the testator, and not his own will'.[2] Thus executors, even those given full and unaccountable

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1. SRGKD 1868 no. 78.

2. Ibid., emphasis added.

powers of disposition, could act only within the limits of precisely executing the definite dispositions of the testator, and were fully responsible for their actions to the beneficiaries of the will and the deceased's legal heirs.[1]

The general principle formulated by the high court thus was that while a person could be given more or less extensive but precisely defined powers of disposition that limited but did not conflict with and ultimately negate the rights and powers given to the owner, a grant of disposition that was independent of and not responsible to the owner and that therefore did negate the owner's rights was illegal. In any case, the court was concerned here with a general limitation on the power of disposition that arose from the nature of the institution of ownership. In this respect, the testator's power was neither less nor more than that of an owner in general.

The other limitation on this aspect of testamentary power that was strictly enforced by the court concerned the period of time over which the various obligations, restrictions, etc. imposed by the testator could operate. Mention of this already has been made in some of the cases discussed above, and the reasoning underlying it will be discussed in more detail below in connection with the court's treatment of substitution. Suffice it to say here that the court ruled that all such arrangements could take effect and be binding only during the period up to the death

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1. See also SRGKD 1870 no. 917; 1874 no. 155; 1875 no. 322; 1877 no. 291; 1879 nos. 1, 205; 1881 no. 116; 1886 nos. 34, 42; also 1876 no. 577; 1910 no. 93.

of the life tenant and the devisee in ownership.[1] Thus, for example, the testator could devise property to one person for life, with remainder to another person in ownership, and limit the rights enjoyed by each, but these limitations would expire with the death of the life tenant and the remainderman respectively. The remainderman's own heirs, while still limited by the rights of any life tenant or other person given limited rights of possession and use, could not be bound by any of the other provisions made by the original testator. Testamentary provisions attempting to achieve this were illegal and therefore invalid with respect to the period extending beyond the life of the devisee in ownership or the life tenant.[2]

This again reveals the dual nature of the will and the devisee as developed by the courts. On the one hand, the will was but a disposition of property by its owner and the devisee only a recipient of various property rights. Consequently, the owner enjoyed extremely broad power to give the people selected by him whatever rights and powers he liked under whatever conditions and limitations he thought appropriate. On the other hand, the will did establish succession of ownership at death, and therefore was analogous to inheritance, as the devisee likewise was akin to an heir. Thus the owner was not allowed to make arrangements that would bind his property with respect to a succession of owners or in perpetuity, except with respect to various charitable or similar social uses,

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1. E.g., see SRGKD 1869 no. 1334, 1881 no. 116, 1892 no. 76, 1900 no. 84, 1902 no. 112, and 1913 no. 62. Also, the cases cited below with respect to substitution and legacies.

2. See the cases cited below with respect to substitution and legacies.

which power might have been accepted if solely the disposition of property was involved. The owner could make such binding arrangements only with respect to his heir. But once this heir had died, the issue then concerned his own succession, and the property passed to his heirs, whether by law or his own will. The original owner's will could not be allowed to determine the direction or conditions of or otherwise interfere with this succession.

B. Conditions or limitations affecting the moment of vesting and duration of rights

The Civil Cassation Department proved to be as flexible and generous in allowing the testator to control and set various conditions determining the moment of vesting and duration of the rights granted his beneficiaries as it had been in allowing the testator to define the content of these rights, although again the testator's freedom was strictly circumscribed by a boundary of time. All the courts and nearly all jurists concurred with this latter development by the high court of what might be called the 'Russian rule against perpetuities', but on several other important issues the Civil Cassation Department diverged sharply from the decisions of the lower courts and the opinions of most jurists in its development of the law, with the effect in each instance of expanding the testator's power and flexibility even further.

(1) suspensive conditions and conditional future interests

The high court allowed the testator to suspend for a definite or indefinite period the vesting of all or some of the rights devised to any person under his will and to make this conditional on the occurrence of

some future event.[1] Attempts to make such arrangements apparently were quite common, particularly in conjunction with a life estate, so that, for example, frequently the testator would leave property to his spouse or a child for life, with the remainder to go either to that child's children, perhaps still unborn, or, in their absence, to some other specified person or his children. In the absence of any guidelines in statutory law, the lower courts found it difficult to deal with such arrangements, especially if they included a conditional bequest to a person not in being[2] at the time the will came into effect, i.e. at the moment of the testator's death, and as a result tended to disallow them. The Civil Cassation Department, however, ultimately permitted such dispositions, even if one of the beneficiaries named was not yet born or conceived at the moment of the testator's death, and in so doing developed doctrines of 'management' and conditional ownership to support its position.

The high court's development of the law is perhaps best seen in a comparison of the arguments and the lower court's decision in the much discussed case of the will of Countess Zubova with the later decision of the Civil Cassation Department in Bek and Bek v. Bloss, Schitz, and Muirstedt.[3]

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1. See especially SRGKD 1875 no. 1073; 1882 no. 63; 1888 no. 63; 1908 no. 77.

2. In such situations the lower courts generally referred to SZ, X, pt. 1, art. 1106, which referred to the right of intestate succession and stated that children conceived but not born by the time of the decedent's death had an equal right to the latter's inheritance.

3. SRGKD 1870 no. 1856 and 1875 no. 1073 respectively.

In the former case, the testatrix, after making various bequests and leaving her immovable property to her son, Ct. P. Zubov, quite clearly appeared to grant the latter only the right to receive for life the income from the rather large amount of capital remaining after all other bequests had been paid, with the ownership of the principal to pass either to any of his children or grandchildren who survived him, or, in their absence, to the five children of the deceased dvorianin N. Sazonov. In either case, the remaindermen were to have no right to dispose of the capital for thirty years after the son's own death, after which time they would divide it equally. In addition, the Countess's son was to safeguard his mother's jewels until the youngest of his own children reached the age of majority, at which time the jewels were to be distributed among all his children equally. If, however, the son died childless, the jewels were to pass to the two daughters of N. Sazonov. Not the least of the problems presented for the courts by these arrangements was the fact that at the time of his mother's death, Count Zubov had no children.

Zubov initially petitioned the St. Petersburg District Court to have the entire will declared invalid, but instead the court struck down only the above provisions concerning the deceased's capital and jewels. The court ruled that, as legal heir, Count Zubov had to receive full and unrestricted rights and powers of ownership of the deceased's property. Conditional dispositions such as those contained in the Countess's will were illegal and therefore entirely invalid. Thus the property referred to in the invalidated provisions of the will passed to the testatrix's heir by law, Count Zubov, in unfettered ownership.

The court's decision caused an outcry in the press, and amid veiled

accusations of improper behaviour by the court and unethical conduct by Count Zubov's attorney, Aleksei Ostriakov, the latter altered his arguments at the appeal instance.[1] Ostriakov now claimed that as the testatrix nowhere _specifically_ stated that Zubov had not been given ownership of the property concerned, but only limited rights of use and possession for life, she must have intended to give him ownership with limited rights of disposition. As all such limitations were a violation of the new owner's rights of ownership and hence illegal, those conditions of the bequest collapsed, but not the bequest itself. In addition, because Zubov had received ownership, the provisions concerning his own and the Sazonov children constituted an illegal attempt by the testatrix to designate the order of succession beyond the devisee in ownership, and thus failed as well. Even if Zubov had received only a life estate, Ostriakov continued, the remainder to his children failed because he had no children at the time the will came into effect, and under Russian law the beneficiaries of a will inherited and therefore had to be alive at this time. This caused the conditional remainder to the Sazonov children to fail as well, because their rights were conditional on his not having children at the time of his own death, _i.e._ at some future time long after the will already

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1. See the editorials in _Mos. Ved._, 1869 nos. 90 (27 April), 115 (28 May), pp. 1-2, and 273 (16 Dec.), p. 3; N. Sokolovskii, 'Iuridicheskiia zametki', _Spb. Ved._, 1869 no. 159 (12 June), pp. 1-2; the Sazonovs' attorney, A. N. Unkovskii, 'Eshche neskol'ko zamechanii po povodu dukhovnago zaveshchaniia grafini Zubovoi', _Sov. Letopis._, 1869 no. 23 (22 June), pp. 14-16; and the Sazonovs' guardian, P. Vel'iashev, 'Pis'mo k izdateliam', _Mos. Ved._, 1869 no. 99 (8 May), p. 3. Nikol'skii, _op. cit._, pp. 186-7, also supported this position. For Ostriakov's reply, 'Vozrazhenie na stat'iu v No. 90-m _Moskovskikh vedomostei_ po povodu dela o dukhovnom zaveshchanii grafini Zubovoi', _Mos. Ved._, 1869 no. 115 (28 May), p. 3. See also Pobedonostsev, _Kurs_, ii. 586-8, 658-60.

had taken effect. In addition, in the intervening period Zubov might father children, who then would be deprived of the inheritance because they had not been alive at the time of the testatrix's death, but whose presence, if they survived their father, would exclude the Sazonov children. To allow ownership of the property to pass immediately to the latter would subvert the testatrix's clear intention of transferring her property to them only in the absence of her own descendents. Thus even in this case, these provisions of the will would fail and the property pass to Zubov in unrestricted ownership as legal heir.[1]

The Sazonov children, represented by the jurist and noted Tver liberal Aleksei Unkovskii, had entered the action as an interested third party and requested that Zubov's petition be denied. Unkovskii argued that Zubov had received only a life estate in the capital and jewels referred to in the will, with the remainder in ownership lying with either his children or, in their absence, the Sazonov children. As ownership had to vest at the moment of the testatrix's death and Zubov had no children at this time, ownership of the property had to pass to the Sazonov children as the only designated heirs of the property alive at the time the will took effect. Thus the only illegal disposition was the bequest to persons not in being at this time, and therefore only that part of the will's provisions was invalid. The remaining provisions were unaffected. Thus only the remainder to Zubov's children failed, and the Sazonov children received ownership of the property immediately. Moreover, their rights and powers were unrestricted, subject only to Zubov's life estate, because

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1. <u>SRGKD</u> 1870 no. 1856; Ostriakov, <u>op</u>. <u>cit</u>. Later support for this position also came from Moiseenko, <u>op</u>. <u>cit</u>., pp. 787-8.

the testatrix did not have the power to violate the heirs' right of ownership by imposing limitations on their power of disposition.[1]

The St. Petersburg Court of Appeal upheld the decision of the district court, but based its decision on different grounds. The court first defined its duty as interpreting the will in such a way that it was not inconsistent with the law yet still preserved the testatrix's main intention. The court concluded from the content of the will that the testatrix clearly intended to preserve her property in her family for three generations, and only in the event of the failure of the family line, to transfer it to Sazonov's children. Proceeding from this, the court essentially agreed with Ostriakov's argument that in the absence of a specific statement by the testatrix to the contrary, it must be assumed that Zubov had been given ownership, only with limited powers of disposition, which arrangement the court did not hold to be illegal. Moreover, the court stated that Zubov's rights arose from the moment of the testatrix's death. Thus the provisions concerning Zubov's own potential children and the Sazonov children constituted an illegal form of substitution, as their purpose was to define the order of succession after the death of the heir, and therefore were invalid. However, this did not affect the rights received by Zubov under the will. The court concluded that this was the only interpretation of the will consistent both with the law and the testatrix's basic intention.[2]

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1. SRGKD 1870 no. 1856; Unkovskii, op. cit., Sokolovskii, op. cit., and the editorials in Mos. Ved. cited in note 1, p. 312 supported this position, as did, later, Liubavskii, 'O vnesh. forme', pp. 192-202, although he may have been closer to the position later adopted by the Civil Cassation Department.

2. SRGKD 1870 no. 1856.

However, in the Bolkovye case in 1868, in which likewise the testator did not state clearly whether his wife had been given ownership or only a life estate, the same court had ruled that it was clear from the nature of the rights granted the devisee, which incidentally were greater than those received by Zubov, that she had received only a life estate.[1] Hence it seems obvious that the court's failure to rule likewise in the Zubov case was due to the predicament caused by its refusal to allow either a bequest to a person not in being at the time of the testator's death or the creation of a future conditional interest. This emerges clearly from the remainder of the court's decision, in which it discussed what the result would have been had Zubov received a life estate.

The court argued that the beneficiaries of a will need not be alive at the time of its composition, but had to be so at the time it took effect. In addition, while the testator could impose whatever conditions and limitations he liked, these could not either suspend the vesting of ownership, so that ownership lapsed for any length of time, or terminate ownership already vested in favour of someone else. In other words, ownership had to be continuous and had to vest unconditionally from the moment of the testator's death. These assumptions were shared by all participants in the case, although each drew radically different conclusions therefrom. The court thus in effect precluded both suspensive and resolutive conditions, as well as any future conditional interests, at least with respect to ownership. It concluded that,

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1. SRGKD 1868 no. 25. The court of appeal was not alone in demanding a specific statement when this suited it, as the Civil Cassation Department sometimes did this as well. E.g., see SRGKD 1902 no. 112; Gomolitskii, 'Mozhet'.

> For this reason. . . , even allowing that the properties were given to Count Zubov for life, the disposition of the testatrix designating his children and grandchildren as heirs after him in ownership, which was limited for their father's or grandfather's life and for thirty years after his death, was defeated because these children and grandchildren were not in being at the time of the testatrix's death, and the conditional designation of the Sazonovs could not be valid because it was made under the condition that Count Zubov have no children, a condition that would postpone /the vesting of ownership/, which is impermissible at law, and which would have the effect of creating a long-term period of ownership with no owner of the contested property; moreover, this conditional designation cannot be recognised as valid even after the destruction of a collateral decision in favour of Count Zubov's children and grandchildren, for such a decision would alter the direct will of the testatrix, who stipulated that the Sazonovs would inherit only if at the time of his death Count Zubov had no children or grandchildren.[1]

In fact, the last clause reveals the crux of the matter: the court was afraid that by recognising Zubov to have only a life estate and the remainder to his issue to fail because there was none at the time of the testatrix's death, ownership of the property would pass immediately and unconditionally to the Sazonov children; thus any children subsequently born to Zubov would be disinherited unfairly and contrary to the testatrix's wishes.

The Civil Cassation Department in this case could not rule on any of these issues because once the court of appeal had found Count Zubov to have received ownership, a decision concerning the merits of the case and therefore not subject to cassation review, all arrangements concerning subsequent succession were illegal. The remainder of the lower court's decision was irrelevant speculation on which the high court need not comment. However, in Bek and Bek v. Bloss, Schitz, and Muirstedt the court did discuss

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1. SRGKD 1870 no. 1856, emphasis added.

many of these issues, and in so doing rejected most of the arguments of the court of appeal. Curiously, so did the court of appeal.

G. Bek, the wife of a recently deceased merchant, died in 1873 leaving a will by which she instructed that all her own and her late husband's property was to be held in trust for her two daughters, both minors, with the income being used for their maintenance and education, until the youngest of them attained the age of majority, at which time the estate was to be divided between them equally.[1] Various other provisions were made concerning an earlier payment to the elder daughter in the event of her marriage or separation from her sister when she reached the age of majority or the disposition of the property in the event that one of the daughters died before the youngest reached the age of majority, but in addition the testatrix stated that if both daughters died without either having attained this age, the property was to pass in ownership primarily to her sister B. Bloss, with smaller amounts going to her mother B. Shitz for life and to N. Bek, one of her brothers-in-law, and F. Muirstedt, the manager of their commercial operations. Both daughters died before coming of age, as a result of which the testatrix's two brothers-in-law, provincial secretary Nikolai and merchant Andrei Bek, brought suit to have the latter provisions of the will declared invalid.

Closely following the reasoning of the court of appeal in the Zubov decision, the plaintiffs argued that in inheritance ownership of the property passed immediately at the death of the testator and had to be continuous and unconditional. It thus could neither lapse for any period nor be

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1. SRGKD 1875 no. 1073.

terminated once it had vested. Thus in the present case, the testatrix's daughters had to receive ownership of the property from the moment of her death, although their powers of disposition were limited for a designated period. Attainment of the age of majority by either of the daughters did not create the right of ownership for her, but only removed the limitations on the enjoyment of an already existing right. As both daughters were alive at the time of the testatrix's death and therefore inherited ownership of the estate, the remaining provisions of the will were invalid because they constituted an illegal form of substitution. Thus on the intestate death of the daughters, the property passed to their legal heirs, in this case the plaintiffs. The St. Petersburg District Court, no doubt also following the lead of the local court of appeal, granted the suit on this basis.

The respondents argued that the testatrix's daughters did not receive ownership of the property immediately on the death of the testatrix, but only the limited rights of use and possession and the hope that in the future their rights would be expanded to the full rights of ownership. Thus, as ownership had never vested in the daughters, the provisions concerning disposition of the property in the event of their death could not be considered an illegal form of substitution, and as the conditional event had not occurred, these alternative arrangements should take effect and the property pass to the respondents. Any rule against ownership lapsing for a period was not applicable in this case because ownership was known whether or not the conditional event occurred.

Perhaps somewhat surprisingly, given its decision in the Zubov case, the St. Petersburg Court of Appeal agreed with the respondents' arguments and reversed the decision of the district court, and the Civil Cassation

Department upheld this decision.[1] The high court stated that the law granted the testator an unlimited right to devise his acquired property in ownership or limited possession and use and unconditionally or conditionally, including ownership conditional on the event of death. Thus the court of appeal's decision that the testatrix did not devise ownership of her property to anyone immediately, but only conditionally designated to whom ownership was to pass on the occurrence of a particular future event, in the interim granting her daughters limited rights of possession and use, and that the disputed provision of the will consequently did not constitute an illegal form of substitution, did not contravene the law by allowing a form of testamentary provision prohibited by or unknown to Russian law. The court held that it did not matter that the identity of the unconditional owner of the property would not be known until one of the specified events occurred, because, given the daughters' rights of possession and use, the property would never be 'managerless' (bezkhoziainoe).[2]

Thus the high court admitted suspensive conditions and future conditional interests and introduced the concept of 'management', previously unknown in Russian law, to support these. Obviously, the latter institution provided the foundation on which the former two rested. Although the court never provided a precise definition of 'management', it made clear that what was meant was some bundle of limited rights that would enable

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1. Ibid. The plaintiffs were represented by the same Unkovskii who had lost the appeal in the Zubov case. One can only imagine his frustration at this turn of events.

2. In this context this term is very difficult to translate exactly. Essentially what is meant is that there would not be a period when there would be no one to look after and manage the property.

the holder to look after and manage the property in question and ensure its legal defence until the moment when unconditional ownership was decided and the owner himself could perform these actions. As long as there was such a 'manager' (<u>khoziain</u>), the identity of the owner could remain conditional, although the group of possible owners and the conditions under which each of them would acquire full and unconditional ownership had to be defined clearly.[1] This latter point was made most clearly in the court's decision in Leblan v. Leblan in 1901. The Kharkov Court of Appeal had attempted to apply the doctrine of management, and the high court, in vacating the decision, did not, as might at first appear, question or limit the doctrine itself, but rather stated that for the doctrine to be applicable, all possible conditional owners and the conditions determining ownership must be stated in the will. Noting that the court of appeal had not examined these questions, it requested the lower court to examine the content of the deceased's will more closely in order to establish whether this was in fact the situation.[2]

The institution of conditional ownership was both another prop and a consequence of the court's position on this issue. While the Civil Cassation Department also held that ownership could not lapse, it ruled, contrary to the opinion of the lower courts and litigants in the Zubov case, that ownership could be conditional for a period. This conditional ownership arose immediately on the testator's death for all conditional owners alive at the time the inheritance opened, and such conditional

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1. <u>SRGKD</u> 1875 no. 1073; 1882 no. 63; 1888 no. 63; 1901 nos. 52, 111. See also Pobedonostsev, <u>Kurs</u>, ii. 584-6.

2. <u>SRGKD</u> 1901 no. 111.

owners could exercise their rights, subject to the limited interests of others created by the testator, until their conditional rights either were terminated or became unconditional with the occurrence or non-occurrence of the specified event. Thus, for example, they could dispose of their rights by will or otherwise, and, unless the condition happened to be their survival until a particular time, in the event of their intestate death, their rights would pass to their legal heirs.[1] Again, as the court made plain in its decision in Leblan v. Leblan,[2] the doctrine of management did not mean that ownership was in abeyance, even though the exact identity of the owner was still to be determined and the property was secured by a '*khoziain*'. Rather, ownership continued, but was conditional.

Thus the Civil Cassation Department had rejected two of the main assumptions of all parties and the lower courts in the Zubov case, *i.e.* that ownership had to pass immediately and unconditionally on the death of the testator and its vesting could not be subject to a suspensive condition. It soon also rejected the third, that a person not in being at the time of the testator's death could not benefit from the will, an

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1. Especially *SRGKD* 1882 no. 63; 1888 no. 63; 1908 no. 77; the cases cited below in connection with resolutive conditions.

2. *SRGKD* 1901 no. 111. The same court of appeal made a similar argument in *SRGKD* 1879 no. 78.

assumption shared by nearly all jurists.[1]

This first became clear in the court's decision in Shilovy v. Rusanova in 1873.[2] The testator, merchant Aleksei Kozhukhov, had devised the bulk of his estate to his youngest daughter Elena Rusanova, with the provision that when the children of his eldest daughter, Avdot'ia Shilova, attained the age of majority, Rusanova distribute 100,000 rubles among them at her discretion if she thought them worthy. If she thought them unworthy, she could keep the money. Shilova and her children were to receive the annual interest from this money for a period beginning five years after the testator's death and ending when Shilova's youngest child came of age. Rusanova refused to distribute the principal among her sister's children, baulked at fulfilling the other provisions of the will in favour of her sister and sister's children, and, with respect to payment of the interest income, argued that as all beneficiaries of a will must be alive at the time it takes effect, the 'youngest child' the coming of age of whom terminated her obligation to pay the interest to Shilova must be defined as the youngest child alive at the time of the testator's death. Shilova and her son Nikolai, who had brought suit for payment of the interest,

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1. SRGKD 1870 no. 1856 and the references cited in note 1, p. 312 above. Also Sbitnev, op. cit, pp. 193-4; Demchenko, Sushch. nasled., pp. 82, 84-5; Nikol'skii, op. cit., pp. 183-95, 203-4; Isachenko, 'Zaveshch. raspor.', cols. 15-16; Moiseenko, op. cit., pp. 787-8; Shershenevich, Uchebnik, pp. 707-9. The issue still was being debated at the turn of the century in connection with the proposed new civil code. E.g., see Gussakovskii, op. cit., pp. 40-44 (against allowing it, for economic, familial, and moral reasons); A. A. Bashmakov, 'Nasledovanie lits, eshche ne rodivshikhsia i ne sozdennykh', in Ocherki prava rodovogo, nasledstvennago i obychnago (Spb., 1911), pp. 123-35 (for allowing it, for the same reasons).

