AD NOVELLAM 159

Legal historians are probably seldom consulted about a contemporary case with the explicit request also to pay attention to the question whether a Justinianic Novel, promulgated fourteen hundred and thirty five years ago, is valid today, in 1990. Yet that is just what happened to me. What was the case? On March 22nd 1782 the wealthy Gijsbert Kist from Amsterdam[1] had made a legally valid will, in which he had instituted three heirs (two daughters and one granddaughter) for equal parts. He further bequeathed by trust, *fideicommissum*, two thirds of his clear inheritance, including numerous immovables, to his two daughters as charged heirs, in favour of the poor relief of a Roman Catholic church in Amsterdam; let us call it the parish of St. Brandane. The beneficiary should be admitted when each of the lines had run out. Kist died in 1792, so in that year his inheritance became vacant. In those days Amsterdam still adhered to the decrees of Roman-Dutch law. In May 1819 the last heir of Gijsbert Kist died. As a result the beneficiary, in fact the parish church, was in May 1819 entitled to two thirds of the Kist inheritance; in 1819 the Netherlands were subject to the French *Code civil*. However, the will did not allow the parish freely to dispose of the share now transferred to it. In particular it was forbidden to alienate the immovable goods that it comprised. If this ban should be disregarded, the goods were to come to the intestate heirs of Kist's mother, Johanna Klomp, *in infinitum*.

Such were the main facts concerning the will of Gijsbert Kist. The church had thus far, that is until 1990, adhered to the ban on alienating the immovables, although it had several times sought advice about the possibility of getting rid of its galling bonds. The immovables, situated in what had originally been little villages surrounding the capital, were now in the most expensive parts of Amsterdam. The parish church wished to profit from this immense increase in value.

All who have occupied themselves with the case agree that the will should be judged in accordance with the law system valid in the time when the inheritance had become vacant, i.e. in according with Roman-Dutch law, which was, in the matter of *fideicommissa*, nothing else than adopted Roman law. In that context mention has repeatedly been made of Novel 159, which might or might not bear on the case. In this Novel Justinian would have laid down that a ban on alienating could never extend beyond four generations. Now that after almost two centuries, it was argued, the period of four generations had evidently passed, the ban on alienating would have lost its validity in accordance with this Novel.

1 On the parties' request the names and places have been changed.

Therefore I too was consulted about the legal validity, anno 1990, of this sort of ban on alienating in general and on that mentioned in Novel 159 in particular. In this *Liber Amicorum* I present some remarks on this question and on Novel 159 in general with some diffidence to the great expert on Justinian's Novels, Nico van der Wal, in admiration of his learning and as a token of a friendship of many years' standing.

Novel 159 can be regarded as a rescript in the original sense of the word. Its composition is unique among the series of 168 Novels in containing an unparallelled publication-decree by the *praefectus praetorio*. We know that each imperial constitution included an order to the magistrates addressed, to publish the constitution by posting. The standard way of formulating that order is also found in Novel 159: Τὰ τοίνυν παραστάντα ἡμῖν καὶ διὰ τοῦ παρόντος δηλούμενα νόμου ἡ σὴ ἐνδοξότης προθεῖναι κατὰ ταύτην τὴν πανευδαίμονα πόλιν καὶ ἔργῳ καὶ πέρατι παραδοθῆναι καὶ παραφυλαχθῆναι προσταξάτω (p.743, 12 ff.).[2] Whereas these imperial orders to publish a constitution have in quite a few instances been transmitted to us in the Novels,[3] the complete text of such publication decrees has been preserved in some exceptional cases only. One of these exceptions is found in the epilogue to Novel 159.[4]

A further peculiarity unique to Novel 159 is the curious remark that closes both the epilogue and the publication decree, in Latin: *PP Fl. Iohannes et Curicus ab actis optulimus*. The precise meaning of this note is uncertain. Zachariä von Lingenthal has proposed[5] to change the letters PP into PR, which would stand for *Princeps*. Flavius Johannes would then have been the head, *princeps*, of the ministerial office of the *praefectus praetorio*, and together with Curicus, the *ab actis* of the same office, he would have taken care that publication did indeed take place. According to Zachariä, the word 'optulimus' would suggest that the entire Novel 159 has been transmitted not through the imperial office, but through the office of the *praefectus praetorio*. He does not, however, explain the precise meaning of 'optulimus'. It remains unclear to Schoell and Kroll as well, as is evident from their critical apparatus to the text: *quid significat incertum*. Ernst Stein seems to me to interpret

2 Cf. N. van der Wal, 'Edictum und lex edictalis. Form und Inhalt der Kaisergesetze im spätrömischen Reich', *RIDA* 3e S. 28, 1981, 289 ff.

3 The compilers of the codices Theodosianus and Justinianus had been instructed to omit them.

4 Another instance is found after a constitution of Theodosius II, a fragment of which is preserved in C.J. 1, 1, 3 d.d. 17-2-448. The publication degree - διάταγμα - is dated 18-4-448; it can be found in *Acta conciliorum oecomenicorum* (ACO), ed. E. Schwartz I, IV, 66 and 67. Van der Wal has suggested in his recension (*TRG* 42, 1974, 129) of M. Amelotti - G.I. Luzzato (edd.), *Le costituzioni giustinianee nei papiri e nelle epigrafi* [Legum Iustiniani imperatoris vocabularium, Subsidia, I], Milan 1972, that the 'Discorso di un governatore per la pubblicazione di leggi imperiali', published on p. 105 under nr 14 is a fragment of another publication decree.

5 *SZ* 12, 1892, 98 = *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte* II, 448.

the words correctly.[6] He considers both Flavius Johannes and Curicus as *ab actis* and grants the letters PP their usual meaning of 'proponatur'. In the original version the prefect would have written down this word, which expresses the real publication order, in his own hand, just as the emperor would personally write down *(re)scripsi* under his rescripts, or as nowadays the president of court orders the execution of his sentence by the word *exequatur*. The word served, so to speak, as the emperor's or the prefect's signature.[7] Stein considers the annotation of the two office clerks as a guarantee of the authenticity of the entire text of the Novel. I doubt, however, that it should have such large implications; it may pertain to the prefect's publication decree only. Surely it is not by mere coincidence that the only direct information that we possess about the activities of the officials of the prefect, is a note transmitted together with the only publication decree of a Novel that we possess in its entirety. In that case Johannes and Curicus have not so much transcribed the whole Novel as drafted the publication decree. Composing such a decree is more than a mere formality and requires an independent ability for formulation. In the usual rhetorical setting the text of the decree quite clearly refers to the contents of the Novel, providing, as it were, a summary: τὰς γὰρ ἐπ' ἀπαιδίᾳ γινομένας ὑποκαταστάσεις διακρίνας σαφῶς, ὡς ἔνεστι τῷ προλάμποντι νόμῳ, δέδωκε καὶ τοῖς τελευτῶσι θαρρεῖν, ὡς οὐδεὶς ἂν αὐτῶν τὰς γνώμας παρακινήσειε, καὶ τοῖς περιοῦσιν ἀμφισβητήσεων καὶ διαδικασιῶν χωρὶς τὰ τοιαῦτα πρὸς ἀλλήλους διατιθέναι (p. 743, 19ff.).

