

Novel 159.

That restitution (required of heirs) shall be limited to one degree (of relationship).
(Ut substitutions in uno gradu subsistant.)

Note.

The title as to “one degree of relationship” is incorrect. The Authenticum has it more correctly: “As to what degree of relationship restitution of a trust applies” etc.

The same Augustus (Justinian) to Peter, glorious Praetorian Prefect, the second time.

Preface. We are possessed of so much benevolence that we do not disdain to determine private matters, which appear to lie outside the sphere of judicial investigation, in order that a cause which does not (usually) come into court, should, if it happens to get into court, cause the litigants a long delay. Now Alexander, of glorious rank, has often reported to us that his father used the following words in writing his testament: “I wish and direct that the property left to my heirs, namely the house (in Constantinople) together with all the rights annexed thereto, and the suburban estate (in)^a Coparia with all rights belonging thereto as above written, and the house at Antioch, situated near that of Mammianus, given to Constantine, of honorable rank, and the suburban estate situated in the Blacherna,^b near that of Eugenius and Julianus, of glorious memory, and the suburban estate on the promontory (next to) the bay of Sosthenius and near that of which formerly belonged to Ardaburius, of glorious memory, given to the dearly-beloved Anthemius, and the suburban estate bearing the name Bytharium or that of Philotheus, given to Calliopus, of honorable rank, and the suburban estate lying in the Venetian territory, given to Alexander, of honorable rank, shall not be alienated by my heirs, or disposed of by sale, gift, exchange or in any other manner, and these houses, and the aforesaid suburban estates shall not be taken or alienated away from my name or my family. But if they have any children (which I hope), and they die, leaving legitimate or natural children or grandchildren, the houses and suburban estates, given to them respectively, including the house situated in this imperial city and in Antioch, shall be left by them to such legitimate and natural children and

grandchildren; and I am confident that they will not violate my wish and disposition in prejudice of even their natural children or grandchildren. If all, or some, or one of them die without leaving children (which I trust may not happen), I wish and direct, that such childless person or persons shall leave to his surviving brother or brothers, the aforesaid houses, here and in Antioch, and the aforesaid suburban estates, together with all rights pertaining thereto, exempting them entirely (however) from giving any bond as is the rule in connection with trusts or legacies.^c For I wish and direct that they shall not demand any such bond from each other, and the party who attempts contrary to this my paternal will and affection toward them, to demand any bond from his brother or brothers on account of the alienation prohibited herein, shall forfeit the trust left him.” This is what he wrote in his testament, but he made a codicil (thereafter) in which he used the following words: “I therefore make it known that I have already made a testament in writing, and have disposed of the property therein mentioned, as I deemed best, and I wish and direct that everything mentioned therein shall remain in force in every respect, except what I have changed in this, my codicil, or where I have cancelled any legacy. I, therefore, wish and direct that my suburban estate called Coparia, which in the aforesaid testament I left to my magnificent son Constantine, shall be given and belong with full right of possession and ownership to the honorable and noble Hierius (the younger), my grandson and son of my son Constantine—I refer to the suburban estate together with its palaces situated thereon and the landing places (scalas),^d and the buildings and shops situated within or without the gateway, and together with the bath and the gardens within or outside of the walls and the hippodrome and the gardens therein and the reservoir, and, in a word, together will all rights belonging to this suburban estate. I want this suburban estate given to the aforesaid Hierius (the younger), my grandson, when, after my death, he is emancipated; but the said noble grandson of mine, and no one else who will succeed to his rights either pursuant to this testament or pursuant to the testament of said grandson, shall have any right to sell, exchange, give away or in any manner alienate the said suburban estate or any part thereof or any right belonging thereto, because I want this suburban estate, and the house which is situated inside of the gateway of

