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THE LEGAL POSITION OF THE TRUSTEE AND THE TERMS OF SUCCESSION TO FAMILIAL *FIDEICOMMISSA* IN LIGHT OF THE LITIGATION SURROUNDING THE RADZIWIŁŁ PRINCES' ENTAILED ESTATES DURING THE INTERWAR PERIOD[1]

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Abstract: This article is devoted to an institution of European civil law known as familial fideicommissa, through which the status of familial estates could be modified to protect a particular family's position and wealth. In this system, ownership of the estate was transferred to the whole family, and one male member was appointed as a 'trustee'. The assets of this property were not subjected to standard inheritance law provisions and were excluded from other general civil law rules, and the trustee was not allowed to sell the estate, burden it with debt, or include it in his will. The article focuses on practical aspects of the functioning of familial fideicommissa in the interwar period. The author analyses five court cases associated with three instances of fideicommissa from the Radziwłł family, which are reconstructed from historical archival documents deponed in the Lithuanian State Archive in Vilnius. The author focuses on highlighting problems in the interpretation and implementation of the legal provisions of the Third Lithuanian Statute (1588) and the Digest of Laws of the Russian Empire (1832) on familial fideicommissa by Polish courts.

Keywords: history of civil law, familial fideicommissa, Third Lithuanian Statute (1588), Digest of Laws of the Russian Empire (1832), court case files, case study, interwar Poland, Radziwiłł family.

Introduction

The subject matter of this article is the practical functioning of the familial fideicommissum (fee tail, entail or entailment, Polish: *ordynacja rodowa*), a specific institution of European civil law under the interwar Polish Republic. As a result of specific historical circumstances, different legal systems were in force in the various parts of the country: Prussian-German, Austrian, Russian, and French. Each of these systems regulated the institution in question in a somewhat different way. Notwithstanding the structural differences in the provisions of the various codes, fideicommissa constituted a homogeneous legal institution deeply rooted in the broad European civil law culture. Its typical characteristics included:

1) the purpose of preserving a family's holdings intact for future generations, guaranteeing that suitable social status is maintained;
2) a common procedure and form of creation – they were created by a legal act of the founder (founding charter), requiring the approval of the state authority;
3) a formula of ownership – the family as a whole was the owner. A fideicommissum always went to one particular male of the family in line with the founding charter. That person, however, was not the owner, but only a 'trustee' of the fideicommissum (holder, possessor, beneficial owner, the beneficiary of an *in-rem* right, etc.), with only the right to enjoy the use and the benefits (*fructus*) of the property;

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4) rules for the administration and alienation of the property – there were serious limitations on the trustee's freedom to divide, transfer, pledge, mortgage, or alter the use of the assets of the fideicommissum*;*
5) rules of succession – the assets were excluded from the statutory regime of testamentary and intestate succession. The assets passed from one trustee to the next according to separate rules of succession arising from the founding charter (Naworski et al., 2020).

The present article will analyse several specific legal and economic issues faced in practice by the three fideicommissa of the Radziwiłł family in the 1920s and 1930s. The paper will utilise various scientific methods, especially legal-analytical, legal-historical, and case study. The tenor of legal provisions and their general understanding in the legal doctrine of the first half of the 20th century will be confronted with interpretations formulated in a few concrete cases by professional legal counsels in the pleadings of disputing parties and by judges in court judgments. The basis for this discussion will be the detailed analysis of primary sources – the files of five civil cases litigated before Polish courts concerning the assets of a fideicommissum or involving the 'trustee' as a party in connection with the property. The social ('critical') approach to legal historical studies will be employed separately in this paper (see Sandberg, 2023, pp. 21–47). The legal interpretations of legal provisions will be evaluated against the practical consequences of the litigations for the economic and personal situations of members of fideicommissum families and other related parties (e.g., employees, business partners, and competitors).

1. The fideicommissa of the Radziwiłł family

The princely family of Radziwiłł was one of the oldest and most powerful aristocratic lineages of the Grand Duchy of Lithuania and, after 1569, the Polish-Lithuanian Commonwealth. Its representatives played an important role in the history of Poland and Lithuania – as military commanders, politicians, patrons of Catholic and Protestant religious communities, and sponsors of art. Their pre-eminent position was the product of vast landholdings amassed and retained for centuries through the ability and ingenuity of the family's various members, as well as by leveraging the institution of the familial fideicommissum. To strengthen and consolidate the position of their family, near the end of the 16th century, three brothers – Mikołaj Krzysztof (called 'the Orphan'), Stanisław, and Albrecht – established three fideicommissa on the estates of Nieśwież, Kleck, and Ołyka by one single joint act (Kempa, 2000, pp. 217–237). These fideicommissa were confirmed by the king and by the parliament of the Commonwealth – the General Diet (Grodziski, 2008, p. 115) – and survived until the enactment of a statute abolishing all fideicommissum constructs in Poland in 1939 (Filipiak, 2022, pp. 155–156).

To understand the litigation surrounding the Radziwiłł estates during the interwar period, one has to bear two issues in mind. Firstly, the fideicommissa founded by the three brothers were loosely modelled on analogous entailments established in the west of Europe, which Mikołaj Krzysztof had had the opportunity to observe during his many years of traveling abroad. In the Polish-Lithuanian Commonwealth, there had been very few institutions of this kind; the three princes, therefore, lacked the benefit of prior experiences, even concerning the technical drafting of the founding charter. In consequence, the contents were incomplete, and the lawyerly precision of the various clauses left much to be desired. Moreover, the fideicommissa functioned under a succession of three different regimes of private law: initially, the Third Lithuanian Statute (hereinafter the LS); after 1840, the Digest of Laws of the Russian Empire (Rymowicz & Święcicki, 1932; hereinafter the DLRE), Volume 10, Part 1; and ultimately, after World War I, the retained Russian Code, with successive narrow amendments introduced by native Polish legislation.

