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## The Alien

Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIXth Century

## Abstract

In early Russian law there is a period of limitation of actions. Acquisitive prescription appeared for the first time in the Statute Book of the Russian Empire in 1832. This institution was transferred to Russian law from the *Code Napoléon*, but without its prerequisites, namely Legal cause and good faith. The fact of a direct borrowing from the *Code Napoléon* contradicts the common view of the Russian Statute Book as a systematized version of older Russian legislation. Acquisitive prescription in the Statute Book is a typical example of a legal transplant. It became a very widespread means of acquisition of property belonging to someone else. But the legal consciousness of Russian peasants resisted the application of acquisitive prescription. In consequence it remained problematic in the Russian legal order up to the Revolution of 1917.



## The Alien

### Acquisitive Prescription in the Judicial Practice of Imperial Russia in the XIXth Century

In Ancient Russian Law there is a period of limitation of actions. But the acquisitive prescription (that is the prescription by possession) appeared for the first time in the Statute Book of the Russian Empire in 1832 (*Svod Zakonov* in Russian). Article 316, vol. X of the Statute Book says: »The tranquil, incontestable and uninterrupted possession with an air of ownership transforms itself into the right of ownership, after its continuation in the course of the prescription period established by law« (this article is also number 451 in the edition of the *Svod* of 1842, and number 533 in the following editions of 1857 and 1887). The duration of the acquisitive prescription was determined to be ten years. (art. 479 – in edition of 1842, = art. 565 in ed. of 1887). By the apt remark of the pre-revolutionary Russian civilian Zmirlov, the acquisitive prescription has been transferred »from alien soil, and in disfigured form, because the compilers of the Statute Book, who borrowed it from the *Code Napoléon*, forgot to take from there the legal cause and the good faith as well«. <sup>1</sup> Professor Engelmann, author of the most thorough monograph about prescription in Russian law (first published in German in 1867, <sup>2</sup> in Russian in 1868), also noticed: »With the role which the *Code Napoléon* played in general during the formation of our Corpus of the Civil Laws, it's hardly possible to have doubts that the source of this article is article 2229 of the *Code Civil*, almost literally similar to it.« <sup>3</sup> This point of view was a *communis opinio doctorum*, and Russian civilians unanimously pointed out that art. 533 of the Russian Statute Book was a mere

translation into Russian of the art. 2229 *Code Civil*.<sup>4</sup> A textual analysis of art. 533 of the Russian Statute Book and of the article 2229 *Code Civil* made by Engelmann, completely corroborates this view. Article 2229 *Code Civil* reads: »Pour pouvoir prescrire il faut une possession *continue* et non interrompue, paisible, *publique*, *non équivoque* et à titre de propriétaire.«

Comparing this article with the Russian text reveals that in the translation process the words *continue*, *publique* and *non équivoque* have been omitted. The Russian legislator has abandoned publicity and unequivocation as necessary requisites of the possession *ad usucapionem*, and also substituted the continuity of possession by its incontestability. From Engelmann's point of view this transformation was connected to the legislator's intention to adapt acquisitive prescription, borrowed from the *Code Civil*, to the limitation of action, already known in Russian law.<sup>5</sup> And also the determination of the time-limit of ten years had been borrowed by Russian law from a Lithuanian Statute for the limitation of actions,<sup>6</sup> although it concurred with another time limit of the acquisitive prescription for the possessor in good faith in art. 2265 *Code Napoléon*.

The fact that there was direct borrowing from the *Code Napoléon* in case of the institution of acquisitive prescription, which was entirely new for Russian law, is in a certain contradiction to the Russian Statute Book as a collection of the systematized Russian legislation of the previous times. Speranskij, Chairman of the commission for the preparation of the Statute

- 1 KONSTANTIN ZMIRLOV, About defects of our civil laws of the part I., Vol. X. <of the Statute Book>. About the essence and the area of different property-rights, in: The Journal of Civil and Criminal law (1883), Book 6, 57.
- 2 IVAN ENGELMANN, Die Verjährung nach russischem Privatrecht, Dorpat 1867.
- 3 ENGELMANN, About the prescription in Russian civil law.

A historical-dogmatic study (Repr. of 3rd ed. 1901, corr. and exp.), Moscow 2003, 253.

- 4 GABRIEL SHERSHENEVITCH, Manual of Russian civil law (ed. of 1907), Moscow 1995, 187.

5 ENGELMANN (Fn. 3) 254.

- 6 For details see: SIMON RUBINSTEIN, Ten-year limitation by Lithuanian Statute and by the general laws of the Empire, Vilno 1896.