The preservation of the publication decree by the *praefectus praetorio* is not the only interesting aspect of Novel 159. It also grants us more than any other Novel a clear insight into the real nature of the Authenticum, which was first understood by Scheltema.[8] Since his paper was published we know that the Authenticum had originally been developed as a didactic aid for students who struggled with the difficult Greek of the Novels. In order to grow familiar with the Greek text they wrote above each word, therefore between the lines, the Latin equivalent of that word, whether this translated word was suitable in the context or not. This didactic aid, the so-called κατὰ πόδας translation, clearly increased the risk of the text deteriorating. Yet Justinian made an exception in allowing its employment for

6 'Deux questeurs de Justinien et l'emploi des langues de ses Novelles' (1937), *Opera Minora selecta*, Amsterdam 1968, 380, note 1.

7 Cf. Van der Wal, 'Edictum und lex edictalis', 283.

8 H.J. Scheltema, 'Subsecivum XI. Das Authenticum', *TRG* 31, 1963, 276-277; idem, *L'enseignement de droit des antécesseurs*, Leyden 1970, 53 ff.

understanding the Digest.[9]

Not only many a translation was peculiar, but also the order in which the words stood, since it depended on the Greek text of the Novels. This peculiarity was even more conspicuous when the Latin text had been disconnected from the Greek and started to live a life of its own. This process resulted in Latin phrases which were originally never meant as phrases, but as a mere series of independent words. The original function of the Authenticum remains particularly clear in Novel 159 and consequently Scheltema often referred to it in establishing his theory. Apparently the scribe responsible for separating the Latin and Greek texts could not everywhere make out the Latin words scribbled between the lines; at his wit's end he would then put down the Greek word instead. That procedure can at least account for the occurrence of 'Hierio viro clarissimo et εὐγενεστάτῳ' (p. 738, 4), in the manuscripts corrupted into *eugenistato* or *eugenii* ('Ιερίῳ τῷ λαμπροτάτῳ καὶ εὐγενεστάτῳ), of 'multae nobis visum est plenum esse περιεργίας' (πολλῆς ἡμιν ἔδοξεν ἀνάμεστον εἶναι περιεργίας, p. 741, 25f.). Similarly, although the translation of σκαλῶν was duly transcribed, the original word was added as well, so that the Authenticum text reads: *ascensu et descensu* σκαλῶν (p. 738,7); this last word was subsequently corrupted into σηaaωN, *opalon* and *opali*. Very interesting is the last lacuna on p. 739 of the edition of Schoell and Kroll, the reconstruction of which passage is in my opinion even more complicated than Scheltema[10] suspected. The editors comment: *in libris et vulg. hic locus misere turbatus et corruptus* and account for this corruption as follows: *corruptela orta videtur versuum serie in archetypo turbata*. More specifically the transcriber of the Authenticum text was led astray by being four times confronted with χώραν or other words closely resembling it in this passage of the Novel: ... οὐδεμίαν ἔφασκον χώραν γενέσθαι· μηδὲ γὰρ παίδων χωρὶς Κωνσταντῖνον τὸν τῆς ἐνδόξου μνήμης ἀπελθεῖν ἐξ ἀνθρώπων, ὡς χώραν τῇ τῶν οἰκιῶν ἑκατέρων ἀποκαταστάσει γενέσθαι, ἀλλ' οὐδὲ ὑπὲρ τοῦ προαστείου μετὰ τοῦ νόμου 'Αλέξανδρον τὸν ἐνδοξότατον χωρεῖν ἐπ' αὐτὰς ... (p. 739,29ff.) Moreover the translator has made a mistake which is typical for a κατὰ πόδας, reading οἰκιῶν (from οἰκία = house) as οἰκεῖον and rendering it by *suum*.[11] Finally there is an incomprehensible mess of words in *Caput* II, due to the fact that

9 In the case of the Digest of course the situation is the opposite; there it is the difficult Latin text which had to be explained to Greek students. Justinian promulgated a strict ban on 'commentarios isdem legibus adnectere, nisi tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia, sub qua et voces Romanae positae sunt (hoc quod Graeci κατὰ πόδα dicunt)'. Cf. H.J. Scheltema, 'Das Kommentarverbot Justinians', *TRG* 45, 1977, 307-331 and recently T.J. Wallinga, *Tanta/Δέδωκεν. Two introductory constitutions to Justinian's Digest*, Groningen 1989, passim. Moreover, we still possess fragments of a κατὰ πόδα translation of the Codex, made by Thalelaeus, Scheltema, *Antécesseurs*, 32 ff.

10 *Antécesseurs*, p. 55.

11 See Schoell and Kroll, loc. cit.

the Greek text εἰσποιοῦσι σφᾶς αὐτοὺς (p. 741, 20) has been transcribed in a steadily increasing degree of corruption, a process in which for instance the prefix εἰς changed into the Latin *eis*.[12]

All things considered, Novel 159 grants us a clear insight into the origin and nature of the Authenticum and it is good once more to stress this point, seeing that many textbooks and manuals remain to this day unaware of the true nature of the Authenticum as a Latin κατὰ πόδας,[13] still repeating obsolete guesses which were for the most part formulated in the last century.[14]

Now that we have discussed some peculiar aspects in the form of Novel 159, it is time for us to turn our attention to its content. The Novel decides a private law case, which could in principle have been left to the judge. The emperor, however, as supreme judge and supreme legislator deemed the case so important, that he wished to widen its scope by means of a legal regulation. The case concerned the interpretation of the will of a certain Hierios. This Hierios had left various houses, country houses and other immovables to his four sons and heirs, with the fideicommissary condition that they were not allowed to alienate the immovables and ought to transfer them as charged heirs to their children. Should one of the sons die childless, then the piece of property was to be transferred to the remaining brothers. Two brothers are relevant for the case: Constantine, the eldest, and Alexander, probably the youngest. The eldest received three houses: two country houses situated near the capital (one of them in in the suburb of Coparia) and a house in Antiochia. After some time this eldest son became the father of a son, a namesake of the testator. The testator then changed his will by a supplementary codicil, in which he disposed of the Coparia country house in direct favour of little Hierios jr., again charged with the same ban on alienating. Should junior die childless, then the piece of property would go back to his father Constantine. In that case too alienation would be forbidden: it ought to remain associated with the family and the name of Hierios.