2. SRGKD 1873 no. 1530.

argued that the youngest child must be defined as Shilova's youngest surviving child, whenever born, and thus Rusanova was obligated to continue paying the total interest income until Shilova's youngest child Elisabeta, born sometime after the testator's death, reached the age of majority. Basing its decision primarily on the meaning of the will's content, the Kharkov Court of Appeal agreed with the plaintiff's argument and ruled that such provisions were not illegal, and therefore found for the plaintiffs. The Civil Cassation Department upheld the decision, in so doing stating that:

> Kozhukhov, when composing a will in which he disposed of his acquired property, by law had the full right to obligate Rusanova, his main heir, to pay a legacy to Avdot'ia Shilova and her children, <u>even those who might be born in the future</u>, . . .until the last of them attained the age of majority.[1]

Once the principle had been admitted, there was no reason why it could not be used in conjunction with suspensive conditions. This was perhaps most forcefully stated by the Civil Cassation Department in its decision in Shul'man and Meniaevy v. Kolontarov in 1888,[2] in which it also more precisely formulated its position with respect to suspensive conditions and conditional ownership.

Commercial councillor and honoured citizen Petr Fedorovich Meniaev had died in 1852, leaving a will by which, <u>inter alia</u>, he bequethed the use and possession of and right to the income from several commercial sites in St. Petersburg to his younger son Nikolai Petrovich, with the remainder

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1. <u>Ibid</u>., emphasis added.

2. <u>SRGKD</u> 1888 no. 63. See also 1875 no. 1073; 1882 no. 63; 1901 no. 52; 1908 no. 77.

in ownership to the latter's children. At the time of his father's death, Nikolai Petrovich had three sons, one of whom subsequently died, and a daughter, who also died later, survived by her husband Evgenii Shakovyi and son Vladimir. After the testator's death, five more children were born to Nikolai Petrovich, a daughter, Klavdiia Shul'man, and four sons, two of whom later died. In December 1884 one of the above commercial sites was inventoried by the court bailiff in pursuance of the execution of a debt judgment obtained by dvorianin Sergei Kolontarov against Nikolai Petrovich's eldest son Petr Nikolaevich. The bailiff acted as if the site were owned jointly by only the two surviving children of Nikolai Petrovich born prior to the testator Petr Fedorovich's death, so the other of these two surviving children, Nikolai Nikolaevich, together with Nikolai Petrovich's remaining children, Klavdiia Shul'man and Aleksandr and Sergei Nikolaevich Meniaev, brought an action in St. Petersburg District Court to have their rights to the site recognised. They claimed that under the terms of the will, ownership of the deceased's property lay with all Nikolai Petrovich's children who survived the life tenant, irrespective of when they were born, and thus at the moment each of them had a conditional right to one-fifth of the estate. Evgenii Shakovyi, the husband of Nikolai Petrovich's deceased daughter Aleksandra, then entered the action as an interested third party and claimed one-quarter of the property for himself and his son as the legal heirs of their deceased wife/mother, on the grounds that beneficiaries of a will must be alive at the time the will takes effect, and thus only the four children alive at this time had a right to a share of the inheritance; all children born subsequently were excluded. For the same reasons, Kolontarov also argued that Shul'man and

Aleksandr and Sergei Nikolaevich had no right to the estate, but he also sought to exclude the heirs of the two deceased children born prior to the testator's death on the grounds that only those children alive at the time the will took effect who also survived the life tenant had a right to the inheritance. This would have limited the heirs to Petr and Nikolai Nikolaevich.

The district court ruled that the children born after the testator's death had no right to the inheritance, except for Klavdiia Shul'man, who was granted an equal right to the estate on the strength of an 1855 decision of the St. Petersburg Magistrat and an 1856 act of entry into possession.[1] Thus Shul'man and the four children born prior to Petr Fedorovich's death each was to receive one-fifth of the estate, with the deceased daughter's share passing to her husband and son and the deceased brother's share being equally divided among the four brothers who had survived him.

All parties appealed, but the St. Petersburg Court of Appeal upheld the decision. The court argued that an inheritance opened with the death of the owner and belonged to the heirs from this moment. Moreover, heirs by will had to be indicated clearly in the testamentary act. Thus it followed that the heirs by will could be only those persons who at the death of the testator conformed to the conditions set down in the will, unless the testator explicitly had established a special term or time for the execution of the will. The court found that the testator Petr Fedorovich had

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1. Nikolai Petrovich and the deceased's brother and executor Semen had sought a private decision from the Magistrat clarifying the terms of the will, and later, based partly on this, obtained a formal act of entry into possession. Both acts named Shul'man as an heir and owner. SRGKD 1888 no. 63.

not done this, and therefore only his son Nikolai's children alive at the time of his death had a right to the inheritance. Again, for the reasons given by the district court, an exception was made for Shul'man. Clearly the court of appeal still was uncomfortable with the high court's ruling that persons not in being could inherit under a will, and as a result was trying to limit the application of the principle as much as possible.

Again, all parties appealed, and the Civil Cassation Department vacated the decision. The court stated that the law provided the following rules by reference to which a court had to determine the true meaning of a disputed will: the will was a declaration of a person's will (volia) concerning his property in the event of his death, which will had to be legal and took effect only at the death of the testator; acquired property could be devised in ownership or in limited possession and use; the property devised and the persons to whom it was devised had to be indicated clearly, and any obvious mistake in these invalidated the will. However, the court found that in the present case the court of appeal had not attempted to use these rules to determine the true meaning of the deceased's will, but instead had ruled that heirs by will had to be alive at the time of the testator's death, otherwise the devise to them was invalid. Although the court of appeal had qualified its statement by admitting that a person not in being at this time might inherit by will if the testator explicitly postponed the time that the will took effect, it never discussed whether the content of the will in question did in fact contain such a provision. The court continued,

> Whereas from the above-mentioned laws it is clear that the will of the testator concerning acquired property is not subject to any limitations insofar as it does not contravene the law, the owner of acquired property can

> dispose of it freely and unconstrainedly (articles 1010, 1011 and note); a declaration by the testator of his heir under a suspensive condition, dependent upon a time or obligations indicated in the will, is not prohibited by nor does it contravene any law; consequently, even a person not yet born, but living by the occurrence of a particular time or event, can be designated as heir (Senate decisions 1873 no. 1530, 1875 no. 1073, and others); therefore, the testator, having granted his property in life possession, is not deprived of the right of making the declaration of his heir dependent on the death of the life tenant and devising his property in ownership to the children of this latter who survive him, even though they were not born by the death of the testator. Such a will does not contravene article 1026, for the persons to whom the estate is devised are designated exactly, the life tenant is indicated, and the owners are defined in the person of his children at the moment the life tenancy terminates; the estate itself does not remain unmanaged (bezkhoziainym) from the testator's death, /as/ it is in the possession and use of the life tenant, and the right of ownership belongs from the very death of the testator to precisely designated persons, however only under a suspensive condition, with the occurrence of which the identity of the designated owners must be revealed.[1]

Thus the high court vacated the court of appeal's decision because the latter failed to determine the true meaning of the will and incorrectly excluded some of the plaintiffs from the inheritance solely on the grounds that they were not alive at the time of the testator's death.

Thus, often contrary to the opinions of the lower courts and most leading jurists, the Civil Cassation Department had eliminated all the assumed restrictions on testamentary power that had led the St. Petersburg Court of Appeal to its decision in the Zubov case. Under the principles formulated by the high court, it was possible for the owner to grant a life estate to one person and the remainder in ownership either to any descendants of this person who might survive him, irrespective of whether they

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1. *Ibid.*, emphasis added.

had been born by the time of the testator's death, or, in their absence, to any other specified persons, which quite clearly is precisely what Countess Zubova had intended. In her case, the Sazonov children would have been the conditional owners unless and until children were born to Count Zubov, whose life estate would have constituted the 'management' necessary to support the suspensive condition and conditional ownership. Hence, by its decisions, the high court both recognised the primacy of the testator's right of ownership and significantly expanded his power and flexibility in arranging a settlement.

(2) resolutive conditions

Given the high court's general view that the devisee acquired and held the property devised to him only on the strength of the testator's will, and that therefore the testator could impose any condition not contravening the law, which condition the devisee had to observe in order to acquire and retain the property, and especially once the court had admitted the concept of conditional ownership in connection with suspensive conditions, it was not a particularly large step for the court to allow the testator to employ resolutive conditions as well, even with respect to ownership. If the acquisition of the rights devised and the rights themselves could be made subject to conditions, then so too could their retention. This did not cause any difficulty in the case of rights less than ownership. For example, in denying the private petition of the widow Nadezhda Ersheva in 1873, both the Kharkov Court of Appeal and the Civil Cassation Department rather perfunctorily dismissed her claim that in the devise to her by her husband of rights of use and possession of property for life or until remarriage, the latter qualification constituted an illegal

restriction of the rights granted her and therefore was invalid.[1] As Ersheva had remarried, the courts held that her rights were terminated, and the property reverted to a local church to be used for charitable purposes. But in such instances the holder's rights were limited in any event, and, as the Civil Cassation Department pointed out in the Ersheva case, the testator merely was further defining the term for which the already limited rights could be enjoyed. On the other hand, the right of ownership presented more difficulty, especially given the strong influence in Russia of Civilian jurisprudence, with its heavy emphasis on the sanctity and absolute nature of ownership. This caused some Russian jurists to reject the idea of resolutive conditions when used in connection with the right of ownership and a bias against such conditions in the lower courts.[2]

This emerges clearly in the case of the Guardians of Minor Mar'ia Emel'ianova v. Gans, in which the Civil Cassation Department again spurned prevailing professional opinion in order not to limit the individual's testamentary power.[3] The testator, collegiate registrar Profirii Emel'ianov, had devised a large building in Moscow to his wife Mar'ia in 'full and inalienable ownership', with the condition that she lost all right to the property if she remarried. Emel'ianova took possession of the property under the provisions of the will in April 1869 and later remarried, to one

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1. SRGKD 1873 no. 1074.

2. E.g., see Liubavskii, 'O vnesh. forme', pp. 196-200; Moiseenko, op. cit., pp. 773-5; Kalachov, 'Otvet B'; idem, 'Otvet Ch.'; Shershenevich, Uchebnik, pp. 715-16; Zmirlov, 'O nedostat.', 1883 bk, 10, pp. 67-8; Pobedonostsev, Kurs, ii. 582, 593; Isachenko, op. cit., cols. 17-18. For a contrary view, see Nrs., 'Substitutsiia i resoliutivnoe uslovie', Iurid. Vest., 1880 no. 5, pp. 159-62.

3. SRGKD 1879 no. 27.

V. Gans. Whereupon, in October 1875 the executors of the testator's estate and guardians of his daughter, the minor Mar'ia Emel'ianova, brought suit in Moscow District Court against Mar'ia Gans for recovery of the property devised to Gans by her first husband. The plaintiff's claim rested solely on the provision of the will concerning the widow's remarriage, which provision they argued was not prohibited by law. On the other hand, Gans, and later her husband, to whom she had devised all her property and who on her death continued the action, argued that as the property had been devised in full ownership, she could not be deprived of it subsequently by the will of the former owner, the testator. Although the law accorded the testator great freedom in choosing a successor and imposing conditions on his possession, use, etc., it did not allow substitution once ownership had vested. Once this had occurred, the testator lost all control of the property, and the devisee's rights could not be revoked or transferred by the occurrence of any event stipulated by the former owner. Moreover, Gans added, the particular condition imposed in this case, the prohibition of remarriage, must be disallowed by its very immoral nature.[1]

The district court, undoubtedly wishing to preserve the deceased's property for his child yet believing a resolutive condition in respect of ownership to be illegal, resorted to the obviously false argument that Gans had not received ownership of the property, but only the rights of possession and use for the period of her widowhood. Thus her rights terminated with her remarriage. The court held such a condition not to be immoral, as it

1. Gans quite probably borrowed this argument directly from Liubavskii and Moiseenko, both of whom had stated this in arguing for the exclusion of resolutive conditions. See the references in note 2, p. 328.

did not prohibit the respondent from remarrying, but only deprived her of certain limited property rights in the event that she did.

This argument clearly could not withstand criticism, and the Moscow Court of Appeal, adhering strictly to the meaning of the will and what it believed to be the law, ruled that resolutive conditions were illegal and reversed the decision. The court found that the testator explicitly had given his wife full ownership of the property in question, and thus the provision concerning remarriage constituted an illegal form of substitution. In the court's opinion, 'the owner of acquired property has the right by the strength of the will to obligate his selected heir for the course of his life to execute certain dispositions with respect to the property, but these dispositions obviously can refer only to the conditions of use and disposition of the property, and not to the personality selected by the testator as heir.'[1] In addition, the court held the provision to be invalid because the testator had failed to stipulate to whom the property was to pass in the event of his widow's remarriage, which, in any case, the court held to be insufficient legal grounds for deprivation of the rights of ownership.

The Civil Cassation Department vacated this decision. The high court argued that statutory law neither specifically permitted nor prohibited resolutive conditions in connection with a devise of ownership, which did not give the court of appeal grounds to assume that such a devise was prohibited by law. Nor was such a devise the same as the form of substitution prohibited by article 1011, SZ, X, pt. 1. That article proscribed

1. SRGKD 1879 no. 27.

the testator from naming a person to succeed to his property after the death of the first devisee in ownership and had the purpose of preventing an owner from controlling the future line of succession to his property, whereas the resolutive condition encountered in the present case concerned the loss of rights by the devisee during his life because of his failure to fulfill the conditions set down by the testator or as a result of the occurrence of some specified event. The court observed in addition that the law provided for conditional gifts and the return of the object of these gifts to the donor or his heirs in the event that the donee failed to fulfill the relevant conditions, and further noted that such conditions could concern either limitations on the use or disposition of the gift or the actions of the donee, including his remarriage. Thus the court of appeal's argument that ownership, once vested, could not be terminated was incorrect. The high court concluded that the present case would be best decided by analogy with the rules for gift.

> Thus considering that in accordance with article 1010, volume X, part 1, of the Civil Laws, a will is the legal declaration of the will of the owner concerning his property in the event of his death; that article 1011 of the same laws contains no prohibition of conditional bequests and that wills are executed in accordance with the will of the testator (article 1084), the Governing Senate finds that the Court of Appeal, in denying the suit of the guardians of the minor Emel'ianova for the eviction, in accordance with the will of the testator, of the respondent from the disputed house for the failure of Emel'ianova /now Gans/ to fulfill the conditions contained in the will concerning her not entering into a second marriage, acted in violation of articles 1010 and 1011, volume X, part 1. . .[1]

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1. Ibid. The court came to the same conclusion in similar circumstances in the case reported by Nrs., op. cit., and again in the Immer, Gebhardt case reported in Pravo, 1912 no. 11, sud. otch., cols. 633-6, except that this case involved a gift and not a will. The power to impose both types of conditions was confirmed by the court in SRGKD 1908 no. 77.

The court's decision left a number of questions unanswered. For example, presumably, as was the case with suspensive conditions, in instances such as this the devisee was considered to be a conditional owner, albeit with far greater present powers of enjoyment and disposition than in the case of suspensive conditions, when the property generally was subject to the management of someone else. In addition, the court never ventured an opinion on what would happen if the conditional owner disposed of the property and then, as in the present case, violated the terms of the bequest. Nevertheless, despite these uncertainties, the court had expanded significantly the owner's power to arrange a settlement of his property and influence the actions of his successors by allowing him to employ resolutive conditions in his will.

(3) substitution and trusts

The Civil Cassation Department's position with respect to most forms of substitution already should be obvious. The court allowed the use of simple substitution, that is, the designation by the testator of an alternative beneficiary in the event that the first named beneficiary of the will for any reason failed to accept the inheritance, both in instances when the rights were enjoyable by the beneficiary immediately on the testator's death and when they were subject to a suspensive condition.[1] Substitution in the first instance was not controversial,[2] whereas in the second the

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1. E.g., see SRGKD 1875 no. 1073; 1882 no. 63; 1886 no. 23. See also 1882 no. 83, which reversed 1873 no. 201.

2. SRGKD 1870 no. 1856. Pobedonostsev, Kurs, ii. 580-81; Grinevich, op. cit., pp. 10-12, 20, 25-6; Isachenko, op. cit., col. 16; Moiseenko, op. cit., pp. 768, 772-3; Zagorovskii, 'O podstave', bk. 11 p. 21; Zmirlov, 'O nedostat.', 1883 no. 10, pp. 67-8; Shershenevich, Uchebnik, p. 714; Rudnev, op. cit., pp. 168-9.

dispute concerned the admissibility of suspensive conditions in general and not the use of substitution in conjunction with them once they had been allowed. More controversially, the court allowed substitution in conjunction with a resolutive condition, as long as the substitution took place during the life of the beneficiary whose rights were being terminated and transferred to the substitute. However, the court drew the line with the death of the devisee in ownership and adamantly refused to allow any form of fideicommissary substitution or, what it believed amounted to the same thing, perpetual trusts, even though, judging from the number of cases reported by the court, attempts to employ such provisions were quite common.[1] In this instance the court was supported overwhelmingly by juristic opinion.[2]

Although from its inception the Civil Cassation Department emphatically rejected any form of fideicommissary substitution, its position on all aspects and implications of the issue was stated most fully in its decision in Izmirov

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1. This also was noted by the Alatyr Congress of the Justices of the Peace, Zamechaniia grazh. zak., No. 521; Fride, op. cit., pp. 13-17; Grinevich, op. cit., p. 3; Isachenko, op. cit., cols. 9, 12, 14; Dumashevskii, 'Zaveshchanie'; Shershenevich, Uchebnik, pp. 713-15.

2. Strictly speaking a fideicommissum in Roman law referred to any charge made by the testator on the beneficiary to convey something to a third party, but as used in European Civilian law generally and by Russian jurists in particular, a 'fideicommissary substitution', or often simply 'substitution', meant the obligation of the beneficiary on his own death to pass the property devised to him on to a person designated by the testator. As such, it was similar to English entail. See Rudnev, op. cit., pp. 167-9; Meier, op. cit, pp. 642-3; Bashmakov, 'Nasled. lits', pp. 126-9; Grinevich, op. cit., pp. 12, 16-19; Isachenko, op. cit., cols. 10-18; Kalachov, 'Otvet B'; idem, 'Otvet Ch.'; Moiseenko, op. cit., pp. 767-8, 773-9; Pobedonostsev, Kurs, ii. 571-3; 575-9, 593, 601-2, 604; Dumashevskii, op. cit.; Shershenevich, Uchebnik, pp. 713-5; Zmirlov, 'O nedostat.', 1883 no. 10, pp. 81-4; Grazh. Ulozh., bk. 4, explanas., pp. 189, 205-6. For a contrary view, see Zagorovskii, 'O podstave', bk. 11, pp. 13f.

v. Izmirova in 1871.[1] Hereditary honoured citizen Artemie Izmirov had sought to have the entire will of hereditary honoured citizen Daniil Izmirov declared invalid on the grounds that the latter was mentally incompetent, that he had disposed of a greater capital sum than he in fact possessed, and that having devised property to his wife in ownership, then on her death to a second person in ownership, and finally, on the death of this person, to a third person in ownership, he had committed a double substitution, which was illegal and invalidated the entire will. Apparently, although the court record is not clear here, there also was some question as to whether the testator's wife had received ownership or only life tenancy, and the plaintiff had questioned the testator's right to devise both a life tenancy and ownership of the same property to different people. Even so, this still left one instance of fideicommissary substitution.

Both the district court and the Tiflis Court of Appeal denied the plaintiff's suit, the latter dismissing the first two points respectively as unproved and irrelevant to determining the validity of the will. On the third point, the court of appeal held that the testator had not contravened the rule in the note to article 1011, SZ, X, 1, as that rule referred 'only to that instance when the property devised to the person selected as heir

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1. SRGKD 1871 no. 643. See also SRGKD 1868 no. 25; 1869 no. 1334; 1870 no. 1856; 1873 no. 201; 1874 no. 299 and 1875 no. 695 (both decisions in a single case); 1879 nos. 21, 27, 78; 1882 nos. 83, 130; 1886 no. 20; 1912 no. 75; 1913 no. 62. There were two minor exceptions to this rule: fideicommissary substitution was possible in those parts of the Empire where local law both retained some force and specifically permitted this, e.g. in Bessarabia (SRGKD 1889 no. 22, 1891 no. 112); where allowed by specific bank statutes to designate a successor in the event of death, a depositor could use such a substitution (SRGKD 1870 no. 981; SZ, XI, pt. 1, Ust. kredit. (1857), art. 1199).

becomes patrimonial, which cannot be related to the transfer of a husband's estate to /his/ wife'.[1] Perhaps anticipating disagreement on this point, the court added that even if this were not the case and the provision was in violation of this article, only those parts of the will's provisions concerning the disposition of the property after the death of the first heir in ownership would be invalid. The rest of the will, including the bequest to the testator's wife, would be unaffected.

The court of appeal's apprehensions proved to be well-grounded, as the Civil Cassation Department upheld its decision, but rejected its interpretation of the note to article 1011. The high court stated,

> There is no doubt that given property can be devised in ownership to only one person and that the law (note to article 1011, volume X, part 1) prohibits the testator from establishing the further order of succession to an estate after that person whom he has selected as his heir, i.e., that person to whom the estate was devised in ownership; however, having selected one or several persons as heirs, each to a specified part of his estate, the testator can postpone the time of their entry into possession of the designated estate under the right of ownership, and until then leave it in the possession for life of another person or obligate the heirs selected by him to execute any disposition concerning his acquired property or to make periodic monetary payments from it to other persons . . .even if it is allowed that the Court of Appeal considered the note to article 1011, volume X, part 1, to apply only to that instance when the property devised, having passed to the heir by will, becomes patrimonial for this latter (article 399 pt. 2), then even such an incorrect conclusion by the Court in the given circumstances cannot serve as grounds to overturn the decision, since not this consideration served primarily as the basis for /the Court's decision/, but the consideration that even had the estate been devised consecutively to several persons in ownership, such a disposition does not invalidate the entire will, but only the disposition

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1. SRGKD 1871 no. 643. The court of appeal used the word 'nasledstvennoe' here, but from the context clearly understood this to be synonomous with 'rodovoe'.

