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## **DIVIDED OWNERSHIP IN LEGISLATION AND LEGAL PRACTICE OF THE DUCHY OF WARSAW AND THE CONGRESS POLAND**

### **Abstract**

The article concerns the history of divided property in the Duchy of Warsaw and then in the Congress Kingdom of Poland until the agrarian reforms of the 1860s. An essential feature of divided (feudal) ownership was the division of ownership attributes between the superior owner (senior) and the lower owner (vassal, peasant).

This text describes the most important legal acts regulating divided property during the period under discussion, the circumstances of their promulgation, and the legislative process. Drawing on archival sources, it discusses selected issues related to the interpretation of these legal acts. One of the main theses of the work is that, contrary to views expressed in the literature, the introduction of the Napoleonic Code to the Duchy of Warsaw did not mean the abolition of divided property in rural areas.

### **KEYWORDS**

real rights, divided property, Duchy of Warsaw, Congress Poland

## SŁOWA KLUCZOWE

prawa rzeczowe, majątek podzielony, Księstwo Warszawskie, Królestwo Polskie

A crucial feature of feudal ownership was the division of ownership attributes between the superior owner (senior) and the lower owner (vassal, peasant). In the case of the relationship between the landlord and the peasants who held lower property, this usually meant that the peasant physically owned the property (farmstead and field), while the attribute of using the property and drawing benefits from it was divided in such a way that the peasant harvested the crops but had to share them with the lord through the payment of a feudal rent (labor, cash rent, or payment in kind). At the same time, both the lord's and the peasant's rights were permanent and effective against third parties. Both were hereditary and essentially transferable.<sup>1</sup>

Moreover, lower owners were obliged to purchase alcoholic beverages only from the superior owner, which was often a source of significant income (*propination right*<sup>2</sup>). There was also a monopoly requiring the exclusive use of the manor mill.<sup>3</sup> The lower owner often also had certain obligations related to the transfer of their rights to the property (sale, donation, inheritance). The most typical obligations included obtaining the superior owner's prior consent for such a transaction (*consensus*) and paying a special fee (*laudemium*). It is worth noting that restrictions on the division of real estate belonging to the lower owner were common.

Various types of divided ownership existed in the Polish-Lithuanian Commonwealth. Knights sometimes received land grants from monarchs under principles that could be described as lower ownership (emphyteusis, fiefs). Ownership of plots of land in towns also often exhibited characteristics of lower ownership. *Dominium utile* was also enjoyed by various categories of the peasant population (e.g., *Olendrzy*, *sołtysi*, *wybrańcy*). The nature of peasants' land rights in the Old Polish period is vastly complex, and it is difficult to generalize in this regard to the entire peasantry.

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In 1807, Napoleon created the Duchy of Warsaw out of most of the Prussian partition. Prussian law (especially criminal and administrative) continued to be

<sup>1</sup> Soviet civil scientist Anatoliĭ V Venediktov believes that in order to speak of lower ownership, the lower owner must have a certain minimum of economic independence; АВ Венидиктов, *Государственная социалистическая собственность*, Москва 1948, 207–223.

<sup>2</sup> Piotr Burzyński, *Prawo polskie prywatne*, vol II (Kraków 1871) 407ff.

<sup>3</sup> Ibid 420ff.

applied to some extent in the Duchy of Warsaw, but the Napoleonic Code was to be the primary instrument regulating civil law.

This code had a distinctly capitalist and anti-feudal character. It did not regulate feudal property at all.<sup>4</sup> The definition of ownership in Article 544 of the Code is purely unitary. Divided ownership was contrary to the *numerus clausus* principle of property rights adopted by the Code. The Code did not provide a legal basis for establishing new legal relationships of this type.<sup>5</sup>

The provisions introducing the code in the Duchy of Warsaw did not mean the extinction of existing property rights, even those unknown to the code.<sup>6</sup> In France, the status of property rights unknown to the code (but established before the revolution) sparked heated debate. According to the overwhelming majority of authors, it was impossible to establish new property rights which were not regulated in the code (*numerus clausus* of property rights). It should be remembered that feudal obligations were essentially abolished in France in August 1789. Nevertheless, the question of which peasant obligations were feudal in nature and subject to abolition, and which were to be maintained under the new legal order, was often unclear.<sup>7</sup>

Article 530 of the Napoleonic Code stated:

Every annuity granted in perpetuity as the price of the sale of immoveable property, or as the condition of ceding an immoveable fund by free or chargeable title, is in its nature redeemable.

<sup>4</sup> Jan K. Wołoski, *Kurs kodexu cywilnego*, vol II (Warszawa 1868) 97; Piotr Kapuściński (ed), *Jurisprudencja Senatu z lat dwudziestu sześciu (1842–1867)* (Warszawa 1869) 445.

<sup>5</sup> Roman Wierchlejski, 'Zasady prawa cywilnego w Królestwie Polskiem. Napisał prof. Antoni Okolski' (1886) 37 *Gazeta Sądowa Warszawska* 590.

<sup>6</sup> Dorota Wiśniewska, *Własność prefabrykancka w Łodzi w latach 1820–1866* (Łódź 2019) 50; Henryk Konic, *Prawo rzeczowe. Wykład ustaw obowiązujących w b. Królestwie Kongresowem z uwzględnieniem przepisów innych dzielnic oraz Kodeksu Szwajcarskiego* (Warszawa 1927) 32.

<sup>7</sup> Murray Raff, Anna Taitlin, 'A Comparative Perspective on the Concept of Ownership in Russian Law: From the Svod Zakonov to the 1994 Civil Code' 41 *Review of Central and European Law* 271–280; Paul. Ourliac, Jehan de Malafosse, *Histoire du Droit privé: vol. 2.* (Paris: Les Biens 1971) 168–179; Jean Joseph Delsol, *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*, vol 1 (Paris 1867) 417–418; Edward Drozd, 'Numerus clausus' *praw rzeczowych*, in Stanisław Sołtysiński (ed) *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego* (Poznań 1990) 257–269; Magdalena Ossowska, 'The numerus clausus issue in property law – European private law and the Polish perspective' (2019) 82 *Studia Iuridica* 217; *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego : o własności* (Franciszek Grabowski), sign. BUW 4.15.1.9, 78; Józef Mazurkiewicz, Władysław Ćwik, 'Własność w miastach prywatnych Lubelszczyzny doby Księstwa Warszawskiego i Królestwa Kongresowego (1809–1866)' (1957) 1 *Annales UMCS* 3; Kazimierz Mejer *O wieczystej dzierżawie* (Warszawa 1873) 72.

It is nevertheless allowed to the creditor to regulate the provisions and conditions of redemption.

It is also permitted him to stipulate that such annuity shall not be redeemed until after a certain term, which shall in no case exceed thirty years; every stipulation to the contrary is void.<sup>8</sup>

Taking into account that the Napoleonic Code defined ownership exclusively in a capitalist way (omitting divided ownership), one must come to the conclusion that the previous superior owners were treated at most as persons entitled to rent, while the pre-revolutionary lower owners generally became owners in the new capitalist sense.<sup>9</sup>

Nevertheless, the interpretation of the discussed provisions in the Duchy of Warsaw went in a fundamentally different direction, although initially it was not obvious how events would develop.<sup>10</sup> After some controversy within the Duchy's government, the proposal of Feliks Łubieński, the Minister of Justice, who was responsible for introducing the Napoleonic Code in Polish lands, prevailed.