the wall of Sycae,^e and which leads to the venerable chapel of the holy Thecla, shall forever belong to my family and shall never be separated from my name. I wish and direct that if it happens that the aforesaid noble Hierius (the younger), my grandson, dies before or after reaching the age of puberty, without leaving any children born of a legitimate marriage, the possession and ownership of this suburban estate and house shall come to, belong to or be restored to his magnificent father Constantinus, under the same condition, that it shall never be alienated away from my family and my name." Having done these things, he died. Hierius (the younger) sold the house situated in the city of Theopolis (Antioch) and which had come to him from his father, to other persons, but the house situated in this fortunate city and the suburban estate given him in the codicil, he transmitted to his son Constantine, of glorious memory, who in turn died, leaving his wife heavy with child, and having written a testament in which he provided that in case no child should be born, or if born, should die before reaching the age of puberty, his glorious mother Maria and his noble wife Maria should be called to his inheritance. A daughter was born who died while an infant and of tender years, and the property which he left, including the house situated in this great city as well as the suburban estate which was specially left to Hierius (the younger) of glorious memory, fell to the aforesaid noble women. And so Alexander says that he justly, pursuant to the testament and pursuant to the codicil, lays claim to the house and the suburban estate, since he is the only surviving child of Hierius (the elder), of glorious memory, and is of the first degree of relationship to those bearing that name. But those who acted for the women, both Maria by name, said that the words in the testament had no application; for Constantine, of glorious memory, had not departed this life without leaving children, so that the (provision for) restitution of either place might apply, and that the glorious Alexander had no legal claim even on account of the suburban estates, since he himself formerly alienated the suburban estates left to him, although the common father had prohibited alienation thereof the same as the other property; that the other brothers had done the same; that our laws provided, in case all concerning whom such provisions had been made, violate the wish of the deceased, this takes away from all equally the right to have property restored, so

that, if they should sue each other in turn, they would not, many times, be called to our attention.^f But the glorious Alexander asserted that he was justly suing for both houses, for the deceased made his wish clear also as to the remaining things, wanting them conserved for his family; that he had even better claims as to the suburban estate; that his own alienation could not rightly be objected to, since he was compelled to do so by imperial order. And many words were used by both parties, now interpreting the will of the testator and again making use of our laws, which they thought of use to them.

- a. "In" should go out; the estate was called Coparia as shown below.
- b. A suburb of Constantinople.
- c. See C. 6.54.2.
- d. Scalis—either a landing place for ships or a port.
- e. Sycae—the thirteenth district of Constantinople, separated from the city in a bay, later called Justiniana, then Galata, and now Pera.
- f. D. 31.77.27; D. 6.42.11.

c. 1.¹ *Therefore, as We have in view both the interpretation of the laws and the construction of the will, We are going to dispose of these matters not by a mere*

¹ Chapter one of this novel is missing from Justice Blume's manuscript, so that of Scott has been inserted here in italics, as Scott's versions have been used elsewhere in this edition where Blume's were unavailable. However, by way of comparison, David D.H. Miller kindly offered his translation of this chapter, which is as follows: **Aware, therefore, that the case before us is one involving interpretation both of laws and of a will, we have concluded that we must incorporate the decision on it not merely in a judgement, but in a law, so as to preclude strife over such questions for others, as well as deciding the present dispute.**

Hence, on closer and more exact scrutiny of the terms of the will, we have found that alienation has been forbidden to the actual sons who were going to succeed to the inheritance, when they were about to die childless, but not, further, to those who would eventually succeed them: it was enough for the departed to confine the prohibition to his children. Should they, too, pass away leaving children, he had not wished to interfere with what was being bequeathed, nor to extend his ban on alienation further than his children's lifetime; it was only the codicil made for the suburban estate that forbade also those who would succeed to the property under the will of Hierius of illustrious

decision, but by a law; in order, at the same time, to put an end to the present controversy, and provide for others which may hereafter arise. Confining Ourselves strictly to the words of the will, We perceive that alienation is forbidden to the children who might acquire the estate when they died without issue, but that this right is not refused to their successors; that the testator only forbade the children to alienate the property, and paid the greatest attention to the persons to whom it might pass if the former should die without offspring, and to the manner in which this should be done; without, however, extending the prohibition to alienate said property beyond the lives of the children. For the codicil subsequently executed with reference to the suburban estate forbade alienation to even those who, by virtue of the will of Hierius (We refer to the younger one of that name), of glorious memory, might obtain the property by succession; hence it results that the grandfather Hierius intended that the property should always remain in his family. These are the points in the controversy.

c. 2. Now considering the whole matter with becoming care, we think that no question can be raised as to the property of which Constantine of glorious memory, son of Hierius the elder, became owner under the testament of his father, and that not only the glorious Alexander, but also the other members of the family should be forbidden from bringing any action in relation thereto, since the words of the testament limit the prohibition (of alienation) to the children, and since the sons of Hierius (the elder) of glorious memory, through whom those who after them became members of the family acquired the rights of Hierius, alienated some of their property, and by common consent, as it were, prohibited any substitution. As to the suburban estate, the ownership of which the codicil gives to Hierius (the younger) of glorious memory, it seems to us that the matter would be full of circuities, if any question in relation thereto were raised after four generations. The glorious

memory (the younger Hierius, that is) to alienate the suburban estate, with the addition of the wish of the departed that it should remain permanently in the family.