> of the estate after the death of those heirs chosen to succeed /the testator/ directly, and does not nullify the dispositions concerning those latter.[1]

Thus the high court would not allow the testator to control the order of succession beyond the death of the first heir in ownership. Any attempt by the testator to do so was illegal and would be invalidated by the courts if contested.[2] As described above, the court felt so strongly about this issue that it extended well beyond that normally allowed the time in which the person whose rights were violated by such attempted substitutions could bring an action contesting them, and even accorded him the right to bring an action for recovery of the property without having to contest the relevant provisions of the will at all. As it stated in its decision in Berkalova *et al*. v. Zakorkova, cited above, the court considered such provisions to be automatically illegal by law, and thus the person whose rights were violated by them acquired an immediate and defensible right in the property involved.[3] However, as the decision in Izmirov v. Izmirova also illustrates, the court held that the presence of such a provision did not invalidate the entire will, nor even the entire section of the will containing the illegal substitution, but only the substitution itself. Thus the devise to the first-named heir in ownership, and all the conditions, limitations, and so on attaching thereto, would

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1. *Ibid*., emphasis added.

2. See the references cited in note 1, p. 335 above. But if not contested, such a devise would stand and could be used as the basis for an uncontested claim for possession. *SRGKD* 1880 no. 243.

3. See above, pp. 138-40; *SRGKD* 1913 no. 62.

retain their force.[1]

As also is evident from the decision in the latter case, the court formally relied on a perhaps questionable reading of the note to article 1011 to support its position. The note, and the legislation underlying it, stated in part that an owner had an unlimited right to devise his acquired property to whomever he chose, and to impose on the devisee whatever conditions and obligations he wanted, but that such conditions and obligations could extend only for the life of the devisee, as 'on the death of this person, when the property devised to him becomes hereditary (nasledstvennykh), it no longer can be subject to the will of the first owner. . .'.[2] Although the word used in the article was 'hereditary', from the contradistinction of it in the article to acquired property and the owner's relative freedom to dispose of that type of property and from the situation giving rise to the original legislation, it seems clear that what was meant was patrimonial property and the conversion of acquired to patrimonial property by devise to the direct heir. If that were true, then the restrictions on testamentary power referred to in the note would be simply those generally arising from the institution of patrimonial property. This in turn would mean that, as the Tiflis Court of Appeal argued in Izmirov

1. This also is stated or apparent in SRGKD 1869 no. 1334; 1870 no. 1856; 1875 no. 695; 1882 no. 130; 1886 no. 20.

2. Note to article 1011, SZ, X, pt. 1, which is given above, p. 67.

v. Izmirova and a very small minority of jurists maintained,[1] property could be devised subject to a fideicommissary substitution if it did not become patrimonial as a result of the transfer by will. This would include all movable property whatsoever, in particular capital deposits, and any immovable property not devised to a direct heir. However, the high court and the majority of jurists seized on the word 'hereditary' and argued, explicitly or implicitly, that the State Council had used it deliberately in its decision in the Lopukhina case in order to distinguish patrimonial property from all inherited property in general and to indicate that the latter was meant in its decision.[2] This interpretation would lead to the principle enunciated by the high court, but it perhaps imputes rather more legal sophistication to the members of the State Council than is warranted, given that the Council was primarily a consultative legislative body which at the time contained few, if any, legal experts and that legal vocabulary at the time was, to say the least, extremely imprecise. Thus it is likely that the Civil Cassation Department was basing its position on other considerations in

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1. SRGKD 1871 no. 643. The cases cited by Fride, op. cit., pp. 13-17, suggest that the pre-reform Senate also acted as if patrimonial property was meant. Zagorovskii, 'O podstave', bk. 11 pp. 22-6, concluded that in appropriate circumstances such substitutions should be valid. Rudnev, op. cit., pp. 168-9; Isachenko, op. cit., col. 10; Zmirlov, 'O nedostat.', 1883 no. 10, pp. 83-4; Pobedonostsev, Kurs, ii. 576, 604; grudgingly, Bashmakov, 'Nasled. lits', p. 128, all agreed that the literal meaning of the note did not support the general principle drawn from it by the high court, but nevertheless supported the latter's position. Zagorovskii, op. cit., bk. 11 pp. 13f., and Grinevich, op. cit., pp. 5-12, 21-2, both argued that this limitation in fact did not arise until the early 19th century or even the State Council decision in the Lopukhina case in 1839.

2. This is implicit in all the court's decisions, and is stated explicitly in SRGKD 1912 no. 75; Moiseenko, op. cit., pp. 767, 775; Sbitnev, op. cit., p. 206; Grinevich, op. cit., pp. 20-21; Pobedonostsev, Kurs, ii. 604.

addition to the generally accepted reading of the statute.

As the language of its decision in Izmirov v. Izmirova suggests, the Civil Cassation Department was concerned primarily with preventing the testator from controlling the future order of succession to his property beyond the death of his designated heir in ownership, which concern appears to have originated from two basic considerations, one juridical and one socio-economic. The first, juridical consideration was the court's dual conception of the devisee as both a mere recipient of a gift of rights from the testator and an heir of the testator. It is clear from the court's treatment of resolutive conditions that it was not an excessive veneration for the right of ownership and a consequent belief that the heir's right, once vested, could not be violated in such a manner by the previous owner that led the court to prohibit fideicommissary substitutions. Rather, it was the conception of the devisee as an heir that caused the court to limit the testator's power to the life of this heir. Otherwise, if the bequest were seen simply as an assignment of rights by the owner, there would have been no reason why fideicommissary substitutions could not have been considered as merely a part of the arrangements made by the owner which only further defined and limited the rights of each assignee. Using a resolutive condition, the testator might direct that one person replace another as his, the original testator's, heir during the life of the former. But, as the high court stated in The Guardians of Minor Mar'ia Emel'ianova v. Gans, this replacement was concerned with establishing the identity of the testator's heir, and was not the same as a fideicommissary substitution, which in effect designated the heir of this heir, at least with respect to the property received from the original testator. As the succession to this

property was a matter of the heir's own inheritance, the court held that it could be determined by the heir himself or by the law, but not by the original owner and testator.[1]

The second, socio-economic consideration, clearly as, if not more, important than the first, was expressed by the high court in its decisions in The Guardians of Minor Mar'ia Emel'ianova v. Gans and Berkalova *et al*. v. Zakorkova, both discussed above, and in Kozintseva and Miloradovich v. The Executors of the Estate of M. G. Kozintsev.[2] This was an antipathy to any form of entail that arose from the court's belief that tying up property for excessively long periods was both socially and economically harmful. Obviously, precisely this would be the result if a fideicommissary substitution were allowed and it was used in conjunction with the testator's powers, allowed by the court, to impose limitations on the devisee's rights of use, possession, management, and disposition, to create future conditional interests for persons who might be born in the future, and to employ simple substitution in designating these potential future beneficiaries. Thus the court argued that the rule in the note to article 1011 was introduced in the interests of social order to prevent this and thereby avoid the resulting harm to state economic interests and society. It consequently sought to eliminate any possibility of this, and held all such attempts invalid,

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1. See the references in note 1, p. 334, and especially SRGKD 1879 no. 27; 1912 no. 75.

2. Respectively, SRGKD 1879 no. 27 (pp. 328-32); 1913 no. 62 (pp. 138-40); 1912 no. 75. See also 1882 no. 130.

regardless of whether they concerned immovable property or capital funds.[1] Although a few jurists argued that a limited form of fideicommissary substitution was desireable and therefore ought to be permitted, the majority supported the high court's position.[2]

Thus the owner's power to arrange a settlement of his property was limited strictly within a boundary of time. However, this period still could be fairly extensive because, as stated by the court in its decision in Izmirov v. Izmirova and elsewhere,[3] the owner simultaneously could grant a life estate to one or more persons and the remainder in ownership to someone else, and this remainderman need not be alive at the time of the testator's death. Thus, for example, the owner could devise a life estate to his son

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1. For this argument of the court, see SRGKD 1879 no. 27; 1912 no. 75; 1913 no. 62. For attempts to create such estates in perpetuum see SRGKD 1882 no. 130, which concerned land; 1883 no. 86; 1887 no. 11; 1912 no. 75, all of which concerned trust funds; also D. S. Fleksor, 'Darenie i pozhertvovanie', Sud. Gaz., 1892 no. 21 (24 May), pp. 2-4, and the cases cited in note 1, p. 335. The commission compiling a new civil code, continuing the prohibition, stated, 'the present project, with respect to substitution, remains grounded on current law, which is guided chiefly by considerations of a political-economic character'. Grazh. Ulozh., bk. 4, explanas., p. 205.

2. Those jurists favouring a limited form of such substitutions included Count Liubavskii, Zamechaniia grazh. zak., No. 507; Zagorovskii, 'O podstave', bk. 11 pp. 27-9. See also the political commentator V. N. Semenkovich, who had a purely political purpose in mind: 'O zapovednykh imeniiakh', Mos. Ved., 1899 no. 215 (7 Aug.), p. 2. For turn of the century opponents of allowing even this, see Bashmakov, 'Nasled. lits', pp. 126-9; Gussakovskii, op. cit., pp. 40-44; Isachenko, op. cit., col. 11.

3. This either is stated explicitly in or is clear from SRGKD 1868 nos. 25, 78; 1870 no. 1856; 1871 no. 653; 1874 no. 299 and 1875 no. 695 (decisions in the same case); 1874 no. 583; 1875 no. 322; 1879 no. 21; 1903 no. 60; 1909 no. 75. See also the cases cited with respect to suspensive conditions; Kalachov, 'Otvet Ch.'; Ch_vu, 'Vopros'; Moiseenko, op. cit., pp. 779-81; the references to Sokolovskii, Unkovskii, and Mos. Ved., 1869 nos. 115, 273, in note 1, p.312 above; Isachenko, op. cit., cols. 12-14; Pobedonostsev, Kurs, ii. 573-88, 602-6.

or grandson, or perhaps even to both, with the remainder to any future children of the son or grandson, limiting, if he so desired, the rights of use, possession, disposition, and so on of each of the devisees. In this way, he could control the succession to and use of his property for two or three generations. Relying on a very strict literal reading of article 1011, litigants sometimes sought to limit this power by arguing that the testator could bequeath either a life estate or ownership, but not both, or, less understandably, that a bequest of a life estate without naming the remainderman in ownership was invalid. Although the lower courts prior to the early 1870s apparently were divided over the latter issue, the Civil Cassation Department rejected both arguments, as apparently did the majority of jurists even at the time.[1] If the testator failed to designate the remainderman, ownership simply passed to the testator's legal heirs.[2]

There was, however, one way in which the boundary established by the courts might have been breached, although it does not appear ever to have been tested seriously. In a decision in 1870 in the private case of Strukov v. Levshina, the State Council ruled as legal the provisions of Baroness Frank's will devising her estate to her husband in use and possession for life, then likewise for life to her son by her first marriage, and then to Levshina in ownership. The only provision of the will struck down as illegal by the State Council was a fideicommissary substitution

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1. Moiseenko, _op. cit._, pp. 779-89; Pobedonostsev, _Kurs_, ii. 576 note, 605-6; Rudnev, _op. cit._, pp. 167-8. _SRGKD_ 1871 no. 643; 1875 no. 322; references cited in note 3, p. 341.

2. _SRGKD_ 1875 no. 322.

naming Levshina's children to succeed her as owners.[1] Thus the State Council's decision, published for guidance and therefore acquiring semi-legislative force, sanctioned the devise of a series of consecutive life estates in the same property. As several jurists pointed out, if used in conjunction with the owner's right to create future conditional interests in favour of persons yet to be born, this would have enabled an owner to circumvent the limitations on testamentary power constructed by the Civil Cassation Department on the basis of the note to article 1011 by assigning a series of life estates to extend over several generations or even in perpetuity.[2] However, although in connection with other cases the high court ruled on several occasions that a bequest creating an hereditary right of use was illegal, with the maximum term for a devise of such limited rights being the life of the devisee,[3] it never had to face this issue directly. Perhaps the nearest it came to pronouncing an opinion on the matter was in Shakai v. Shakai _et al._, in which, in general with the other provisions made by the testator, it allowed to stand a bequest to the testator's brother of the right to receive for life the income from certain commercial properties, which right then passed to the brother's daughters until their marriage. No remainderman was designated.[4] However, while in

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1. _Otchet Gos. Sov. 1870_, pp. 188-9; _Grazh. Ulozh._, bk. 4, intro., p. 28.

2. Moiseenko, _op. cit._, pp. 787-8; Zmirlov, 'O nedostat.', 1883 no. 10, pp. 81-3; Bashmakov, 'Nasled. lits', p. 129; Zagorovskii, 'O podstave', bk. 11 p. 24; Isachenko, _op. cit._, cols. 14-16; Pobedonostsev, _Kurs_, ii. 574-5, 577-80. The latter four were willing to accept this as long as the right was limited in such a way as to ensure that property was not tied up too long.

3. _SRGKD_ 1892 no. 76; 1903 no. 60; 1912 no. 75.

4. _SRGKD_ 1902 no. 104. See also 1901 no. 52, in which the first-named life tenant rejected the bequest; thus the court made no ruling on the issue.

this decision admitting two successive limited estates, the court was not concerned directly with this question, and thus the decision hardly could be said to have resolved the issue. For example, even if this decision were accepted as signifying the high court's sanction of multiple successive life estates, it still would leave unclear the question of how many such estates the court would tolerate before it considered such a provision to contravene its rule against a devise of property in hereditary use. Thus in the event, the breach remaind more potential than real.

A second potential breach in the high court's wall appeared during the latter half of the nineteenth century. As the economy developed and financial institutions became more sophisticated throughout this period, more varied and complex types of settlements became possible, including, potentially, the use of trust funds to provide for descendants or other relatives over long periods or even in perpetuity, thereby evading the prohibition against fideicommissary substitutions enforced by the courts. From their introduction, the courts had allowed such bequests for charitable or other social uses, for example permitting funds to be deposited eternally and the income managed and distributed by local government, religious, or other agencies for the benefit of schools, hospitals, the poor, or other needy groups or causes,[1] and it was not long before an attempt was made to employ this device for more private purposes. However, the Civil Cassation

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1. E.g., see SRGKD 1871 no. 643; 1875 nos. 27, 322; 1883 no. 86; 1891 no. 112; 1902 no. 104; 1903 no. 60; 1906 no. 85; 1909 no. 75; the cases reported in Nov. Vr., 1882 no. 2388 (21 Oct.), khron., pp. 2-3; 1899 no. 8535 (30 Nov.), sud. khron., p. 5; 1901 no. 9252 (5 Dec.), G. G., 'malen. khron.' p. 4, sud. khron., p. 13; K. Z. (Zmirlov), Zhur. Min. Ius., 1894/95 no. 9, khron., pp. 155-67.

Department considered this to be a different matter altogether, and although the lower courts sometimes were willing to accept such arrangements, the high court firmly rejected them.[1]

The court's reasoning is well illustrated by its decision in Kozintseva and Miloradovich v. The Executors of the Estate of M. G. Kozintsev in 1912.[2] Collegiate assessor Mikhail Kozintsev had died in July 1906, leaving a will by which he bequeathed a farm to his wife Matrena in use and possession for life and directed that all his remaining property be sold and the proceeds deposited in perpetuity in the Kherson branch of the State Bank. The testator obviously had taken note of the judicial ruling barring self-regenerating trusteeships and had sought to circumvent this by in effect designating a permanent juridical person, the local office of the State Bank, as trustee and executor.[3] The Bank was instructed to pay annually various sums from the fund's income to the testator's daughter, Elena Miloradovich, and her husband Boris, to the widow of his deceased brother and, after her death, to their four youngest children until they reached the age of majority, and to his grandson Rostislav Miloradovich.

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1. SRGKD 1883 no. 86; 1887 no. 11; 1912 no. 75; also Fleksor, op. cit.

2. SRGKD 1912 no. 75.

3. This was decreed in the decision reported in K. Z., op. cit.; SRGKD 1902 no. 104; see also 1909 no. 75. The courts formally based this doctrine on the provisions of article 1011 and note, SZ, X, pt. 1, arguing that the rights of use and management could not be separated and granted in perpetuity to someone apart from the rights of ownership and so on. But as this is precisely what occurred in the case of bequests to charitable uses, which the courts accepted, it must be assumed that the courts were merely using this to cover objections based on more general considerations.

After the death of the latter, the entire income from the fund was to be distributed annually among all his descendants equally, if he had any, or, if not, paid annually to the local zemstvo for the maintenance of an agricultural school to aid the local peasantry. The relevant bank officials refused to accept the deposit under the conditions stated on the grounds that these were too complex, whereupon the testator's widow and daughter brought suit against the will's executors and remaining beneficiaries to have all the provisions of the will declared invalid except that granting the widow a life estate in the farm. The plaintiffs argued that these testamentary arrangements contravened article 1011 by devising property in perpetual use without assigning ownership to anyone and by establishing a series of illegal substitutions. The plaintiffs also contended that as the local bank officials had refused the deposit on the terms stated in the will, the latter had become incapable of fulfillment and therefore void. Although the Kherson District Court granted the suit, the Odessa Court of Appeal reversed the decision on the grounds that an owner had the right to devise limited rights of use and possession of property without also assigning ownership to anyone, that the will contained no illegal substitutions, but only named a series of beneficiaries of limited rights, and that the validity of the will was in no way conditional on the acceptance of the deposit by the State Bank.

The plaintiffs appealed to the Civil Cassation Department, seeking a ruling on the legality of a devise of perpetual use without any accompanying grant of ownership and of an hereditary and unlimited right of use. The high court vacated the decision, holding that both types of devise violated article 1011, at least when not used in connection with charitable donations.

The court argued that the law allowed the testator to impose conditions and limitations on the rights granted only to the first person named as heir under the will. However, after this the property became hereditary and on the heir's death passed to his successors under the terms either of his own will or the rules of intestacy. Thus the grant of property, even capital deposits, in hereditary use, as if it were entailed or reserved, was illegal. The court agreed that the testator need not designate the heir in ownership, in which case it stated that ownership would pass under the rules of intestacy. However, it concluded that if the testator had constructed his will such that this was impossible, then the relevant provisions of the will were illegal, and the court was obligated to determine which parts of the will remained valid and which were invalid. Thus the high court rejected any form of perpetual trust for private purposes, although, as several of the decisions cited above show, it did allow more limited trusts that fell within the time limitations set by its interpretation of article 1011.[1]

The legal heirs of persons making large charitable donations in their wills, who nearly always seemed to be merchants or members of other urban social groups engaged in commerce, attempted unsuccessfully to use the court's reasoning to defeat such testamentary donations, thus forcing the court to qualify its position somewhat. In Shakai v. Shakai et al., for example, the plaintiff Il'ia Shakai obviously relied on previous rulings of the Civil Cassation Department in his suit to have the will of his adoptive

1. This is perhaps best illustrated by the decision in SRGKD 1881 no. 116.

uncle, Sevastopol merchant Saduk Shakai, declared invalid.[1] In his will, the deceased had directed that several of his commercial properties in Evpatorie be managed in perpetuity by a group of executors, who had the right to co-opt new members and who were to pay one-half the income from these properties to the deceased's brother for life, and then to the latter's daughters until their marriage. The remaining income was to be deposited until a capital fund of 20,000 rubles had accumulated. One-half the annual income from this fund was to be added to the principal, and the other half was to be distributed by the executors among poor brides of the Karaite Jewish sect as dowries, in amounts not exceeding 100 rubles, with a further 100 rubles to be deposited annually to form a separate fund of 1000 rubles to be called 'Jerusalem Aid', one-half the income of which was to accrue to the fund and the other half to be sent to Jerusalem in aid of poor members of the Karaite sect. The plaintiff claimed, inter alia, that these provisions violated article 1011 by assigning the use of property in perpetuity apart from ownership. Under the provisions of this article, an owner could devise neither a mere right of management nor a perpetual right of use. The plaintiff further argued that self-perpetuating executorships were illegal, as was the grant to such a body of a perpetual right of management.

Both the Simferopol District Court and the Odessa Court of Appeal denied the main parts of the suit, although the latter agreed that the unlimited and self-perpetuating executorship established by the testator was illegal. However, the court held that this did not serve as grounds to

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1. SRGKD 1902 no. 104. See also 1875 no. 322; 1903 no. 60; 1909 no. 75; the case reported in Nov. Vr., 1899 no. 8535 (30 Nov.), sud. khron., p. 5; 1901 no. 9252 (5 Dec.), G. G., 'malen. khron.', p. 4, sud. khron, p. 13.

invalidate the testator's directions concerning the disposition of his property, as it referred only to the means by which this disposition was to be carried out and not to the substantive content of the disposition itself. In cases where the executors failed or were unable to perform their duties the law provided that these be performed by the Ministry of Internal Affairs.[1]

The Civil Cassation Department also rejected the plaintiff's arguments, save that concerning the self-perpetuating executorship, and upheld this decision. The court stated that the law allowed an owner to distribute his property in accordance with his own will in the event of his death, and that this property included both immovable property and the income derived therefrom and movable property and the interest accruing thereto. Thus, by assigning the income from and interest accruing to his own property to stated charitable uses for an unlimited period, the testator did not exceed the bounds of the law. Article 1011 merely confirmed the owner's right to devise his property in ownership or in limited use and possession and, contrary to the plaintiff's argument, did not establish any more general property rules, by which the court meant that it did not prohibit the testator from devising other bundles of limited rights in this property. Indeed, the court continued, acceptance of the plaintiff's arguments would exclude almost any donations to charitable uses or organizations, as such grants generally did not include a right of ownership, but only that of distribution. Yet the law specifically foresaw such testamentary donations, which by their very nature required the power of administration to oversee their proper distribution and not the right of ownership. In its decision in a similar case

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1. SZ, X, pt. 1, arts. 1093-4. See also *ibid.*, art. 986.

in 1903, the court added that the bequest of an eternal right of use was impermissable only with respect to a private person, but not with respect to a public foundation.[1] Donations to charitable uses were permitted specifically by law and by their nature were intended to provide a continuous source of support for charitable organizations. Therefore, the court concluded, they need not be limited by time.