Łubieński's project was signed by the monarch and published in the Journal of Laws on 21 December 1807.<sup>11</sup> It became known as the December Decree. On the one hand, the decree confirmed the abolition of serfdom (*poddaństwo*) stipulated in the constitution, declaring that every villager could leave their current place of residence and move to any new location within the Duchy of Warsaw. On the other hand, it significantly worsened the legal status of all peasants who did not have contracts. The concluded contracts were to remain in force. However, peasants who did not have contracts (on both private and national estates) could be evicted from their land after one year by their heirs (lessees of national estates).<sup>12</sup> They

<sup>8</sup> *The Code Napoleon or the French Civil Code. Literally Translated from the Original and Official Edition Published at Paris in 1804* (London 1827).

<sup>9</sup> Delsol, *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*, vol 1 (Paris 1867) 408–412; Mazurkiewicz and Ćwik estimate that divided ownership was not common in the countryside (n 7); Until 1828, 24.5% of the villages on government lands were fully rented. (Zbigniew Stankiewicz, *Reformy czynszowe dóbr skarbowych w Królestwie Polskim* (Łódź 1968) 40–42); In the opinion of the Second Legislative Deputation: 'In our country, a significantly larger proportion of divided property is found in villages, where individual rural estates, mills, etc., are granted by emphyteutic law or by perpetual rent' (95). Therefore, the members of the deputation did not recognize majority of peasants as lower owners (*Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9).

<sup>10</sup> S. Markiewicz, 'Uwagi nad własnością podzieloną' (1866) *Ekonomista* 127.

<sup>11</sup> *Dziennik Praw [Księstwa Warszawskiego]*, vol 1, no 1, 10–12.

<sup>12</sup> Tadeusz Mencel believes that the decree did not apply to government-owned land ('Zniesienie poddaństwa w Księstwie Warszawskim na tle porównawczym' (1983) 13 *Acta Universitatis Lodziensis. Folia Historica* 29.)

were no longer protected by the prohibitions on ousting or transferring land from better to worse, which were present in Prussian law.<sup>13</sup>

At the same time, the judicial reforms introduced by Łubieński (adopting the French systems) meant that all the disputes between peasants and manors were to be resolved by State courts (Courts of the Peace and Civil Tribunals of first instance). The new judicial systems meant the abolition of court servitude. Nevertheless, it must be remembered that in practice, in the Duchy of Warsaw, village owners usually became mayors of communes. This entailed some judicial powers (exercised, however, in the name of the King, not the landlord), namely, mayors adjudicated, among others, the most minor offenses (misdemeanors). The new judicial institutions involved the abolition of patrimonial jurisdiction.

On 31 January 1810, the King of Saxony and Duke of Warsaw, Frederick Augustus, issued a decree on the perpetual lease of smaller national estates.<sup>14</sup> Referring to Article 1712 of the CC, one could argue that the issuance of this decree did not violate the provisions of the Napoleonic Code. However, given the fact that the decree created new property rights, in my opinion, such a thesis does not stand up to criticism.

The decree defined lower ownership as *Erbpacht*. Real estate was to be leased out by auction (§ 2). The decree specified the rules for calculating rent (*canon*) (§ 4). The amount of the rent was independent of the auction. Nevertheless, the redemption fee was determined by auction (§ 7). Maintaining the property in an unsuitable condition and arrears in paying the rent installments could result in sequestration and eviction of the perpetual lessee (§ 14). Division of real estate into lots was possible only with the government's consent. Perpetual leasehold property could be sold without the consent of the administrative authorities; however, they had the right of preemption (§ 15). Upon each sale of real estate or change of ownership due to inheritance, the government was entitled to a *laudemium* (§ 16–17).

In the Duchy of Warsaw, broader reforms of civil law were not possible due to Napoleon's attitude.<sup>15</sup> The situation changed after most of the Duchy's lands fell under Russian influence and the Congress Kingdom was established. The need for a broad reform of civil and criminal law, including property law, was widely recognized. According to the Constitution of the Kingdom, changes in civil law required the consent of the Sejm (Article 90). The Kingdom authorities appointed

<sup>13</sup> Marcin Konarski, 'Legal Reforms of Agrarian Relations in the Duchy of Warsaw between 1807 and 1809' (2022) 31(1) *Studia Iuridica Lublinensia*.

<sup>14</sup> *Dziennik Praw [Księstwa Warszawskiego]*, vol II (16), 131–142.

<sup>15</sup> *Correspondance de Napoléon Ier*, vol 16 (Paris 1858–1870) 161.

subsequent commissions to prepare projects, and their work usually intensified before subsequent sessions of the Parliament (in the constitutional period, the Sejm met 4 times: 1818, 1820, 1825 and 1830 (V–VI) – the insurrectionary Sejm (1830–1831) should be considered separately). This work also covered property law – including issues related to divided property.

During the formation of the Congress Kingdom, the Civil Reform Committee played a significant role. It was established by Alexander I on 19 May 1814.<sup>16</sup> On 20 November 1814, at the meeting of the Committee, Antoni Bieńkowski presented a plan for a new code. Bieńkowski planned to regulate complete and incomplete ownership separately.<sup>17</sup> This work probably ended at the initial conceptual stage.

On 4 October 1817, in connection with the planned convening of the Sejm, the Viceroy of the Kingdom, Józef Zajączek, appointed the Legislative Commission. The Legislative Committee consisted of three deputies: 1) for changes in certain provisions of the Civil Code, 2) for the development of court procedure, and 3) for the development of the Penal Code.<sup>18</sup>

The most important bills prepared by the Legislative Commission deputies included the Mortgage Act, the Penal Code, and the Marriage Law. These bills were submitted by Alexander I to the Sejm of 1818 (March–April). The Marriage Law project was rejected by the Chamber of Deputies (*Izba Poselska*). However, the Mortgage Act and the Penal Code were passed.

Reforming the institution of mortgage, which is a part of property law, was one of the most pressing issues at the dawn of the Congress Kingdom. The Napoleonic Code, still considered as one of the greatest legislative achievements in history, regulated the institution of mortgage in a way that left much to be desired. Numerous important pieces of information regarding real estate did not have to be entered in mortgage registers, and worse still, mortgage entries were not perpetual. After 10 years, they had to be renewed; otherwise, they expired. These solutions were inferior to the principles of the Prussian Mortgage Ordinance of 1783, well-known in Poland (as they were also in force in the Prussian parti-

<sup>16</sup> Michał Gałędek, Anna Klimaszewska, Piotr Pomianowski, 'Prace Komitetu Cywilnego Reformy nad przygotowaniem narodowej kodyfikacji prawa cywilnego i procedury cywilnej w przededniu utworzenia Królestwa Polskiego (1814–1815) : edycja źródłowa'. Cz. 1 (2019) 12(2) *Krakowskie Studia z Historii Państwa i Prawa* 239–275.