2. The litigation brought by Ferdynand Aleksander Radziwiłł – illegitimate birth and succession to a fideicommissum

To understand the first dispute over Radziwiłł fideicommissa heard by the civil courts of interwar Poland, we must go back to the turn of the 19th century. In February 1790, two of the three Radziwiłł Entailments – Nieśwież and Ołyka – were inherited by Dominik Radziwiłł, who was 4 years old at the time. The prince was 9 years old when his homeland – the Polish-Lithuanian Commonwealth – disappeared from the map of Europe due to its partitioning among the three neighbouring powers. The territories of both of his fideicommissa were

annexed by the Russian Empire. When the Emperor of the French, Napoleon Bonaparte established a non-sovereign ersatz of Polish statehood in the form of the (Grand) Duchy of Warsaw, the young aristocrat became involved in independence activism. He joined the Duchy's army in 1810 at the age of 24, and was directly commissioned as a colonel. His conduct in the Russian campaign of 1812 brought him the French Legion of Honour and the Order of St Hubert from the Bavarian crown for bravery. Following the retreat of French and allied armies from Russian territory, the prince fought at Leipzig and Hanau in 1813. In the latter battle, he suffered wounds ultimately leading to his death at the age of 27.

Prince Dominik's heroic military career was of only moderate consequence to the history of the Radziwiłł fideicommissa of Nieśwież and Ołyka. More significant was his turbulent personal life. In 1807, against his will, he married Countess Izabela Mniszchówna, a Polish aristocrat. The marriage was unhappy, and the young prince quickly began a scandalous affair with Teofilia Starzewska (married to Count Józef Starzeński), with whom he escaped to Graz after a few months. This flaming affair provoked a torrent of outrage because Dominik was a close relative of Teofila (he was formally her uncle, albeit 5 years younger). As early as the beginning of 1808, the fugitives had a child named Aleksander Dominik.

Though this story may appear to be nothing more than the stuff of a classical romance novel at first glance, it carries important legal ramifications. Prince Dominik's relationship with his paramour was a concubinage; a legally efficacious elopement required both lovers to establish the nullity of their prior marriages. Even this did not fully clear the path, as their close blood ties continued to pose a problem, which called for papal dispensation before the marriage could proceed. However, to a man of young Radziwiłł's stature and means, this was not an insurmountable hurdle – following the completion of the required procedures, the lovers said their vows in 1809. Nonetheless, even despite the subsequent matrimony, their son remained an illegitimate child from a legal point of view. While young Aleksander was already recognised as a fully qualified Radziwiłł by the Austrian authorities after Dominik's death, Russian heralds were not so liberal. As a result, by the decision of Tsar Alexander I, both fideicommissa passed to the Greater Poland line of Radziwiłł Princes. The next incumbent was Antoni Radziwiłł, talented musician and composer, husband to Princess Louise of Prussia, and *Statthalter* of the Grand Duchy of Poznań, created in 1815 within the Kingdom of Prussia in the aftermath of the Congress of Vienna (Szymańska, 2010, pp. 5–23).

Thus, the agnatic line of descent from the heroic adventurer Dominik Radziwiłł was removed from succession to the familial fideicommissa. However, their hopes of reinstatement were sparked by Poland's independence after World War I. Already before the enactment of the 1921 Constitution amid war with Bolshevik Russia, on a wave of patriotic sentiment, the Polish Parliament passed a radical resolution condemning the confiscation of property under the partitions as acts of 'violence and lawlessness' (Resolution of the Parliament of the Republic of Poland, 1920). This led to an avalanche of suits from former owners disenfranchised for their patriotic activities, such as participation in armed uprisings. Prince Dominik's great-grandson (the grandson of the illegitimate Aleksander) – Fryderyk Aleksander Radziwiłł – also sensed that the time had come to see 'justice' restored to him. On 22 November 1928, he petitioned the regional court in Łuck for his 'inheritance rights to the estates of Ołyka Entail', held at the time by Prince Janusz Radziwiłł, grandson of Antoni. The case took on a complicated course in 1933 with the petitioner's death, for he left no male progeny – only a daughter, Maria Olga, who, as a woman, was barred from claiming the fideicommissum. On 21 December 1933, she modified the claim, demanding the payment of a dowry to which she was entitled under the founding charter as the daughter of the lawful 'trustee'.

Whether on the facts or points of law, the case was not a difficult one to solve. Perhaps only emotions, family pride, and the enormous size of the proprietary stake inclined Prince Fryderyk Aleksander and Princess Maria Olga after him to fight their way through all possible court instances. Ultimately, on 20 October 1936, the Supreme Court affirmed the lower courts' decisions and dismissed the cassatory appeal, unequivocally upholding Prince Janusz's rights. Prince Aleksander Dominik's illegitimate birth proved a decisive bar to his descendants' civil rights of inheritance and claims to the estates composing the fideicommissum. From the perspective of the legal interpretation of the legal institution of fideicommissum, this case, or rather the collection of arguments expounded in the petition, is extraordinarily interesting and warrants a closer look.