Such were the circumstances when the testator, Hierios senior, died. The subsequent history makes it quite clear that the descendants took little notice of the ban on alienating. Alexander sold the estate left to him, situated in the suburb of Veneti, and Hierios junior alienated the house in Antiochia, which he had inherited from his father Constantine. However, he bequeathed the country house in Coparia, which he had received in accordance with the codicil, to his son Constantine II, the great-grandson of the testator. This Constantine in turn bequeathed it to his unborn

12 See H.J. Scheltema, *Antécesseurs*, 55.

13 See also D. Holwerda, 'Fouten in het Authenticum', *Flores legum H.J. Scheltema oblati*, Groningen 1971, 115-120.

14 See recently for instance O.E. Tellegen-Couperus, *Korte geschiedenis van het Romeinse recht*, Deventer 1990, 125-126.

child, but with the additional provision that, in case this little child should die without issue, the property should devolve upon his wife Mary, together with another Mary who lived with him, presumably his mother-in-law. When the child, a daughter, did indeed die as an infant, the inheritance, including the Coparia country house, devolved upon the ladies Mary. Thus it was after four generations dissociated from the name and family of Hierios. The still surviving great-uncle Alexander, however, did not much like this. He claimed the country house on the ground of the substitutory provision laid down in the will, that the property should devolve upon the remaining brother(s) lacking any direct descendants. So the conflict was between the two ladies Mary on the one hand and the great-uncle Alexander on the other. The spokesmen of the two women argued that, according to the words of the will, substitution would take place only if one of the testator's sons would die without issue, and that it could therefore not be appealed to now that Constantine, far from dying without issue, had had a son, Hierios II, as well as a grandson, Constantine II. As a second argument they pointed out that Alexander was the last person who ought to litigate at all, seeing that he for his part had sold his house in defiance of the ban on alienating.

Alexander replied that he had not sold the house of his own free will, but on orders of the emperor and that, furthermore, the words of the codicil showed beyond all doubt the testator's intention, that substitution would take place not only if one of his sons should be childless at the time of his death, but in case there were no longer any of his descendants alive. The testator's idea had been that the property should remain associated with his name and family. These were the conflicting positions when the matter came to the attention of the emperor.

Justinian proceeded with accuracy and care. First of all he established that, according to the words of the will, substitution would take place only if one of the sons should die without issue, which limited the ban on alienating to the first generation. Moreover, appeal to it had been undermined by the fact that the plaintiff himself had broken this very ban. Meanwhile, however, the Coparia country house mentioned in the codicil was a different matter; this estate was definitely charged with a perpetual ban on alienating. So this was the case that had to be decided, and the decision was made in favour of the two Marys, on two grounds. In the first place the two women also ought to count as family - for this point the emperor referred to his constitution from 532: C. 6, 38, 5 - and, secondly, they would have been entitled to the estate according to intestate succession too. But how about the two women's heirs, who would expect to receive the country house in the future? Would their claim to it be secure? Yes, the emperor says, even the right of these heirs cannot be challenged by referring to the ban on alienating, because - and this is paramount in the emperor's consideration - such a ban has become invalid after four generations: ἀπιουσῶν δὲ καὶ τούτων, ὡς τέσσαρας ἤδη γενεὰς παρεληλυθέναι δοκεῖν, οὐκ ἂν ὑπομείναιμεν ἀρχαίαν οὕτω δικαστηρίοις

ὑπόθεσιν παραδίδοσθαι ... (p. 742, 3ff.). By promulgating this decision in the form of a constitution, the emperor declares his instructions to apply to any future bans on alienating: after the fourth generation the heirs must be released from the charge of the *fideicommissum*. This is how the rule has been adopted in Western Europe.

Apart from the legal rule formulated by the Emperor, Novel 159 also offers us a glimpse of an interesting phenomenon of Late Roman, Early Byzantine society: the system of titles used amongst the elite of highplaced officials. Because in the Novel the members of the testator Hierios' family feature in various phases of their lives, along with their changing titles, insight can be gained into the system of official ranks in the time of Justinian.[15] The testator's wealth is evident from his will; his high rank is shown by the title he bears. At the time of making his will he bears the title of the the highest rank in the empire: he is ἐνδοξότατος or, in Latin *gloriosissimus*. The sixth-century system of titles is a professional one, which means that the title corresponds to the office that one holds. In other words, the title depends on the office, not the other way round. Now three classes of offices already existed, which had for ages given the right to corresponding titles. The highest class comprised the most important ministeries, such as the office of *praefectus praetorio* (Prime Minister), *praefectus urbi* (City Prefect), *magister militum* (Minister of Defence).[16] These offices gave in the 6th century the right to the title of ἐνδοξότατος, which title one was allowed to bear even after being released from one's office. So everyone who bore this title possessed such a high office or had possessed it. Yet appearances were deceptive, for it was not necessary to have actually held the office. In other words, while the fiction of a system of professional titles was maintained, real offices were complemented by honorary offices and vacant offices. Thus besides, e.g., the *magister militum* (*ordinarius*) there existed *magistri militum honorarii* and *magistri vacantes*. A complicated system determined the hierarchy between them. The *vacantes* for instance, came before the *honorarii*, and a *vacans* and a *honorarius* who had been granted the token of their status in the emperor's presence ranked higher than their counterparts who had been awarded it in the emperor's absence, etc. etc. Yet there was one thing which all these actual, vacant and honorary offices had in common: they all gave a right to the title of ἐνδοξότατος. Justinian, who grossly increased the inflation in titles, complicated things further by introducing a new possibility, whereby an office holder was assumed by a fiction to have actually held the office, although in fact he had not done so. In such a case one held the office *inter agentes*, which ranked higher than

15 See stemma 30 in J.R. Martindale, *The prosopography of the later Roman Empire*, II, Cambridge 1980, 1326.

16 J.H.A. Lokin, 'Die Karriere des Theophilos antecessor. Rang und Titel im Zeitalter Justinians', *SG* I, 1984, 43-68; J. Avotins, *On the Greek of the Code of Justinian* [Altertumswissenschaftliche Texte und Studien, 17], Hildesheim 1989, 55ff.

vacantes and *honorarii*. Tribonian for instance held in 528 AD - the first time we hear about him[17] - the office of *magister officiorum inter agentes*.[18] The middle class had originally, i.e. in the first years of Justinian's reign, consisted of slightly less important ministeries, such as those of the *magister officiorum* (Minister of Home Affairs), the *quaestor sacri palatii* (Minister of Law) and of *comes sacrarum largitionum* (Minister of Finance). In the Const. Δέδωκεν, 9 the antecessors Theophilus, Dorotheus, Anatolius and Cratinus are addressed as μεγαλοπρεπέστατοι or, in Latin, *magnifici*, not because of their professorship, but because of the honorary offices they have been awarded. Theophilus and Anatolius were both *magister officiorum*, Dorotheus a *quaestor sacri palatii* and Cratinus an honorary Minister of Finance, *comes sacrarum largitionum*. In 528 Tribonian too is called *magnificus* because of his above-mentioned position of *magister officiorum inter agentes*. Incidentally, these ministerial offices were soon to infiltrate into the highest class, that of the ἐνδοξότατοι.