Book, denied the presence of such borrowings in the Statute Book and insisted that there was no influence of Roman or of any other foreign law in it.<sup>7</sup> In order to understand to which degree these declarations are in any conformity with the real situation, one has to trace briefly the history of the creation of the Statute Book. When in 1808 Speranskij joined the legislative commission, he was at the peak of his glory and might. At that time he was »great and powerful Speranskij, Secretary of State of the Empire, first and probably even sole minister«, as he was characterized by the sardine ambassador in Russia *Joseph de Maistre*.<sup>8</sup> He had just returned from *Erfurt*, from a meeting between the Russian emperor Alexander I. and Napoleon. The Russian emperor and in particular his Secretary of State were fully charmed by Napoleon and by French customs. When Alexander I. asked Speranskij: »How do you like it abroad?« – Speranskij answered: »Our people are better, but here the institutions are better.« »It's also my impression«, said the Tsar. As the Russian *Filippov* noticed, we don't know for fact if there really has been this dialogue or not, but there was this radical reorganization of the governmental institutions, inspired mainly by the fascination of everything French, one could notice in all the activities of Speranskij during the reign of Alexander.<sup>9</sup> By testimony of the count Korf, who was Speranskij's biographer, he joined the commission, burdened with many other important posts and missions, being familiar almost only with the *Code Napoléon*, and almost without knowledge of Russian legislation, which he regarded as barbarian and unworthy of study.<sup>10</sup>

Speranskij abandoned the study of contemporary Russian law and borrowed the system and material for his draft directly from the *Code Napoléon*. With this attitude to codification the

work was done rapidly. The first part of the draft of the Civil Code – on persons – was already finished in October 1809. The second part – on property – was submitted for consideration of the State Council in 1810, and by the end of the same year it was already considered by the Council. The third part – on contracts – also prepared by Speranskij, was considered already in December 1813, after his exile.

The State Council in general approved the draft and adopted it with few exceptions that mainly concerned questions of family law. Already at that time there were voices in the Council asking Speranskij to emphasize those Russian laws that created the basis of the draft of the Code. Iljinski, famous specialist of Russian Law was chosen by Speranskij to furnish references for every article of the draft. Iljinskij (who was chief of the archives of the legislative commission) accomplished that duty with great »difficulties and often with extremely strained interpretation«. <sup>11</sup> But this machination couldn't justify the content of many articles of the draft and so some members of the State Council still remained convinced that the new Code had been taken from the *Code Napoléon*. The famous historian Karamzin even openly declared in his »Report about ancient and new Russia«, which he had submitted to the emperor, that the draft was a »mere translation of the *Code Napoléon*«. <sup>12</sup>

But the State Council was still reluctant to attack openly the emperor's favourite. It was only after Napoleon having assaulted Russia and after Speranskij being exiled because of his feebleness to France, that the members of the State Council bluntly fell on the Code, subjected it to criticism, and handed it over to the archives, pretending the necessity to compare it with actual law.

7 MICHAÏL SPERANSKIÏ, Commentary on the historical information about the Statute Book; in: SPERANSKIÏ, Handbook for the study of laws, Saint Petersburg 2002, 146–147, 151; Plan of the state reform of the count M. M. Speranskij, Moscow 1905, 339.

8 JOSEPH DE MAISTRE, Letter to Cavalier de Rossi; in: JOSEPH DE MAISTRE, Petersburg's Letters.

1803–1817, Saint Petersburg 1995, 202.

9 ALEXANDER FILIPPOV, Manual of the History of Russian law, Part 1., 4 th. ed., corr. and exp., Juriev 1912, 562.

10 MODEST KORF, The life of the count Speranskij, Saint Petersburg 1861.

11 FILIPPOV (Fn. 9) 565.

12 NIKOLAJ KARAMZIN, Report about ancient and new Russia, in:

Retrospective and comparative politology 1 (1991) 232.

It is interesting to notice, that also Speranskij alleged that the draft had no connection with the *Code Napoléon*. In a letter to the emperor sent from the city of Perm, where he was exiled, he wrote: »Different persons tried to prove that the Code submitted by me was a translation from French or a close imitation. It is a falsehood or an ignorance, which is so easy to dismantle, because both are published.«<sup>13</sup> It is evident that Speranskij and his allies strove to present the draft as ostensibly untouched by the influence of the foreign law as far as possible, due to their political motives. On the other hand – and as Filippov correctly mentions – knowledge of the Russian, as of the foreign law in Russia of that time was spread so little, that it was not difficult for the opponents to mystify on that issue.<sup>14</sup> But incidentally Speranskij's draft wasn't the *only* translation of the *Code Napoléon*.

From 1812 on, after Speranskij's exile, the legislative commission decided once again to study previous Russian legislation instead of borrowing from the foreign codes. From 1817 up to 1821 some collections of old laws were published. This was accomplished under the reign of Alexander I. His successor Nicholas I. was very interested in the question of codification from the moment of his ascension to the throne in 1825. He also charged Speranskij with the task, seeing that he was the only person in Russia, capable of successful completion of the work. But Speranskij was supervised: Balughianskij, ex-teacher of the emperor, was appointed head of the II Department of the Imperial Chancellery, which was now in charge of the codification. The emperor also demanded that the Russian *Svod Zakonov*, the Statute Book, should be collected without any alteration of old laws.