Such, then, are the points that have been disputed.

Alexander has instituted the action brought by him unjustly and without good reason at the present time while the glorious Maria (the mother) and Maria, the widow, are living, they being considered as part of the family, inasmuch as our laws deign to also recognize a daughter-in-law as such. When they die and four generations have passed, we do not permit such an ancient cause to be taken into court, particularly since the daughter of Constantine died during such tender age, that even if he (Constantine) had not made a testament (providing for substitution for the daughter), the suburban estate would have passed to the mother, the law and not the minor (below the age of puberty) creating that effect (on such case), even if none of the successors of Hierius (the elder), of glorious memory, had violated his wishes. Even though Constantine had provided for some substitutions in his written testament, in case his daughter should die before reaching the age of puberty, no difficulty would have arisen on that account, since the law itself would have given the property of the minor to the mother, if such minor had died without testament.

c. 3. We therefore ordain that neither the glorious Alexander nor his children nor his successors, nor the successors of the other children of Hierius (the elder) of glorious memory, nor anyone else who is considered a part of the family, can bring any action against Maria and Maria, glorious women, on account of the property now in their hands or against anyone else in whose hands any such property may be or against those who may receive the same hereafter, in connection with which property Hierius (the elder), of glorious memory, prohibited alienation, and they cannot even hereafter make use of such prohibition or of the name of the family or obtain any rights by reason thereof, inasmuch as the fact that the other children of Hierius (the elder) of glorious memory alienated their property, and in a manner consented to alienation by the others, thereby destroying any rights of action which they or their successors might have had, and the other reasons heretofore stated, are sufficient for such judgment and sanction. And this shall be the decision not only in the present case but also in all others in which such prohibition (of alienation) has been made and so many generations have passed and the last heir has received the inheritance through a child under the age of puberty; in such case

he shall have the power to transmit such property to persons who are not members of the family of the person who originally made such prohibition. For we have made the present law to apply both to the present cause as well as to prohibitions of that nature in the future, settling both the present contention as well as those that may arise in the future.

Epilogue. Your Glory will direct that this our will, declared in the present law, be published in this fortunate city and that it be carried into force and effect and that it be observed.

(At the end of the Novel are found the following remarks—probably published in connection with the Novel by the official staff of the praetorian prefect, reading as follows):

And now the republic enjoys the care and the clear-sightedness in legislation of the most powerful emperor. For as he fully examined substitutions in cases where there are no children, as clearly appears in the law, he has benefitted the dying by the fact that they may abandon the fear that their wishes will not be observed, and has benefitted the living by enabling them to settle such matters between them without controversy or litigation, and while he directed one case, he has extended the intent thereof to all, and he bestowed his benefit not alone to certain persons, but to all alike. And it is not at all necessary, citizens, to exhort you to pray for his victory, for you have already shown you do this; moreover it is clear that the Great God, who accepts such pious and just acts even before our prayers, will spare us our common lord, continuous in victory upon victory, for a longer time. Given June 1, 555.

Note.

Buckland, at 360, has made the following brief statement of this Novel: “Hierius had given specific estates, each to a different son, on the terms that he was not to alienate it away from his name and family. Those who had issue were to leave it to them, the shares of those without issue going to the survivors on the same

terms. In a codicil he gave land to a grandson, on similar terms, but adding a direction that it was to remain forever in the family, thus, unlike the will, creating a perpetuity. The grandson obeyed the directions, but his son left the property, under conditions which occurred, to his wife and mother jointly. A surviving heir of the original testator claimed the property on the ground that the wife and mother were not of the family. The decision was that for the purpose, they were, so that there had been no breach. Justinian then decided, or rather enacted, that it had been going on long enough, that the present holders might do as they liked with the property, and that for the future no such prohibition was to hold good for more than four generations." He adds in a note that this became the rule in the countries governed by Roman law, citing *Strickland v. Strickland*, 1908 App. Cas. 551.