Unfortunately, we do not have access to all court files. What we do have is an excellent legal analysis of the dispute, including the regional court's judgment in the first instance of 1928 offered by one of the legal journals (Kronika Cywilna, 1929a, 1929b), the decision of the court of appeals in Lublin of 12 October 1934 (Lithuanian Central State Archives, appeal court in Vilnius [LCSA, ACV], No. 4962, pp. 201–208), and, finally, the Supreme Court's judgment published in the official digest (Zbiór Orzeczeń Sądu Najwyższego, 1937, pp. 1110–1131). These sources will serve to reconstruct the parties' respective lines of argument. The petitioner relied primarily on emotion, emphasising the injustice done to a patriotic and well-deserving *line* of the family divested of succession rights to the fideicommissa by an unlawful act of revenge by the tyrannical Russian Tsar. The petition accordingly narrated the tragic and heroic fate of Prince Dominik, and drew far-reaching conclusions:

> The estates of Ołyka Entail found themselves in the respondent's hands (…) not by the course of law but out of political expediency and the Tsar's grace, to the detriment of Prince Dominik's heirs. For these reasons, accordingly, (…) it should be held that the respondent's possession of the estates of the fideicommissum (…) as grounded (…) in an act of violence and Tsarist oppression and contradictory to the course of descent set forth in the fideicommissum charter (…) is unlawful and should result in the petitioner's reinstatement in said estates. (LCSA, ACV, No. 4962, p. 201v)

This argument was not especially persuasive, either to the courts or public opinion. For example, celebrated Polish conservative columnist and amateur historian Stanisław Cat-Mackiewicz wrote that the matter of the descendants of Prince Dominik could not be 'explained by political expediency', for although he was a 'Napoleonic officer and ardent patriot', the court's decision, 'concerned itself (…) only with points of law' (Cat-Mackiewicz, 1990, p. 168).

The petitioning party had to deal with the exceedingly inconvenient fact of Aleksander Dominik Radziwiłł's extramarital origin. The counsels in Prince Fryderyk's employ advanced all possible arguments and assertions to if not subvert, then at least relativise this fact. They even embarked on a desperate and futile attempt to dispute the applicability to a Catholic marriage of both the rules of Catholic canon law and the ecclesiastical jurisdiction of Catholic tribunals, in whose purview the civil effects of marriage also fell at the time (LCSA, ACV, No. 4962, p. 214.). The most powerful of the petitioning party's arguments seemed to be Aleksander Dominik's legitimisation by the Emperor of Austria in 1822. The courts, however, decided that this legitimisation was an act of the Habsburg Monarchy, and thus its binding force did not extend to the fideicommissa's locations within the Russian Empire. This was all the more so considering that this form of legitimisation was incompatible with the LS and with Russian law:

> (…) in turn, the aforesaid decree of the Emperor of Austria of 30 April 1822 (…) recognising Aleksander Dominik without any reservations as a son of Prince Dominik cannot have any significance or legal effect in the territory of the Russian Empire, for in the said empire the Emperor of Austria's writ did not run. (LCSA, ACV, No. 4962, p. 214)

In designing their litigation strategy, Fryderyk's counsels had to be aware of the weakness of his position, especially after the crushing judgment of the regional court in the first instance. Any hope of winning on appeal hinged on strong additional arguments resting on solid legal foundations. Eventually, they decided that the very structure of the familial fideicommissum could operate to the benefit of Prince Dominik's progeny, especially considering that the judgment of the first instance omitted most of the arguments relating to the institution of fideicommissum (Kronika Cywilna, 1929b, p. 781).

Relying on the opinions of Franciszek Bossowski, the most eminent expert on property law and the law of obligation, Fryderyk's counsels argued that a line derived from an illegitimate descendant of a 'trustee' could not be excluded from succession on the basis of the general rules of civil law. Hence, to them, the disenfranchisement of Prince Dominik's line was unlawful:

> in light of the special legal structure of the legal institution of entailment, allowing, with the death of each legitimate or illegitimate trustee, the advancement of rights to the fideicommissum on the part of the person capable of demonstrating the most proximate descent from the fideicommissum's founder,

> is a principle which (…) is indisputable in scholarship and court decisions. (LCSA, ACV, No. 4962, p. 212v)

In Bossowski's (1915, 1929) prominent works analysing the essence of fideicommissum in the legislation of all post-partitioning statutory regimes of civil law, no direct statement could be found to the effect that, in fideicommissa, succession should pass to the next male scions of the family by operation of the law irrespective of their legitimacy. The formulation of such an opinion by this eminent jurist is improbable, as it would directly contradict the language of the codes and the majority of known fideicommissa founding charters (e.g., Ordynacyi Sułkowskiey Ustawa, 1908, and Statut Ordynacji Łańcuckiej, 1830; State Archive in Poznań, court of appeals in Poznań, 776, p. 11). The Radziwiłł charter is one of the few omitting the issue of the fideicommissary's legitimacy. In the clause dealing with the death of the fideicommissum trustee 'without male progeny, though (…) he may have left female progeny', the rights to the assets were to pass to his 'brothers by birth', with no mention of legitimacy (Radziwiłł, 1905, p. 15).

The petitioning party's position should not be seen solely as the cynical manipulation of a renowned legal authority by an industrious lawyer. The recourse to Bossowski's opinion was justified; he was the most prominent adherent to two views important to the descendants of Prince Dominik Radziwiłł. Firstly, Bossowski believed all forms of familial fideicommissa existing in Europe, not excluding Polish-Lithuanian ones, to constitute a homogeneous legal institution taking on only certain minuscule and non-essential differences in the legal orders of the various states. In one of his articles, he expressly emphasised that the purpose behind his research into familial fideicommissa was to 'recall the existence of one link among our legal institutions with the law of the Latin nations' (Bossowski, 1929, p. 222). Secondly, Bossowski accepted the thesis that each subsequent trustee was the direct legal successor of the founder and not of the previous trustee. This was derived from the general characteristic of a fideicommissum as the property not of the trustee, but of the family as a whole. According to this view, succession to a trustee should take place not on the basis of the general rules of civil law for inheritance procedures, but automatically by operation of the founding charter. Thus, Bossowski stated:

> The starting point in time for the rights of each trustee is the death of the preceding trustee or a different event entailing the loss of rights to the fideicommissum, such as a waiver. The ending point is the trustee's own death or other event entailing the loss of rights to the fideicommissum. Thus, every trustee (…) is the direct legal successor of the founder of the trustee and not of the previous trustee. (Bossowski, 1929, p. 222)

In the most important interwar synthesis analysing the Polish civil law of the late 1930s, the topic of fideicommissa was entrusted to Bossowski. This allowed him to summarise his many years of study and comprehensively voice his opinions on the subject. With regard directly to sections 485^{1}–486, 493^{21}, 493^{24}, 500, 503, 505, 509^{1}, 509^{4}, 1202 and 1203 of the DLRE, he appreciated the specificity of this codification, noting as follows: 'the Russian lawmaker formulated the entailment as an institution proximate to family estates, treating every successive holder as a complete owner' (Bossowski, 1936, p. 1227). Bossowski immediately went on to add, however, that some of the provisions of the DLRE were clearly not compatible with such a view, instead following a model derived from German legislation and scholarship. Here, Bossowski pointed directly to Article 485 of the DLRE, as modified by an 1861 amendment, which provided that a fideicommissum was to be understood as 'property not only of the current proprietor, but also of the entire family (…), i.e., all persons belong to the house, whether born or to be born' (Bossowski, 1936, p. 1227). He also added that the DLRE contained a set of rules governing the indebtedness of a fideicommissum, modelled after the solutions of the Prussian Landrecht and Austrian ABGB, which expressly stipulated that the trustee was 'not the legal successor of the previous trustee, but that of the founder' (Bossowski, 1936, p. 1227).

The counsels for Prince Radziwiłł's descendants hoped that the structural complication of the fideicommissum framework would allow them to minimise the weight carried by the argument of the illegitimacy of Prince Aleksander's birth. The goal was to dispute the general rules of inheritance law, or even civil law as a whole, with the effect of concluding that succession to a fideicommissum depended solely on descent from the right line of the house. The courts adamantly disputed this position, although the judges were at great pains to work out a cohesive and persuasive explanation. The courts' rationale could not stop at suggesting the inapplicability

of Bossowski's theses to the facts of the case; they had to embark on a radical criticism of the view of a fideicommissum as a universal pan-European construct. It is difficult to ascertain whether the position of the court of first-instance was an attempt to dispute the legal character of all fideicommissa existing within the territorial sphere of applicability of the DLRE or just the three relating to the Radziwiłł family. Even if we were to decide that the latter was the case, which appears most probable, the rationale of the regional court rightly appears to be quite revolutionary. It explicitly asserted that the Radziwiłł fideicommissa were not affected by the fundamental principles of: treating a fideicommissum as the property of the entire family; a succession regime separate from inheritance law; and the belief that the trustee succeeded not the previous trustee, but the founder himself.

The court found that this set of characteristic features '(…) ha[d] no basis either in the language of the charter of the fideicommissum under discussion or the applicable law (…). The charter, as follows from the above (…), makes the entailed estates the property of the trustee and not of the family (…) subjected to entailments (…)'. It went on to add: '(…) such a legal condition of the fideicommissum precludes the proposed legal concept of a pretender's succession to the entailment's founder as incompatible with the right of ownership accruing to each incumbent' (LSCA, ACV, No. 4692, pp. 212v–213).

This stance was only marginally softened by the Supreme Court. The latter focused mainly on demonstrating that the charter contained special provisions (*lex specialis*) overriding the semi-imperative Code provisions regulating fideicommissa. In the court's opinion, the effect was similar, however, because the language of the charter 'in nowise departs from the general principles of inheritance consisting in that the inheritance passes to the most proximate relatives of the deceased, one must not (…) invoke special rules of succession to an entailment, whether contained in vol. X pt 1 DLRE or existing in the legislations of other states or in theory' (Zbiór Orzeczeń Sądu Najwyższego, 1937, p. 1131).

The outcome of the action brought by the descendants of Prince Dominik Radziwiłł posed no doubts from the perspective of the merits of the case. The illegitimate origin of his son and therewith the illegitimacy of the entire line derived from him was decisive. The claim that the exclusion of the whole line from succession resulted from political Tsarist repression could not be sustained. What commands attention in the rationale of the court rulings issued in this case, however, is a tendency to interpret the legal construct of fideicommissum narrowly. In essence, the courts of the so-called Eastern Lands and the Supreme Court found that the Radziwiłł Entails were not fideicommissa within the meaning of the provisions of the DLRE, nor did they have anything to do with the constructs adhered to in the scholarship and legislation of the German states and the Habsburg Monarchy. Moreover, the courts disputed the existence of fideicommissum as an institution with fixed and universally accepted characteristics common to the European legal tradition.

3. The litigation brought by Karol Radziwiłł – testamentary succession to a fideicommissum bypassing primogeniture

On 18 December 1935, whilst only 50 years of age, Prince Albrecht Antoni Radziwiłł, the trustee of the Kleck and Nieśwież Radziwiłł Entails, died at his palace in Warsaw. He had been not only one of the wealthiest landowners in the reborn Polish state, but also a philanthropist, active public figure, and one of the political leaders of Polish conservative circles.

Albert had a long sojourn in London in the first decades of the 20th century (before succeeding to both fideicommissa). During that time, he became involved with American citizen Dorothy Parker Deacon, a woman of not-so-great repute, having no aristocratic pedigree or significant wealth. The young prince showed determination and made the marriage happen against his mother's intentions, caring little for the disappointment of part of the aristocracy, nor even for the degree of ostracism that he experienced. However, the marriage concluded in adverse circumstances, was short-lived, and fell apart within less than a decade.