<sup>17</sup> Gałędek, Klimaszewska, Pomianowski, 'Plan kodeksu cywilnego i projekt utworzenia komisji kodyfikacyjnej w pracach Komitetu Cywilnego Reformy (1814–1815)'. Edycja źródłowa (2020) 13(3) *Krakowskie Studia z Historii Państwa i Prawa*, 2020 345–387; Similarly, another version of the plan presented by Bieńkowski in 1819. *Plan do projektu kodexu cywilnego Królestwa Polskiego*, AGAD, [Pierwsza] Rada Stanu Królestwa Polskiego, vol 193, 13ff.

<sup>18</sup> Anna Zarzycka, 'Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1818' (2008) 2 *Krakowskie Studia z Historii Państwa i Prawa*.

tion), and even to Polish pre-partition practice.<sup>19</sup> Thus, already at the first Sejm of the Congress Kingdom, in place of Title XVIII, Book III of the Napoleonic Code, a Polish mortgage law was adopted, largely modeled on the Prussian law – clearly closer to the Polish tradition than the French solutions. From that time on, separate mortgage registers were established for individual landed estates. The most important element of each register is the mortgage register, consisting of four sections: 1) description of the property, 2) owner details, 3) restrictions on ownership rights, and 4) mortgage debts. The principles of perpetuity, openness, particularity, and public credibility of mortgage registers were adopted. Modern mortgage law enabled the widespread use of credit, which was crucial to the economic development of the Kingdom.

The Polish mortgage law of 1818 applied to landed and urban estates – but only those located in capitals of voivodeships (Article 162). The limitation in establishing mortgage registers for landed properties (and municipal properties in capitals of voivodeships) was justified primarily by the costs.<sup>20</sup>

Under Article 52 of the Polish mortgage law of 1818, only privately owned immovable property could have mortgage registers. This provision was not always observed. There were instances of mortgage registers being established for government-owned property.

The issue was negatively determined (at least to some extent) by the General Assembly of the Council of State of the Kingdom of Poland in its ruling of 21 December 1821, which ruled that mortgage registers could only be established for private property. In the factual circumstances that formed the basis for the aforementioned ruling, a private individual, the lower owner of a large acreage (*wójtostwo* and a former monastery farm in Tyniec near Kalisz), over which the Kingdom Treasury was the superior owner, sought to open a mortgage register for this property. The Mortgage Commission of the Kalisz Voivodeship complied with these expectations, which was met with opposition from the Government Commission for Revenue and Treasury (*Komisja Rządowa Przychodów i Skarbu*). The General Assembly of the Council of State agreed with the latter's position.<sup>21</sup>

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<sup>19</sup> French law was not fully observed when maintaining land and mortgage registers in the Duchy of Warsaw. See Władysław Sobociński, 'Studia z dziejów miast Królestwa Polskiego w XIX w. (1866-1869)', in Jan Skarbek and Jan Ziółek (eds), *Kościół – Państwo – Niepodległość* (Lublin 1980) 299.

<sup>20</sup> AGAD, [*Pierwsza*] *Rada Stanu Królestwa Polskiego*, vol 469, protokół z 22 kwietnia 1825 r.; See also Mścisław Godlewski (ed), *Zbiór prac przygotowawczych do ustaw hypotecznych w Królestwie Polskiem obowiązujących oraz tekst tychże ustaw z pierwotną ich redakcją i dyskusjami zestawiony: na podstawie źródeł urzędowych* (Warszawa 1876) 300–301.

<sup>21</sup> State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu* (11/1201/0), vol 3183, 60ff.



The question of whether a mortgage register can be established for a lower property has been controversial.<sup>22</sup> One of the prominent Polish lawyers of the time, August Heylman, believed that under the Polish mortgage law of 1818, mortgage registers could only be established for properties whose owners were not obligated to pay rent – thus, only for properties that were fully owned. Real estate properties that were lower property could not have separate mortgage registers.<sup>23</sup>

The Polish mortgage law of 1818 recognized lower property as a limitation of ownership rights. It rejected the concept of divided ownership as such and recognized the superior owner as the full owner, while simultaneously recognizing the lower owner as a person entitled to a very broad, limited property right. In mortgage registers, annotations regarding the rights of lower owners were made in Section III (limitations of ownership rights). During research at the State Archives in Kalisz, while reviewing 19th-century mortgage registers, I found a significant number of such references. For example, in the mortgage register concerning the Iwanowice estate, Section III, under Item 2, we find the following annotation:

the right of perpetual lease of twenty-one Chełmno *włókas* of land in these estates under the nomenclature Joanka is granted to the colonists under the obligations of the notarial agreement concluded on 2 January 1809, between Daniel Wężyk and the colonists covered by it, which was recorded here as a result of the granting of a guardianship representative for minor owners of the estates in the protocol of the new regulation of 21 October 1820.<sup>24</sup>

When establishing mortgage registers for individual landed estates, it was often omitted to enter information on lower owners into the mortgage registers, which could lead to the extinction of the rights of lower owners after the sale of the estates (Articles 19, 31, 43, 45 of the Polish mortgage law of 1818).<sup>25</sup>

<sup>22</sup> AGAD, [Pierwsza] Rada Stanu Królestwa Polskiego, vol 469, protocol of 22 April 1825; Survey queries suggest that the district mortgage operated under the same principles as before the reform of 1825 (i.e., under the principles from the times of the Duchy of Warsaw). This follows from the beginning of the instruction issued by the Government Commission of Justice on 22 December 1825, under No 15,054. It was published by Walenty. Szepietowski (*Zbiór praw, urzędzeń i instrukcji hipotecznych w Królestwie Polskiem*, Suwałki 1840); State Archives in Lublin. Branch in Radzyń Podlaski: *Konservator Hipoteki Powiatu Białskiego*, (38/539/0); State Archives in Lublin, *Księgi konservatora Hipotek Powiatu Krasnostawskiego*, vol 4.

<sup>23</sup> August Heylman, *Rozbiór wykazu hipotecznego* (Warszawa 1858) 141; Heylman, *O stosunku hipoteki gubernialnej do okręgowej* Biblioteka Warszawska; *Instrukcja dla władz sądowych i konservatorów hipotek z 31 sierpnia 1809 r.* (sign. BUW 4.18.1.311); Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego* (Toruń 1964) 256; Jan Wąsicki, *Ziemie polskie pod zaborem pruskim: Prusy Południowe 1793–1806 : studium historycznoprawne* (Wrocław 1957) 307.

<sup>24</sup> State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu* (11/1201/0), vol 2475. See also State Archives in Warszawa, *Hipoteka Warszawska*, vol 442 (section III, entry 11, 14).

<sup>25</sup> Mejer, *O wieczystej dzierżawie* (Warszawa 1873) 82; Włodzimierz Wójcikiewicz, *Prawo hipoteczne Królestwa Polskiego* (Wrocław 1967) 99.



The introduction of mortgage law, following the enactment of the Napoleonic Code and the December Decree, was the next stage in the transformation of ownership relations in the Polish countryside – a shift away from feudal rules and towards capitalism. As with the December Decree, this generally meant making superior ownership more like full ownership and weakening the legal position of lower owners (thus, this process proceeded in the opposite direction from that in France or Prussia).