The last and lowest title, that of λαμπρότατος, or *clarissimus*, has a remarkable history. It had formerly been the highest title in the empire, used exclusively for *patres conscripti* and their families. *Clarissimus* was then the proud designation of senatorial rank. However, the vast bureaucratic reorganisation that the empire had seen since the days of Diocletian and Constantine, and the title inflation involved in this reorganisation, had given rise to all sorts of fresh titles which were grafted onto the trunk of the clarissimicy, which had vulgarised and degraded the old name of *clarissimus*. Some offices gave a right to the title of *(clarissimus et) spectabilis*, others to that of *(clarissimus et) illustris*.[19] The name of *clarissimus* in this context soon went out of use, the standard title becoming *illustris* for the highest and *spectabilis* for the middle class.

The time of Justinian witnessed a further shift in this matter. Out of the illustracy grew fresh shoots: *magnificus* for the middle class and *gloriosissimus* as a designation for the highest ranks. Yet their common origin, the clarissimicy, was never completely forgotten. It was, for instance, not felt as an insult to address a high official, who had a right to the title of *gloriosissimus*, as *clarissimus*. Thus in Novel 13 (533) the *praefectus urbi* is normally being labelled ἐνδοξότατος, but in one place λαμπρότατος. Similarly the consuls, who nominally held the highest office in the empire, remained to the end faithful to their title of *viri clarissimi*.

There is another aspect of the title *clarissimus* which makes it exceptional, and this aspect too was a result of its origin. It was the only title that was not necessarily associated with an office. Certainly some offices, e.g. that of lower provincial

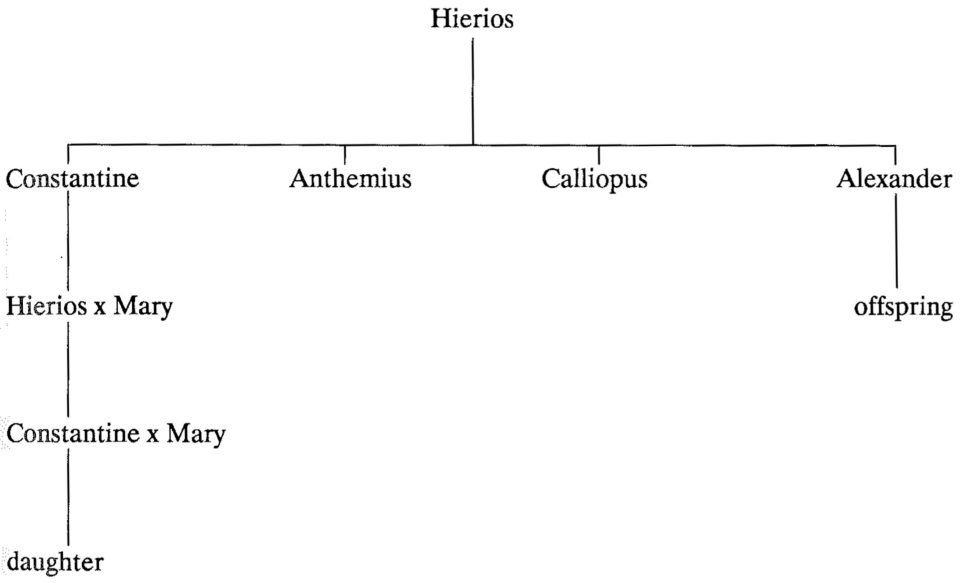
17 Const. *Haec quae necessario*, 13-2-528.

18 Cf. E. Stein, 'Deux questeurs de Justinien', 359 and the refutation of Kübler who thought that the passage referred to *agentes in rebus*.

19 See J.H.A. Lokin, 'Die Karriere des Theophilos', *SG* I, 1984, 43-68.

governors such as *consularis* and *praeses*, did involve the right to the title of *clarissimus*, but this title was also due to everyone born from parents who possessed titles, even when the child did not personally hold any office. It was therefore the only title that one could inherit, all other titles being linked to an office. The children of ἐνδοξότατοι and μεγαλοπρεπέστατοι were born as λαμπρόπτατοι. In this way the designation of *clarissimus* became the general term for 'noble' and a large group of noblemen, λαμπρότατοι, came into existence, who had either acquired an office which involved the title, or - in the vast majority of cases - who had been born from titled parents without personally holding an office.

The description of Hierios' family in Novel 159 is a beautiful illustration of this system of professional and hereditary titles. It may also enable us to identify some members of this family. Let us have another look at Hierios' family tree.



The Novel shows that Alexander, the son of Hierios I, is still alive when the Novel was promulgated, which was in 555. Moreover he clearly survived his nephew Hierios II as well as his great-nephew Constantine II and even the latter's little daughter. Apparently the family of his brother Constantine I married at a young age, let us assume at the age of twenty. In that case Alexander would be 65 or 70 years old in 555. Moreover we can assume with some certainty that the daughter of

Constantine II died shortly before 555, when she was only a few years old. Consequently she had been born in about 550 AD. Since she was a *postuma*, her father Constantine II must have died around 550, shortly before his only child was born. Assuming that Constantine II was twenty years old at the time, he was born around 530 as a son of Hierios II, who in his turn may have been twenty years old at that time and consequently born in 510. Sometime about 510, then, the codicil of Hierios I must have been made, for this codicil was occasioned by the birth of his namesake and grandson Hierios II. Father Constantine I is busy making his career; he is not ἐνδοξότατος yet, but more than merely λαμπρότατος. He holds an office of the middle class, which grants him the title of μεγαλοπρεπέστατος. If we may reasonably assume that he is also twenty years old, then he was born around 490 as the oldest of four sons, so that the will of Hierios I dates from about 495 AD.[20] In this will Alexander is the last-mentioned and might be expected to be the benjamin, except that Anthemios is supplied with a pet name as a title, γλυκύτατος, which seems to hint that Anthemios is still a baby. A different reason for Alexander to be the last-mentioned is, that he is the only son surviving till 555. It is entirely consistent with this hypothesis that the three other children are called λαμπρότατοι, which indicates that they are youngsters without offices, and offspring of a titled father. The will makes it clear that Hierios senior is a wealthy man at the time and that he is addressed as ἐνδοξότατος. So he must, either as a real or as a fictional (vacant or honorary) function have held an office allowing him that title. There is indeed a constitution of the emperor Anastasius from February 13th 496 which is addressed to the *praefectus praetorio per Orientem* Hierios, who may very well have been our testator. Malalas too refers to a certain Hierios *patricius*, who was made a prefect by Anastasios.[21] Zachariae von Lingenthal has published an edict promulgated by him.[22] When Hierios senior makes the codicil on the occasion of the birth of his grandson, he calls this grandchild quite consistently λαμπρότατος, whereas his son Constantine I has now been promoted to μεγαλοπρεπέστατος. When this Constantine dies, he is ἐνδοξότατος just as his father, so he must have held an office corresponding with this title.[23] We know from the Novel that Hierios II too died ἐνδοξότατος, just as his own son Constantine II. Therefore they must have been awarded the high offices implied by their titles at a young age, perhaps as

20 If we have rightly guessed, then Hierios cannot have instituted his son Calliopius as *comes Orientis*. Cf. Martindale, *Prosopography*, II 558.