Speranskij proposed to create a new Code on the base of the Statute Book. He insisted on

the necessity of a thorough revision of the actual laws on the basis of well-known general principles of law and of the historical tradition of Russian law, completed with corrections and additions proper to the new requirements of contemporary society. Emperor Nicholas I., who acknowledged the absolute necessity of the creation of the Complete Collection of Laws and of the Statute Book of Russian law, rejected the idea of Speranskij to codify it. Nicholas feared serious upheaval of the existing legal order resulting from such a project.

But nevertheless Speranskij partly realized his plan clandestinely within the framework of the Statute Book, and gave it, to a certain extent, the character of a Code. The fact is corroborated by the study of Baratz,<sup>15</sup> who revealed many textual concurrences of the articles of the Statute Book with the articles of the *Code Napoléon*, and with some places in the treatises of Pothier and of some other French jurists. The fact that French jurisprudence influenced Speranskij cannot only be explained by his liberal political views and his admiration of all things French, but also by the fact, that his German was feeble and that he began to study it only since being in exile.<sup>16</sup> All these are reasons why he was familiar only with French juridical treatises. If we take into consideration that the Statute Book was created in extremely short time, we have to suppose that Speranskij, taking advantage of connivance of his incompetent environment including Nicholas I., who by his own confession from the days of his youth felt a deep aversion for jurisprudence,<sup>17</sup> simply reused the previous elaborations of the first commission for the creation of the Statute Book. And he must have declared them to be results of historical research in Russian legislation. At the same time the references to historical sources in the articles of

13 Plan of the state reform of the count M. M. Speranskij, 338.

14 FILIPPOV (Fn. 9) 567.

15 HERMAN BARATZ, About the foreign origin of the majority of the Russian civil laws, in: The Journal of Civil and Criminal Law (1884) Book 8: 1–34; Book 10: 109–146; (1885) Book 5: 81–112; Book 6: 67–81.

16 Ibidem.

17 <B. Sh.> Our historical journals // Moscow Registers, 1903, N. 200, 3.

the Statute Book had only formal character. In many cases these sources had nothing in common with the article commented. As Engelmann excellently demonstrated all references to ancient Russian legislation, adduced as proofs of historical grounds of the acquisitive prescription in the Statute Book, were false – the matter of the references wasn't acquisitive prescription, but the limitation of actions.<sup>18</sup> At the same time Speranskij conceded in one of his notes that he intended to introduce acquisitive prescription (*usucapio*) in the Statute Book, despite the fact that the tradition of Russian law didn't give grounds for that.<sup>19</sup>

Also striking is Speranskij's lack of precision in his historical research, his carelessness for example in establishing the »Complete Collection of Laws«. As Filippov wrote, the »Complete Collection of Laws« was rather an »Incomplete« Collection of Laws. As for the period from 1725 to 1740 it only mentions 1296 legislative acts. In fact, in the archives of the Senate alone the register notes 6411 acts: 5115 legislative acts have not been included in the »Complete Collection of Laws«. For the period from 1740 to 1762 538 legislative acts have been registered in the Collection of Laws, leaving out a number of 3742.<sup>20</sup>

As has been shown, the acquisitive prescription in the *Svod Zakonov* of the Russian Empire was a typical example of a legal transplant. Even from the moment of its appearance in the civil law of Russia its defects became obvious, caused by the fact that among the necessary requisites of the possession *ad usucapionem* the *bona fides* and *justus titulus* were not indicated. Already in 1832, according to the opinion of the State Council, confirmed by the emperor, the Senate was called upon discussion materials of the judicial practice of application of the prescription.

At the same time the Senate was required to display in what cases it had been applied and from what moment one had to begin to mark off its starting-point. The conclusion of the Senate was discussed at the Ministry of Justice and at the II Department of the Emperors' Chancellery. Afterwards the materials were handed over to the State Council. The opinion of the State Council was confirmed by the emperor April 23. 1845 and became law. In this law the State Council acknowledged an imperfection of Russian laws of prescription, but decided to postpone the reform of this institution to the moment of a general revision of the civil laws. It was decided to make selective amendments of the laws of prescription in the form of additions to actual law. In the foreword to the law of April 23. 1845 a principle defect of the acquisitive prescription in the Russian law was mentioned: the lack of *bona fides* and *justus titulus*, and the too brief time period for acquisitive prescription. At the same time references to Roman law and to French, Prussian and Austrian codes were presented as reasons for the reform. However, it was decided that for the present it was too early to modify these norms.<sup>21</sup>

The tolerance is obviously due to the fact that in the first decades after the appearance of acquisitive prescription the benefits of this institution seemed more important than the injuries it caused. First, courts usually didn't consider the character of possession at all – because they regarded the limitation of actions and the acquisitive prescription as an indivisible unity. Second, prescription was usually applied in cases, when possession was acquired on the basis of an informal transaction. Peasants in tsarist Russia usually didn't want to use a public notary and pay duties for an official registration of their transactions. That's why they ceded property on

18 ENGELMANN (Fn. 3) 132–193.

19 SPERANSKIJ, About the civil laws, in: Archives of the historical and practical information on Russia of N. V., Kalatshov 1875, Book II, 22.