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After the conclusion of the 1818 spring Sejm session, legislative work naturally had to continue. On 20 October 1818, Viceroy Józef Zajączek appointed three editors of future codes:

- Antoni Bieńkowski (civil code)
- Franciszek Ksawery Potocki (criminal procedure)
- Jan Nepomucen Wolicki (civil procedure)<sup>26</sup>

In 1819, Bieńkowski presented another plan for the Civil Code – similar to the one from 1814. Here, a distinction was made between complete and incomplete ownership too.<sup>27</sup> All three editors fulfilled their mandate by preparing appropriate drafts. However, Bieńkowski's draft of civil law reform was not submitted to the Sejm at all. Drafts for both procedures were submitted to the Sejm of 1820, but they were not passed. Only relatively detailed laws were passed, not touching on the issue of divided ownership.

After the failure of the Sejm of 1820, by the appeal of the Minister-Secretary of State, the First Legislative Deputation was established, which prepared a draft of the first book of the Polish Civil Code (to replace the first book of the Napoleonic Code).

The main results of the deputation's work were the adoption by the Sejm of 1825 of Book I of the Civil Code, a new mortgage law, and an act repealing Article 530 of the Napoleonic Code. From the perspective of the subject of this study, the most significant was the act modifying Article 530 of the Code of Napoléon in 1825, which permitted the redemption of rents.<sup>28</sup>

The law was likely motivated by the fear that lower owners would purchase rents, thus depriving the superior owners (the landed gentry) of income from rents and

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<sup>26</sup> Hipolit Grynwaser, *Pisma* (Wrocław 1951) vol I, 118.

<sup>27</sup> *Plan do projektu kodexu cywilnego Królestwa Polskiego*, AGAD, [Pierwsza] Rada Stanu Królestwa Polskiego, vol 193, 13ff.

<sup>28</sup> *Dziennik Praw [Królestwa Polskiego]*, vol IX, 352.

from *propination*. According to the official justification, restricting the application of Article 530 CC was intended to contribute to the popularization of perpetual leases (the landed gentry were said to be afraid of entering into such contracts due to the fear that perpetual leaseholders would invoke Article 530 CC).<sup>29</sup> This provision, however, was not often applied in practice. According to some historians, the minister for Revenue and Treasury, Franciszek Ksawery Drucki-Lubecki, who planned to sell some crown lands and feared that the continued existence of Article 530 CC could negatively impact interest in auctions.<sup>30</sup>

Despite some resistance and arguments that it was not in the interest of economic development to perpetuate feudal institutions, but rather to make farmers owners of the land they cultivate, in this case, the interests of the landed gentry prevailed (and this was understood rather short-sightedly). Nevertheless, it should be noted that the bill passed the Chamber of Deputies with a narrow majority.<sup>31</sup>

In 1825, the principles of mortgage law were significantly modified.<sup>32</sup> In the context of our discussion, it is particularly important that it became possible to establish mortgage files (simplified mortgage registers) for smaller properties, which were often subject to lower ownership. Previously, such properties did not have separate mortgage files and the entries concerning them were placed in the collective books for individual districts or in the mortgage books of individual estates.<sup>33</sup>

The costs and the level of legal awareness of the population were the reasons why the establishment of mortgage files under the so-called district mortgage was not very popular before agrarian reforms.<sup>34</sup>

<sup>29</sup> Jan J Litauer, *Własność podzielona w oświeceniu źródeł urzędowych polskich* (Warszawa 1916) 395.

<sup>30</sup> Zofia Kirkor-Kiedroniowa, *Włóścianie ich sprawa w dobie organizacyjnej i konstytucyjnej Królestwa Polskiego* (Kraków 1912) 348–349; Zbigniew Filipiak, *Prawo własności nieruchomości w działalności legislacyjnej Księstwa Warszawskiego i Królestwa Kongresowego (1807–1830)* (Toruń 2020) 406–407.

<sup>31</sup> Wiśniewska, ‘Uwagi nad problemami inkulturacji Kodeksu Napoleona w Królestwie Polskim — wątpliwości na tle art. 530’ (2019) 3948 *Acta Universitatis Wratislaviensis* 97–108; A. Zarzycka, ‘Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1830’ (Ph.D thesis: Jagiellonian University Archiwess) 303–305; Filipiak, *ibid* 405ff; Ryszard Przelaskowski, *Sejm warszawski roku 1825* (Warszawa 1829) 127ff; Stanisław Barzykowski, *Historia powstania listopadowego*, vol I (Poznań 1883) 120; Kirkor-Kiedroniowa, *ibid* 348; Fryderyk Skarbek, *Dzieje Polski*, vol II (Poznań 1877) 193–194.

<sup>32</sup> ‘Prawo o Przywilejach i Hypotekach’, 9 *Dziennik Praw* [Królestwa Polskiego].

<sup>33</sup> State Archives in Lublin, *Księgi konserwatora Hipotek Powiatu Krasnostawskiego*, vol 4, deed no 3, 12, 18, 21, 25, 29, 31, 35, 36, 38, 39, 40, 41, 42, 43.

<sup>34</sup> See *Wstęp do inwentarza zespołu: AP w Zamościu, Akta hipoteczne Ordynacji Zamojskiej i dóbr wydzielonych z Ordynacji*. Jerzy Szumski, *Akta hipoteczne i notarialne do 1939 r. z terenu*

While in the provincial (voivodeship) mortgage registers, the information on the divided nature of ownership can be found primarily in sections III of the mortgage registers (these registers were established for estates belonging to superior owners), in the district mortgage registers, this type of information can be found both in sections II and III.<sup>35</sup> The district mortgage (*hipoteka powiatowa*) register in the period before the agrarian reforms mostly concerned real estate belonging to lower owners.

During my research at the State Archives in Kalisz, I reviewed 7 sets of mortgage records relating to the village of Dobrzec Wielki.<sup>36</sup> In each case, Section II contained the phrase: 'As for buildings, by right of ownership, and as for land, by right of perpetual lease' or a similar one, which clearly indicates the lower nature of ownership. The entries in Section III also had similar content in each case. Each time, the article mentions rent, *laudemium* and *propination*, and the superior owner's rights regarding hunting.<sup>37</sup> In one case, there is also a mention of fishing.<sup>38</sup>

Among smaller rural estates, mills require separate consideration, as they were relatively often subject to mortgages. The Kalisz Archives include a collection of mortgage records relating to a mill and approximately half a *tan* of land.<sup>39</sup> In Section II, we find the typical formula: 'as to buildings, by right of ownership, and as to land, by right of perpetual lease'. In Section III, in addition to provisions concerning rent, *laudemium*, and the obligation to pay church dues, we find the following provisions: '3. The owner is obligated to supervise that no strangers catch fish or shoot wild birds in the pond without the Demesne's knowledge. 4. The owner is obligated to maintain the mill's repairs and maintenance at his own expense, and is only to contribute to the repair of the Demesne's dike. 5. The owner is obligated to *Dominii Directi* (for the Manor Distillery) to grind 20 pieces and 40 drills of grain annually for the larder, without any measure or monetary compensation'.<sup>40</sup>

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województwa łomżyńskiego, 104; Tadeusz Mencil, *Chłopska własność i posiadanie ziemi przed uwłaszczeniem w Królestwie Polskim*, RDSG, vol 48, 1987, 58; State Archives in Lublin – Branch in Chełm, Akta notariusza Aleksandra Dąbrowskiego w Chełmie (36/120/0): 1821, deed no 241.