Thus the court exempted charitable bequests from the limitation of testamentary power established by it with respect to time. However, in both making this exemption and enforcing the limitation so strictly in other instances, one of the court's primary motivations was the same: the pursuit of social welfare and the avoidance of social harm. To be sure, the court's position in each case had a more or less firm foundation in statutory law. But this law was ambiguous, and the severity or leniency with which it was interpreted by the court depended on other factors. The court believed that the tying up of property for an excessively long period was socially and economically harmful, and thus, by prohibiting fideicommissary substitutions, grants of hereditary rights of use, conditions and limitations extending beyond the life of the devisee in ownership, and perpetual trusts for private purposes, imposed its own 'rule against perpetuities' to prevent it. However, when the objective of a trust or perpetual right of use was to provide some social benefit, these were to be allowed. It also should be recalled that while this did constitute a significant restriction of the individual's testamentary power, an owner still was able to control the devolution of his acquired property and provide for his descendants for two or three generations

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1. <u>SRGKD</u> 1903 no. 60.

by using the powers that were recognised by the court. Obviously, in the court's opinion, this was sufficient.

C. Legacies

The right to provide legacies is an important aspect of testamentary power, especially in situations where for political or economic reasons it is thought necessary or desirable to preserve landed estates, farms, or other economic units intact, because it increases the owner's ability to satisfy this need or desire while still providing adequately, if not equally, for all members of his family. However, the use of legacies in this way requires not only adequate financial institutions and a reasonably stable currency, but also a judicial system and body of law capable of providing adequate security for such arrangements. For example, even in situations where sufficient financial and economic conditions exist, the granting of legacies is of little use to either the testator seeking to arrange an appropriate settlement or the legatee if the latter is unable to enforce his rights against the deceased's heirs or estate easily and swiftly. The economic development that took place in Russia after the emancipation of the serfs was accompanied by a parallel development of financial institutions that enabled owners to make even greater use of legacy-like grants when arranging a settlement than they had in the past. In addition, the swifter and more impartial adjudication of disputes resulting from the introduction of the judicial reforms undoubtedly considerably improved the security of such arrangements. However, Russian statutory law was very poorly developed in this area. There was no mention of legatees at all and only brief mention of the testator's power to direct

that his heirs make monetary payments to persons designated by him.[1] The rights and status of the beneficiary of such a bequest and his relation to the person obligated to make the payment and to the deceased and his creditors all were undefined. Yet the relative security of and benefit provided by a legacy, and thus its usefulness, depended significantly on the answers to these questions.

Russian jurists lamented this gap in statutory law, and in trying to fill it, nearly all resorted to a greater or lesser extent to theories and principles of Civilian jurisprudence. Indeed, in an important sense, the question itself only arose as a result of the influence of Civilian law and was posed in its terms. Moreover, many of the chief disagreements among jurists in this area were largely a result of the difference in the extent to which they were willing to accept Civilian institutions or to which, under the influence of the historical school of jurisprudence, they rejected such borrowing and sought to formulate a more uniquely Russian law. One prominent school of thought, for example, represented by the prominent legal experts and law professors Nikol'skii, Demchenko, and Sbitnev in the 1860s and 1870s and later by the eminent jurists and, in some cases, Senators, Shershenevich, Tiutriumov, Zmirlov, and Bashmakov, advocated, or, in the earlier cases, assumed the acceptance in Russia of the full Civilian institution.[2] Accordingely, members of this group maintained that persons receiving a general and undifferentiated share

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1. SZ, X, pt. 1, arts. 1011 pr. and 1086.

2. E.g., see Sbitnev, op. cit., pp. 195-6, 198-202; Shershenevich, Uchebnik, pp. 772-6; Demchenko, Sushch. nasled., especially pp. 1-25; Nikol'skii, op. cit., pp. 11-14, 169-71; Tiutriumov, etc. in Zamechaniia grazh. zak., Nos. 501-2; Bashmakov, 'Byt' ili ne byt''; Beliatskin, 'Nasled. i lega.'; Zmirlov, 'O nedostat.', 1883 bk. 10, pp. 55-9.

of the deceased's estate, whether by law or by will, were his heirs and universal successors and represented his juridical personality, whereas recipients of only particular objects or values were legatees and did not represent the deceased. Only the heir, as representative of the deceased, was responsible for his debts and obligations, even with his own property if the deceased's estate was insufficient; the legatee either was not responsible for these at all, or had a liability limited to the value of the legacy in the event that the deceased's remaining property was insufficient. And whereas the heir had a direct right to the inheritance, the legatee had only an indirect right through the heir. Thus the legatee initially had only a right of action against the heir, to claim payment of the legacy, and consequently he would lose this right if the heir failed to accept the inheritance. Obviously, there was little in Russian statutory law that even remotely could support such a complex institution, and its advocates relied on a brief reference in the law to what appeared to be a simple form of legacy to justify introduction of the entire Civilian doctrine.

A second group of jurists, represented by the eminent legal scholars Meier, Annenkov, Tovstoles, and, generally speaking, Pobedonostsev, adhered more conscientiously to the letter of the Russian statutes and sought to develop a doctrine of legacies that was based on Civilian principles, but which nevertheless was consistent with existing domestic statutory law and legal traditions.[1] Thus, while they generally agreed with the previous

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1. E.g., Beliaev, op. cit., no. 6 pp. 45-56, 72; Annenkov, 'Otkazy'; Meier, op. cit., p. 642; Vavin, 'Poniatie zaveshch. otkaza'; idem, 'O nekotor. vazh. moment.'; Tovstoles, 'Otvetst. nasled.', nos. 9, 10. Pobedonostsev, Kurs, ii. 566, 609-10, 635-9, 641-3, 666, vacilated between this and the previous group over various points, but generally adopted the more moderate position.

group on the nature of a legacy and the legatee's rights, _i.e._ the legatee's lack of or limited liability for the deceased's debts and obligations and his indirect and dependent right to the legacy, they argued that under Russian law the only beneficiary of a will considered a legatee was the person to whom an heir or devisee had been obligated to make a monetary payment or transfer of other property under article 1086, _SZ_, X, 1. Otherwise, statutory law made no distinction between direct beneficiaries of a will, regardless of whether they received a particular object or sum or a general and undifferentiated share of the estate. All were heirs of equal status and, as such, had an unlimited and proportionate responsibility for the deceased's debts and obligations. The legatee, being only a creditor of the heir obligated to pay the legacy and not himself an heir, was not so liable.[1] While obviously far more faithful to the Russian statutes in defining who a legatee was, this interpretation nevertheless still clearly relied heavily on Civilian jurisprudence in defining what he was and what his rights were.

Finally, there was a third group of jurists, represented principally by the legal scholars Poletaev and Ostrikov, who, attempting to reject all influences of Civilian law, denied that the institution of legacy existed in Russian law. All beneficiaries of a will, whatever they received, were considered coheirs of equal status with a direct and absolute right in the inheritance and all had an equal responsibility for the deceased's debts and

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1. Annenkov, 'Otkazy', pp. 34-8, was unique, if consistent, in arguing that the heir had a similar unlimited liability before the legatee, who, in turn, was in no way liable for the deceased's debts.

obligations.[1] This interpretation rested on a perhaps too narrow reading of the statutes and, often times, a sense of equity that demanded that all the deceased's property be liable for his debts and obligations and all who benefitted from his estate bear a proportionate burden of the responsibility for these.

Clearly, then, the new courts were called on to answer the fundamental question of whether a legatee in fact existed in Russian law, and, if so, to define precisely what his relationship was to the deceased's estate, heirs, and creditors. In other words, how secure were the legatee's rights to the legacy, and, especially, what was his responsibility for the deceased's debts and obligations. As statutory law provided little direct guidance for the courts in answering these questions, they had to rely on their understanding of the general meaning of Russian law and broader considerations of equity and practicability, if not theoretical consistency. The Civil Cassation Department's general rule that all beneficiaries of a will were of equal status and akin to an heir by law, and therefore bore a proportionate responsibility for the deceased's debts and obligations, might seem to have decided the issue. It certainly attracted considerable criticism from jurists associated with the first two groups described

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1. I. A. Ostrikov, 'Kassatsionnyi Senat i zakon o pravakh otkazoprinimatelei (legatariev)', Zh. Min. Ius., 1903 no. 4, pp. 151-72; Poletaev, 'O zaveshch. otkaz.'; Rudnev., op. cit., pp. 171-81; Nechaev, Frumkin, and Vinaver in the discussion of Beliatskin's speech to the Spb. Jurid. Soc., Beliatskin, 'Nasled. i lega.', no. 46 cols. 2519-22; Grazh. Ulozh., bk. 4, explanas., pp. 189, 266. Ostrikov, in a not entirely consistent argument, did allow for a type of legatee under article 1086 and denied that he had an absolute right to the legacy. Rudnev was perhaps unique in arguing that both heirs and legatees were akin to the donee of a gift, and therefore neither was responsible for the deceased's debts and obligations.

above.[1] Yet there the court was concerned primarily with assigning responsibility for the deceased's debts and obligations and ensuring that his creditors were not defrauded, and thus with the relationship between the deceased's estate, the people succeeding to it by law or by will, and the people who had claims against it as creditors of the deceased. It was still possible and even necessary for the courts to draw distinctions and define the relationships between different types of beneficiaries of a will, and between them and the heirs by law, especially those obligated to make payments under article 1086.

Initially, despite sporadic attempts by some lower courts to introduce a formal distinction between heirs by will and legatees,[2] the Civil Cassation Department, albeit not entirely consistently, adopted the position advocated by the third group of jurists and held that all beneficiaries of a will were coparticipants in the deceased's inheritance and thus heirs of equal status.[3] This was stated generally by the court in its decision in Saltykova v. The Executor of the Will of Hereditary Honoured Citizen Butorin in 1868,[4] in which the action concerned a direct particular bequest, but also specifically in several cases which involved both direct

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1. See the reference in notes 2, p. 353 and 1, p. 354 above. Jurists associated with the third group generally agreed with the court's position. See the references cited in note 1, p. 355.

2. E.g., see SRGKD 1874 nos. 284, 596; 1880 no. 217; 1904 no. 99 (although here there possibly was another basis for the lower court's position); 1908 no. 77.

3. SRGKD 1868 no. 777; 1874 no. 596; 1879 nos. 294, 340; 1886 no. 60; 1904 no. 99; 1907 no. 11; 1908 no. 77.

4. SRGKD 1868 no. 777; above, p. 280-81.

particular bequests and bequests under the provisions of article 1086.[1] For example, in its decision in Baialova v. Baialov et al. in 1874, the high court rejected the argument of the respondents and the Tiflis Court of Appeal that the beneficiary of a bequest under the provisions of article 1086 was not an heir with a direct right to the deceased's estate, but only the beneficiary of the heir's obligation to pay the bequest and thus merely a personal creditor of the heir with no greater right to the latter's property than his other creditors.[2] The high court held that such beneficiaries, in this instance, the plaintiff, together with all other beneficiaries of a will, received their rights to a share of the deceased's estate on the strength of the will and thus were equal coparticipants in the inheritance. As such, they had a right to demand receipt of the bequest as a coheir with, and not merely as a creditor of, the heir obligated to pay the bequest, and therefore they had a preferential right to the latter's property before his creditors. In an identical situation in Rymareva v. The Bankruptcy Administration of 'E. Plotitsyn Sons', the court again overruled a similar decision by the Saratov Court of Appeal and held that the respondents were obligated to pay the plaintiff '*not as her debtors*, but in accordance with their father's will, as executors of this will, in the capacity of heirs of their father, who had imposed on them the obligation to pay from the inheritance left to them 100,000 rubles to their sister, *as the heir* of the father for this amount.' The court continued,

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1. For the former, see *SRGKD* 1868 no. 777; 1879 no. 294; 1908 no. 77. For the latter, see 1874 no. 596; 1879 no. 340; 1886 no. 60; 1904 no. 99; 1907 no. 11.

2. *SRGKD* 1874 no. 596.

> From this it follows that until the indicated payment is made, Rymareva's share of the inheritance consists in the other property of the testator devised to her brothers and that the latter's actual share of the inheritance is comprised of the value of the property conveyed to them by their father's will after deduction of the payment in favour of the coheir, imposed on them under the will (article 1086, volume X, part 1, and decisions of the Civil Cassation Department 1874 No. 596 and 1879 No. 340). In such juridical relations of equal heirs as those established by the court, Rymareva's right, to whom was adjudged a share of the inheritance in money, remains an independent right of inheritance to the heritable property remaining after the testator under all eventualities which may ensue with respect to her other coheirs. If these coheirs become insolvent, Rymareva's share of the inheritance nevertheless remains unchanged, and until this share is paid, no one deriving his rights from personal obligations with respect to Rymareva's coheirs can extend his claims to Rymareva's share of the inheritance, she not being privy to her coheir's insolvency. In accordance with this, if Rymareva seeks receipt of her share of the inheritance in the event of the insolvency of her coheirs, who have received the inheritance but have not paid their coheir, Rymareva, her share, then this claim lies outside of the procedure for bankruptcy and is not related to the personal debts of the insolvents.[1]

Thus, again, the plaintiff was given a preferential right of satisfaction.

As the court made clear in the above and other decisions, it considered all beneficiaries of a will, including those receiving a bequest under the provisions of article 1086, to have received a direct and absolute right to the object of the bequest made to them. Thus, as in general with inheritance rights, their rights arose from the moment of the testator's death and passed to their own heirs in the event that the rights had not been realised prior to their death, and, conversely, their rights were enforceable against the heirs of the heir obligated to pay the bequest.[2] Although this meant that

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1. SRGKD 1904 no. 99, emphasis added.

2. See especially SRGKD 1886 no. 60; 1904 no. 99; 1907 no. 11; 1908 no. 77.

would-be legatees were proportionately responsible for the deceased's debts and obligations, it also afforded them greater security against the heirs and the heirs' own creditors and heirs than would have been the case had the court adopted the Civilian doctrine advocated by most Russian jurists.[1] It is almost certain that both these considerations contributed to the court's decisions. In addition, while it is true that nearly all of the decisions in which this formula was enunciated by the court concerned such issues as the responsibility for the deceased's or an heir's debts and obligations, the doctrine did follow from the court's conception of the will as merely the distribution of property rights by the owner. As the will did not appoint an heir, but only distributed rights and benefits, there appeared to be no basis on which to distinguish between any of the beneficiaries, even those receiving only the right to a payment from another heir. All were identically the gratuitous recipients of rights, benefits, and attendant responsibilities.

Yet in practise the court had to recognise that there was a difference in fact between devisees whose bequest, whether of a particular object or sum or of an undifferentiated share, was to be received directly from the testator's estate and beneficiaries whose bequest consisted of a payment or other act to be made by a particular devisee or legal heir under the provisions of article 1086. As the practise and sometimes even formal pronouncements of the high court reveal, the former had a direct claim against the deceased's estate in general and therefore presented their

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1. See the references cited in notes 2, p. 352 and 1, p. 353 above, and Ostrikov, op. cit. Their argument was that the legatee's right consisted solely of a personal claim against the heir which consequently died with either the obligor or the obligee if not realised prior to either of their deaths.

demands directly to the estate as represented by the deceased's appointed executors or the legal heirs or other persons acting as executors.[1] Moreover, because of this, such devisees could receive satisfaction of their claims only from the net resources of the deceased's estate. If these were insufficient, the devisees' shares would be reduced appropriately, and in no case would the executors or legal heirs, acting only as agents distributing the deceased's property in accordance with his directions, be liable for any such insufficiency. This was stated clearly by the court in its decisions in Shavrova _et al_. v. Peshekhonova in 1874 and The Nizhegorod Municipal Administration v. Shumliaev in 1976.[2] In each case, the deceased had bequeathed a specific amount to the plaintiffs and the bulk of and residual right to his estate to the respondent, who, as a relative or spouse of the deceased and chief beneficiary had acted as executor of the will. The plaintiffs had received partial satisfaction of the bequest and sought payment of the balance from the respondent, who in each case had refused on the grounds that the net resources of the deceased's estate were insufficient. In both cases the court ruled that in such situations the respondent would not be responsible for payment of the balance, providing that he could prove, as he had not in the latter case, that the estate's net resources in fact were insufficient to meet all the bequests in full. In the first case the court held that the Moscow Court of Appeal was correct to rule that the plaintiffs were coheirs and

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1. This is obvious from any case concerning undifferentiated shares. For the case of direct particular bequests, see _SRGKD_ 1868 no. 777; 1869 no. 816; 1874 no. 274; 1876 nos. 66, 577 (with respect to Anna Koreneva); 1877 no. 191; 1879 no. 294.

2. _SRGKD_ 1874 no. 284; 1876 no. 66, respectively.

not legatees because they had received the right to acquire the property directly from the testator's estate and not mediately through the heir, and that with respect to the plaintiffs, the respondent, as executor, was merely the agent by which the property was transferred directly to them. '*Being coheirs and not legatees*, the plaintiffs did not have the right to demand payment of the property to them *as from the heir, in accordance with articles 1259 and 1086* volume X, part 1, but could demand execution of the will *only as from the executor*'.[1] In the second decision, the court stated that '*the person executing the will* is obligated to make monetary payments *only within the limits of the inheritance remaining after the testator*; if there is no property, or it is insufficient for complete satisfaction of all payments, then *the person executing the will is not obligated to make the payments in the amount stipulated* in the will'.[2] Thus it is clear that any recipient of a right to a direct share of the inheritance, be it an undifferentiated share or a particular object or sum of any value, was an equal coheir whose potential benefit was limited by the resources of the deceased's estate.

On the other hand, the court in practise, and, fleetingly in its decision in Shavrova *et al*. v. Peshekhonova, formally, recognised that a devise under the provisions of article 1086 created an entirely different set of relations between the person obligated to make the payment, the person

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1. *SRGKD* 1874 no. 284, emphasis added.

2. *SRGKD* 1876 no. 66, emphasis added. The court used the term '*ispolnitel'*' rather than the term '*dusheprikazchik*' to indicate that it meant any person who executed the will, including the legal heir or heir by will, and not merely the person formally appointed as executor. See *SZ*, X, pt. 1, art. 1084.

who was to receive it, and the deceased's estate. In this instance, the beneficiary of the obligation imposed on the heir had a claim only against the heir so obligated and not against the deceased's estate in general. Thus, he could claim payment of the bequest only from this particular heir and could not seek satisfaction for his claim from any of the other coheirs or from the estate in general in the event that the heir obligated to pay the bequest was unable or unwilling to do so.[1] Because making the payment was considered a condition of accepting the inheritance, the obligated heir's acceptance or enjoyment of the inheritance was considered as implying his acceptance of the obligation, and therefore, once having accepted the inheritance, he became fully obligated to pay the bequest, even with his own resources if those received by him in the inheritance proved insufficient.[2] This is in sharp contrast to the previous situation, and clearly rests on the contractual nature imputed to such bequests.

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1. This can be inferred from SRGKD 1868 no. 610; 1871 no. 675; 1872 no. 1223; 1873 nos. 620, 1530; 1874 nos. 284 (where it is nearly explicitly stated), 596; 1880 no. 78 (continuation of 1878 no. 54); 1903 no. 122; 1904 no. 99; 1907 no. 11; 1908 no. 77; and is explicit in 1908 no. 83; 1909 no. 40; the case reported in Pravo, 1915 no. 47, sud otch., cols. 3020-22. In each of these cases, the action involved the obligor and obligee of a bequest under article 1086, and I have found no instance in which the obligee ever brought or was allowed to bring an action against anyone other than the obligor or his successors. The decision in 1874 no. 284 is cited because, in holding that the respondent was not an heir obligated under article 1086, it implies that if he had been, the plaintiffs' suit would have been satisfied.

2. On the obligation as a binding condition of acceptance, see SRGKD 1870 no. 79; 1871 no. 675; 1872 no. 1223; 1873 no. 620; 1874 no. 284; 1880 no. 78 (continuation of 1878 no. 54); 1903 no. 122; 1909 no. 40; the case reported in Pravo, note 165. On the consequent extended liability of the heir, see 1871 no. 675; 1872 no. 1223; 1880 no. 78; the case reported in Pravo, note 1 above. This also is implied in 1874 no. 284.

The court first stated this principle in 1872, and reaffirmed it in its decision in Podgornaia v. Serdiukov in 1880,[1] that is both before and after its decisions stating the limited responsibility of heirs acting as executors in the case of direct particular or general bequests, which suggests that it intended to distinguish between the two situations. In the latter case, Cossack esaul Ivan Meshkov had devised all his acquired and patrimonial property to his nephew, esaul Stepan Serdiukov, with the condition that he pay Anna Podgornaia 3129 rubles annually for 87 years. Podgornaia had sued Meshkov for the first payment, which the latter refused to make on the grounds that the property involved was patrimonial, and therefore the bequest was not binding on him, and the total value of the bequest exceeded the value of the property inherited. The case moved through various appeals, but on rehearing, the Kharkov Court of Appeal denied Podgornaia's suit on the grounds that the law granted an owner the right to dispose only of his own property by will in the event of his death, but not the property of anyone else, including his heirs by law or will. Thus any disposition of property rights that went beyond those belonging to the testator was illegal and invalid. On this basis the court argued that bequests made under the provisions of article 1086 could not exceed the value of the share of the inheritance actually received by the heir obligated to pay them because to allow otherwise would be to allow the testator to dispose of the heir's property. Multiplying the annual value of the annuity by the number of years over which it was to be paid and comparing this sum to the total value of the estate, the court concluded

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1. SRGKD 1872 no. 1223; 1880 no. 78 (continuation of 1873 no. 54). There also was a brief statement to this effect in 1871 no. 675.

that in this case the value of the bequest far exceeded the estate's total value, and therefore, particularly as most of the deceased's property was patrimonial, the bequest was illegal. However, the Civil Cassation Department rejected this reasoning and vacated the court's decision. The high court ruled that while a person receiving both patrimonial and acquired property was not obligated to use the former to satisfy the bequest made to a third party, his obligation to pay the bequest remained valid with respect to the latter type of property. The fact that payment of the bequest might lead to a greater or lesser loss of this type of property was irrelevant, as the devisee accepting acquired property under the condition of paying a legacy to a third party was obligated to pay the legacy even though its value exceeded that of the property inherited. Moreover, the court added, although the obligation to make periodic payments could not extend beyond the life of the heir so obligated, the fact that the testator provided for a term in violation of this did not invalidate the entire testamentary disposition, but only that part of it concerned with the period after the death of the obligated heir.