20 FILIPPOV (Fn. 9) 573.

21 ENGELMANN (Fn. 3) 195.

the basis of different informal acts.<sup>22</sup> If later one needed to legitimate an acquired property, the acquirer insisted on being acknowledged as owner on the base of the acquisitive prescription.

Judge Borovikovskij described the situation: »Although the law doesn't require good faith for the possession *ad usucapionem*, nevertheless, as I can judge from the general impression of my personal practice, in most cases the possession *ad usucapionem* produces an impression of that in good faith, if not in the strictly juridical sense of the word, then in the last resort in that of everyday understanding. Usually a transaction of acquisition of property into ownership by a possessor, which isn't clothed into the legal form, serves as the cause of possession/see: appendices I, II, VII, XV/, or at any rate a reference to such cause of acquisition/see: appendices III, XI/. A purchase or a gift of immovable property, which aren't clothed in the required forms established by law, don't give the right of ownership, and if the possession *ad usucapionem* required »good faith«/art. 529/, the court should decide if the possessor understood the nullity of his act of acquisition, and if he knew that despite such act the immovables remain by law in the ownership of the previous proprietor. However, in the dispute only about the fact, if the possession had an »air« of ownership, the presence of such acts quite often solves the problem. If the possession is based on an agreement of the proprietor with the possessor about cession of the right of ownership by the former to the latter, then the possession seems to be with an air of ownership: Certainly, it was such the realization of the possessor, and the proprietor knew that.

The form of transaction loses importance in such cases: A transaction serves only to characterize possession, and after that already the force of the prescription transforms the possession

into the right. If the form of transaction is insignificant at all – it is insignificant particularly as regards the kind of juridical qualification the parties attributed to their transaction. So, for example, the parties called their transaction »preliminary contract«, and even arranged to make sale and purchase; but if by the meaning of the transaction the same sale was decided definitively, and it was arranged by the parties that the right of ownership transfers itself just now and irrevocably, – then the possession existed on the basis of such transaction can be recognized as possession with an air of ownership/ appendix XV/.«<sup>23</sup>

In the appendices of his »Report of a judge«, Borovikovskij published a series of cases illustrating his affirmations. The fact that in the first decades after the appearance of the acquisitive prescription in Russian law it was used just in cases of such sort is supported by other sources as well.<sup>24</sup> From the very beginning acquisitive prescription has played the same role in Russian law as it had already played in Roman law: *usucapio* in cases of transfer of *res Mancipi* by means of the plain *traditio*.

Borovikovskij also acknowledged that there were also cases of another type: When a proprietor of a small plot in the country, who had left the place for earnings in another region, and had commissioned the plot to the cares of a relative or of a neighbour, found a possessor *ad usucapionem* after his return, with whom he had to litigate up to the end of his life.<sup>25</sup> The defects of the acquisitive prescription, deprived of such requisites as *bona fides* and *justus titulus*, began to tell when the mobility of the population increased because of the beginning industrialization and the development of capitalism. Under such circumstances arbitrary seizures and permanent holding of the other people's immov-

22 See, for example: IVAN SKITSKIJ, Apropos of the law of the 26 May 1881 in Minor Russia, in: The Journal of the Civil and Criminal law (1883) Book 7, September, 33–63.

23 ALEXANDER BOROVIKOVSKIJ, Report of a judge, Vol. 2, Saint Petersburg 1892, 85–86.

24 ZMIRLOV (Fn. 1) 58.

25 BOROVIKOVSKIJ (Fn. 23) 21.



ables became possible. The legal consciousness of Russian peasants in such cases resisted the application of the acquisitive prescription. By testimony of the Justice of the Peace Bakunin: »The peasants, with their recognition of law and legality, don't admit a possibility of the legal protection of the infringement of law. In most cases they don't recognize a possession, infringing ownership, and they don't allow any prescription for such infringement. Witnesses from peasants, testifying possession, don't corroborate the fact of possession, but the right of ownership, and one has to resort to intensive interrogations and to legal tricks for obtaining from witnesses from peasants testimonies in favour of the fact of possession. The peasants regard every possession which infringes the right of ownership as a violation of law and justice, as taking off possession by force, or, according to the expression of peasants, by nature. On the contrary, every right of ownership is acknowledged without saying, even if accompanied neither with use nor with possession. Moreover, in the view of peasants, the right of ownership proves itself not only by documents, but for lack of the latter also by the testimonies under oath of the local elders, who keep track of it up to its original establishment. They don't permit prescription against the right of ownership, which by the expression of peasants is perpetual and hereditary.«<sup>26</sup>