<sup>35</sup> See Mazurkiewicz, Ćwik (n 9) 56.

<sup>36</sup> Dobrzec Mały, D[obrzec] Wielki in: *Słownik Geograficzny Królestwa Polskiego*, vol II (Warszawa 1881).

<sup>37</sup> State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu*, sign.: 84, 94, 101, 105, 114, 239, 403.

<sup>38</sup> Ibid, sign. 105.

<sup>39</sup> See Agnieszka Galczak-Froch, *Problemy z usystematyzowaniem wewnętrznego rozwarstwienia chłopstwa* (2013) 18 *Krakowskie Studia Małopolskie*.

<sup>40</sup> State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu*, sign. 1635.

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On the last day of the session of the third Sejm of the Kingdom of Poland (13 June 1825), Alexander I established another (second) Legislative Deputation. Within 4 years, the Second Legislative Deputation prepared a draft of Book II of the Civil Code, which, although largely referring to Book II of the Napoleonic Code, differed significantly from the original.<sup>41</sup> In the context of this study, Title III of the project deserves special attention, as it includes, among others, provisions on divided ownership (Part III).<sup>42</sup>

The essence of divided ownership is defined in Article 54 of the draft:

When one person has a part of the right to dispose of the substance of a thing, and another person has a part of the same right and the exclusive right to use it, ownership is divided for that time, and both owners, both the substantial owner and the lower owner, are each entitled to dispose of and use their incomplete property, provided that they do not infringe upon each other's rights. The relations between them, unless regulated by contracts, third-party decrees, or by law regarding specific types of divided ownership, are subject to the following rules.<sup>43</sup>

This definition was clearly inspired by the content of § 357 ABGB.<sup>44</sup> Whether a given right is a form of divided ownership was to be determined not by its name but by its content.<sup>45</sup> The project also included provisions concerning, among other matters, the so-called *iura bannaria*: *ius patronatus*, *propination* rights, mill monopoly, and hunting rights. It was proposed to adopt a presumption that all these rights belonged to the superior owner (Article 57). The limits within which the lower owner could transform the property were defined (Article 58). The lower owner was obliged to maintain the property in a non-deteriorated condition (Article 59) and to pay public charges (Article 60).

Article 61 of the draft prohibited unilateral changes to rents and other performances. This regulation was made primarily to benefit lower owners. In the past, it was generally accepted that rents and other performances could rise with inflation. In accordance with the proposed regulation, this would only be possible if there was an express contractual stipulation. On the other hand, the provision severely limited the possibility of requesting a reduction in rents due to extraor-

<sup>41</sup> Grynwaser (n 26) 146–148.

<sup>42</sup> Zarzycka (n 31) 303ff.

<sup>43</sup> *Projekt do tytułu III Księgi II Kodeksu Cywilnego o własności*, The projects of individual titles and their justifications were printed as separate leaflets. Sygn. BUW: 4.18.1.23

<sup>44</sup> Zarzycka (n 31) 317.

<sup>45</sup> *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*; sign. BUW: 4.15.1.9, 86.

dinary events. Natural disasters (drought, flood, etc.) did not constitute grounds for such a request.

Articles 62 and 63 concerned the payment of *laudemium*. There was no presumption of *laudemium*. Therefore, this fee was payable only if it was expressly stipulated in the contract. If the contract stipulated the obligation to pay *laudemium* but did not specify its amount, it was assumed that 5% of the annual rent was due. There was also a presumption that *laudemium* did not burden the heirs. Furthermore, the obligation to pay *laudemium* in the event of division of the inheritance was excluded.

The project deliberately refrains from regulating the institution of *konsens*, which is justified as follows:

1. Assessing whether a new acquirer of lower property is capable of properly managing it is a difficult and highly subjective matter, and can open the door to litigiousness, often devoid of any principle and resulting solely from personal relationships or passions. If the transfer to an unfit person significantly impairs the rights of the actual owner, the latter will already have the right to oppose such a disposition under Article 658. [...]

2. By leaving the superior owner the possibility of refusing to give a *konsens*, and thereby making the transfer dependent on this confirmation, the superior owner would be given the possibility, even by delaying the declaration or by refusing to confirm, even if it were later found unjustified by the Court, to force the lower owner to retain his property, and this would indeed be a kind of serfdom, i.e. *globe adscriptionis*.<sup>46</sup>

The regulation of pre-emption and the distinction between different types of divided ownership were abandoned (with the exception of the *superficies*, which is devoted to Article 56).

Title VI (*On exclusive-district rights arising from land ownership*) of the draft book II of the code also dealt largely with divided ownership. Article 1 of the draft stipulated that:

Exclusive-district rights resulting from land ownership, such as the propination right and mill monopoly, consist in the legal force of prohibiting anyone from providing such needs within the area of the landed estate except the owner of the land or the person to whom the owner of the land transferred this right for a [fixed] period or forever.

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<sup>46</sup> *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 103.

Therefore, in individual landed estates (in accordance with generally existing practice), the manor was to have a monopoly on *propination*, milling, and so on. This monopoly applied to both permanent residents and those temporarily staying on the estate. Provisions concerning *propination*, mill monopoly and other monopolies can be found in numerous 19th-century notarial deeds and mortgage entries concerning lower property.

As the Second Legislative Deputation states in the justification of the project in question:

It is common knowledge that in our country, from time immemorial, the landowners (*domini directi*) have been exclusively responsible for the production and sale of alcoholic beverages, and that they have the power to prohibit anyone from producing or selling alcoholic beverages on their land, or importing them, even for their own home use.<sup>47</sup>

The landlord's monopoly on alcohol and milling was accompanied by the obligation to produce alcoholic beverages and maintain the mill. Failure to fulfill these obligations resulted in the monopolies being terminated.

On 4 December 1829, the General Assembly of the Council of State adjourned the debate on the entire project until the opinions of judges and other lawyers had been received and instructed the Second Legislative Deputation to extract smaller sections from the project:

1. On divided property
2. On navigable rivers and public roads
3. On forest and pasture servitudes
4. On exclusive-district rights
5. On acts of legitimation
6. On changing the inheritance procedure<sup>48</sup>

In connection with the subject of this study, we are particularly interested in the drafts of points 1, 3, and 4. The draft law on divided property was based on Title III, Book II of the national code draft. It was rejected by the General Assembly of the Council of State.<sup>49</sup>

The General Assembly of the Council of State in December 1829, after analyzing the project on exclusive-district rights, decided that there was only a need to

<sup>47</sup> *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 1.

<sup>48</sup> Litauer (n 29) first footnote, Grynwaser (n 26) 158.