Thus, clearly, the relationship between the heir obligated to pay the bequest and the person designated to receive it was akin to one of contract. For this reason, the court also held that the obligation to make the payment and the right to receive it passed to the respective heirs of the imputed obligor and obligee if for any reason the payment had not been made during either of their lives.[1] As the court ruled in Nikitina

1. SRGKD 1868 no. 610; 1872 no. 1223; 1875 no. 288; 1909 no. 40. The court also somewhat inconsistently based this on the considerations underlying its position with respect to direct bequests. *E.g.*, see SRGKD 1874 no. 596; 1880 no. 60; 1904 no. 99.

v. Moskvichev, the heir's obligation to pay a bequest imposed under the provisions of article 1086 passed to his successors by will or by law in the same way as all of his other debts and obligations, and thus his successors became liable for the payment of such bequests as a result of this general rule of inheritance defining responsibility for the deceased's debts and obligations and not on the strength of the original testator's will.[1] Thus while the bequest in such situations arose originally in the context of an inheritance, it became, in contrast to a direct particular or general bequest, a contractual obligation for the heir instructed to pay the bequest. It was precisely this distinction that the court was trying to make in the above citation from its decision in Shavrova _et al_. v. Peshekhonova, when it referred to the differing rights of coheirs and legatees to demand satisfaction 'as from the executors' or 'as from the heir, in accordance with articles 1259 and 1086'.[2]

However, because this obligation did arise out of a will and thus constituted a condition imposed on the heir, as the decision in Podgornaia v. Serdiukov also shows, the court remained consistent with its conception of the dual nature of the will and its consequent rule against perpetuities and held that a bequest consisting of periodic payments could not be valid beyond the life of the heir obligated to make them, although the heir's successors would be liable for any payments that he had not made.[3] While

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1. _SRGKD_ 1868 no. 610; above, pp. 280-81.

2. _SRGKD_ 1874 no. 284.

3. _SRGKD_ 1871 no. 643; 1880 no. 78; 1886 no. 60; 1891 no. 112; the case reported in _Pravo_, note 1, p. 363. See also Ostrikov, _op_. _cit_.

consistent with statutory law and the court's general position, this obviously made use of an annuity to provide for children, a spouse, or other persons somewhat insecure because the annuity would depend on the life of the obligor and not of the obligee. However, the primary objective of such bequests was to secure the future precisely of the latter. Thus apparently the only way that a testator could avoid this insecurity was by granting the desired person the right to receive for life all or a specified part of the income from particular property or a capital fund, which of course would complicate management of the property or require the resources to establish the fund in the first place.[1]

Aside from the one instance in Shavrova *et al.* v. Peshekhonova, until 1909 the high court refused to recognise formally that this distinction between different beneficiaries of a will signified the existence of the institution of legacy in Russian law, and, on the contrary, on several occasions even explicitly denied both this and that a bequest under the provisions of article 1086 created a relationship of credit-debt between the heir and the obligee.[2] The inconsistency of the court in this respect probably can be ascribed to a combination of considerations of Civilian jurisprudence and equity. Under the influence of strict Civilian doctrine, at least as understood by most Russian jurists, the court had no way to

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1. Much later, the Civil Cassation Department, over the objections of the lower courts, allowed an owner to establish by gift annuities that would run for the life of the donee and bind the donor's heirs, as this constituted a contractual obligation and not a testamentary bequest. *Pravo*, 1912 no. 11, *sud. otch*., cols. 633-6; 1914 no. 5, *sud. otch*., cols. 571-3.

2. See especially *SRGKD* 1874 no. 596; 1879 nos. 294, 340; 1886 no. 60; 1904 no. 99; 1907 no. 11; on the denial of credit-debt relationship, 1874 no. 596; 1904 no. 99.

separate beneficiaries of a direct particular bequest from those of a bequest made under the provisions of article 1086. Both were legatees. Yet the court did not want to release especially the former from responsibility for the deceased's debts and obligations, which adopting the Civilian doctrine of legacies appeared to require. Thus it refused to consider such beneficiaries as anything other than equal coheirs under the will. However, having made this decision and for jurisprudential reasons not being able to distinguish one type of legatee from another, the court believed that it had no option but to deny the existence of the institution of legacy altogether and include even the beneficiaries of a bequest made under the provisions of article 1086 among the coheirs.[1] Thus, as far as the high court was concerned, the concepts of 'legacy' and 'legatee' existed as abstract tools for analytical purposes, but they had no practical effect, as Russian law made no distinction between them and the heirs proper. It seems clear as well that in every case where the Civil Cassation Department explicitly stated that the beneficiary of a bequest under the provisions of article 1086 was an equal coheir, the court was guided by similar considerations. For example, in Baialova v. Baialov *et al*. and Tymareva v. The Bankruptcy Administration of 'E. Plotitsyn Sons', the court sought to establish the priority of the beneficiaries of such bequests for satisfaction *from the deceased's property* over the creditors *of the heir* obligated to make the payment, which would not be the case if such beneficiaries were themselves

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1. This dilemma is illustrated by *SRGKD* 1868 no. 777; 1879 no. 294; in which the beneficiaries of direct particular bequests are called legatees for analytical purposes but then, to ensure that they remain liable for the testator's debts and obligations, are called coheirs under Russian law, as the latter is held to make no distinction between heirs and legatees.

merely creditors of the heir;[1] in another case the court sought to distribute the burden of inheritance taxation more fairly, and, interestingly, for the same reason reversed its position entirely once statutory law had been amended to account for this;[2] in yet another case it sought to ensure payment of the bequest after the heir obligated to pay it had died;[3] and finally, in still another case it sought to preserve both the limitation on the power to devise patrimonial property and the beneficiary's responsibility for the deceased's debts and obligations.[4] Thus, while constrained by the statutes in all cases, the courts clearly preferred practicability and equity to theoretical consistency in this situation.

However, given the general criticism of professional jurists, the court found it difficult to maintain its position, and in a series of decisions in the early twentieth century in which the composition of the court does not appear to have been a factor, it vacillated between its established formal position and formal recognition of its factual position.[5] It was not until its decision in Shcheglov and Smolentsova v. Vasil'eva in

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1. SRGKD 1874 no. 596; 1904 no. 99.

2. SRGKD 1879 no. 340; 1900 no. 104. The relevant statutes are SZ, V (1857) Ust. o Poshlin., arts. 372, 375, 396-7, and (1893 edn., Prod. 1895), arts. 153, 163. The law was altered in 1882, 3PSZ, ii., no. 972 (15 June 1882), pp. 306-11, and again in 1895, 3PSZ, xv., no. 11530 (10 April 1895), pp. 188-9.

3. SRGKD 1886 no. 60.

4. SRGKD 1907 no. 11.

5. For cases in which the court held to its previous position, see SRGKD 1904 no. 99; 1907 no. 11; 1908 no. 77; for traces of the new position, see 1900 no. 104; 1903 no. 122; 1908 no. 83.

1909 that the court finally committed itself to a major change in its stance.[1]

Meshchanin Sergei Fedorovich Shcheglov had died in December 1902, leaving a will by which he devised all his property to his daughter Klavdiia Vasil'eva, with the condition that she pay various bequests, among them one of 300 rubles to her brother Ivan Fedorov. However, Fedorov had predeceased the testator by a few months. Consequently, the testator's remaining legal heirs, Sergii Aleksandrovich Shcheglov and Zinaida Smolentseva, the children of his deceased sons, brought suit against Vasil'eva for part of the amount due Fedorov under the will. Relying on the previous practise of the high court, the plaintiffs argued that Fedorov was a coparticipant in the inheritance who had been assigned a direct right to a share of the deceased's estate. Thus his death prior to the testator rendered this part of the will invalid, and the property devised to him had to be considered undevised. It therefore should pass to the testator's legal heirs. The district justice of the peace found for the plaintiffs, but the Moscow Congress of Justices of the Peace reversed the decision, ruling that the beneficiary of a bequest under the provisions of article 1086 received only the right to demand payment of it from the heir so obligated. Thus failure of the bequest through the death of the beneficiary prior to the testator did not transform the former's right to demand payment into a separate fund of property lying outside the will and subject to succession under the rules of intestacy, but only

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1. SRGKD 1909 no. 40; reaffirmed in the decisions reported in Pravo, note 1, p. 363 above, and 1915 no. 46, sud. otch., cols. 2959-60.

eliminated the heir's obligation to pay the bequest. The property therefore remained with the heir to whom it had been devised in ownership, i.e. the respondent.

The plaintiffs appealed this decision to the Civil Cassation Department, citing the latter's previous practise in support. No doubt much to the surprise of the plaintiffs, however, the high court upheld the decision and in the process formulated a new formal doctrine on legacies. The court opened its argument by stating that the principal point at issue was whether there was an identity between an inheritance by will and a legacy which the heir was directed to pay the legatee under the provisions of article 1086. On this point the court stated that 'in many decisions the Governing Senate had explained that our legislation makes no distinction between legatees and direct heirs by will and that legatees are identical coparticipants in the inheritance with the direct heirs. However, a closer familiarity with the circumstances of those cases from which these explanations were derived leads to the conclusion that the Governing Senate did not establish in these decisions that an inheritance by will and a legacy were identical in all respects'.[1] This last statement was not entirely frank, but the court now was concerned with presenting its past decisions as being not inconsistent with its new position, and so pressed on to a selective discussion of some of these cases which, in some instances, was not entirely correct. The court stated that in each of these cases it had been concerned with a specific question, for example, that of the legatee's

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1. SRGKD 1909 no. 40.

responsibility for the testator's debts and obligations,[1] of the fair distribution of the burden of inheritance tax, or of the preservation of the legatee's right to the legacy in the event that the heir died prior to fulfilling his obligation, and that in each instance it had resolved the question fairly and correctly. Thus the court concluded that 'the principle developed in the resolution of these questions, that "our legislation makes no distinction between direct heirs by will and legatees", must be understood only in the sense that with the acceptance of the legacy all the rights and obligations connected with it pass to the legatee'.[2] While the court's explanation of being prompted by the particular circumstances of each case was true, its conclusion would appear to be less so, as in several of the cases cited the point at issue was defining 'the rights and obligations connected with' a legacy, and the court previously had held them to be those of a coheir. However, the court had a more important motive here than simply judicial wriggling to make a new interpretation appear to be nothing more than a logical extension of the old. After all, under the existing civil procedures, it could have ignored its previous decisions altogether. However, by referring to these decisions in the manner in which it did, the court ensured that the main principles established therein would continue to apply even under the new interpretation of the law which it was about to present.

Having thus disposed of its previous practise and concluded that

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1. Some of these cases here cited by the court concerned the legatee's relationship not to the testator's, but to the heir's, creditors, which was an entirely different matter.

2. SRGKD 1909 no. 40.

the heir and the legatee were not identical, the court went on to define the latter. Referring to another recent decision, the court stated that there it had ruled that legatees under the provisions of article 1086 'were not heirs of the testator, but only persons who had received the right to demand from the heir the execution of the obligation imposed on him'.[1] The court continued,

> The correctness of this last principle is confirmed by the substantive difference between the direct heir by will and the legatee, which consists in the following: if the heir does not reject the property devised to him, then from the moment of confirmation of the will he acquires the right to take directly into his control all that was devised to him, and, being in the position of heir, he is the successor of the juridical personality of the deceased testator and enters into all the rights which belonged to the testator with respect to the devised property. . . .The legatee has entirely different rights. The right to demand payment of the sum bequeathed to him arises not earlier than the entry of the heir into possession of that property from the value of which the payment must be made, moreover this demand can be directed only to that heir on whom such an obligation has been imposed and to no one else, for execution of any obligation can be demanded only from that person obligated to the demander. For this reason, in those instances when the heir has lost his right to the property devised to him, e.g. if he predeceased the testator, or does not wish to implement it, having rejected it, the legatees have no right to demand the legacy as until the heir himself has realised his right, he can have no obligation connected with this right. All other people to whom this property then may pass, not being the legal successors of the person obligated, are in no way obligated to the legatee, as no one has imposed on them any obligation with respect to him; therefore he does not and cannot have a right to demand anything from them. From these considerations it follows that it is as if the testator, having imposed on the heir the obligation to pay a specified sum to a third party, has concluded a contract with the heir in favour of the third party;

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1. Ibid., emphasis added. The decision referred to was SRGKD 1903 no. 122.

> the obligation to execute this contract always depends on the agreement to it of the contracting party on whom the obligation is imposed; consequently, as soon as the heir does not wish to accept the inheritance on the conditions set out in the will, the testamentary dispositions with respect to the property devised to him fail automatically: there is no contract, hence no obligation of the heir and no right of the legatee. If the heir accepts the property devised to him, then by this itself he agrees to the condition declared by the testator, on the strength of which he becomes the debtor of the legatee and the latter his creditor.[1]

Thus the relations between the heir and the legatee were to be based on a contractual bond.[2] Applying this doctrine to the case in hand, the court concluded that as in a credit-debt relationship, the heir as debtor was released from his obligation and retained the object of the debt, unless otherwise stipulated in the will, if the legatee as creditor lost or failed to realise his right for any reason, including that of predeceasing the testator.

Thus the court at last eliminated most of the inconsistencies found in its previous practise and formalised what it had accepted in fact. However, while the court thus accepted the definition of the identity of a legatee advocated by the second, and in part by the first, group of jurists discussed above, it rejected much of what both groups had argued must be the results of this. Thus, in this and subsequent decisions the court reconfirmed that the legatee retained his right against the heir's own heirs should the heir die without having executed his obligation, that he was

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1. SRGKD 1909 no. 40, emphasis added.

2. Interestingly, the court just prior to this decision had ruled that the will could not and did not establish any sort of contractual relation between the testator and the beneficiaries. The beneficiaries involved were executors/direct heirs. SRGKD 1904 no. 85.

proportionately responsible for the testator's debts and obligations, and that the heir was obligated to satisfy the obligation even with his own resources should those received from the testator prove insufficient.[1] The court considered the heir's right to reject the inheritance afforded him sufficient protection in the latter instance, but it never explained adequately how the second and third proposition were to be reconciled, nor did it discuss again the legatee's relationship to the heir's other creditors.

On balance, then, it would seem that, in addition to the major contribution made by the very fact of their existence, the new courts improved the security both of bequests of particular objects or sums, by making the beneficiary of such bequests a coheir, and of legacies, first by holding the legatee also to be an equal coheir and then by providing essentially the same degree of security through an analogy with contract law. In either event, this increased the practicability of such bequests and, consequently, the owner's flexibility in arranging a secure settlement. Although in both instances the court tempered the beneficiaries' security by consideration of the just interests of the testator's creditors, this hardly could be considered a limitation on the testator's power. This power was all the greater because all the rules concerning conditions, beneficiaries not in being at the time of the testator's death, and so on described above obviously applied to direct particular bequests and, as the court made clear, also to bequests of what ultimately came to be considered

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1. See the cases reported in Pravo, above note 1, p. 363. One or all three cases were discussed in N. Rabinovich, 'Otvetstvennost' naslednika pered legatariem', Pravo, 1915 no. 51, cols. 3311-15; Beliatskin, 'Nasled. i lega.'; Vavin, 'O nekotor. vazh. moment.'; idem, 'Poniatie zaveshch. otkaza'.

legacies.[1] The courts added still further to this power by its handling of the question of payment of legacies incumbent on heirs of patrimonial property.[2] Indeed, the only significant limitation with respect to legacies enforced by the court was that restricting the period of time over which periodic payments could be made obligatory, albeit, given the general objectives of legacies, this could be a serious limitation.

Thus it is quite clear that due to the actions of the courts, and particularly of the Civil Cassation Department, the individual owner enjoyed an extraordinarily broad power to dispose of his acquired property by will. As a result, he acquired sufficient flexibility to produce a broad range of settlements designed to suit a wide variety of situations and achieve numerous diverse objectives. Indeed, the courts' general approach to the question of testamentary power seems to have been based on considerations similar to those expressed in a memorandum produced in the Ministry of Justice at the time of the courts' introduction and again by the majority

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1. On conditional legacies, see SRGKD 1873 no. 620; 1908 no. 77; on legatees not in being, see 1873 no. 1530 (the early history of which was reported in Zh. Min. Ius., 1865 no. 1, sud. prakt., pp. 103-24). It perhaps should be noted as well that in the latter case and in SRGKD 1903 no. 122, the court ruled, quite logically, that the payment of legacies left to the discretion of the heir were not enforceable.

2. Described above, pp. 143-4. The court's attitude in any particular case apparently depended on the total value of legacies in relation to the value of the property. Thus in addition to the references cited above, see SRGKD 1907 no. 11; the case reported in Pravo, 1915 no. 40, sud. otch., cols. 2510-11; see also ibid., 1914 no. 5, sud. otch., cols. 370-71.

in a report of the Duma Commission on Judicial Reform in 1911,[1] in both of which it was argued that in general in any particular case the individual owner was in the best position to know the needs and deserts of each member of his family and the rewards and consideration due other relatives or non-relatives, and how best to reconcile these with the resources of his estate and other social and economic considerations. It was impossible for the law to foresee and provide for all possible contingencies. Thus the individual owner should enjoy the broadest possible freedom of testamentary power. This outlook, combined with the courts' juridical conception of the will as primarily a distribution of property by the owner and general belief in the desirability of broad powers of disposition for the individual owner for social and especially economic purposes, produced the attitude expressed by the Civil Cassation Department in its decision in Kikiny v. Shirov in 1875, that 'instances in which the freedom of action of testators is limited have the characteristic of an exception from the general rule granting testamentary dispositions to the discretion of the owners of the property devised'.[2]

Indeed, the only significant limitations of testamentary power were

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1. The Ministry of Justice memorandum is described in the report of the Duma committee, Pril. Gos. Duma (1911) iii. no. 212, pp. 5-6, and the Duma committeemen's opinion given on pp. 8, 13. Liubavskii, 'Unichtozhenie', pp. 22-3, also describes what probably is the same memorandum, although he states that it was prepared in connection with Count Bludov's proposed reforms, whereas the memorandum cited by the Duma was a response to a petition of the Smolensk assembly of dvorianstvo calling for the equalisation of male and female rights of inheritance. It is possible, of course, that there were two memoranda expressing similar sentiments composed at roughly the same time, or that a single memorandum referred to both issues.

2. SRGKD 1875 no. 429.

those concerned with the time over which testamentary control could operate and those arising from the institution of patrimonial property. Both of these could have important consequences. However, the courts' approach to each of them was significantly different, although based on similar considerations. Each had a foundation in statutory law. Yet in the former case vague statutory references were developed by the courts into a more comprehensive doctrine that was strictly enforced, partly for juridical reasons, but also for social and economic reasons and assumed interests of state. For similar reasons, the far more explicit statutory restrictions arising from the institution of patrimonial property were enforced much less strictly.[1]

The Commission established to draft the new civil code generally followed and only formalised and polished the practise of the Civil Cassation Department, although it did propose some important changes and additions.[2] Of course, the most important and fundamental change proposed was the abolition of the institution of patrimonial property, which would have granted the owner the power to dispose of all his property by will and left his 'necessary heirs' with the right to claim a particular value from his estate if they were not provided for in the will. As concerned the substantive content of testamentary power, little was changed, with the Commission adopting the same basic attitude on this issue as that

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1. See above, pp. 134-45. In SRGKD 1881 no. 131 there was an attempt by the testator to assign the specific patrimonial property to be received by each heir, but unfortunately this issue was not the one in dispute and the court did not rule on it. See also Pobedonostsev, *Kurs*, ii. 569.

2. *Grazh. Ulozh.*, bk. 4, arts. 39-120, especially arts. 66-120 on the content, strength, and execution of wills.

expressed by the high court in Kikiny v. Shirov. Commenting on the article that was to express the basic principle of testamentary power in the proposed code, the Commission stated, 'article 66 has the significance and meaning of a general guiding principle indicating the point of view of the law. The meaning of the article is that the testator can make any type of disposition with respect to property. Freedom of disposition is thus a general principle which is set aside only as far as there is a law that limits this freedom'.[1] Thus, the will still was defined as primarily the distribution of property by the owner at his death.[2] The rule against perpetuities was simplified and made more explicit and somewhat more restrictive, so that any event determining a suspensive condition had to occur within thirty years of the opening of the inheritance, with the exception of dispositions in favour of persons not in being at this time. However, the only such beneficiaries to be allowed were the children of people alive at that time. Thus the possibility of a grant of successive life estates was eliminated. Otherwise, as before, all conditions, limitations, and so on on the rights of use, possession, and disposition could not extend beyond the life of the devisee.[3] Simple substitution was to be allowed, but substitution with respect to resolutive conditions was not mentioned, except in the specific case of remarriage of the testator's spouse, when it was to

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1. Ibid., art. 66, and explana., p. 190.

2. Ibid., art. 39, and explana., p. 114.

3. Ibid., arts. 68, 70-74, and explana., pp. 198-206. Thirty years was chosen because it was thought to represent one generation.

be allowed in favour of the testator's children.[1] In contrast to existing statutory law and judicial practise, the testator was to have the right to allow his executors to appoint co-executors or successors, and the satisfaction of all bequests was to be limited to the resources of the testator's estate.[2]

These proposals would have maintained, and in some respects even extended, the owner's already substantial testamentary power, and thus his ability to arrange a flexible settlement. They appear to have been generally accepted by both the legal profession and the general public. But then the substantive content of testamentary power, while unclear, had never really been a source of sharp public debate, in contrast to the question of the amount of his property that an owner should be allowed to dispose of by will.

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1. Ibid., arts. 76-7, and explana., pp. 212-13. Fideicommissary substitutions clearly were not to be permitted. Ibid., pp. 189, 205-6.

2. Ibid., respectively, art. 97, and explana., pp. 248-9; arts. 116-20, and explana., pp. 266-7. In allowing the greater power of executors, the Commission was concerned primarily with providing greater security for bequests for charitable uses.