The customary law of Russian peasants attached importance to prescription by possession only when the owner of the property couldn't oppose the possessor *ad usucapionem* with documents, proving his property.<sup>27</sup> By testimony of the judge Franzesson, the peasant courts (*volostniye sudy*), which made their decisions according to the customary law of the peasants, always gave decisions in favour of an owner, and not of a possessor *ad usucapionem*, without taking

into consideration, how long the latter possessed the contested property. The courts of arbitration treated acquisitive prescription in the same way.<sup>28</sup>

From time to time jurists made attempts to prove that the actual law presupposed the *bona fides* and *justus titulus* as the necessary requisites of the possession *ad usucapionem*. They suggested that both of them are presupposed by the characteristics of the possession *ad usucapionem*, fixed in the text of the law – »tranquil« and »on the right of ownership« correspondingly.<sup>29</sup> This argumentation was based on the idea that the institution of acquisitive prescription would be impossible without the mentioned requisites, because they were present in Roman law. K. D. Kavelin insisted on the application of the principle »*nemo sibi causam possessionis mutare potest*« in Russian law and on the existence of *justus titulus* and *bona fides* as requisites of the possession *ad usucapionem*.<sup>30</sup> He referred to the law of March 21. 1851, which in the spirit of Pandect law differentiated between possession in good faith and that in bad faith from the point of view of settling up in the case of the return of a property from an illegal possession.<sup>31</sup>

But the Department of Cassation of the Governing Senate went another way. In both its jurisprudence and the decisions of courts of appellate jurisdiction, there was an obvious intention to expand the sphere of application of acquisitive prescription.<sup>32</sup> As W. G. Wagner (USA) wrote, the intention of the Governing Senate of the Russian Empire in the second part of the XIXth century consisted in encouraging the circulation of goods by destroying all of the restraints in positive law.<sup>33</sup> The unlimited application of acquisitive prescription gave good means to achieve this goal.

26 Remarks about the defects of the actual civil laws. The edition of the editorial commission for working out of the draft of the Civil Code, Saint Petersburg 1891, 242.

27 SEMEN PAHMAN, Customary civil law in Russia, Vol. I., Saint Petersburg 1877, 447.

28 Remarks about the defects of the actual civil laws (nt. 26) 384.

29 KORNELIJ DVORGIZKIJ, in: Judicial Newspaper (1895), No. 25,

6–8; DAVID FLEXOR, *Justa causa* and good faith of the possession *ad usucapionem*, in: Judicial Newspaper (1892), No. 27, 28. Cf. DMITRIJ MEIER, Russian Civil Law (Repr. of 5th ed. 1873), Moscow 2003, 399.

30 KONSTANTIN KAVELIN, Rights and duties into properties and obligations, 1879, 77.

31 The Hole Collection of Laws of the Russian Empire, No. 250556, II.

32 VASILIJ ISATSHENKO, The prescription by possession in the decisions of the Senate, in: Juridical Bulletin XXVII (1888) Book I (January) 62–63.

33 WILLIAM WAGNER, *Marriage, Property and Law in Late Imperial Russia*, Oxford 1994.



In all its decisions related to the possession *ad usucapionem* as a way of acquiring, the Senate persistently promoted the idea that by vigour of art. 533 and 557 of the Civil Laws – which included the definition of the prescription as a way of acquiring the right of ownership – for the recognition of acquisition of ownership by prescription was required only the tranquil, uninterrupted and incontestable possession with an air of ownership, which lasted in the course of the established ten year time limit of the prescription. In the interpretation of the Senate, these articles of the *Svod Zakonov* required only the establishment of the fact of possession, unrelated to the way of acquiring of possession (1878 No. 47, 1879 No. 67, 1884 No. 107). The Senate acknowledged, that it didn't require any *justus titulus* of possession (1867 No. 584, 1876 No. 28, 1884 No. 107, 1891 No. 154, 1894 No. 107). It was not required even in the form of any *justa causa* of possession (1882 No. 50, 1884 No. 107). In the decision 1878, No. 47 the Senate postulated that for *the possession ad usucapionem* good faith wasn't required. In the decision 1879, No. 130, the Senate recognized that the fact that from the very beginning a person had had holding of a property of another person as a curator, tutor or mandatary of the last one didn't exclude the possibility of acquisition of the property by such holder on the ground of acquisitive prescription – if this person had changed his attitude to the property and had clearly expressed his intention to possess it on his own behalf as an owner (*pro suo*). For the Senate it seemed to be clear that from this moment the possessor on behalf of the other person became the possessor on his own behalf (*pro suo*), who could acquire ownership of the property by acquisitive prescription. On the same ground a possessor for life could also be

transformed into the possessor *ad usucapionem*, as it was postulated by the decision of 1879, No. 21. In the decisions of 1869 No. 906, 1872 No. 430, 1878 No. 271, the Senate acknowledged that one of the co-owners could become an individual owner of a part of the common property on the title by prescription. On the whole the Senate rejected the Roman principle *nemo sibi causam possessionis mutare potest*, and acknowledged that a dependent derivative possessor could arbitrarily change the causa of his possession. (See also: 1879 No. 216, No. 130, 1880 No. 19.) So the Senate acknowledged that the possession in fact was sufficient for acquisitive prescription (1884 No. 107).