<sup>49</sup> Grynwaser (n 26) 160.

regulate the *propination*, while there was no such necessity as regards the mill monopoly.<sup>50</sup> The project was presented to the monarch. However, due to opposition from the Minister of the Treasury, Franciszek Ksawery Drucki-Lubecki, it did not gain the King's approval and was not included on the agenda of the June Sejm of 1830.<sup>51</sup>

The only project touching upon the issue of divided ownership (and only indirectly) that was presented to the June Sejm of 1830 was the project concerning the servitude of pasture and felling.

According to Antoni Wyczechowski, State Counsellor, who spoke in the Chamber of Deputies, the main goal of the project was to regulate the possibility of abolishing servitudes.<sup>52</sup>

While this may seem puzzling, in 1830, during the Chamber of Deputies' session, voices were raised that the draft 'law on pasture and felling servitude' was of little importance. The Council of State was even accused of disregarding the Sejm by submitting such insignificant bills.<sup>53</sup> Contrary to this opinion, the parliamentary committees (all three of them discussed together) approached the project with great attention and introduced a number of changes to it.<sup>54</sup> After introducing the changes, the committees approved the project by a narrow majority.<sup>55</sup> At this stage, the possibility of purchasing a servitude at the request of the entitled person was removed from the project.<sup>56</sup> The Act was adopted on 18 June 1830, with 82 votes in favor and 30 against.<sup>57</sup> It received the monarch's approval on 28 June 1830.<sup>58</sup>

The parliamentary law on servitudes of pasture and felling uses the institution of servitude. However, it does so in a manner inconsistent with the definition in the Napoleonic Code. The Code defined servitude in Article 637 as follows:

A servitude is a charge imposed upon an estate for the use and benefit of an estate belonging to another proprietor.<sup>59</sup>

<sup>50</sup> Grynwaser (n 26) 159; *Projekt do ustawy sejmowej o prawie propinacji z własności gruntowej wynikającym*: AGAD, [Pierwsza] Rada Stanu Królestwa Polskiego, sign. 202, 9ff

<sup>51</sup> Grynwaser (n 26) 161.

<sup>52</sup> *Protokół posiedzeń Izby Poselskiej z roku 1830*, 107.

<sup>53</sup> Skarbek, *Dzieje Polski*, vol II (Poznań 1877) 283; *Protokół posiedzeń Izby Poselskiej z roku 1830*, 112.

<sup>54</sup> *Ibid* 109.

<sup>55</sup> *Ibid* 111.

<sup>56</sup> *Ibid* 109–110.

<sup>57</sup> *Ibid* 121

<sup>58</sup> *Dziennik Praw [Królestwa Polskiego]*, vol XIII, 122–129.

<sup>59</sup> *The Code Napoleon or the French Civil Code* (n 8).



If we agree that the parliamentary law was correctly incorporated into the code's framework of concepts, then it must be assumed that those entitled to the servitudes of pasture and felling had to be the owners of the real estate,<sup>60</sup> because the land servitude could only be established for the benefit of the real estate. In practice, if the entitled parties had property rights to land at all, they were often lower owners. It can, therefore, be said that by adopting the law on servitudes, the Sejm, in a sense, once again confirmed the existence of divided ownership.

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The first major agrarian reform in the Kingdom of Poland, implemented by the Tsarist government, took place in 1846, in connection with the planned national uprising across the three partitions organized by the Polish Democratic Society. Although the uprising manifestos stipulated that peasant plots would become the full property of their holders (without compensation for the landlords), Austrian officials managed to incite the Galician peasants against the insurgents, resulting in numerous attacks on manors and murders that went down in history as *rabacja*. The scale of conspiratorial and insurrectionary activity was the smallest in the Russian Partition among the three partitions. There were no major peasant disturbances in Congress Poland, although there were noteworthy instances of peasants capturing and handing over conspirators to the occupying powers, as well as instances of peasants refusing to perform their duties to the manor (e.g., in Miechów district).<sup>61</sup>

Due to the tense situation in the Kingdom, Emperor and King Nicholas I arrived in Warsaw on 18 May. The monarch established a secret committee to improve the lives of peasants. The committee's work resulted in the Supreme *Ukaz* (the so-called June *Ukaz*), signed by the monarch on 26 May (7 June) 1846.<sup>62</sup>

The most important provision of this act is the inviolability of farms of peasants of at least 3 *morga* of land (approx. 1.5 hectares), provided that the peasants fulfill their obligations. At the same time, the landlords were prohibited from increasing the obligations of this category of peasants (Article 1). Since the entry into force of this act, there has been no doubt that the farms covered by it were subject to divided ownership.<sup>63</sup> If a farm was vacated, the landlord was obligated to install a new peasant within two years (the annexation of vacant lands to manors was

<sup>60</sup> Arts 8–9.

<sup>61</sup> Sample information about the peasants' understanding of two 'Rokoszans': AGAD, *Rada Administracyjna Królestwa Polskiego*, vol 98, 423–424.

<sup>62</sup> AGAD, *Rada Administracyjna Królestwa Polskiego*, vol 98, 374.

<sup>63</sup> Jan K Wołowski, *Kurs kodeksu cywilnego*, Warszawa 1868, vol II, 104; W. Grabski, *Historia wsi w Polsce* (Warszawa 1929) 344.

prohibited – Article 2). Furthermore, peasant obligations that were not based on legal titles were abolished (Article 3). The practical significance of this provision was limited due to the often precisely defined scope of peasant obligations. However, the Administrative Council issued a resolution on November 14/26, 1846, clarifying the content of Article 3. In principle, obligations defined by working days or the amount of work were retained, while the remaining obligations were abolished.<sup>64</sup> Nevertheless, determining which obligations were abolished was the subject of much dispute.

In connection with the implementation of the reform, tables of duties (*tabele prestacyjne*) were prepared on landed estates throughout the Kingdom. They indicated the plots of land to individual peasants and their obligations. The tables were prepared by the landlords (without the involvement of the peasants) and submitted to the administrative authorities.<sup>65</sup>

The June *Ukaz* is a very short act (only seven articles) and quite general. Many important issues were not regulated. It was supplemented, to some extent, by later acts of the Viceroy and the Administrative Council. The fundamental interpretative problem was – as with the December decree – the scope of application of the regulations. Initially, Viceroy Ivan Paskevich stated that the decree did not apply to colonists who had leased lands based on written, temporary contracts.<sup>66</sup> The resolution of the Administrative Council of 18/30 November 1858 determined that the decree should also apply to tenants and farmers holding land on the basis of long-term contracts.<sup>67</sup> The *ukaz* itself did not stipulate anything about the transferability of peasant grounds. According to established practice, they could be sold and be subject to inheritance.<sup>68</sup>

The provisions of the June *Ukaz* were intended to be temporary. However, the development of definitive regulations dragged on. The authorities probably hoped that the problem would be solved – at least to some extent – without their involvement, through the conclusion of agreements between the manors and the peasants. This process undoubtedly progressed, but slowly. Both the landlords and the peasants often believed that maintaining the current state of ‘undefinedness’ was more advantageous to them than concluding an agreement. On the one hand, the manors did not want to be bound by long-term contracts, which would hinder the

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<sup>64</sup> *Dziennik Praw [Królestwa Polskiego]*, vol XXXVIII.