From the perspective of succession to the fideicommissa, key significance belonged to the fact that his marriage to Deacon did not produce a male progeny but only a daughter, Elżbieta. Because of his influence and his family's position, the prince obtained an ecclesiastical decree of nullity without significant trouble. Of a relatively young age, he was not hampered from starting a new family and producing a male heir. He did,

however, decide against remarrying. At the time of his death, his closest male relatives capable of succeeding to the fideicommissa were his younger brothers, Karol and Leon. Acting in accordance with aristocratic custom and conscious of the necessity of mitigating potential family disputes, Albrecht wrote a last will. He devised practically all his property – not only his vast personal estates, but, above all, the fideicommissa of Nieśwież and Kleck – to the younger of the two brothers (LCSA, ACV, No. 5692, p. 11). This inspired the older brother, Karol, to petition for the partial annulment of the testament. Without disputing his brother's right to dispose of his personal estates, he demanded that the clauses by which the deceased arbitrarily disposed of the two Radziwiłł Entails to be struck from Albrecht's last will.

The importance of litigation over the two Radziwiłł fideicommissa was weighty on account of the great value in the dispute, as well as the juridical complexity of the controversy surrounding the institution of fideicommissum. Prince Karol, the petitioner, retained as many as three counsels of record. The petition was drafted and signed by Advocate Jan Anastasiu, but the quality of his pleading reveals that the conduct of such a large and difficult case was somewhat beyond his capability. For this reason, throughout the first-instance proceedings before the regional court in Nowogródek, Anastasiu was assisted by a lawyer with more expertise, Maksymilian Madaliński. As the record attests, Madaliński was the more active co-counsel, making the majority of statements and posing questions to witnesses. During the appellate proceedings before the court of appeals in Vilnius, Prince Karol dismissed Anastasiu altogether, and Madaliński was joined by Advocate Zygmunt Rymowicz. The latter was an eminent personality, a member of the Codification Committee, and one of the publishers of the Polish-language edition of the DLRE. The replacement of the counsels following the unfavourable decision at the court of first instance was neither adventitious nor premature. Though Madaliński and Rymowicz did not depart from the principal lines of argument in the drafting of their appeal, the pleading and the rationales reflected considerably higher substantive and linguistic value.

The key issue facing the petitioner's counsel was the lack of precision in several clauses of the charter, suggesting the divisibility of the estates of the fideicommissum. This was to be permissible, especially in the absence of the trustee's male progeny, in which case the estates were to pass to 'brothers (…) in equal partition' (Radziwiłł, 1905, p. 15). In several other places, the charter noted that the trustee's statements of will in the form of so-called 'devises' could exclude or modify the application of the charter's provisions. For example, the charter stated: 'And should there be devises, then descend according to such devises', or: '(…) should said estates (…) be turned over by some special devise'. As per another clause: 'should there be devises, then descend according to such devises'. In another passage of the charter, the incumbent's powers to dispose of the estates of the fideicommissa were articulated with even greater clarity: 'so that a brother among brothers, paternal uncle among nephews, as well as father among sons, may divide his estates according to his intention and understanding' (Radziwiłł, 1905, p. 15). The principle that the 'estates of Radziwiłł fideicommissa are divided among brothers in equal shares' was the product of the interpretative efforts of the highest Russian judicial instance – the Governing Senate – in 1877 (LCSA, ACV, No. 5692, p. 83). This was also confirmed by the courts in the abovementioned case of the descendants of Prince Dominik Radziwiłł (LSCA, ACV, No. 4692, pp. 212v–213). The petitioner's litigation strategy had to take this into account.

The petition's language voiced acceptance of the binding character of the general rule, allowing the trustee to dispose freely of the entailed estates. Advocate Anastasiu's argument on behalf of Prince Karol was grounded in a strictly formalistic interpretation of the legal terminology used in the charter. He pointed out that the acts through which the trustee was able to dispose of the property forming part of the fideicommissum were somewhat consistently referred to as 'devises'. Expounding on the meaning of that term, the counsel quoted from the provisions of the LS and a synthesis of civil law before 1795 (Dutkiewicz, 1870, pp. 107, 115). The findings of this inquiry were that: 'in the terminology of Polish law and the Lithuanian Statute, the terms "inscriptions – devises" never meant a testament or legacy, but only contracts made in Court' (LCSA, ACV, No. 4962, p. 3) (this sentence is a direct, though unmarked, quotation from Dutkiewicz). The conclusion was that the trustee had complete freedom to dispose of the entailed estates, but not in the legal form of a testament. Albrecht's disposition was accordingly irregular, and ought to be regarded as a nullity. The trial transcripts from the regional court in Nowogródek confirm the key role of this assertion in the petitioner's argument (LCSA, ACV, No. 4962, pp. 39–41). It was, however, firmly rejected by the first instance court. In his trial strategy, Anastasiu failed to take into account the obvious fact that both the LS and the charter were terminologically inconsistent. A literal reading of the provisions purporting to distinguish between terms used within a code

dating from the 16th century could not yield a credible outcome. The court had no trouble refuting it, or even making it look ridiculous. The rationale noted, for example, that the charter establishing the Radziwiłł fideicommissa contained one clause explicitly allowing the estates of the fideicommissum to be disposed of not only by 'devise', but also be 'testament'. This was the case if only one should remain among the male progeny of the three founders – the last of the family, leaving no offspring: 'such last descendant shall be free to dispose of all our aforesaid estates to him having descended, give out however and to whomever he will, by devise or testament, as he may see fit' (AUO, 1905, p. 21). At the same time, however, the provisions of general civil law (i.e., LS) substantially prohibited the testamentary disposal of real property. In the court's view, were the legal terms used in the two instruments to be interpreted strictly, one would have to surmise that the charter clause directly contradicted the statute. As a result, the judges concluded that the founders simply lacked precision in using legal terminology. The names of types of legal acts mentioned in the charter thus constituted a sort of guidance, rather than the deliberate use of the terms:

> Although the LS uses the word 'testament' with a different meaning than it does the word 'devise', the wording of the charter of the Radziwiłł Entail does not suggest the difference was paid any special attention by the drafters. When in expansive sentences they reiterate on several occasions the terms of inheritance, they provide no rules as to the method of testation or devising (…). Moreover, the charter's legal terminology is not rigorous (…). Therefore, the word 'devise' in the fideicommissum charter should be held to mean such an act as by which the right to the entailed estates may be transferred to heirs. Such an act, within the meaning of the provisions now in force, may even be a testament (…). (LCSA, ACV, No. 4962, pp. 110d v–110e)

In particular, the penultimate sentence of the passage cited above was of key importance to the outcome of the case. The court invoked a teleological interpretation of the intention of the fideicommissum founders, departing from the analysis of the literal wording of the charter's clauses. According to the court, the three founders intended to preclude the alienation of the estates to non-Radziwiłłs to the furthest possible extent. Simultaneously, they had no intention of imposing restrictions on male members of the family. Thus, under the charter, those members could enter among themselves into any transactions compatible with the applicable provisions of general civil law. Thus, if, as at the drafting of Prince Albrecht's testament, civil law permitted the disposal of real property by testament, such a form of disposal in the event of death had to be regarded as permissible and lawful in light of the charter. Only one additional condition was required: the recipient had to be a male member of the Radziwiłł family.

This had very important theoretical and practical ramifications. The very essence of the familial fideicommissum as a legal institution common to all European legal orders was at stake. It appeared that the existence of a fideicommissum did not exclude the rules of the statutory intestate and testamentary regime arising from the general provisions, but merely modified them to a slight extent. Moreover, the interpretation made a foregone conclusion of the absence of any prohibition against the disposal of the entailed estates by the trustee. Finally, in the court's view, the incumbent was a full owner, cosmetically limited by the charter in his method of administration of the estates.

This was disputed by Madaliński and Rymowicz in their appeal. They attempted to demonstrate, in a somewhat interesting way, that the rather imprecise Radziwiłł charter did, in fact, establish a typical European familial fideicommissum. They argued that although the founders permitted the disposal of the entailed estates by transactions within the family, they regarded such a situation as an altogether exceptional scenario, for with regard to succession to the fideicommissum, the charter was supposed to adhere to the principle of primogeniture, in line with a principle accepted throughout Europe. This was a succession model in which the entailed estates passed to the male descendants of the deceased trustee, always according to the seniority of the line and order of birth. Only in their absence were the estates to pass to collateral lines, i.e., the male descendants of the deceased fideicommissary's immediate predecessor, also according to seniority of line and birth. Prince Karol's counsel argued that the dispositions of entailed assets by legal acts, as allowed by the charter, were but a set of exceptions from this general rule. These exceptions were not to put a significant dent in the entailment's general character, including the estates' indivisibility: in the logical interpretation of the charter, the trustee was not allowed to split them. Disposition by a legal act was permissible only when the trustee held two or three fideicommissa. In such a case, he could adhere fully to the principle of primogeniture, settling all estates on a

single successor (the eldest son or, if having no sons, the eldest brother), but he was also empowered to pass each of the fideicommissa, in whole, to a different male relative as long as such recipients remained in the same degree of consanguinity (e.g., several sons or several brothers). He still had to comply with the general consequence of the principle of primogeniture: the order of birth. Thus, he was not free to settle the fideicommissa on younger sons or brothers, bypassing the elder ones. In support of this argument, the appeal invoked the example of the testament of Prince Fryderyk Wilhelm Antoni Radziwiłł of 1902. In the counsels' opinion, that testament was 'most wholly in accord with the charter of the Radziwiłł Entail. Since the father left several entails and two sons, he ought to have divided those among them, and he did' (LCSA, ACV, No. 4962, p. 135).

In their appeal, Madaliński and Rymowicz proceeded from the assumption that the familial fideicommissum was a pan-European institution with fixed characteristics irrespective of the regulation of the various specific civil codes or fideicommissum charters. Deciding on their appellate strategy, they came to the conclusion that the absence of such an assumption was the primary defect of the petition. Anastasiu devoted only marginal mention to the specificity of the fideicommissum, and only in the context of emphasising the family's responsibility ('moral duty') for the legacy of its forebears (LCSA, ACV, No. 4962, p. 2v). In the appeal, the pan-European nature of the institution and the Western inspiration in the shaping of the Radziwiłł Entail were the key points argued. Prince Karol's counsels interpreted the convoluted and imprecise terms of the charter as a bungling attempt at implementing the general principles of functioning of fideicommissa, including primogenitural succession. They loyally acknowledged that the founders' intention did not 'make explicit mention of the principle of primogeniture', explaining that this was the case 'because inspiration was taken from the West, where the system of primogeniture, often called majorate, was prevalent' (LCSA, ACV, No. 4962, p. 132). Clauses of the charter enabling the trustee to dispose of the estates of the fideicommissum constituted only a closed list of exceptions from the accepted general rule.