21 Malalas p. 392 (Bonn).

22 *Anecdota*, Leipzig 1843 (repr. Aalen 1969), 265, nº 7; 269, nº 7.

23 Perhaps he is the *praefectus praetorio* of 502-505 who is the addressee of C.J. 2, 7, 22; 3, 13, 7; 20, 18; 6, 58, 11 en 8, 48, 5. In that case, however, he would have been ἐνδοξότατος in 502. Of course Constantine is one of the frequent names.

vacant or honorary offices.[24] Alexander survives all the others and is still alive in 555. He may be the Alexander mentioned by Malalas as one of the συγκλητικοί who were in 518 sent to the east by Justinian, as military commanders against the Persians.[25] In any case it is beyond all doubt that Hierios' family was one of the most distinguished and wealthiest of Constantinople, which is what induced Hierios senior to associate his property forever to his name and family. To the superficial observer the content of Novel 159 seems perfectly unambiguous. Yet it has been questioned during the process of the Reception of Roman law. In the first place it was doubted whether the Novel belonged to the European *ius commune* at all. This question was generally answered in the affirmative. The next question wrestled with was, whether all 'everlasting' *fidicommissa* were necessarily restricted to four generations. Could the testator preclude this restriction by an explicit provision? Further commotion was caused by the problem of defining those four generations: was the testator or the first heir himself to be counted as the first generation? We shall present here no more than a short and incomplete summary, which will lead us to the will of Gijsbert Kist.

Accursius has made just a few rare notes in connection with this Novel, which was in his days found in collatio 9 nr 8 (126) of the Authenticum. The words *nos igitur voluisse* prompt him to remark: *nota prohibitionem alienationis ultra filium non extendi nisi expresse dicatur. et facit D. 30, 114, 14.*

As is so often the case it is Bartolus de Saxoferrato who marks out the lines which debate is to follow for the next couple of centuries.[26] The Accursian gloss leads him to deal with the question of how far a ban on alienating can extend. In this context he makes several distinctions. If the testator has addressed the ban on alienating to his sons, mentioning them by name, then the ban is restricted to them and stops with them. If he has made an additional provision that the piece of

24 I did for a while believe that the Constantine who was in any case from 528 till 533 the head of the Department of Petitions and Procedure and who also held the honorary office of Minister of Finance *inter agentes*, was a member of Hierios' family. See E. Stein, 'Deux questeurs', 360, note 1. In the const. *Haec* (528) and the const. *Summa* (529) he is referred to as *Constantinus, vir illustris comes largitionum inter agentes et magister scrinii libellorum sacrorumque cognitionum* and in the const. *Tanta*, 9 the emperor adds the qualification that by constant sound judgment and good repute he has deserved well of the emperor. In the Δέδωκεν he bears the title of μεγαλοπρεπέστατος. If this person, however, should be identified as Constantine I, then the codicil of Hierios I would date from 533 and Hierios II would have been born in the same or the preceding year. In that case it would have been impossible for Hierios II to have had a grandson in 555. If, on the other hand, the *comes largitionum* should be Constantine II, then it is hardly probable that he would have married and become a father seventeen years after the peak of his career.

25 Malalas, p. 442 (Bonn). Martindale, *Prosopography* II, 58 (Alexander 19), attributes to him the vacant illustrious office of *magister utriusque militiae*.

26 *Bartoli Commentaria super authenticis*, Lyon 1549, 57r.

property must forever remain within the family and is not to be dissociated from the name of the testator, then such a provision does not extend beyond the fourth generation of the testator. A further possibility is, that the testator has *expressis verbis* laid down that the ban is addressed to his children, their heirs etc., because he wishes the piece of property forever to remain in the hands of his descendants. In that case he does not limit himself to his sons or to the family name. Does such a provision legally extend beyond the fourth generation? Bartolus here refers to Jacobus de Bellapertica, who has answered this question in the affirmative:

> *Sed quaero, quid si testator prohibuit liberos vel haeredes alienare, volens suas res ad suos descendentes perpetuo pervenire: an ista prohibitio extendatur ultra quartam generationem. Iacobus de Bellapertica dicit quod sic, etiam in infinitum: ut C de suis et leg. l. Si (C. 6, 55, 11), I. de haer. quae ab intest. § 1 (I. 3, 1, 1) Sed aliud est in nomine familiae: ut hoc nos igitur vers. codicillum et vers. seq. (Nov. 159, caput 1).*[27]

The interpretation of the Novel remained such as given by Bartolus until the rediscovery of the Greek texts. The first person to comment on it after this rediscovery is Cujas, who had made a new arrangement of the Greek Novels through the editions of Haloander (1531) and Scrimger (1558).[28] In his *Novellarum expositio*[29] he summarizes the Novel and criticizes the emperor's decision, warning against its rash application to all sorts of similar cases; for, if an everlasting substitution has been laid down, it is legally valid: *nam ius ita est, ut liceat in infinitum substituere*. Hence the decision of the Novel is of a dubious quality according to Cujas, who infers that it must be attributed to Tribonian, Tribonian being corrupt and selling justice for money.[30] Rittershusius is of the same opinion, although he considers it a fairly rigorous one. He too calls Tribonian a *homo avarissimus*.[31] Yet it is improbable that Tribonian had anything to do with Novel 159, since the Novel dates from 555, long after he had fallen into disfavour.[32]

It was still in Cujas' days, in 1544, that a lawsuit was started which involved our own William the Silent, eleven years old and still William of Nassau at the time. In this lawsuit Novel 159 played a part. It concerned the goods that William's cousin, René of Châlon-Orange, had inherited from his uncle Philibert and that originated

27 *Bartoli commentaria super authenticis*, Lyon 1549, 57r.

28 On several emendations of the text: Cujas, *Observationes* IV, 38 (*Opera omnia* III, Naples 1758 111-112). Here too Alciatus has played a dubious part in reconstructing the text.