<sup>65</sup> Stankiewicz, *Tabele prestacyjne jako źródło wiadomości o przemianach wsi Królestwa Polskiego w połowie XIX wieku* 53(2) *Przegląd Historyczny* 311–331.

<sup>66</sup> Grynwaser (n 26) 152.

<sup>67</sup> *Dziennik Praw [Królestwa Polskiego]*, vol LII, 39ff.

<sup>68</sup> Grynwaser (n 26) 150 (footnote).

future modernization of their landed estates, while on the other hand, the peasants hoped for a governmental agrarian reform, which ultimately occurred in 1864.

On 16 (28) December 1858, the Administrative Council issued a resolution intended to regulate the future renting process on private landed estates. This act contained relatively few guarantees for peasants and left virtually all important issues related with this process to the parties. Therefore, it changed little and did not significantly accelerate the renting process. Importantly, the rules adopted in the contracts were to be perpetual.

The Administrative Council's resolution stipulated that, after concluding a new lease agreement, the peasants were to become owners of the buildings (even if they had previously belonged to the landlord). The primary benefit to the landlord was to be monetary rent. Labor could be retained under perpetual lease agreements for a maximum of six years. The rent could be perpetual or subject to indexation every 20 years (by reference to the price of rye). The agreements were to be approved by the provincial committees, then notarized and entered into the mortgage registers of the relevant landed estates.

The Russian agrarian reform of March 1861 caused a major stir in the Kingdom. Although it did not extend to the Kingdom, the news of it quickly reached Polish peasants. Various disturbances occurred, including significant evasion of labor.<sup>69</sup> However, there were no acts of violence directed against the landlords and their officials.

In this situation, Aleksander Wielopolski decided to take the next stage of the agrarian reform and persuaded Tsar Alexander II to sign the decree on the ransom of forced labor.<sup>70</sup> The basic premise of this decree was to replace forced labor with monetary payments. However, it applied only to those farmers who were not bound by any contract with the manor (neither written nor oral, neither perpetual nor temporary – Article 3).

The peasants' attitudes towards the decree varied. The economic consequences of its implementation were also mixed. In some regions, ransom rates were relatively low compared to the value of previous obligations, but generally they should be assessed as high. The peasants viewed the new law with distrust. About twenty percent of village heads (*sołtysi*) refused to sign the protocols announcing the decree.<sup>71</sup>

<sup>69</sup> Grynwaser (n 26) 29.

<sup>70</sup> *Ukaz co do oczyszczowania włościan w Królestwie Polskim 4(16) maja 1861 r.* 57 Dziennik Praw [Królestwa Polskiego] 378ff.

<sup>71</sup> Tomasz Szczechura, *Ukaz o okupie pańszczyzny z dnia 16 maja 1861 r.* (1949) XL Przegląd Historyczny; Grynwaser (n 26) 61.

By the summer of 1861, the level of peasant resistance had diminished compared to the spring. Nevertheless, the prevailing mood in the countryside, including the continuing numerous acts of mostly passive resistance, prompted Wielopolski to begin work on the next stage of the reform: renting process *ex officio*. The drafting of the relevant decree sparked considerable controversy, including an open conflict between Wielopolski and Viceroy Nikolai Sukhozanet. Ultimately, on 24 May (5 June) 1862, Alexander II signed the decree. It was a comprehensive and detailed legal act (147 articles). It differed from the decree on the ransom of forced labor, which had been issued a year earlier, in the method of calculating the fees paid by the peasants. The decree of 1861 used the number of days of compulsory work and the quality of the land as the basis for calculating the ransom, while the decree of 1862 linked the rent amount to the quality of the land and the price of grain. Rents could be periodically indexed due to changes in grain prices (Article 27). The assumptions of the 1862 decree were similar to those underlying the resolution of the Administrative Council of 16 (28) December 1858. The most significant difference is that the 1858 resolution left the final rent amount to the discretion of the parties (requiring agreement between them), while the 1862 decree allowed for the possibility of setting rent amounts by special rent delegations. Servitudes (such as the right of peasants to use manor meadows and forests) were to be abolished, but their abolition was linked to a reduction in rents (Article 23). Perpetual rents could be redeemed by peasants (Article 45 repealed the Sejm Act of 1/13 June 1825, which abolished the right of those obligated to pay perpetual rents to redeem them).

The decree on the renting process *ex officio* explicitly stated that ‘in perpetual-rent farms, ownership rights are divided. The ownership of the substance, or the principal property (*dominium directum*), belongs to the landlord, while the lower ownership (*dominium utile*) belongs to the peasant’ (Article 46). ‘The right to hunt and fish, and also *propination* belongs exclusively to the principal owner, unless the peasants acquired these rights by privilege, grant, or contract’ (Article 47). The peasant was the owner of all buildings and other attachments (Article 47). A peasant’s change of purpose of the plot of land required the *konsens* of the superior owner (Article 48). A sale required the *konsens* of the landlord, as did taking possession of the peasant’s land by a testamentary heir (Article 49). ‘The principal owner may refuse permission only if the applicant for the farm is of bad conduct or lacks the means to properly develop the land’ (Article 50). In the absence of a will, the right to a peasant’s land was subject to inheritance, but only one heir could inherit it. If the heirs could not agree on who would inherit the land, it was subject to auction (Article 52). Peasants’ farms were to be indivisible, and their area could not exceed 33 hectares (Article 51). Peasants’ farms were not allowed to be indebted (Article 56).

The practical application of the decree on renting process *ex officio* of 1862 was very limited. It was solemnly announced to the peasants in August and September 1862. By the end of 1862, rent delegations were in the process of being organized. In January 1863, an uprising in the Kingdom broke out.<sup>72</sup>

Similarly to the National Uprising of 1846, conspirators in the 1860s hoped to win over the peasantry by announcing the agrarian reform. The Central National Committee's appeal to the Polish nation, dated 22 January 1863, containing a call for an uprising, included an announcement of agrarian reform: 'The land that the peasants have held so far on rent or other rights shall from now on become their unconditional property, their perpetual inheritance'.<sup>73</sup> Simultaneously with the proclamation, a decree was promulgated concerning the agrarian reform, which specified: 'Any plot of land that any farmer has previously held through rent, or any other title, together with the gardens, residential and farm buildings, as well as the rights and privileges attached thereto, from the date of this Decree shall become the exclusive and hereditary property of the previous possessor, [...]' (Article 1). At the same time, compensation for landlords was announced from the State treasury (Article 2). A separate decree stated that every peasant who joined the uprising would receive a plot of land (at least 3 *morges*) from the national property. In the event of the death of the entitled person during the fight, the share was to go to his wife and children.