The Senate's attitude toward this problem was heavily criticized by the majority of Russian civilians. They wrote that acquisitive prescription in Russia often concealed open robbery, and adduced many examples of this sort from judicial practice.<sup>34</sup> In a proposal of the members of the district court of Kaluga to the draft of a future Civil Code of Russia they pointed out that because of the lack of a family property community (husband and wife, and also of children and parents), the relatives often possessed *de facto* and disposed over each other's property. There were frequent cases when such possessors insisted to be acknowledged as owners on the ground of prescription by possession.<sup>35</sup> As one example there is the nobleman Shjuchkin: As long as his wife was alive he possessed and disposed over an estate which was part of her dowry; after her death he successfully litigated with his sons, both heirs of their mother, on the ground of prescription by possession.<sup>36</sup> It was an acquisition of ownership by prescription by a pledgee, who made known by fraud that the pledged thing had been stolen from him.<sup>37</sup>

34 ENGELMAN (Fn. 3) 280–281 etc.; VLADIMIR SINAJSKIJ, Russian Civil Law (Repr. of the ed. 1914–1915), Moscow 2002, 221; SHERSHENEVITCH (Fn. 4) 192; EUGENIJ VASKOVSKIJ, Manual of the civil law (Repr. of the ed. 1894–1896), Moscow 2003, 337–338.

35 Remarks about the defects of the actual civil laws (nt. 26) 262.

36 Ibidem.

37 SHERSHENEVITCH (Fn. 4) 188.

All these defects of the institution of acquisitive prescription in Russian law have been neutralized in the course of a long time, because at the beginning the possessor *ad usucapionem* could obtain the recognition of the fact that he had become an owner only after litigation with a previous owner. At the same time, the limitation of actions and the acquisitive prescription formed an indissoluble unity. If there were grounds for the suspension of the deadline for the limitation of actions, then the time for the acquisitive prescription couldn't run either. This was at least the opinion of Russian civilians, adhering to a theory of integral prescription as it was elaborated in German Pandectistics. As a result, for example, it was impossible to have an appropriation by the curator or by the tutor of the property of a child under guardianship. His property could not be acquired through prescription by possession, because the period of limitation of actions didn't run for infants (art. 566, Vol. X, Part. 1). Coming of age, the infant could require his property from the curator, and it was not permitted to oppose this with prescription by possession.<sup>38</sup>

But this situation also created disadvantages. A possessor *ad usucapionem* could achieve public recognition of the transformation of his possession into the right of ownership only on the base of a court decision. If there was no such decision, he could achieve neither this recognition nor the fixation of the right of ownership, which was connected with the official procedure of putting into possession and the registration of ownership by a public notary. Without an official recognition of the right of ownership the possessor could not exercise any legal transactions with the immovables. This was the case when the previous owner didn't bring an action against the possessor *ad usucapionem*. If the

previous owner didn't try to make restitution of his property by illegal methods at the same time, the possessor didn't have any formal grounds to bring an action for the recognition of the right of ownership for him. In the absence of a court decision, the legal status of the new owner remained officially unrecognized. This created difficulties for transactions and the possessors *ad usucapionem* often tried to address a request to court to establish by order of procedure of the so called »protective jurisdiction« – that is in proceedings on *ex parte* application – the fact of termination of the time limit for the acquisitive prescription, and to issue a court order, which could be a title deed for the official fixation of the right of ownership acquired by prescription, and for the official procedure of putting the possessor *ad usucapionem* in possession of the same estate, which he had possessed before, but now already as its owner. The courts refused the requests, referring to the rule that prescription by possession could be established only by order of the litigious procedure. Due to this, Engelmann asserted, that in Russian law acquisitive prescription didn't exist – because it didn't make the possessor *ad usucapionem* automatically an owner by the termination of its time-limit. He thought that the legal consequences of the termination of the time limit for prescription in positive Russian law indicated that it in any case was not acquisitive prescription, but only the mere limitation of actions.<sup>39</sup> Thus Engelmann considered the institution of prescription in Russian law as not being analogous with *usucapio*, but with the *longi temporis praescriptio* of Roman law.

In perfect harmony with the Senate's orientation for the comprehensive encouragement of the circulation of goods – e.g. its decisions in cases of a baker's widow Kerst (1868 No. 449)

<sup>38</sup> ISATSHENKO (Fn. 32) 55.