29 Expositio Novell. CLIX (*Opera omnia* II, Naples 1758, 1164-1165).

30 Cujas o.c., 1165: *Et videtur haec Novella ex earum numero esse, quas Harmenopulus Tribonianum composuisse narrat, obscure et ambigue pecunia corruptum, ut et Nov. 2 et 106 et recantata pleraeque.*

31 C. Rittershusius, *Ius Justinianum*, Strassbourg ^{3}1669, 363 ff.

32 On this see F.A. Biener, *Geschichte der Novellen Justinians*, Berlin 1824 (repr. Aalen 1970), 529.

from the inheritance of Stéphan de Montfaucon. Stéphan had in 1397 made a will to the benefit of his son Henri, who was a crusader and fell against the Turks. Henri's four little daughters had been instituted as substitute-heirs. The eldest of them married a count of Württemberg, the second Louis of Châlon. The will contained a ban on alienating, addressed to the descendants of these four daughters and prohibiting them to alienate the goods described in the will from the family. The last Châlon with Montfaucon blood running in his veins was René of Nassau-Dillenburg, whose mother Claudia was a Châlon-Orange. After having inherited the entire Châlon estate from his uncle Philibert, he henceforth called himself René of Châlon, Prince of Orange, *Renatus de Cabilone, princeps Auriacensis*. When in 1544 this René died without offspring and his cousin William of Nassau accepted the inheritance, the goods became lost from the family. This induced the descendants of the first daughter, Ulrich and Georg van Württemberg, to claim the Montfaucon property before the parliament of Dôle. A prolonged suit ensued, in the course of which many authorities were consulted, among them the Faculty of Law in Tübingen and the famous humanist Bonifacius Amerbach (1495-1562). Both the Faculty and Amerbach referred in their advices to Novel 159 and showed themselves pessimistic about the Württembergers' cause in view of the regulation laid down there. Amerbach also elaborated on the question of counting and referred in this context to the Greek text, which had just recently seen its first edition by Haloander. This Greek text seemed to hint that the *institutus* could count as the first successor, which was unfavourable to Amerbach's client. It did however not follow from the Authenticum text. As a matter of fact the Authenticum heading says that *fideicommissa* remain valid *usque ad quartum gradum* and the text of the heading possesses, thus Amerbach argues, the same legal force as the other words of the Novel.[33] The only Latin text that unambiguously designates the heir as the first successor is the text of const. 117 (Novel 159) in the Epitome of Julian. In cap. 3 (499) Julian says ... *et primo herede inter quatuor successiones reputato*.[34] Amerbach had however no access to this text, for it had not been printed yet.[35] Amerbach's client, Christoph of Württemberg, would have profited from a later starting point, but whichever way Amerbach counted, Novel 159 obstructed the Württembergers' wishes:

33 In the margin of his advice Amerbach wrote down the Greek words: μέχρι δ βαθμοῦ from the Novel's heading. The Greek really says μέχρι ἑνὸς βαθμοῦ, but due to a wild conjecture by Alciatus the Greek text had been adjusted to the Latin: μέχρι ἑν δ βαθμοῦ. Cujas had already pointed out that correct Greek would in any case have said μέχρι δ βαθμοῦ, so that was what Amerbach wrote down. On all this see H.E. Troje, *Graeca leguntur*, Cologne-Vienna 1971, 214.

34 G. Haenel, *Iuliani Epitome Latina novellarum Iustiniani*, Leipzig 1873 (repr. Osnabrück 1965), 164 and 257*.

35 In the first edition, from 1512, const. 117 was lacking.

> Dieweil man nuhn nahm uber den vierten grad kummen, so mag dass fideicommissum oder die prohibition der alienation herr Stephans güter uff wythere linein jnhalt gemelter constitution nit mer sin würcksam oder kraft haben.[36]

On April 16th 1666, thus after more than a hundred years, the lawsuit came to an end with a definitive decision, which dismissed the claims of the Württemberg family.

In Germany dispute on the correct way of counting carried on till the introduction of the BGB, but in the last century the relevance of the Novel diminished. Besides the *fideicommissum* of Roman law the German family *fideicommissum* had devoloped, based, incidentally, on Roman law as well, and designed for 'die Erhaltung des Glanzes und des Ansehens der Familie'.[37] This new development reduced the Roman regulation of Novel 159 to a primarily academic subject amongst the Pandectists. Apart from the correct way of counting the various degrees, it was disputed whether the fideicommissary goods were automatically liberated from the restrictions after the fourth generation, or, alternatively, whether the Novel ought to be taken literally, so that one did not get the free disposal of them unless the last fideicommissary had died without having reached puberty; for that was the case described in Novel 159. Windscheid adhered to the latter opinion.[38] For even though 'ein Grund für diese Beschränkung nicht ersichtlich ist', the restriction simply occurs in the Novel, 'in einer durch Interpretation, wie mir scheint, nicht zu beseitigenden Weise'. Yet the majority of Pandectists attached little importance to this 'besondere und wohl zufällige Moment'.[39] Brinz does attempt to eliminate the condition - not a *Bedingung* but a *Concession* - by interpretation. In his

36 A. Hartmann - B.R. Jenny, *Die Amerbachkorrespondenz*, VI, Basel 1967, 103.

37 Windscheid-Kipp, *Lehrbuch des Pandektenrechts*, 3, Frankfurt a.M. 1901, 584 note 9. See also C.F.F. Sintenis, *Das practorische gemeine Civilrecht*, 3, Leipzig 1851, 715, note 24.

38 Windscheid-Kipp, 3, Frankfurt a.M. 1901, 583, note 7. Th.G.L. Marezoll, *Magazin für Rechtswissenschaft und Gesetzgebung (Von Löhrs Magazin)* 4 (1825), 203 thought that the third generation had to be a *impuber* and for this opinion he referred to Julianus and Cuiacius. On the contrary, retorted B. W. Pfeiffer, *Practische Ausführungen* 3 (1831), 60: the fact of infancy is irrelevant; the fourth generation is free to dispose. All right, said C. W. E. Heimbach, 'Über Justinians Constitution *de incertis personis* L.un. C. VI.48 und deren Verhältniß zum ältern und neuern Justinianischen Rechte', *Zeitschrift für Civilrecht und Prozeß*, N.F. 5 (1848), 47: but after four generations from the testator, so that the fideicommissary is free after the second substitution.

39 H. Dernburg, *Pandekten* 3, Berlin 1903, 224 note 9: 'Die Novelle 159 bestimmt dies nur für einen Fall, in welchem der Vorgänger in der Unmündigkeit verstarb. Doch auf dieses besondere und wohl zufällige Moment legt die gemeine Meinung kein Gewicht.' L. Arndts, *Lehrbuch der Pandekten*, Munich 1861, 815 note 3 merely calls 'diese Bestimmung wohl mit Recht unpraktisch'. C. F. F. Sintenis, *Das practorische gemeine Civilrecht* 3, Leipzig 1851, 717 note 37: ... es sei unmöglich, einen practischen Rechtssatz darauf zu gründen. Ich wenigstens kann keine andere Überzeugung gewinnen.

opinion *Caput* II of the Novel bears on the particular case, which explains why it is restricted to infancy, whereas *Caput* III provides the legal rule, which is to remain valid in the future.[40] In Germany the introduction of the BGB on January 1st 1900 put an end to what had degenerated into a mainly academic dispute anyway.