Chapter 7

Inter-Vivos Devolution: Gift, Allotment, and Dowry

The owner's power to dispose of his property by will did not exhaust the available means of arranging a settlement. This also could be accomplished wholly or in part during the owner's life by transfer of his property to his legal heirs or other persons as a gift, allotment, or dowry. There were any number of reasons why such action may have seemed preferable to testamentary disposition, despite the fact that the owner surrendered a considerable degree or all of his control over his property thereby. For example, he may have wished simply to retire from the active management of his enterprise and pass it on to his children or other heirs; or he may have desired to establish his children when the time arrived or the need arose and the resources were available, and yet ensure that these children did not gain unfairly at the expense of his remaining children when his inheritance finally opened; or he may have wished to control the devolution of his property to his heirs in order to achieve or avoid certain economic or other practical effects or to eliminate the possibility of an acrimonious family dispute over the inheritance and its division. Indeed, as far as patrimonial property was concerned, this was the only way in which an owner could do this legally, as he enjoyed greater power to control the devolution of such property to his heirs during his life than he did at death. Whereas he had no power to dispose of such property by will if he was survived by descendant heirs and only very limited power otherwise, during his life at least he could freely

distribute such property among his heirs within certain limits.[1] Of course, his power in this respect always was limited by the necessity of obtaining the agreement of at least the heir receiving the property, who therefore could look out for his own interests.

The courts could affect significantly the extent to which such means were used depending on the range of powers they allowed the owner and the degree of security they accorded both the owner and the arrangements made by him. Obviously, devolution of proprietary rights during life would be an attractive option only if the owner had powers sufficient to achieve his objectives and if the arrangements that he made enjoyed adequate legal protection. In addition, the owner would want protection for himself. Gift, allotment, and dowry entailed the loss of substantial proprietary rights and powers and therefore of material security by the owner, and thus could involve considerable risk on his part. The more this risk could be reduced and the less likely it became that the owner himself would be left destitute, the more attractive use of _inter-vivos_ transfer would become. As we have seen, the Civil Cassation Department did make a major stride in this direction by ensuring that all property received in this manner by children from their parents reverted to the latter in ownership in the event that the former died intestate and were not survived by

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1. For a description of the law, see above, pp. 70-73; also Annenkov, _Sistema_, iv. 101-20; Pobedonostsev, _Kurs_, i. 66-70, 74-77, 88-95, 371-83, ii. 430-41; Shershenevich, _Uchebnik_, pp. 487-94, 652-6; Meier, _op. cit._, pp. 200-210; Podetaev, 'Darenie'; Zmirlov, 'O nedostat.', 1883 no. 9, pp. 39-62, no. 10 pp. 47-52; N. N. Tovstoles, 'Darenie po deistvuiushchemu pravu v sviazi s proektom grazhdanskago ulozheniia', _Zh. Min. Ius._, 1906 no. 8, pp. 1-34; B. Popov, 'Dogovor ob otrechenii ot nasledovaniia po russkomu pravu', _Pravo_, 1912 no. 26, cols. 1409-15.

descendant heirs.[1] In addition, the courts achieved the same effect and simultaneously greatly expanded the owner's flexibility by allowing him to impose a wide variety of conditions on the recipients or retain limited rights of possession and use when making a gift, allotment, or dowry.

As described above, the Civil Cassation Department eventually distinguished between a gift on the one hand and allotment and dowry on the other on the basis of the difference in the donor's presumed intention and the consequent imputed character of allotment and dowry as an 'anticipated inheritance'.[2] Thus the legal characteristics and effects of each were different in certain important respects, and it is necessary to deal with each separately. However, it is important to bear in mind that although the persons to whom an allotment or dowry could be given were narrowly limited, a gift could be made to anyone, including the donor's direct legal heirs, and thus when dealing with descendant relatives the owner retained the option of choosing which form of act to use.[3] In addition, in its decision in the case of the private petition of meshchanin Ivan Goncharov in 1872 the high court held that gifts to relatives were made under the same procedure and rules as gifts in general.[4] Hence, when making a gift to such persons, the donor had the same power to impose conditions, the same rights

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1. See above, pp. 204-14.

2. See above, pp. 124-32.

3. This is explicit in SRGKD 1872 no. 872; 1874 no. 889; 1879 no. 178; 1901 no. 97; the Baryshnikov case, reported in E_v, op. cit. For other cases of gifts to direct heirs see SRGKD 1873 no. 865; 1878 no. 221; 1886 no. 14; 1900 no. 8; the cases reported in Sud. Gaz., 1892 no. 28 (12 July), pp. 2-3; Pravo, 1913 no. 12, sud. otch., cols. 754-8, and no. 35, cols. 2037-40.

4. SRGKD 1872 no. 872.

of reversion, etc. that he had when making a gift in general. Thus the owner could vary the extent both of his own powers in making the act and of the rights received by the recipient by selecting one or the other type of act.

I. Allotment and Dowry

Prior to 1888, when the Civil Cassation Department reversed its position on the nature of allotment and held it to be an anticipated inheritance, it had not been necessary to differentiate very clearly between gift, allotment, and dowry, and indeed the court had tended to treat the latter two as only special variations of the former.[1] However, once the court had drawn such a sharp distinction between gift and allotment, it became necessary to determine the nature of dowry as well. This followed fairly quickly, and in Sollogub and Balk v. Iazykova in 1890 and subsequent decisions the court ruled that dowry was only a special form of allotment and consequently the same rules applied to both, subject only to any special provisions specifically made by law.[2] The legal effects of each likewise were identical. Thus, unless the case concerned one of these special provisions, a decision made with respect to one form of act would apply to the other.

Having held that the acts were by nature the same, it was necessary

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1. See above, pp. 124-8. Meier, _op. cit._, pp. 200-210, appears to have subscribed to this view. On the other hand, Pobedonostsev drew a sharp distinction, _Kurs_, i. 66-70, 74-77, 88-95, 371-81, ii. 430-39.

2. _SRGKD_ 1890 no. 40; 1910 no. 16; 1912 no. 46; 1913 no. 72. See also 1867 no. 279, in which the respondent made this claim, but the court did not feel that the distinction was significant for deciding the point at issue.

for the courts to determine who the beneficiaries of such acts could be. Statutory law left little room for doubt in the case of allotment, even though the rule and the court's development of it were somewhat inconsistent with the nature of the institution as defined by the courts. Article 994 SZ, X, pt. 1 clearly stated that parents and other ascendant relatives were empowered to assign an allotment to their children or other descendants, and the Civil Cassation Department strictly observed this rule, regardless of whether or not the recipient was in fact the donor's legal heir either at the time of the allotment or at the moment of the donor's death. Obviously, in certain instances this could conflict with the court's view of allotment as an 'anticipated inheritance'. For example, an allotment could not be made to a collateral relative, even though at the time he was the donor's direct legal heir.[1] On the other hand, an allotment could be made to a descendant relative even though at the time he was not a direct heir, e.g. in the case of a grand-son receiving an allotment from his grand-father while his father still was alive.[2]

However, statutory law was more ambiguous with respect to dowry, mentioning only 'daughters and /female/ relatives',[3] and the courts were correspondingly more circumspect. Prior to 1913 it would appear that a dowry in the full sense of an allotment could be given to a collateral

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1. SRGKD 1880 nos. 150, 183; 1912 no. 46; 1913 no. 72. Annenkov disagreed with this, and argued that only the direct legal heir, be he descendant or collateral relative, ought to be able to receive an allotment, Sistema, iv. 109-11.

2. SRGKD 1876 no. 214; Pobedonostsev, Kurs, i. 67-8, ii. 430-35; see also Liubavskii, 'Vydel'; Shershenevich, Uchebnik, p. 652; Popov, op. cit., no. 26 col. 1412.

3. SZ, X, pt. 1, art. 1001. The phrase was 'docherei i rodstvennits'.

relative, although toward the end of this period at least some of the lower courts already were attempting to limit this solely to descendant relatives.[1] Apparently this meant that a dowry could be given to a collateral relative under the same terms and with the same consequences as a dowry or allotment to a descendant relative.[2] However the Civil Cassation Department managed to avoid making a direct statement on this issue until its decision in Firsanova v. Mazurina and Kostiakova in 1913.[3]

In this case, merchant Ivan Lezhenin had died in 1903 survived by two sisters, Nadezhda Mazurina and Aleksandra Kostiakova, and by Agrippina Firsanova, the daughter of a third sister who had predeceased Lezhenin. Firsanova had brought suit against her aunts for a share of the deceased's inheritance, which claim the respondents disputed on the grounds that in 1874 the plaintiff's mother had received a dowry of 7500 rubles from her brother and in a notarial act of dowry had renounced for herself and her heirs any right to his inheritance. Thus Firsanova was bound by this act and as a result excluded from the inheritance. Both the Moscow District Court and Court of Appeals denied the suit, rejecting the plaintiff's argument that under the general rules of allotment the power to renounce the right to a future inheritance at the time of receipt of a dowry was limited to descendant relatives of the donor. The courts held that a dowry could be given to any female relative.

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1. SRGKD 1910 no. 16; 1912 no. 46. In both of these, and especially the latter, the Civil Cassation Department was marvellously ambiguous on this point.

2. Popov, *op. cit.*, no. 26 col. 1412.

3. SRGKD 1913 no. 72.

The Civil Cassation Department vacated this decision. It argued that dowry was only a special form of allotment and that the nature of both, as an anticipated inheritance, was identical. Hence, 'if an "allotment" can take place only with respect to descendants, and a "dowry" is only a form of "allotment", then it is obvious that even a dowry in the sense of an allotment can be assigned only to direct descendants, and not to relatives in the collateral lines'.[1] As a special form of allotment, dowry could not have characteristics that were incompatible with the general institution of allotment, and its only special feature was that it was given to females at the time of their marriage. Thus, the court argued, the term '*rodstvennits*' in article 1001 must be understood to mean only descendant *rodstvennitsy*, and the power of renunciation in article 1002 therefore must be limited to dowrys received in the sense of an allotment. A dowry received by a collateral relative was received as a gift and not in the sense of an allotment, and therefore renunciation of any right to the donor's future inheritance was not permitted.

Thus, receipt of both allotment and dowry was limited to descendant relatives. The point is not unimportant because an owner could usefully employ the recipient's power of renunciation when arranging a settlement of his property. As this power existed only in the case of allotment and dowry, the court's decisions meant that it could not be used by the owner if his heirs presumptive were collateral relatives.

Statutory law stipulated that acquired property could be given in allotment and dowry in any amount, whereas patrimonial property could be

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1. *Ibid*., emphasis added.

so given only in an amount not exceeding that which the donee was entitled to receive under the rules of intestate inheritance.[1] Thus it would seem that the owner's powers were fairly limited, at least where patrimonial property was concerned. While he might be able to control the precise composition of the share that passed to each heir, and thereby minimise the extent of disruption caused by division of his property, he could not alter the share due each heir nor prevent a physical division itself. However, the law also stated that the recipient of an allotment of acquired property or of a dowry in general could renounce his or her right to the donor's inheritance,[2] and the Civil Cassation Department developed this rule in such a way as practically to eliminate the above limitation and allow the owner much greater flexibility. Thus, always dependent on the agreement of the recipient, not only could the owner control the physical division of his property, but he also could prevent such division by substituting any form of acquired property, including a monetary payment, for the patrimonial property to which the donee was entitled, with the donee

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1. See above, pp. 72-3 ; SRGKD 1888 nos. 74, 91.

2. SZ, X, pt. 1, arts. 998, 1002. Popov argues that the recipient of an allotment of patrimonial property only could not so renounce his right, op. cit., no. 26 cols. 1410-11. Even if true, the point is not too important, because acquired property, which would include a money payment, easily could have been included in the transfer, thereby enabling resort to renunciation. Contrary to Popov's claim, Shershenevich is ambiguous. Shershenevich, Uchebnik, p. 653.

thereupon renouncing any further right to the inheritance.[1] For example, some heirs could be induced to accept a sizable monetary payment as an allotment and renounce their right of inheritance, thereby allowing a patrimonial landed estate, factory, or commercial house to pass intact to a single heir, either as an allotment or in inheritance; or one heir could be alloted a separate acquired immovable property and renounce his right to the inheritance, again leaving the patrimonial property to pass to another heir, with any disparity in value being compensated by monetary payements.

These arrangements would be protected by the donee's renunciation of his right to the inheritance, as neither the person renouncing his right nor his heirs later would be able to seek a share of the inheritance or contest what might be a technically illegal gift or allotment of patrimonial property to another person.[2] This followed from the court's conception of such renunciation on receipt of an allotment or dowry as essentially a voluntary acknowledgement by the recipient that his inheritance rights had been satisfied completely. Therefore, a person renouncing his rights was

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1. This is most clearly stated in SRGKD 1899 no. 49 (described above, pp. 101-2); 1906 no. 15. On this and the power of renunciation in general see also 1876 no. 280; 1886 no. 60 (which held that renunciation did not bar the donee from further receipt of a testamentary gift); 1888 nos. 74, 91; 1890 no. 40; 1894 no. 95; 1912 no. 46; 1913 no. 72. Also Popov, *op. cit.*; Liubavskii, 'Vydel'; I. Kharlampovich, 'Otrechenie ottsa ot nasledstva vlechet' li za soboiu lishenie syna prava na to zhe nasledstvo?', *Zh. Min. Ius.*, 1900 no. 5, pp. 198-215; *idem*, 'Primenenie 1002 st. t. X ch. 1 v sviazi s poniatiem "otrechenie"', *ibid.*, 1901 no. 2, pp. 185-91.

2. In this respect, see especially SRGKD 1899 no. 49 (described above, pp. 101-2); also 1894 no. 95; 1906 no. 15; 1912 no.46.

excluded from the inheritance not so much by the actual act of renunciation as by the fact that he already had received everything to which he was entitled by law. That being the case, the donee no longer had any right to share in the donor's inheritance or to contest any future act the donor might make concerning succession to his property. This applied to the donee's heirs as well, as they could not enjoy any right with respect to the donor's property or inheritance that the donee himself had not enjoyed.[1]

The effect of the high court's decisions obviously was to expand considerably the owner's ability to arrange wholly or in part a settlement of his property during his lifetime. This ability was extended even further by the court's decision in Grigor'ev v. Grigor'evy in 1894.[2] By an act of separation of 1862 Iuliia Grigor'eva had alloted to her son Aleksandr her acquired estate of 238 desiatin in Tula province, on condition that he renounce his right to any future inheritance from both his mother and his father, Dmitrii Grigor'ev. Aleksandr declared himself satisfied with this allotment and duly renounced his right to both inheritances. However, after the death, first, of Dmitrii Grigor'ev and, then, of his son Aleksandr, the latter's son and heir Petr brought suit against Dmitrii's remaining children for his father's share of Dmitrii's inheritance, arguing that Grigor'eva had had no right to make an allotment conditional on the renunciation of the right to a third party's inheritance and that such a renunciation made by the father could not bind his son. The Moscow District Court found for the plaintiff, but the Moscow Court of Appeal reversed the

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1. This is formulated clearly in SRGKD 1894 no. 95; 1899 no. 49; 1906 no. 15.

2. SRGKD 1894 no. 95.

decision on the grounds that the law did not specifically prohibit one parent from alloting to a child the amount of property that would be due to that child in inheritance from both parents on condition that the child renounce his right to both inheritances, and therefore it would be proper to interpret the laws defining allotment to allow this. Thus as Aleksandr's rights to his father's inheritance had been satisfied fully by the allotment, he had no rights to transmit to his son, who therefore had no right to the inheritance and hence no right of action. The Civil Cassation Department agreed completely with the court of appeal and upheld the decision. Thus it became possible for parents to combine their property when arranging a settlement among their children, with some children being satisfied from the property of one parent and other children being satisfied from the property of the other.

A potential heir might have been tempted to accept such arrangements because as a result he would gain control of the property much earlier than he otherwise would have done, if at all. However, there was also a risk involved, because if in the period intervening between the act of allotment or dowry and the opening of the donor's inheritance the number of potential heirs decreased, the donee would be entitled to a greater share of the inheritance than he had been at the time of the allotment or dowry. Thus by renouncing his right to the inheritance he risked losing this additional amount, as the law provided no rule for this situation. However, in Sollogub and Balk v. Iazykova in 1890 the Civil Cassation Department appears to have eliminated this risk when it upheld the decision of the Moscow Court of Appeal, ruling that renunciation of the right to an inheritance made on receipt of an allotment or dowry was not final or unconditional,

but was invalidated if the conditions determining the share of the inheritance prevailing at the time the act was concluded altered in such a way that as a result the heirs not renouncing their right received more than their fair share of the inheritance, to the detriment of the heir who had renounced his or her right.[1]

In addition, by its decision in Kolesovy v. Kolesovy in 1888, the court accorded considerable security to the recipient of an allotment or dowry who had not renounced his right to the inheritance and appears to have placed him in a more favourable position than heirs not receiving such a grant.[2] The court held that, in accordance with the law, a person receiving an allotment or dowry of patrimonial property was excluded from the inheritance of such property if he already had received his full share of this property, but took part in the inheritance of such property and received a supplement if he had not received the full amount to which he was entitled. Thus far there was nothing of exceptional benefit for the

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1. SRGKD 1890 no. 40. However, the Civil Cassation Department still left the matter somewhat unclear, as it based its decision primarily on a narrow interpretation of article 1004 SZ, X, pt. 1, and hence could be interpreted as applying only to dowry and only in that particular instance. The law said little about the reverse situation, i.e. the donee receiving a share larger than that to which he was entitled, either. However, article 1004 SZ, X, pt. 1 would appear to state clearly that, at least in the case of dowry, the recipient could not be deprived of any part of her dowry under any circumstances. Also, as the owner had the power to dispose freely of his acquired property, it would seem that the remaining heirs also would have no recourse in this event if the allotment or dowry was composed of acquired property.

2. SRGKD 1888 no. 91. The decision in 1888 no. 74 appears to be somewhat contrary, but the court was not concerned with the same issue. See also SRGKD 1867 no. 518; 1890 no. 40; 1906 no. 15; 1910 no. 16; the case reported in Kalachov, 'Otvet 1149'.

donee. But then the court added that if he had received only acquired property and had not renounced his right to the inheritance, he participated in the inheritance of the donor's patrimonial property without any deduction for the acquired property that he had received,[1] which clearly implied that a person receiving an allotment or dowry of acquired property in an amount exceeding that to which he would have been entitled in the absence of such an act could refuse to take part in the inheritance of the donor's acquired property and thus retain all such property that he already had received while simultaneously demanding a full share of the donor's patrimonial property, thus receiving a larger total share of all the donor's property. Only if he decided to take part in the inheritance of the donor's acquired property as well would he risk having to return any of this property to the general fund of the inheritance. He also could demand a supplement if he had received less acquired property than he would have done in inheritance in the absence of the allotment or dowry. This was hardly a disincentive for the prospective recipient of such grants. Thus in both this and the previous decision, by reducing the risk involved for the recipient, the court eliminated one of the potential major discouragements to the use of allotment and dowry as a means of arranging a settlement.

The court accomplished the same end by reducing the risk to the donor as well. One instance of this was the expansion of the parents' reversionary rights described above.[2] In addition, while it would appear that in general the same array of conditions that could be imposed when giving a gift could

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1. Two of the jurists responding to the Commission formed to compose a new civil code referred to the lack of clarity in the law on this point and stated that it led to numerous family disputes and lawsuits. Zamechaniia grazh. zak., No. 495.

2. See above, pp. 204-14.

not be employed when assigning an allotment or dowry, as statutory law made no provision for such conditions, nevertheless the high court was prepared to allow the imposition of such conditions as the retention of rights of possession and use for life that were intended to protect the donor against being left destitute as a result of his action.[1]

However, the primary limitation to the use of these institutions by the owner in arranging a settlement, once he had decided to part with his rights, most certainly must have been the necessity of obtaining the agreement at least of the person who was to receive the allotment or dowry. Without this, nothing could be done, whatever the owner's desires or intentions. Thus the potential recipient had the capacity to protect his own interests.

The same could not entirely be said for the remaining potential coheirs, who in most instances would have little choice but to accept what the owner had done. The Civil Cassation Department did rule that the donor's actual heirs could seek recovery of part of the property from the recipient of an allotment or dowry of patrimonial property who otherwise would have been a coheir and who had received a greater share of this property than he was entitled to in inheritance by law, but they could do this only after the donor's death, as prior to then they could not be considered as heirs of the donor and they otherwise had no independent right to interfere with his use and disposition of his property.[2]

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1. SRGKD 1899 no. 30; Pobedonostsev, Kurs, i. 93-5, ii. 432-3; Annenkov, Sistema, iv. 108, 113-14; Shershenevich, Uchebnik, pp. 652-6; for a contrary view, Liubavskii, 'Vydel'.

2. SRGKD 1879 no. 178; 1899 no. 49; 1900 no. 8 (both this and the two preceding cases are described above, pp. 114-15, 101-2, and 105 respectively); 1906 no. 15.

Moreover, they would lose this right if they had received from the donor by allotment, dowry, or gift any acquired property, including money, clearly intended as a substitute for their share of patrimonial property.[1] In addition, they had no right to challenge an allotment or dowry of patrimonial property in an amount not exceeding that due the recipient in inheritance by law, nor of acquired property in any amount, as the owner had unrestricted powers of disposition over such property and consequently his heirs had a right only to that property which he had not disposed of by the time of his death or by will.[2] Thus the donor's potential heirs had no power to prevent the donor from making an allotment or dowry, and, except in the one instance, little recourse against the beneficiaries of such acts. Hence the owner could control even what property, including to a significant extent patrimonial property, passed to those of his heirs who had not received or who refused to accept an allotment or dowry in *lieu* of their share of his inheritance by distributing his property among his other prospective heirs and leaving the former with little choice over what was left.

II. Gift

In many important respects a gift was considered the same as an allotment or dowry and hence was subject to the same rules and effects of certain judicial decisions. For example, the agreement of the potential beneficiary was required in both instances; when making a gift the owner

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1. *SRGKD* 1899 no. 49; 1906 no. 15. But the act had to state clearly that it was so intended, as otherwise the donee's right to patrimonial property would be unaffected: 1879 no. 178.

2. This can be inferred from *SRGKD* 1888 no. 91.

had the same freedom to dispose of acquired property and the Civil Cassation Department ruled that he was under the same limitations with respect to patrimonial property as when assigning an allotment or dowry; in both instances the potential and actual heirs enjoyed only the same limited ability to contest the act.[1] However, there also were important differences which arose primarily as a result of the difference in nature imputed to each institution. Allotment and dowry were considered an anticipated inheritance and hence were influenced and limited by the institution of inheritance. A gift had no connection with inheritance, but was an agreement freely concluded between the participating parties and therefore was more akin to contract. This basic difference led to a number of important differences in practical effects. For example, a gift could be given to anyone whereas an allotment or dowry could be given only to an admittedly imperfectly defined group of potential heirs, and a gift of acquired immovable property to a direct heir did not make the property patrimonial whereas receipt in allotment or dowry did because the property was considered to have been received as if in inheritance.[2] Both these would seem to make a gift more flexible and advantageous than an allotment or dowry. However, there were serious practical limitations with respect to a gift as well. Consideration of the special features of each institution obviously would influence which form of act an owner would choose to employ when arranging a settlement.