<sup>39</sup> ENGELMANN (Fn. 3) 237–251.

and of honorary freewoman Moloshnikova (1872 No. 792) – the Senate created a new form of recognition by court of ownership acquired by prescription. It postulated that there was no need for recognition by court because it came *ipso jure* when the time for prescription expired. The court would then just establish the fact of the termination by order of procedure of the »protective jurisdiction«. The court order would serve as the title deed for the official fixation of the right of ownership acquired on the title by prescription and for putting in possession of the immovables. As proof for the termination of the time limit for prescription, the Senate accepted all those proofs which were in vigour in the litigation procedure, including questioning of witnesses and neighbours.

This decision of the Senate gave full scope for abuse. First, witnesses could simply confirm that the present possessor possessed property – but they couldn't know whether he possessed the land as his own or on behalf of somebody else as a dependent derivative possessor. Second, they couldn't know whether his possession was incontestable or if it had been contested in court. Besides, ignorant witnesses often couldn't understand the questioning concerning the qualification of the possession. On the other hand, the procedural aspect of these proceedings played a very harmful role. In cases of »protective jurisdiction« – that is in proceedings on *ex parte* application, when the opponent was absent – there was nobody to oppose to the testimonies of the witnesses proposed by the initiator of the proceedings. That's why, for example, even if a possessor possessed under a lease or as a business-manager of the estate, nobody had in proceedings to confirm this given fact by documents. In these cases the court often didn't even have an opportunity to clear the matter. In particular, in

such cases the question about the termination of the time limit of the limitation of actions suitable for vindication of the estate under consideration remained unanswered. Since by norms of procedural law the court was not allowed to pick proofs by itself, the procedure of recognition of the possessor as an owner was greatly facilitated. In order to achieve ownership, no more was required than just a few witnesses.<sup>40</sup>

Despite the fact that the termination of the time limit for the prescription by possession could be contested later by litigious procedure – as the Senate acknowledged –, it was impossible when the possessor *ad usucapionem*, being recognized as owner, had in the meantime given the object to a third party.<sup>41</sup> As a matter of fact, it was during this period when the Senate definitely held the position of favouring protection of the acquirer in good faith. Doing so, the Senate took advantage of the ambiguity of norms in the Statute Book, and was orientated towards a corresponding trend in Western Europe's jurisprudence.

But, even if the property on the title by prescription wasn't alienated, it was very difficult to vindicate it after the court's recognition of the termination of the time limit for the prescription. The plaintiff would have to contest already written acts that certified the ownership of the possessor. And if the plaintiff burdened by the *onus probandi* tried to prove the case by the testimony of witnesses, the court would explain to him that written acts couldn't be contested by a verbal testimony.

In the last third of the 19th century, when the Senate eliminated almost all the possible restrictions for the application of acquisitive prescription, and so facilitated the procedure of the recognition of the possessor *ad usucapionem* as an owner in court to a very high degree, the

40 ISATSHENKO (Fn. 32) 59–63.

41 ISATSHENKO (Fn. 32) 52.

institution of acquisitive prescription became a very widespread means of acquisition of property belonging to someone else. At the same time the hostility of Russian customary law to this institution restrained its application in the relations of Russian peasants, who formed the majority of the population. But it was the same peasants who successfully used the prescription to justify seizures of land belonging to government or landlords<sup>42</sup> or land of peoples in colonized areas in the East of the Russian Empire.<sup>43</sup>

In those years acquisitive prescription began to play a particularly big role in the Caucasus region. The situation there was characterized as an »orgy of misappropriation of lands«. <sup>44</sup> The case in the Caucasus was in fact peculiar, since the Senate had noted in its decisions of 1878 No. 164 and of 1874 No. 126 that before Muslim provinces of Trans-Caucasus were joined to Russia in 1846 there was no private property of immovables in this region. By Muslim law, which was in force there before joining Russia, all the land belonged to Allah – and to the monarch as his representative on the Earth. All private ownership occurred through supreme power, and thus was provisional, although it could pass from hand to hand by means of legal transactions. The Muslim law knew an analogous institution to *occupatio* – that is an appropriation of land by means of its cultivation, that is by its »resuscitation of lifeless nature«. But this also meant that cultivation should be initial, that is the plot shouldn't be in possession of somebody else. Besides, for the cultivation of no man's land the consent of the local religious authority was required. When Trans-Caucasus was joined to Russia in 1846 special laws on private ownership of land by the local nobility (beks) were introduced, and the scope of the law of a ten years prescription was enlarged to cover

this region as well, but with some restrictions. All the restrictions were eliminated in 1871, and from then on local courts acknowledged the right not only of noblemen but also of other persons to become owners of land through prescription by possession.<sup>45</sup>

At the same time the norms of the *Svod Zakonov* were applied to the Muslim provinces with reference to the communal ownership of land that existed in middle Russia. Land was allocated to rural communities of peasants. However, the Muslim law didn't know any communal ownership of land and only recognized personal possession by plots. Consequently, after 1871 all peasants began to require recognition for ownership to the plots acquired by prescription by possession. In these cases the courts insisted that representatives of the Government should present documents to prove the allocation of the moot plot to one peasant. Since the land had been allocated to the rural community as a whole, there were no such documents, and so the possession of the peasants was acknowledged as an independent possession *ad usucapionem*.