If we now finally turn our attention to the Low Countries, we see the familiar questions repeating themselves. It was generally agreed that Novel 159 had force of law in our provinces too. General opinion also allowed testators to preclude the restrictive effect of the Novel in so many words. As Simon van Groenewegen van der Maden puts it, in a note to Hugo de Groot,[41] a testator could 'het voorsz. verbod van vervremdinge nog vorder als tot het vierde lid uytstrecken' by laying that wish down in his will. In Amsterdam this had been settled 'by menigte van getuygen voor den geregte aldaer': July 6th and 7th 1593, January 9th 1597, August 27th 1567, March 4th 1569.[42] In other words, Novel 159 did contain valid law, but it was possible to deviate from it by expressing one's intention in so many words. Of course it remained necessary in each individual case to check whether the expressed will did really deviate from the Novel. In the province of Utrecht they were easily convinced of this; there an everlasting fideicommissum did in fact last forever.[43] In other regions the strict interpretation of the Novel prevailed, occasionally restricted to three degrees, as for instance in Deventer, Brabant and in the Southern Netherlands. In those Belgian districts art. 16 of the 'Ordonnance et edict perpétuel des archiducs ... emané le 12 de Juillet 1611' ordained:[44]:

> ... que toutes telles dispositions de substitutions, *Fideicommis*, prohibitions d'aliéner ... n'auront effect que trois fois, y comprise l'institution première et au profit de trois personnes, en ce comptée la première instituée, déclarans celles ultérieurement ordonnées de nulle valeur.

So the first heir or *fiduciarius* was included in the counting, which granted the second *substitutus* the free disposal of the goods concerned. Thus it was decided on

40 A. Brinz, *Lehrbuch der Pandekten*, 3, Erlangen 1886, 381 note 27.

41 H. de Groot, *Inleydinge tot de Hollandtsche Regts-geleertheid*, [annotated by] Simon van Groenewegen van der Made, Book 2, tom. 20, note 22, Dordrecht 1644, 78; Delft 1652, 115.

42 The authority referred to in this context was always the great Spanish lawyer and theologist Didacus Covarruvias a Leyva, *Opera omnia*, II, Antwerp 1615, var. resol. libri 3, 5, 4 (p. 207), who stressed the explicit intention of the testator as a vital point, 'quae ad quartam, quintam et alias generationes egreditur. ... ideo mehercle non possum percipere, qua ratione aliud dicendum sit eo casu, quo prohibuit testator alienationem, eo quod perpetuo voluerit res alienari prohibitas manere apud eius decendentes'.

43 Ant. Matthaeus, *De Successionibus post. disput.*20, in auctorio num. 54, cited after J. Voet, *Opera omnia*, 1707, ad D. 36, 1 num. 35.

44 See *Placcaerten ende Ordonnantiën vande Hertoghen van Brabant*, IV, 1677, 500-507.

April 15th 1614, March 16th 1620, October 10th 1623, January 24th 1660, April 24th 1663.[45]

In Frisia the normal way of counting was used and the Novel interpreted in accordance with the *communis Interpretum opinio*. This is shown e.g. by a decision of December 20th 1616.[46] The testator had bequeathed certain goods to his sister Tiedt (Tida) on the condition that they were not to be brought 'uyt mynen bloedt ofte graed'. Her great-grandson Pieter Jongama (Petrus Jongamanus), who had inherited the goods after his grandfather Pieter Harlinganus and his mother Catharina, was allowed by the Court of Frisia to dispose of them as he pleased and to bequeath them to his nephew Ids Albada (Idsius ad Albada), who was not of the testator's family. Although the descendants of the testator, the Verrucius family, claimed that Jongama too was subjected to the ban on alienating, the Court interpreted the clause 'niet uyt mynen bloedt ofte graed' to the letter, limiting it to Tida's heirs. One of the Court's considerations was: '*Quia tamen Doctorum sententia de prohibitione alieniationis ultra quartum gradum non extendenda, communiter recepta est, periculosum est ab ea in judicando recedere.*'

Finally we come to Holland. Just as in Frisia the *communis opinio Doctorum* was also followed in Holland, with the modification that not the heir, i.e. the *fiduciarius*, was counted as the first degree, but the first fideicommissary. Consequently the fifth fideicommissary is the first to get the free disposal of the fideicommissary goods.[47]

That is how things were when Gijsbert Kist made his will in 1782 and died ten years later. Novel 159 was valid law in Holland and was interpreted in accordance with common law, the fifth fideicommissary being the first to have the free disposal of his goods.

We now return to the original question that was put before me, whether the ban on alienating with which Gijsbert Kist had charged the Roman-Catholic Church is legally valid anno 1990.

The answer is in the negative. This negative answer, however, is not based on the force of Novel 159, as it had been claimed in several former legal opinions: Novel 159 itself has also been rendered inoperative, due to the fact that Roman law was abolished on May 1st 1809. The answer is given by a couple of French

45 See *Placcaerten ende Ordonnantiën vande Hertoghen van Brabant*, I, 1648, 4, 2.

46 Joannes a Sande (Van de Sande), *Decisiones Frisicae (Gewijsde zaken)*, Leeuwarden 1639, 4, 5, 4.

47 Joh. Voet, *Opera omnia*, 1707, ad Dig. 36, 1 num. 35: 'In Hollandia et Frisia communis opinio de quarto gradu recepta et praejudiciis firmata est ... adeo ut primum gradum non primus faciat institutus seu fiduciarius, sed demum primus fideicommissarius, atque ita quintus demum fideicommissarius liberum in rebus fideicommissariis arbitrium nanciscitur.

transitional provisions, which came into effect when our country lost its independence and was incorporated into the French Empire.[48]

Let us for a moment again consider the nature of the ban on alienating in Roman-Dutch law somewhat more closely. It had of old been certain that a ban on alienating tout court, i.e. without specifying on behalf of whom this ban was laid down, was void. Joannes van der Linden, the last author of ancient Dutch law, says so in perfectly plain language:[49] 'Enkel verbod van vervreemding zonder uittedrukken ten wiens behoeve het geschiedt heeft geene verbindende kracht'. These same words recur in art. 745 of our first national codification of civil law, the Wetboek Napoleon ingerigt voor het Koningrijk Holland, dating from May 1st 1809; but with an important addition. Art. 745 WNvKH:

> Een enkel verbod van vervreemding zonder uit te drukken ten wiens behoeve het geschiedt, heeft geene verbindende kracht, maar zoodra het gedaan wordt ten voordeele van een 'ander', bevat het een fideïcommis ten voordeele van dien anderen, bij het overlijden van den bezwaarden erfgenaam.

These words formulate the nature of the ban on alienating during the Ancien Régime. A ban on alienating *sec* was void, a similar ban on behalf of a third person was a *fideicommissum*, a tacit *fideicommissum*, in which the person charged with the ban acted as the *fiduciarius* and the third person as the fideicommissary. Thus R.J. Pothier in his Traité des substitutions says:[50]

> L'exemple le plus ordinaire de substitutions est celui qui résulte de la défense que le testateur a faite à son héritier ou légataire de tester ou d'aliéner les biens qu'il lui laissait.