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1. For the last two points see SRGKD 1879 no. 178; 1899 no. 49; 1900 no. 8 (all described above, pp. 114-15 , 101-2 , and 105 respectively); 1890 no. 41.

2. See above, pp. 124-32.

The most serious apparent shortcoming of a gift was the donee's inability to renounce his right to the donor's inheritance on receipt of the gift. There was no mention of this power in the statutes defining gift, and although it was granted specifically by law in the case of allotment and dowry, the Civil Cassation Department found the justification for this to lie in the nature of these institutions as anticipated inheritance. The renunciation was merely an acknowledgement by the donee that his inheritance rights had been satisfied. As a gift had no connection with inheritance, this clearly could not apply in its case. Consequently the Civil Cassation Department consistently ruled that the power of renunciation could be used prior to the opening of an inheritance only in those two instances for which the law made specific provision.[1] Thus it would appear that in the case of gift there was no possibility of employing the strategy, or one of its variations, of giving one or more heirs money or other forms of acquired property in lieu of their share of patrimonial property, with them then renouncing their right to the future inheritance. However, in its decision in Sipiagin v. /Sipiagin/ in 1899, the court held that under the spirit of the law the donee's power of renunciation in the event of allotment was applicable as well to a gift that resembled an allotment.[2] In the court's opinion, the purpose of the law was to protect the donor's heirs from any possibly harmful arbitrary actions by the donor, so that as long as the heirs' rights were protected, the court saw no

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1. That is, allotment and dowry, SZ, X, pt. 1, arts. 998, 1002. SRGKD 1876 no. 280; 1891 no. 82; 1912 no. 46; 1913 no. 72.

2. SRGKD 1899 no. 49 (above, pp. 101-2); reaffirmed in 1912 no. 46. But there had to be an overt act resembling allotment, e.g. see 1879 no. 178.

impediment to extending the law to gifts. Thus the gift of all the donor's patrimonial property to one son, with a compensatory payment to the second son, who thereupon renounced his right to the inheritance, was held to be valid and binding on the second son. Hence it became possible when making a gift to descendant relatives to use safely the donee's power of renunciation in the same way that it could be used in allotment and dowry. The owner's flexibility in devolving his property to his descendant heirs was greatly increased as a result, although, as with allotment and dowry, he still was barred from using this with respect to collateral relatives.

Another major difference between the two institutions which, depending on the owner's objectives, could be either an advantage or a disadvantage concerned the relationship between the gift and the donor's future inheritance. As in allotment and dowry, and really arising from the general characteristics of the institution of patrimonial property, such property received as a gift was included by the courts when calculating the donee's share of such property due in inheritance. However, unlike with allotment and dowry, acquired property received as a gift was not treated in this way. As the owner had complete freedom to dispose of such property, and as a gift had no connection with inheritance, a gift of acquired property was considered as given for reasons unconnected with the donor's inheritance and therefore to have no effect on the donee's rights to this inheritance.[1] Thus, if an owner wanted to favour one or more of his prospective heirs, he could transfer acquired property to them

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1. SRGKD 1879 no. 178; see above, pp. 131-2 ; Pobedonostsev, Kurs, i. 92-5, 373-4.

by gift without affecting in any way their rights to his inheritance. On the other hand, he could not use a gift as flexibly as allotment or dowry to control the inheritance of his acquired property.

All these points emerge clearly from the court's decision in de Kampello v. Logvinova and Andruzskaia in 1879.[1] In that case the owner had given two of his daughters, the respondents, each 3127 desiatin of patrimonial land and one daughter, the plaintiff, 1082 desiatin of such land plus the proceeds from the sale of a further 1400 desiatin. On his death, after deduction of his widow's statutory share, the owner had left 1943 desiatin of patrimonial land, all of which the plaintiff claimed on the grounds that her sisters already had received somewhat more than the equal one-third share of the deceased's patrimonial property to which they were entitled by law. The respondents disputed this claim, and themselves each claimed one-third of the remaining land, arguing that the law only specifically restricted the gift of patrimonial property to the direct heirs, but, in contrast to allotment and dowry, neither limited the amount of such property that each heir could receive by gift nor directed that such property so received be included when calculating the donee's share of the donor's future inheritance.[2] Thus the owner could give such property to his heirs as a gift in any amount and such property so received remained in the absolute ownership of the donee and did not affect his rights to the donor's inheritance. Hedging their bets, the respondents also argued that in any event the plaintiff already had received by gift a share of the deceased's patrimonial property nearly equal to that received by each of them

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1. SRGKD 1879 no. 178 (above, pp. 114-15).

2. SZ, X, pt. 1, art. 967.

because the proceeds from the sale of the 1400 desiatin must be included in her share as well. All three courts found for the plaintiff, with the Civil Cassation Department ruling that the restrictions limiting the grant of patrimonial property by allotment and dowry applied as well to the gift of such property and that such property so received was considered part of the recipient's eventual share in the inheritance of the donor's patrimonial property, whereas acquired property received by gift was not so included and had no effect on the donee's right of inheritance, even if the acquired property consisted of the proceeds from the sale of patrimonial property.

One of the chief distinctions between a gift on the one hand and allotment and dowry on the other, and one of the important advantages of the former, was that a gift could be made subject to any conditions not contrary to law, the failure to fulfill which would cause reversion of the gift, whereas the conditions that could accompany an allotment or dowry were very limited.[1] Again the divergence arises from the difference in the nature of the institutions. As a form of inheritance, allotment or dowry could not be conditional, except within very narrow limits in order to provide the donor with some degree of security. In contrast, a gift was a gratuitous transfer of property which the donee had no right to expect, from which the donee could expect to benefit, and which, including

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1. Ibid., arts. 975-7. See also Pobedonostsev, Kurs, i. 92-5, 371-2, 375, ii. 432-3; Shershenevich, Uchebnik, pp. 487-94; Meier, op. cit., pp. 200-210; Poletaev, 'Darenie', p. 103; Tovstoles, 'Darenie', p. 26. For contrary views see A. Liubavskii, 'Uslovnoe darenie', in Iurid. Mon., iii. 398-400; Zamechaniia grazh. zak., Nos. 483, 491; 'Po povodu odnogo sudebnago resheniia', Sud. Gaz., 1892 no. 28 (12 July), pp. 2-3.

conditions, the donee had to agree to accept before it could be realised. In such a situation, the donor was free to make the gift under whatever conditions he thought desirable, and the prospective donee was free to accept or reject the gift under these conditions. Acceptance of the gift constituted agreement to the conditions, which in turn justified the right of the donor or his heirs to seek the return of the gift or its value in the event that the conditions were not fulfilled.[1] This probably also provided the justification for the donor's right to demand the return of the gift if the donee made an attempt on his life, threatened, slandered, or beat him, or otherwise showed him any 'clear disrespect',[2] which right most commentators agreed did not apply in the case of allotment and dowry.[3]

Obviously this power both increased the flexibility with which a gift could be used and provided the donor with a greater degree of personal security and assurance that his wishes would be observed. Not only could he retain the rights of possession and use for life, which appears to have been common in the case of immovable property, but he could impose any obligation, limitation with respect to time, or other condition with respect to the possession, use, and management of the property that generally was not contrary to law, even if the property concerned was patrimonial. This would include, for example, all the conditions acceptable in the case of a

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1. E.g., see SRGKD 1879 no. 178. The court stated that the donor or his heirs had the right, but were not obliged, to seek return of the gift. In other words, reversion was not automatic, but required a separate action by the donor or his heirs.

2. SZ, X, pt. 1, art. 974; SRGKD 1868 no. 17; 1872 no. 765; 1876 no. 33; 1879 no. 193; 1882 no. 12.

3. Exceptions were: Shershenevich, Uchebnik, p. 652; Pobedonostsev, Kurs, ii. 432-3, but see i. 89.

will.[1] If the donee or his heirs failed to fulfill or otherwise violated the conditions under which the gift had been given, the donor could demand its return.[2] Clearly, then, the owner could use this power to control the devolution of his property to the next generation fairly closely. In addition, while it is unlikely that the courts would have accepted a condition directly compelling the donee to renounce his right to the donor's inheritance, as this probably would have appeared to them to be a contract of inheritance, which they prohibited,[3] nevertheless the conditions of the gift could be constructed in such a way as to discourage his participation in the inheritance. This would be useful particularly if the owner's heirs presumptive were collateral relatives, as it would have enabled him to circumvent the proscription against the renunciation of rights in this situation. Thus in this respect, a gift was both more flexible and secure than an allotment or dowry.

An equally important advantage of a gift over an allotment or dowry resulting from the high court's practise was the donee's lack of responsibility for the donor's debts and obligations, provided that no action for recovery had been brought against the donor with respect to this property by the time the gift was made. According to the court, it made no difference whether the donee would have inherited the property in the absence of the

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1. E.g., see SRGKD 1871 no. 333; 1872 no. 765; 1873 no. 865; 1874 no. 179; 1876 nos. 134, 299; 1878 no. 221; 1879 no. 178; 1886 no. 14; 1899 no. 49; 1904 no. 7; Sud. Gaz., note 1, page 399.

2. E.g., see SRGKD 1874 no. 179; 1876 nos. 134, 299; 1879 no. 178; 1904 no. 7.

3. SRGKD 1869 no. 1322; 1872 no. 980; 1899 no. 66; 1904 no. 85; SZ, X, pt. 1, art. 710; Kurdinovskii, Dogovory, pp. 1-2, 303-19; Pobedonostsev, Kurs, ii. 434, 489 (and note), 541-3.

gift.[1] In the case of allotment and dowry, the position was unclear, and the recipient, being considered in receipt of an anticipated inheritance and consequently akin to an heir, may well have been so liable. Unfortunately, the Civil Cassation Department published no decision resolving the question. A distinguished jurist, future Senator and aid to the Commission composing the new civil code, Konstantin Zmirlov, writing well after the principal decisions limiting the donee's liability in the case of gift, stated in 1883 that the position was still unclear, although he thought that the recipient of an allotment or dowry ought to be liable for the donor's debts and obligations.[2] This suggests that at least at that time it was not generally thought that the court's decisions with respect to gift applied to allotment and dowry. This difference in legal effect certainly would follow from the nature of the court's distinction between gift and allotment, which was stated explicitly in one of the court's decisions rejecting the donee's liability in the case of gift.[3] The court held that gift was an independent means of acquiring rights to property that had nothing in common with inheritance. In the latter, the person receiving the

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1. For gift, see SRGKD 1871 nos. 333, 392; 1872 no. 765; 1876 no. 578 (which reiterates the general principle, but provides for a specific exception for a particular type of case in Chernigov and Poltava provs. as a result of local law); 1886 no. 14; Sud. Gaz., note 1, p. 400 above; Pobedonostsev, Kurs, i. 379-80, 382.

2. Zmirlov, 'O nedostat.', 1883 no. 9, pp. 60-62. Although it will be recalled that at this time, i.e. prior to 1888, the Cassation Department still considered allotment and dowry closer to gift than to inheritance, so that perhaps in its mind the problem did not arise, at least until after it had reversed its position on the question of the nature of allotment. See also Pobedonostsev, Kurs, ii. 439.

3. SRGKD 1872 no. 765.

inheritance represented the deceased's civil personality in all the latter's proprietary relations, whereas this did not occur in the case of a gift. Aside from any particular relationship formed between the donor and donee under any special conditions of the gift, the donee's property relations with the donor were identical to those between him and everyone else, irrespective of the personal relationship that existed between them. Thus the rule concerning the heir's liability for the deceased's debts and obligations did not apply to the beneficiary of a gift. However, by this reasoning, it would apply to the recipient of an allotment or dowry. If in fact such a distinction was drawn, then in this respect it would make a gift much more advantageous than not only allotment and dowry, but any other legal means of devolving property to one's heirs, as it would constitute the sole means in Russian law of passing one's property to these heirs without simultaneously transferring to them an extended liability for one's debts and obligations. Indeed, some commentator's complained that the law frequently was abused in this way to defraud the donor's creditors.[1]

Thus, in sum, in certain important respects gift would appear to have been a more flexible and advantageous means of devolving property to one's heirs during one's lifetime, while in other respects allotment and dowry might have appeared to be more appropriate. In any event, the option

1. Shershenevich, Uchebnik, pp. 491-4; Poletaev, 'Darenie', pp. 87-8, 99-101. However, donees remained liable for the donor's debts within the terms of the bankruptcy laws, i.e. if the donor became insolvent within ten years of making the gift and it could be shown that the gift was made while the donor actually was insolvent. SZ, XI, pt. 2 (1857) Ust. Torg., arts. 1932-7 (1893 edn., Ust. Sudoproiz. Torg., arts. 554-8, 624; 1903 edn., arts. 460-5, 531).

of choosing either existed only in the case of descendant relatives; only gifts were possible in the case of collateral relatives or non-relatives. However, as a result of the decisions of the Civil Cassation Department, again only when making a gift to a descendant relative, an owner could combine many of the principal advantages of both institutions while avoiding many of the disadvantages of an allotment. Thus, he could substitute a money payment or other acquired property for patrimonial property and have the donee renounce his right to the future inheritance; he could retain the rights of use and possession or impose any condition generally not contrary to law and demand the return of the gift if the conditions imposed were not fulfilled; he could demand the return of the gift if the donee showed him 'clear disrespect'; the donee would not be liable for his debts; acquired property would not become patrimonial, so that the donee too would be able to dispose of the property freely. There were significant advantages here for both donor and donee. Clearly, then, subject to the agreement of the recipients, the institutions of allotment and dowry and particularly of gift gave the owner extensive power to arrange a settlement of his property during his lifetime while ensuring the necessary security for himself.[1] Such power could be used to avoid any economically disruptive or otherwise harmful effects that operation of the inheritance law might have produced, to forestall any acrimonious

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1. This power was increased still further by two late decisions of the high court recognising as binding on the donor's heirs for the life of the donee a gift of an annuity for life. This enabled the donor to circumvent the rule limiting periodic payments under a will to the life of the heir obligated to make the payments. Pravo, 1912 no. 11, sud. otch., cols. 633-6; ibid., 1914 no. 5, cols. 571-3. See also ibid., cols. 370-71.

dispute within the family over division of the inheritance, and generally to reconcile conflicting practical and other needs and considerations.

Chapter 8

Conclusion

If prior to the reform of 1912 the statutory form of the law of property and inheritance had not altered much from the traditional law existing at the time of emancipation, significant changes clearly had been introduced by the reformed courts into its substantive content. In some cases these consisted of clarifying or creating legal norms where existing statutes were vague or silent, while in others existing norms were altered, expanded, or restricted. Thus, the courts consistently restricted the institution of patrimonial property, by narrowly defining what forms of property could become patrimonial and the instances in which this occurred and excluding altogether from this category important new forms of property, particularly stocks and shares and the assets held by corporations and partnerships. The owner's power to dispose of patrimonial property was expanded in various ways and his right to impose on the heirs of such property the payment of at least modest legacies was assured, while his relatives' right to redeem any such property alienated was severely curtailed. Indeed, the courts appeared to consider the law primarily as a means by which observance of the owner's moral obligations toward his immediate family could be enforced rather than a way to preserve particular property within a given clan. Thus often they treated formal violations by the owner of the restrictions on his power of disposition rather leniently. A majority of the legal profession concurred in this attitude and demanded replacement of the law by a system of inheritance incorporating obligatory shares based on the nuclear family. With respect to testamentary power and the inter-vivos transfer of property, the courts

clarified the law considerably and significantly expanded the owner's power and flexibility in devolving his property by allowing him to transfer widely differing combinations of rights under a wide variety of conditions, even to persons yet to be born, provided that his arrangements did not violate the rule against perpetuities formulated by the high court from an unclear statutory rule. Wills could be ambulatory, and the definition of a legacy and the rights of legatees received greater clarification and security. Only in defining the rules and order of intestate succession did the courts not alter the law to any great extent, despite the promptings of many, and perhaps a majority of, members of the legal profession. Yet despite the limited possibility for reform provided by the statutes in this area of the law, the courts did recognise the family principle, and they managed to improve somewhat the position of the deceased's parents and surviving spouse, although in other ways the latter's rights were constricted as well. For whatever reason, the courts also did less than might have been possible to improve the position of women.

Quite apart then from the benefits of swifter and impartial adjudication, the reformed courts, led by the Civil Cassation Department, also appear to have contributed significantly to the process of social and economic development in post-emancipation Russia by adapting substantive law to suit changing social and economic conditions. Fleeting references in the court's decisions to this as a consideration and the lively debate among jurists over these issues suggest that the process was to a large extent conscious. In consistently interpreting the law so as to restrict the institution of patrimonial property and its effects, particularly the right of redemption, and expand the individual owner's powers of disposition, the

high court judges appear to have been motivated by the same considerations that led their academic and other colleagues to criticise existing statutory law in these areas and demand similar and even more radical legislative reform. These considerations often conflicted. Thus the compromises between them worked out by the courts were uneasy, due partly to the nature of the problems involved and partly to the sometimes limited opportunity to reform the law by interpretation provided by the statutes' content. But they were the same considerations that underlay the proposals of the Commission compiling a new civil code and the compromises that underlay the law of 1912 that expanded testamentary power over patrimonial property and equalised women's inheritance rights in all but rural realty.[1]

To be sure, the courts were limited to varying degrees by the statutes, but these still left considerable scope for creative judicial interpretation. Particular statutes were interpreted narrowly or expansively, with reference to their historical and legislative origin or with such reference having been barred, or within the 'general meaning' of the laws or not, depending on considerations transcending the narrow text of the statute and its logical interpretation. In choosing by which method to interpret a particular statute the judges were strongly influenced by general principles of Civilian jurisprudence and such broader social and economic considerations as a belief in the need to protect viable economic enterprises and ensure adequate mobility of resources by providing the individual owner with broad power to deal with his property flexibly, but within a narrow frame of time, and a belief in the transition from clan to family and in the owner's moral obligations

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1. Grazh. Ulozh., bk. 4, intro. and explanas.; Wagner, 'Legisla. Reform', pp. 167-78.

toward family members.

Thus the tendency of the courts' decisions was to expand the owner's proprietary powers, often at the expense of the clan. Yet this expansion was tempered by consideration of the owner's obligations toward his immediate family. As a result, the limitations arising from the institution of patrimonial property were seen primarily as a device to ensure observance of these obligations, and generally were enforced strictly only to achieve this end. It is clear that the courts had little regard for the identity of patrimonial property with the clan, or for the clan in general, and hence were not particularly concerned to conserve such property within the clan. Although when necessary they, often seemingly less than enthusiastically, enforced the limitations on the owner's powers provided for by the law, their attitude seems to have been that clansmen had little else than a preferential right to the deceased's estate in the event of intestate succession. Thus where possible they reduced or eliminated the more distant clansmen's ability to interfere with the owner's own dispositions. Obviously, at least in their opinion, as in that of the majority of the legal profession, the broader clan and the institution of patrimonial property were no longer socially relevant.

If the courts, and particularly the Civil Cassation Department, did not go as far in reforming the law as they might have done, or as most of the legal profession apparently desired, this probably in part was because the judges had to deal with the resolution of real cases within the frame-

work of existing social, economic, and political relationships.[1] Thus they had to balance theoretical considerations with the valid expectations of the parties concerned based on existing law and the actual effects of their decisions in each case. The law professors and other commentators often were concerned with what the legal and social structure ought to be and how they could be made to conform with one another and with the perceived new level of Russian social development, whereas the judges had to cope with the often painful process of actually trying to get there. Understandably, as a result the latter often tended to be more cautious. Nevertheless, while little was done with respect to the rules of intestacy, except for the deceased's parents, the powers granted the owner to arrange a settlement of his property during his life or at death were considerably expanded and clarified, with the result that these arrangements became far more flexible and secure. The powers and flexibility granted the heirs in dividing an inheritance if the owner had failed or been unable to arrange a settlement were even greater.[2] Indeed, in dealing with property in general

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1. E.g., see Gessen, Sud. ref., ch. 8; Tabashnikov, 'Zhelat. otnosh.', pp. 105-6; 'Redakts. kom.' (Zh. Gr. i Ug. Pr. 1885 no. 8), pp. 141-4; Orshanskii, 'Nasled. prava', no. 3, pp. 14-16; 'Protokol' (Iurid. Vest. 1871 no. 4). On the other hand, some conservatives thought the courts frequently went too far, e.g. V. I. Gurko, Features and Figures of the Past. Government and Opinion in the Reign of Nicholas II (Stanford, 1939), pp. 179-80; the views of Dmitrii Tolstoi and Pobedonostsev cited in Vilenskii, Sud. ref., pp. 287-305. A perhaps more balanced assessment of the courts' achievements and limitations in this respect can be found in A. Filippov, 'O peresmotre Svoda nashikh grazhdanskikh zakonov', Iurid. Vest. 1882 nos. 3-4, pp. 575-80; the review by N. A. Raigorodskii in Pravo, 1911 no. 13, Bibliog., cols. 827-33; Nol'de, 'Pravotvor. deiatel'nost''.

2. A chapter on the courts' development of the heirs' power to divide an inheritance was completed and originally included in this thesis, but unfortunately has had to be omitted in order to conform with the prescribed requirements for length of D.Phil. theses.

the courts seem to have assimilated completely the concept of it as a fund the substantive content of which was open to change and in which inhered an infinitely partible bundle of rights subject to the individual owner's complete control, tempered only by considerations of state interest and moral obligation.

It is more difficult to determine to what extent the laws of patrimonial property and inheritance actually constituted an impediment to economic development in the post-emancipation period. Certainly the former presented no obstacle to the commercial transfer of property, although the existence of the relatives' right of redemption was a serious disincentive in this respect. However, the courts managed to reduce substantially the relatives' opportunity to exercise this right, and in 1899 a majority in the State Council, led by the Finance Minister Witte and stating chiefly economic reasons, rejected a conservative proposal to eliminate the statutory foundation on which the high court's position rested.[1] The courts also allowed development of a number of means by which the purchaser could safeguard his investment. Thus the potential effect of this institution was drastically reduced.