From this interpretation, a rather clear view of Prince Albrecht's testament and its effects emerges. The deceased was the holder of two fideicommissa, and his closest male relatives were his two brothers. He was given certain leeway to dispose of these fideicommissa intact – he could accept the taking over of both by the elder of the brothers, Karol, or, by a legal act, could settle one fideicommissum on the elder and one on the younger brother. As Karol's counsels commented:

> The Radziwiłł charter foresaw such a case as precedes Prince Albrecht's death (…). The trustee of (…) Nieśwież and Kleck parts this world, leaving only a daughter behind (…); the closest male relatives were his two birth brothers: Karol, the elder, and Leon, the younger. The Radziwiłł family charter provides: 'when the Lord God calls us from this wretched world with no offspring of the male sex (…) his property shall pass to his birth brothers (…) in equal partition. And should there be a devise, then descend according to the devise. (LCSA, ACV, No. 4962, pp. 135–136)

However, such an exceptional statement of will required Albrecht to avail himself of the special legal form of 'devise', i.e., judicially executed gifts *mortis causa*. A testamentary disposition, even notarised, was insufficient:

> A testament (…) may not repeal or amend an express provision of the entail charter as a special law not subject to wide construction, which may be amended solely by an express provision of the law, according to the principle of *lex generalis non derogat legi speciali*. A testament (…) contradictory to a provision of the charter (…) should be deemed a nullity in respect of the disposition of the entailed estates. (LCSA, ACV, No. 4962, pp. 135–136)

This theory is internally consistent and logical. From the perspective of Prince Karol's interests, it had the special benefit of reinforcing and giving a deeper sense to the formalistic argument expounded in the petition. However, the assertion that dispositions of the assets of the fideicommissum could be made, according to the charter, solely in the form of a 'devise', i.e., a contract registered in court, ceased to be grounded solely in the literal construction of imprecise and anachronistic terminology. Instead, it became the natural consequence of adhering to the conscious concept that the free disposition of the estates of the fideicommissum constituted an exception from the general rule. Accordingly, it had to be strictly delimited and admissible only in the special legal form prescribed by the charter.

Whether one would concur with this sophisticated argument is of no great import. For Madaliński and Rymowicz to be able to offer a logical line of reasoning in the case at hand required the adoption of a consistent general principle. The sole theory capable of properly serving that function had the following two components: (1) the Radziwiłł fideicommissa and the forms of fideicommissum existing under the DLRE constituted variants of the standard institution of familial fideicommissum; and (2) those fideicommissa were the subject matter of homogeneous regulation adhering to similar principles in the various civil codes throughout Europe.

As a marginal note, we can add that Madaliński and Rymowicz, being lawyers educated and trained in French and Russian law, struggled greatly to understand the essence of the institution of fideicommissum. Despite emphasising that fideicommissum was an institution common to European legal systems, they had studied the construct in somewhat of a cursory manner. In their appeal, they regularly confused and conflated two completely separate methods of succession to a fideicommissum – primogeniture and majorate. According to the Prussian Landrecht and ABGB, as well as the consistent position of German and Austrian scholarship, these were two different succession regimes. The former privileged the previous trustee's male descendants in the order of birth, while the latter favoured the founder's most senior male descendant, ignoring the line and degree of consanguinity with the previous trustee. It can thus be seen that the counsels did not go to the trouble of an in-depth study of writings concerning fideicommissa in other partitions. This, however, does not detract from the significance and logical soundness of their argument.

According to the same principle, the appeal also modified the argument dealing with the application of the provisions of the DLRE and the few scarce Polish provisions of the 1920s. Before the court of the first instance, Advocate Anastasiu tried to leverage the provisions governing fideicommissa in the Russian codification, especially those dealing with the indivisibility of entailed estates and the prohibition against disposing of them by legal acts, especially by testament. The petition expressly highlighted the importance of Article 1069 of the DLRE, which provided that fideicommissa: '[we]re not subject to testaments ordained for their inheritance contrary to legislation' (LCSA, ACV, No. 4962, p. 3v). Prince Karol's counsel also mentioned other such provisions of the Russian Code as were amenable to a construction favourable to his client's interests (Articles 1202, 1206, 1207, 1029 and 1066[2]) (LCSA, ACV, No. 4962, p. 3v). He also noted the provisions of two interwar statutes enacted by the Polish Parliament in 1926 – one on private international law, another on private interpartitional law. These provisions provided for the use of the estate's location (situs rei) as the 'link' to determine the legal regime applicable to a fideicommissum. In both enactments, fideicommissum estates were narrowed with the following descriptive formula: 'estates whereof the decedent may not dispose in the event of death' (Article 30 of the Resolution of the Parliament of the Republic of Poland on the Governing Law for Private International Relationships (1926) and Article 29 of the Resolution of the Parliament of the Republic of Poland on the Governing Law for Private Domestic Relationships (1926)). Accordingly, the petition reveals a clever attempt to harness these statutes, which, in the opinion of Anastasiu, 'confirm the principle that entails may not be the object of testamentary dispositions' (LCSA, ACV, No. 4962, p. 3). In the first-instance proceedings, the regional court made short work of such claims very simply. Referring to the invoked provisions of the DLRE, it correctly concluded that the Code had been enacted subsequently to the creation of the Radziwiłł Entails, and thus it could not apply to constructs dating back to before it came into force. In the court's view, the charter allowed the trustee to divide and dispose of the estates of the fideicommissum, and subsequent provisions of Russian civil law could not alter those rules. The court also found the interwar provisions of Polish private interpartitional law and private international law to be inapplicable for this purpose. Literally, they applied to such estates as could not 'be the object of testamentary dispositions', and were thus inapplicable to the Radziwiłł fideicommissa due to 'devises' being allowed by charter (LCSA, ACV, No. 4962, p. 110e v).

In drafting their appeal, Advocates Madaliński and Rymowicz essentially reiterated the original interpretation of the petition, citing the same provisions of the DLRE (emphasising the importance of Article 1069), as well as the Polish statutes of 1926. However, they added one small but incredibly important change, writing:

> (…) Article 1069 vol. X Pt 1 [DLRE] was cited in the petition not as the legal basis of the claim, but as an illustration of the principle that the general law of inheritance was not applicable to estates subjected to a special mode of succession in the territorial sphere of Russian civil law. (LCSA, ACV, No. 4962, p. 140)

In the appellant's view, Article 1069 of the DLRE, rather than finding direct application, ought to be regarded as a certain interpretative directive necessary for the correct understanding of the generally recognised characteristics of fideicommissa. Once again, this argument proceeded from the assumption that fideicommissa constituted a pan-European legal institution, always causing a particular estate to be excluded from the general rules of inheritance law and passed to successive male members of a family as trustees according to the principle of primogeniture.