The January Uprising had no chance of success. Pacifying the Kingdom and the Stolen Lands, however, took the Russians a long time and required considerable effort. The relatively liberal Tsar, Alexander II, began to realize that consolidating Russian power on the western frontiers of the empire required relying on the peasants rather than the nobility after the conciliatory policies of Alexander Wielopolski (supported by the monarch) ended in failure. From the Tsar's perspective, it was obvious that another agrarian reform was necessary and that it should be initiated by St Petersburg, not the insurgent authorities. On 31 August 1863, the Tsar received an audience with Nikolai Milyutin, whom he wished to entrust with the work of reform in the Kingdom. Milyutin and his companions then embarked on a tour of the Kingdom to learn about local agrarian relations. At the end of December 1863, the Tsar appointed a special committee to prepare the reform. It consisted of approximately 10 people, including Milyutin, Russians who typically held high government offices. As a result, four principal decrees were drafted, signed by the Tsar on 19 February (2 March) 1864. Among them was the decree on a huge agrarian reform.<sup>74</sup>

<sup>72</sup> Grynwaser (n 26) 106

<sup>73</sup> *Wydawnictwo materiałów do historii powstania 1863–1864* vol I (Lwów 1894) 32.

<sup>74</sup> Józef Targowski, *Komitet urządzający i jego ludzie* 34(1) Przegląd Historyczny.

According to Article 1 of the decree on agrarian reform, 'The lands remaining in the possession of the peasants (i.e., peasant farms), both in private and donated estates, as well as in foundations and government estates, shall become the full property of the peasants in possession of these lands'.

The decree transformed the existing peasant lower ownership into full ownership. However, it did not abolish divided ownership as such. The concept of a peasant (*włościanin*) was not defined in the legislation in force in the Kingdom until then. In practice, who was subject to the decree and who was not was often controversial. The decree undoubtedly did not cover, among others, innkeepers, millers, and farmers from private towns (many towns were still agricultural in nature). The *ukaz* abolished all obligations to the manor (labor, rents, benefits in kind).

The decree stipulated that lands would become the full property of peasants. Nevertheless, certain detailed regulations meant that peasant ownership under the decree differed significantly from that described by the Napoleonic Code. In particular, specific regulations were introduced for mortgage entries concerning decree farms, while a resolution of the Organizing Committee of 30 December 1866 (11 January 1867) prohibited the division of farms into parts smaller than 6 morges. Hunting and fishing rights, previously held by landlords, were granted to communities, not to the owners of individual farms (Article 16). The decree maintained servitudes (Articles 11 and 12).

The agrarian reform entailed the payment of compensation to landlords. However, these were paid by the State treasury, not individual peasants. Repayments were spread over 42 years. The State maintained the *propination* (the State treasury, not individual landlords, was entitled to this income) and imposed a land tax on peasant farms. By the outbreak of the First World War, revenues from these sources exceeded the costs of compensation.<sup>75</sup>

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My archival research and 19th-century legal studies – in contrast to publications from the Polish People's Republic period – lead to the conclusion that divided ownership was widespread in the Polish countryside, although it took very different forms and is found in the sources under numerous names (*dzierżawa wieczysta*, *Erbpacht*, *prawo powierzchni*, *umowa wieczystoczynszowa*, *emfiteuza*, *prawo czynszowo-własne*).<sup>76</sup> In my opinion – contrary to the views appearing in the

<sup>75</sup> Krzysztof Groniowski, *Uwłaszczenie chłopów w Polsce*, Warszawa 1976, 128ff; Konstanty Grzybowski, Juliusz Bardach (eds), *Historia państwa i prawa Polski*, vol IV (Warszawa 1982) 98ff.

<sup>76</sup> *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 86; Sobociński, 'Studia z dziejów miast Królestwa Polskiego w XIX w.

literature – it is difficult to distinguish the types of divided ownership corresponding to the specific names found in the archival sources and in the 19th-century literature. As Walenty Dutkiewicz rightly noted: ‘In Polish law, to understand it thoroughly, one should not consider the name so much as the property itself’.<sup>77</sup>

The relationships between superior owners and lower owners were very diverse. Nevertheless, we can find many typical elements (which in individual cases appeared in different configurations – sometimes all of them, often selected ones). Therefore, in addition to the basic right to possess a plot of land and derive benefits from it, the lower owner often had the opportunity to exercise servitudes (collecting timber from the manor forest, grazing cattle on the manor pasture). In turn, the manor, in addition to collecting what we traditionally call feudal rent (labor, rents, benefits in kind), held *iura bannaria* (*exclusive-district rights*), such as *propination*, the mill monopoly, and the right to hunt in peasant fields after the harvest. In the event of the sale (and sometimes in the case of any transfer of rights) of lower property, the manor was entitled to *laudemium*. Often, the *konsens* of the manor was required for the validity of transactions involving subordinate property.

The form of divided ownership (the rights and obligations of the superior and lower owners) was determined primarily by the granting act (the agreement establishing divided ownership), and to a lesser extent by general legal principles, which, moreover, were unwritten – the Napoleonic Code recognized only full (capitalist) ownership. Furthermore, it was governed by the *numerus clausus* principle of property rights. This means that, according to standard rules of interpretation, while it is possible to conclude that property rights created before the Code came into force (such as the rights of the *Olenders*) remained in force, the creation of new forms of divided ownership was legally prohibited. A specific exception to this principle was established by Frederick Augustus’s decree of 31 January 1810 on the hereditary lease of smaller national estates. However, as the title suggests, this decree did not apply to private properties. Despite this, notarial deeds and mortgage registers contain numerous agreements establishing various forms of divided ownership (under various names) in private properties. While divided ownership was common in that period, the cases of peasants obtaining full ownership were exceptional.<sup>78</sup>

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(1866–1869)’ in Jan Skarbek i Jan Ziółek (eds), *Kościół – Państwo – Niepodległość* (Lublin 1980) 300; Waldemar Dutkiewicz, *Program do egzaminu z historii praw, które w Polsce przed wprowadzeniem Kodeksu Napoleona obowiązywały* (Warszawa 1866) 240; Mazurkiewicz, *Ćwik* (n 9) 57.

<sup>77</sup> Dutkiewicz *ibid* 241.

<sup>78</sup> State Archives in Płock, Branch in Łęczyca, *Hipoteka w Łęczycy 1801–1947* [1989], vol 220 „Księga hipoteczna Dobra Kałów Okręg Zgierski Nr. Re 275 1801–1947”, 99–101; State Archives in Łódź, *Akta notariusza Józefa Stokowskiego w Zgierzu* (39/438/0), deed no 3950.



The introduction of the capitalist French code caused a discord between the letter of the law and practice – particularly in rural relations. This problem was noted during the works on legal reforms, but for decades it remained unregulated in the existing legal system (although a relevant draft was prepared before the session of parliament in 1830). The existence of divided property was recognized (albeit somewhat peripherally) by mortgage laws. The existence of divided property on a very large scale (and simultaneously a significant expansion of the number of farms covered by lower ownership) was confirmed by the June *Ukaz* of 1846. The reform initiated by Aleksander Wielopolski (the *Ukaz* on the renting process *ex officio* of 1862) could have consolidated the functioning of divided property on a large scale and simultaneously transferred many aspects of its operation from customary law to the written law. However, it never entered into force. In turn, the agrarian reforms of the 1860s brought about a significant reduction in the number of real estates subject to lower ownership, making farmers (previously lower owners) owners of farms in the capitalist sense.

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