The effect of the laws in the case of inheritance appears to have been much more damaging, both economically, socially, and politically. Certainly landowners, economists, and political commentators as well as jurists in the late nineteenth century believed this to be the case.[2]

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1. Otchet Gos. Sov. 1898-1899, pp. 252-7, 266-7.

2. See Wagner, 'Legisla. Reform', pp. 157f.; Sel. Khoz. i Les., ccii. no. 8(1901), 294-310; Grazh. Ulozh., bk. 4, intro., pp. 81-92; ch. 4 above.

However, when examining the social institution of inheritance and its various implications, it is necessary to consider not simply the law of inheritance as narrowly defined, but all the means by which property could be devolved to the next generation, both under and independently of the owner's control. When seen from this perspective, it is clear that Russian law, particularly as developed by the post-reform courts, was very flexible and at least by the 1880s provided a wide variety of means of devolving property to succeeding generations under an extremely broad variety of conditions. If property was acquired, either by acquisition, or by transformation of patrimonial into acquired property by one of a number of available, albeit expensive, means, or by some form of incorporation, then the owner's power to control the path and terms of succession by will or during his life was unlimited, within the constraints imposed by the courts with respect to time and substitution. Even if property was patrimonial, as frequently seems to have been the case with respect to privately owned realty, the owner's powers still were fairly broad, particularly with respect to _inter-vivos_ transfer, although in this case the consent of some, if not all, of the owner's heirs presumptive was necessary. The courts tended to be very flexible in their interpretation of the law and consistently expanded the individual's power to devolve his property to his heirs on terms of his own devising, yet they still sought to provide some measure of protection to direct, particularly descendant, heirs. This latter task was the purpose ascribed by the courts to the institution of patrimonial property, and as long as adequate provision was made in some way for the heirs of patrimonial property, the courts were willing to extend the owner's powers even further. Thus the policy of the high court in particular

seems to have been one of allowing the owner the maximum possible latitude in arranging a settlement of his property, thereby enabling him to reconcile conflicting practical and moral needs and considerations with the needs and merits of each heir. If he failed to make such arrangements, the heirs had even greater flexibility in dealing with the inheritance.

Yet despite such freedom and flexibility in the law, the last decades of the nineteenth and first decade of the twentieth century witnessed an acrimonious public debate over the law and its effects in which it was generally assumed that the law led inevitably to the division in kind of an estate's physical assets, particularly in the case of agricultural land.[1] The question thus immediately arises whether this was the inevitable result of the law's operation, the blind adherence to customary practices, followed in ignorance of their effects and the alternatives presented by the law, or a conscious action done in full knowledge of its wider implications and the law's possibilities.

It should be clear from all that has gone before that division in kind of the physical assets of the deceased's estate was by no means the inevitable outcome of the law's operation. Indeed, on the contrary, the law provided many opportunities for both the owner and his heirs to avoid this, and the courts made strenuous and successful efforts to expand these. It is true that, where patrimonial property was concerned, an heir's power to prevent the owner from imposing a settlement was significant and his ability ultimately to obtain a proportionate share of the property in kind nearly absolute, provided the owner did not resort to some form of extra-legal action,

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1. See note 2, p. 411 above.

but this should not be exaggerated. The owner and remaining heirs had great power to minimise this and to offer any recalcitrant heir considerable inducements to accept an alternative arrangement, although this solution often could lead to equally damaging indebtedness. Indeed, the combination of the high price of land relative to its income at the end of the nineteenth century, the vagaries of the Russian weather, and the high cost of capital may well have been more of an impediment to this type of solution than the law or the recalcitrance of any heir.

That there was widespread ignorance of the law is abundantly clear from the law reports and the comments of the judiciary and other jurists, although this must have been diminishing steadily from the 1860s as a result of the extensive coverage of legal cases and discussion of legal issues in both the popular and the specialist press and the growth of the legal profession. However, if the law reports reveal ignorance, they even more frequently reveal a high degree of awareness of the law and sophistication in arranging settlements. In any case, the landowners who from the 1880s were complaining most bitterly about the law were doing so not out of ignorance of it, but because of their belief that the powers that it offered them still were inadequate.

This leads to the third explanation, that most landowners and heirs were aware of the law and many of its implications, but for whatever reasons chose to continue dividing property in kind in the traditional manner. This quite conceivably could be the case if neither the owner nor his heirs viewed the property as a functioning economic enterprise, but rather saw it as a convenient source of income, possibly to supplement that received from other pursuits such as state service. But it also is quite possible that here the

priorities of the owner, seeking to arrange a settlement of his property and ensure the continued socio-political position of his family, may well have diverged from the priorities of the heirs, seeking the assets of the estate for their own purposes. Hence would arise the complaints of the former about the law's restrictions and the consequent demand for even greater and more simplified power to impose a settlement on the heirs.

Whatever the explanation, it is clear that, given the great flexibility provided by the law, the owners and heirs must be considered at least as responsible for the law's effects during the last half of the nineteenth and the beginning of the twentieth century as the law itself.

Finally, there can be no doubt that the traditional statutory law of Imperial Russia increasingly was becoming unsuited to the social and economic realities of post-emancipation society. However, largely through the efforts of the new courts and judicial personnel, the deficiencies of statutory law, to the extent that they arose from the law and not from deeper social causes, represented much less of an obstacle to the further development of Russian society and its adjustment to changing conditions than might have been the case had the judicial structure and procedure not been altered and the attitude of the judiciary been different. The professional legal training that developed from the 1830s in Russia provided a group of jurists committed to their calling, aware of its social function and potential power, and capable of using their expertise to develop the law in particular directions; the judicial reforms provided them with the opportunity to exploit this expertise. All of which suggests that in the relationship of law to social and economic development, the system of adjudication and the attitude of the judiciary are at least as important as the law's substance.

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List of Abbreviations

I. Primary sources

A. Law codes, collections of laws, statutes, and judicial decisions, and records of legislative bodies

B. Journals, newspapers, and serial publications of archival material

C. Monographs, treatises, memoirs, articles, law reviews, and texts

D. Pre-1917 Russian monographs, treatises, and articles of a secondary nature

II. Secondary sources

A. General

B. Economic and legal theory

List of Abbreviations

Am. Slav. and E. Eur. Rev.: The American Slavic and East European Review.
Arkhiv ist. sved. Kalachovym: Arkhiv Istoricheskikh i Prakticheskikh Svedenii, Otnosiashchikhsia do Rossii, Izdavaemyi Nikolaem Kalachovym.
art(s).: article(s).

Birzh. Ved.: Birzhevyia Vedomosti.

Can. Slavic St.: Canadian Slavic Studies
ch.: chast'.
ch(s).: chapter(s).
ChOIDR: Chteniia v Imperatorskom Obshchestve Istorii Drevnostei Rossiiskikh pri Moskovskom Universitete.

Ekon. Zh.: Ekonomicheskii Zhurnal.

Grazh.: Grazhdanin.
(G/g)razh.: grazhdanskii(aia)(iia)(oe)
Grazh. Ulozh.: Grazhdanskoe Ulozhenie. Proekt Vysochaishe uchrezhdennoi Redaktsionnoi Kommisii po sostavleniiu Grazhdanskago Ulozheniia (followed by number of book).

Iurid. Vest.: Iuridicheskii Vestnik.

Lenin.: Leningrad.

Mos.: Moscow.
Mos. Ved.: Moskovskiia Vedomosti.

Novosti i Bir. Gaz.: Novosti i Birzhevaia Gazeta.
Nov. Vr.: Novoe Vremia.

Otchet Gos. Sov.: Otchet po (deloproizvodstvu) Gosudarstvennomu(ago) Sovetu(a) (followed by the year of the session being reported).
Otech. Zap.: Otechestvenniia Zapiski.

polozh.: Polozhenie.
pril.: Prilozhenie.
Pril. Gos. Duma: Prilozheniia k stenograficheskim otchetam gosudarstvennoi dumy (followed by year of publication, vol. no., and no. of report).
prim.: Primechanie.
(P/p)rod.: (P/p)rodolzhenie.
1,2,3PSZ: Polnoe Sobranie Zakonov Rossiiskoi Imperii, 1st, 2nd, or 3rd series (followed by vol. no., no. of pt. of vol., no. of law in series, and date of enactment).
pt.: part.
Ptgd.: Petrograd.

RGKD: Resheniia Grazhdanskago Kassatsionnago Departamenta Pravitel'stvuiushchago Senata (followed by year of report and case no.).
ROSPKD: Polnyi svod reshenii obshchago sobraniia pervago i kassatsionnykh departamentov i kassatsionnykh departamentov Pravitel'stvuiushchago Senata (followed by year of report and case no.), ed. Rotenberg.
Rus. Arkh.: Russkii Arkhiv.
Rus. Mysl': Russkaia Mysl'.
Rus. Rev.: Russian Review.
Rus. Ved.: Russkie Vedomosti.
Rus. Vest.: Russkii Vestnik.

Sel. Khoz. i Les.: Sel'skoe Khoziaistvo i Lesovodstvo. Zhurnal Ministerstva Zemledeliia i Gosudarstvennykh Imushchestv.
SIRIO: Sbornik Imperatorskago Russkago Istorichesskago Obshchestva.
Slav. and E. Eur. Rev.: The Slavonic and East European Review.
Slav. Rev.: The Slavic Review
Sovrem. Let.: Sovremennaia Letopis'.
Spb.: St. Petersburg.
Spb. Ved.: Sanktpeterburgskie Vedomosti.
SRGKD: Polnyi Svod Reshenii Grazhdanskago Kassatsionnago Departamenta Pravitel'stvuiushchago Senata, 1866-1910 (followed by year of report and case no.).
SRPS: Sbornik reshenii Pravitel'stvuiushchago Senata (followed by vol. no. and case no.).
Sud. Gaz.: Sudebnaia Gazeta.
Sud. Ust. 50 let: Sudebnye Ustavy 20 noiabria 1864 g. za piat'desiat let.
Sud. Vest.: Sudebnyi Vestnik.
SUz.: Sobranie Uzakonenii i Rasporiazhenii Pravitel'stva, izdavaemoe pri Pravitel'stvuiushchem Senate (followed by year and no. of issue and no. in series).
SZ: Svod Zakonov Rossiiskoi Imperii (reference is to the 1857 and all subsequent edns., unless the articles cited differed between edns., in which case the year of the edn. and/or Prod. is given in parentheses after the vol. and pt. nos.; followed by vol. and pt. no., name of statute if relevant, and art. nos.).

Trudy Vol. Ekon. Ob.: Trudy Imperatorskago Vol'nago Ekonomicheskago Obshchestva.

Uchr. Sud. Ustan.: Uchrezhdenie Sudebnykh Ustanovlenii.
ust.: Ustav(y).
Ust. Grazh. Sud.: Ustav Grazhdanskago Sudoproizvodstva.
Ust. Ugol. Sud.: Ustav Ugolovnago Sudoproizvodstva.

Vest. Ev.: Vestnik Evropy.
Vest. Pr.: Vestnik Prava.

zak.: zakon(y).
Zh. Gr. i Ug. Pr.: Zhurnal Grazhdanskago i Ugolovnago Prava.
Zh. Iur. Obshch. pri Spb. Univ.: Zhurnal Iuridicheskago Obshchestva pri Imp. S.-Peterburgskom Universitete.
Zh. Min. Ius.: Zhurnal Ministerstva Iustitsii.
Zh. Spb. Iurid. Ob.: Zhurnal Sanktpeterburgskago Iuridicheskago Obshchestva.

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The Development of the Law of Inheritance and Patrimonial Property in Post-Emancipation Russia and its Social, Economic, and Political Implications

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The thesis examines the impact of the courts created by the 1864 judicial reforms on the law of inheritance and patrimonial property existing at the time of the abolition of serfdom, and attempts to explain the reasons underlying the courts' development of this law. A description of the traditional law and its real and potential economic, political, and social effects is followed by an analysis of the manner in which the courts consistently sought to restrict the institution of patrimonial property, particularly the owner's relatives' right to redeem such property, in order to minimise its presumed pernicious economic and social effects and expand the owner's proprietary powers. The courts were more confined by the existing law of intestate succession and thus had far less impact here, but they greatly clarified the law concerning wills, gift, allotment, and dowry and substantially expanded the owner's power and flexibility in arranging a settlement of his property by enabling him to transfer numerous combinations of rights and powers under a wide variety of conditions. In general the courts sought to maximise the individual's proprietary powers and yet ensure that his moral obligations toward his family were observed and certain state economic and social interests safeguarded.

Most members of the legal profession in general shared the courts' attitudes, believing patrimonial property to be anachronistic, economically harmful, and extremely unjust, and thus advocated abolition of the institution and its replacement by a system of obligatory shares.

It is concluded that the courts had considerable impact on the law and became an important mechanism by which increasingly inadequate traditional law was adapted to suit changing social and economic conditions. Also, the Russian law of inheritance was far more flexible than previously has been believed.

THESIS ABSTRACT

THE DEVELOPMENT OF THE LAW OF INHERITANCE AND PATRIMONIAL PROPERTY IN POST-EMANCIPATION RUSSIA AND ITS SOCIAL, ECONOMIC, AND POLITICAL IMPLICATIONS

When discussing the Russian judicial reform of 1864, nearly all historians refer to it as one of the most, if not the most, successful and far-reaching of Alexander II's 'Great Reforms'. It is claimed that the fundamental transformation of the judicial system that took place constituted a major stride toward the achievement of the 'rule of law', however imperfect, in Russian society, significantly improved the political rights and security of the citizenry, and contributed substantially to Russia's subsequent economic development. However, the few specialised studies of the post-reform judicial system and law available are concerned almost entirely with the mechanics of the reform and subsequent efforts to amend it, and with the criminal law, particularly in its political uses. There have been no studies of the impact of the new judicial system on civil law, which, it would seem, in many ways is of far greater concern to the overwhelming majority of the population, as it is concerned directly with the daily economic and social activities of all members of society, and thus has an immediate and substantial influence on the affairs which every citizen normally considers most vital. Moreover, aside from the benefits of swifter adjudication, it would be largely here that the reform's contribution to economic development would be made, particularly given the situation prevailing in Russia after the emancipation of the serfs: a traditional agrarian society partly being drawn and partly pushed along the path of development by commercial means. Whatever the attitudes of gentry landowners, merchants, and others toward economic innovation and production

for the market prior to the emancipation, it is certain that afterwards they would have to accommodate themselves to market forces in order to survive socially and politically. Yet the civil laws in force in the 1860s were designed primarily to maintain a sedantary serf-owning society, not to facilitate the movement of resources and provide the security of transactions that a commercialised society requires. So, clearly, the new courts could have contributed significantly to the development of the economy in the last half-century of tsarism, as often is claimed by historians, by adapting the laws of the old order to the conditions of the new, but it would seem that heretofore these claims have rested largely on belief and not detailed study of what actually occurred.

As property and inheritance law generally provide one of the most important legal supports of traditional agrarian societies, and yet also are fundamental institutions in a commercialised society, with their functions in each instance in some ways being opposite, it seemed that a useful way to contribute to our understanding of the reformed courts' impact on Russian society and their contribution to economic development would be to investigate whether and to what extent the courts were able to adapt the traditional law of property and inheritance to the requirements of a more lively market and eliminate the obstacles that this law presented to increased commercial activity and viability. Historians of Russia always have maintained that the Russian law of inheritance, characterised by obligatory equal division of the inheritance among the sons or other heirs and by the lack of entail and testamentary power, had disastrous economic and political effects, as it led to excessively fragmented holdings which were scattered and inter-mingled with the holdings of other owners and to the

disruption of merchants' enterprises with each generation. Obviously, the effect and importance of these disabilities would be increased in the conditions arising after the emancipation, and therefore the need to deal with them would become all the more urgent. Thus the questions arose, to what extent did property and inheritance law actually present an obstacle to economic development, and to what extent were the new courts able to eliminate, or at least mitigate, these obstacles.

The present thesis is concerned primarily with these questions. Thus, following a description of the salient features of the law of property and inheritance existing at the time of the abolition of serfdom and an assessment of some of the real and potential social, political, and economic implications of this law, a detailed analysis is made of the development by the Civil Cassation Department of the Governing Senate of the institutions of patrimonial and acquired property and settled land, the rules of intestate succession, and the law concerning the transfer of property by will, gift, allotment, and dowry. A similar analysis of the heirs' right and power to divide an inheritance originally was included as well, but unfortunately had to be omitted in order to enable the thesis to conform to the rules governing the length of D.Phil. theses. In each case, the discussion and criticisms by the wider legal community of the particular area of law under consideration is examined as well, in order both to illuminate further the law and the courts' development of it and to help explain the reasons underlying this development. Thus, an attempt is made not only to describe how the courts developed the law, but also to explain why they acted as they did.

In determining the new courts' development of the law, it was thought possible to concentrate on the reported decisions of the Civil Cassation Department, a source hitherto largely ignored by historians of Russia, because within the reformed judicial system the two Senate cassation departments were the only courts with national jurisdiction over civil and, at least non-political, criminal actions respectively and were charged specifically with interpreting the law and explaining it to the lower courts and thereby ensuring its uniform application by all courts of the Empire. Thus the various departments and combined sessions of departments of the Senate were the only courts in the Empire to have their decisions regularly and systematically reported, and within a short time after introduction of the reforms most unofficial editions of the Russian digest of civil laws included references to the relevant decisions of the high courts under each article. Moreover, it would appear that the lower courts generally adhered to the precedents set by the various Senate departments. In the event that they did not, appeal to the relevant department was possible, and these departments generally followed their own precedents. Thus, within the new judicial system, the primary burden of interpreting and developing civil law fell on the Civil Cassation Department of the Senate.

Although the social, economic, and political foundations and implications of the traditional law of property and inheritance and of the courts development of this law emerge clearly from the courts' decisions and the debates within the legal profession, originally it was intended to place these questions in a broader context by concluding the thesis with an examination of the wider public debate over these issues that occurred in Russia from the 1880s onwards. Unfortunately, again due to considerations

of length, this discussion largely has had to be omitted. While reference to this debate is made at various points in the text, a fuller treatment of it may be found in the preliminary version of the omitted chapter that formed the present author's contribution to the collection of essays on Russian and Soviet law edited by W. E. Butler listed in the bibliography, to which the interested reader is referred.

Taken together, these three sources, the judicial development of the law and the debate over it within the legal profession and the public at large, show clearly that by the end of the nineteenth century for a number of diverse and often conflicting reasons there was considerable dissatisfaction with the law across a broad spectrum of Russian society, that the existing law no longer corresponded to the circumstances, needs, and attitudes of many members of this society, but that because of the diversity of views and priorities there was little consensus as to what direction reform of the law ought to take.

Under these conditions, and in the absence of any comprehensive legislative reform of the law, the courts became the chief mechanism by which the existing law was adapted to reflect new social conditions and attitudes. The courts used this opportunity to restrict the institution of patrimonial property and the limitations on the owner's powers of disposition embodied in it, to limit very severely the owner's relatives' right to redeem any such property alienated by him, and to expand the owner's control over his property and his ability to settle it by will, gift, allotment, or dowry by enabling him to transfer numerous combinations of rights under a wide variety of conditions. Yet while the courts in general sought to maximise the individual's proprietary powers, they also sought to ensure

that the owner's moral obligations toward his family were observed and certain state economic and social interests safeguarded. In addition, the courts' development of the law was constrained by existing statutes, especially evident with respect to the rules of intestate succession, and by the valid expectations of the litigants in any given case. Thus while the courts were reformist, they generally were not as radical as and did not move as far in reforming the law as desired by most members of the legal profession and many members of educated society. Within these circles the existing law was considered anachronistic, unjust, economically harmful, and an unjustifiable legal remnant and continuing support of the pre-emancipation social and political order and thus an obstacle to further social progress. In their view, the law needed to be reformed completely and the institution of patrimonial property abolished altogether. On the other hand, the courts did move further than many conservative elements in society were willing to accept, which only served to reinforce the distrust of the new courts felt by this segment of society.

The debate over the law revolved around four basic issues. First was a dispute over the nature and basis of contemporary Russian society. On the one hand, there was continued support for the traditional social foundation of the law, _i.e._ the extended clan, with its consequent features of male primacy, discrimination against women, and limitations on the individual owner with respect to family property. On the other hand, critics of the law argued that the clan had been replaced as the basis of social organisation by the nuclear family and the individual, and thus the law should be reformulated on this basis.

Second was a dispute over the proper basis and function of law in

society. Should the law be based primarily on moral considerations and principles of natural justice, which take precedence over any sort of practical consideration; or should it be based primarily on practical considerations and prevailing social conditions and needs, such as economic needs and the political interests of the state, which take precedence over questions of morality; or should it rest firmly on the basis of tradition, remaining unchanged in its fundamentals, thereby ensuring continued social harmony and stability.

Related to these was a dispute over the acceptable extent of the individual's proprietary power. In conformity with the alleged rise of the individual as the focus of property rights and social action and the confirmation of the absolute right of ownership, or merely for practical economic reasons, it was argued by some that the individual's proprietary power should be unlimited. Others argued that moral obligations should provide the proper boundaries for the individual's proprietary power, so that many of those who advocated legal reform based on the rise of the individual simultaneously could argue that it was necessary to limit the individual's power, quite often in ways not dissimilar to the existing law, but in favour of the family rather than the clan and for more equitable objectives.

Fourth was a dispute over the impact of existing law on the social and political structure of the state and the desirability of its reform either to support and preserve existing political relations or to facilitate and even introduce further change in these relations.

The courts were influenced by all these as well as by purely jurisprudential considerations in their development of the law. And their

influence on the law indeed was substantial, such that by the late nineteenth century many of the obstacles presented by the law at mid-century had been removed or greatly reduced and the Russian law of property and inheritance had become far more flexible than had been the case prior to the judicial reform and than has been previously assumed by historians.

I would like to take this opportunity to express my gratitude to a number of people who have been of inestimable assistance in the preparation of this thesis. To the President and Fellows of Wolfson and St. John's Colleges, Oxford, the Dean and Students of Christ Church, Oxford, the librarians and staffs of the Slavic and law divisions of the Bodleian Library, Oxford, the Helsinki University Library, the British Library, London, and the Bibliotheque Nationale, Paris, Mr. John Simmons, Dr. Ross McKibbin, Prof. William Butler, and especially Prof. Bernard Rudden and Mr. Angus Walker, my deepest thanks. My deepest debt of gratitude is to my wife, Linda, who not only helped with the preparation of this thesis, but who endured so much for so long so patiently.