Looking now at the ban on alienating in the will of Gijsbert Kist, we see that it is first addressed to the heirs on behalf of the Roman Catholic Church, and, secondly, by the Roman Catholic Church on behalf of a third person, of rather of third persons, who are the intestate heirs of his mother Johanna Klomp *in infinitum*. This gives the ban on alienating the force of a tacit *fideicommissum*, in which the Roman Catholic parish of St. Brandane is the *fiduciarius* and the Klomp heirs are the fideicommissaries. At first sight this second *fideicommissum* differs from the first. The Roman Catholic Church is not obliged to bequeath the goods or to alienate them after some time to the Klomp heirs, but instead the latter are entitled to the goods as a sort of sanction imposed on violating the ban. Yet this difference is only on the surface. It remains impossible for the Roman Catholic Church to alienate the goods to anyone else than the Klomp heirs. Another way of putting it would be, that

48 *'réunie* à l'Empire', as it is so impertinently said in the incorporation decree of July 9th 1811.
49 Joannes van der Linden, *Regtsgeleerd, practicaal, en koopmanshandboek*, Amsterdam 1806, 72.
50 R.J. Pothier, *Oeuvres* X, Paris 1819, 587.

the goods come to the Klomp heirs on the condition that the Roman Catholic Church disposes of them, which is a potestative condition. Since the parish church is not apt to die, the moment for the Klomp heirs to succeed potentially lies in the remote future, if the moment ever arrives at all, but that does not alter the fact that the Klomp heirs are the first fideicommissaries. For that reason there is no point in the argument of certain advisers, who attempted to aid the Church by saying that the church might have possessed the goods for the time of five generations (150 years), equal to the five generations (150 years), mentioned in Novel 159. The fideicommissaries are not the fictional descendents of the Church, but, on the contrary, the Klomp heirs. But it is not even necessary to seek refuge in Novel 159, for a special arrangement existed which put an end to the ban on alienating. This arrangement had come into existence as a corollary of the legal changes that took place at the beginning of the last century.

On March 1st 1811 the *Code civil* had become operative in our country, which put an end to the everlasting *fideicommissa* as a result of the French revolutionary wishes. In fact they had already been abolished by a Decree of November 17th 1792, but this Decree was never pronounced effective in our country. The *Code civil* now prescribed in art. 896:

> Les substitutions sont prohibés. Toute disposition par laquelle le donataire, l'héritier institué, ou le légataire, sera chargé de conserver et de rendre à un tiers, sera nulle même à l'égard du donataire, de l'héritier institué ou du légataire.

So there was no doubt with regard to future *fideicommissa*. But what about those that had been made prior to the introduction of the *Code*, in other words, what about the tacit type of *fideicommissum* such as Gijsbert Kist had included in his will in the disguise of a ban on alienating? The *Code* provided for these cases by means of a transitional arrangement, which became operative in our country by art. 1 of the Decree from January 24th 1812.[51] This transitional arrangement bears on the will under discussion and denies unambiguously the legal validity of the ban on alienating. The emperor had already adopted the arrangement from a Decree dated on July 4th 1811 and addressed to the Hanze department.[52] Art. 155 of this Decree had presented an arrangement which on January 24th 1812 the emperor declared applicable to the former Koningrijk Holland. Art. 1 of this 1812 Decree ran:

> L'article 155 de notre décret du 4 juillet dernier, sur l'organisation générale des départemens Anséatiques, portant que les substitutions de la nature de celles

51 Décret impérial etc. (Bull. n° 419) 24 Janvier 1812, in C.J. Fortuijn, *Verzameling van wetten, besluiten en andere regtsbronnen van Franschen oorsprong* etc. I, Amsterdam 1839, 79.

52 Décret impérial etc. (Bull. n° 381) 4 Juillet 1811, in C.J. Fortuijn, *Verzameling van wetten, besluiten en andere regtsbronnen van Franschen oorsprong* etc. III, Amsterdam 1841, 321.

> prohibées par le Code Napoléon, seront abolies, et cesseront d'avoir leur effet à compter du jour où le Code sera mis en activité, que néanmoins la substitution faite antérieurement à la mise en activité du Code Napoléon, tiendra au profit du premier appelé, né avant cette époque, et que, hors ce seul cas, le grevé jouira des biens comme propriétaire incommutable, est déclaré commun aux départemens de la ci-devant Hollande, y compris l'Ems-Oriental, les Bouches-du-Rhin, les Bouches-de-l'Escaut, la Lippe et l'arrondissement de Breda.

Three clauses are relevant. *Fideicommissa*, including tacit ones, have been abolished at the moment that the *Code* became operative, i.e. on March 1st 1811. The legal validity of *fideicommissa* made before March 1st 1811 is restricted to the first fideicommissary born before March 1st 1811. With that single exception the charged heir is free to dispose of the goods as their unassailable proprietor.

Applied to the present case this arrangement implies, that only those Klomp heirs who were born before the introduction of the *Code* in our country, that is before March 1st 1811, would have been in a position to profit from a violation of the ban on alienating. If they have died - and in 1990 one may assume they have - the heirs born after 1810 can no longer found any rights on the sanction imposed on violating the ban; the charged heir, i.c. the poor relief of the Roman Catholic parish of St. Brandane, is free to dispose of the goods as the unassailable proprietor, *propriétaire incommutable*. In short, the Church has been free to dispose of them for probably more than a century. Subsequent legislation, e.g. the Dutch Civil Code of 1838, has caused no changes in this respect. It is true that on May 16th 1829 (Stb. n^0 33) the abolition was announced of all French measures, laws and decisions from the moment that the new BW would become operative (October 1st 1838), but an exception was made for art. 1 of the Decree of January 24th 1812. Art. 50 of the Overgangswet 1838[53] runs as follows:

> De bepaling van art. 1 van het decreet van den 24 Januari 1812, betrekkelijk de erfstellingen over de hand, zal van kracht blijven in dat gedeelte van het Koningrijk waar hetzelve is executoir verklaard.

Moreover art. 931 BW regulates the ban on alienating for the future:

> De bepaling waarbij de nalatenschap of het legaat ofwel een gedeelte van dezelve, onvervreemdbaar is verklaard, wordt voor niet geschreven gehouden.

So Novel 159 turns out not to rule from its grave. Together with thousands of other rules of Roman law it died a legal death on May 1st 1809, when the *Wetboek Napoleon ingerigt voor het Koningrijk Holland* was introduced in our country. This result is common knowledge and not particularly astonishing. It is not the result of

53 A. de Pinto, *Handleiding tot de wet op den overgang van de vroegere tot de nieuwe wetgeving*, The Hague 1850, 60.

the investigation which is astonishing, but the very fact of the investigation. It will no doubt give Nico van der Wal satisfaction to realise that the legal validity of Novel 159 for the will of Gijsbert Kist has been seriously defended in 1990, by legal advisers who drew their knowledge of the Novel from his *Manuale Novellarum*.

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