The seizure of the governmental land in the Caucasus region still acquired more extent than in Russia. Up to the end of the 19th century almost all of the governmental agricultural land, woods, mineral springs and oil deposits were seized and acquired in private ownership by prescription by possession.<sup>46</sup> As a rule, these seizures were realized by local magnates, but there were also examples where the peasants did so, and so acquisitive prescription was almost the principal way to acquire immovables in the Caucasus.<sup>47</sup> After the biggest part of the governmental land was seized, local inhabitants began to apply this method of acquisition in respect of the private seizures of each other. As

42 See, for example: MOR, Seizures of lands, in: Juridical Newspaper 10 (1902) 3.

43 See, for example: About the litigations of the Tartars-owners by ancient formal acts and of the peasants-possessors in Tarskij district of Tobolsk province, in: Business Reporter (1888), No. 24; SERGEJ KRIVENKO, How some rights of us lose ourselves (for example, of Tartars in Tobolsk

province to the land, occupied by Russian settlers), in: The Journal of Saint Petersburg's Juridical Society (1894) Book 10, 88–93; <Bur-ov Nik. > Seizures of Kalmyk lands // Citizen (1899) N. 17, 7–9.

44 VASILIJ EFIMOV, Prescription by possession in Trans-Caucasus, in: Journal of Civil and Criminal law (1892) Book 5, 54.

45 EFIMOV (Fn. 44) 45–47.

46 NATHANAIL GERENSTEIN, Acquisitive prescription in Batumy district, in: Juridical Newspaper (07.04.1894), N. 28, 2 (continuation) 10.04.1894, N. 29, C. 2; IDEM, Land-matter in the former Batumy region, in: Journal of Civil and Criminal Law (1893) Book 9, 17–67; EFIMOV (Fn. 44) 47–48.

47 <VI. B.> About seizures in Caucasus, in: New Time (23.01<05.02> 1903) No. 9658, 4. Cf.: A way of

an observer noticed: »One of the old and long practised swindles is the seizure of land. The real estates of many Caucasian residents of long standing are so enormous that a possessor could not always observe if somewhere in a secluded corner a parasite-invader has nested. Nevertheless, even if he had observed this, there was nothing he could do. Almost nobody in the Caucasus has any documents and there is a good hundred of young and old perjured witnesses at the invader's disposal, who will corroborate the possession *ad usucapionem* of anybody you like.«<sup>48</sup>

The problem of perjury was extremely acute in the Caucasus. It was connected to the fact that by Muslim law a false oath given to a non-Muslim wasn't acknowledged as a sin.<sup>49</sup> So if Russian peasants were restrained from perjury in court by religious morality in Muslim regions this was different. It was because of this peculiarity that the order of the recognition of acquisition of ownership by prescription by »protective jurisdiction« – that is by proceedings on *ex parte* application, with admission of the testimonies of witnesses as the means of proving, introduced by the Senate's decision of 1872 No. 792 – had especially hard consequences in the Caucasus.

After this brief survey of the fate of the institution of acquisitive prescription as a legal transplant in Russian law, one may agree with

Engelmann, that historical development of a native law wasn't so important when whole codes or institutions had been borrowed. But when a single article was borrowed, taken out of its original context and was put into a foreign code, as happened in the presented case, then the article was disfigured in the process of borrowing: »In the new situation it lost its original character, and both in its form and in its content it no longer serves as an expression of French law, but already of Russian law, and in this form it can be interpreted not from the point of view of the history of French law, but only of that of Russia.«<sup>50</sup>

The presence of the transplant created different challenges and correspondingly created diverse responses to them in different periods of the social history and in the various ethnic-cultural areas of the recipient country, while recognizing that the foreign origin of the borrowed norms necessitated looking for ways to resolve newly arising problems also by borrowing doctrinal ideas and separate constructions of the foreign law taken out of their systematic context. All this taken together generated some very fanciful configuration that depended on the circumstances of the place, of the time and of the actual condition of the social-cultural environment of the recipient country.

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seizure of the governmental lands in Lenkoran, in: Bulletin of Land-surveying (1884) Book 8, 68–69.

48 <VI. B.> Land seizures and forgeries in Caucasus, in: New Time (16<29>01.1903) No. 9651, 4.

49 DMITRIJ ARAPOV, Oath of Musulmen in Russian legislative acts and in the jurisprudence of the XIXth century, in: Ius Antiquum 10 (2002) N. 2, 252–263.

50 ENGELMANN (Fn. 3) 254.