The court of appeals rejected this argument and confirmed the correctness of the interpretation offered by the regional court, which is hardly surprising. However, Rymowicz and Madaliński's brilliant attempt prompted the appellate court to generalise and reinforce the assumptions of the first-instance judgment. The court's rationale asserted that the DLRE provisions could not apply to fideicommissa. However, whereas the first-instance judgment emphasised only the temporal aspect of their applicability, the appellate court additionally rejected the thesis of the homogeneity and universality of the institution of familial fideicommissum:

> (…) the institution of the Radziwiłł Entail must be identified neither with predicted estates [Polish: *majątki zapowiednie*] due to differences in regulating the alienation and divisibility of such estates, (…) nor with majorates (fideicommissa), due to the different method of derivation and formation of the estates. (LCSA, ACV, No. 4962, p. 256v)

The court stated that the Radziwiłł Entails were creations different and separate from the fideicommissa regulated by the Russian Code, which, in turn, should not be identified with the fideicommissa prevalent in Western Europe.

4. The cases of Princess Elżbieta Czartoryska *née* Radziwiłł – succession to a fideicommissum and the position of women

As noted above, the only child of Prince Albrecht Antoni Radziwiłł's marriage to Dorothy Deacon was a daughter named Elżbieta. In 1937, she married a wealthy aristocrat, Prince Witold Czartoryski. After his death in 1947, she married Jan d'Ornellas-Tomaszewski in Lisbon. Having lived to the venerable age of 103, she died in Warsaw in the summer of 2021.

We already know that Prince Albrecht devised and bequeathed almost all of his personal property and both of the fideicommissa of which he had been the incumbent to his younger brother, Leon. This does not mean that he left his only daughter without sufficient means. He left valuable legacies to her, especially in the form of several attractive landed estates. Separately, he instructed the new trustee to pay an annuity to Elżbieta from the incomes of the fideicommissum estates. The obligation to provide for daughters was a fixed element of fideicommissum charters in the European legal tradition (Kucharski, 2022). The unsophisticated Radziwiłł charter also prescribed this. Again, lacking precision, it provided as follows: 'a dowry and trousseau be given (…) according to voloks [an old area unit] (…) to all the maids, howsoever many of them, were there one only, such same dowry is to be given her' (Radziwiłł, 1905, pp. 16–17). Thus, in his testament, Albrecht had to specify the size and method of payment:

> According to family tradition and the fideicommissum charter, I oblige my brother Leon to pay to Elżbieta, my daughter, a lifetime annuity of 40,000 francs yearly in quarterly instalments, provided that in the case of defaulting on two consecutive instalments, my daughter will be entitled to demand the one-off payment of such an amount (…). (LCSA, ACV, No. 5692, p. 11v).

Initially, Leon made Elżbieta's payments regularly. Doing so was tactically expedient to him, as it corroborated the binding force of Albrecht's testament in the eyes of public opinion and the courts. A change came with the escalation of his dispute with his brother, Karol. During the litigation, the young princess declined to participate on Leon's behalf, exposing herself to her uncle's revenge of sorts. He ceased to pay the annuity, arguing cynically that the payments ought to wait until the courts' final decision on who is the true trustee. Leon went as far as claiming that Elżbieta's statement constituted a waiver of her claim to an annuity as it was against him personally (LCSA, ACV, No. 5692, pp. 8v, 76). Elżebieta was forced to try to play a game between arguing

brothers. At some point, through her counsel, she approached Prince Leon with an offer of collaboration against Prince Karol, so as to uphold the testament and her father's will. For reasons unknown, Leon ignored the proposal. Later, during the litigation, Elżbieta gained a statement by Karol, that in the event of prevailing in the litigation, he would honour the stipulations of Albrecht's testament with regard to the annuity (LCSA, ACV, No. 5692, pp. 59–61v).

The case was open and shut both legally and factually – Elżbieta's entitlement was beyond any doubt. The key importance belonged to the general rules of civil law, especially the express will of the testator. The evaluation of the nature of the annuity as the specific right of a female member of a fideicommissum family did not play any significant role. Prince Leon tried to leverage the institution of fideicommissum to downscale Elżbieta's claims. He argued that the payment of the amount claimed could 'ruin the substance of the entail'. The essence of the fideicommissum was to maintain the family property intact, whereas the need to pay enormous sums to Albrecht's daughter could jeopardise the financial stability of the fideicommissum (LCSA, ACV, No. 5692, pp. 64–65). Of course, this argument did not attract much credibility.

Elżbieta's situation was unfavourable for reasons beyond mere problems with the annuity. Contrary to Albrecht's last will, his creditors attempted to enforce their claims against Elżbieta, ignoring the testamentary heir and new trustee, Prince Leon. Materials exist from two cases of such kind brought against Elżbieta. The first was an action brought by Zachariasz Elkind for the payment of a debt secured by a promissory note. His position is of extraordinary interest, as he alleged that Elżbieta ought to be regarded as her father's true and sole heir. He based his argument on the general characteristics of fideicommissa in European legal tradition, arguing that 'fideicommissum estates d[id] not constitute the inheritance estate'. Thus, Prince Leon was not Albrecht's heir, but merely a 'specific legatee' – a beneficiary of a testamentary devise (LCSA, ACV, No. 5692, p. 40). In opposition to such a claim, Elżbieta's counsels had a full arsenal of legal arguments, of which they readily took advantage. Firstly, they were adamant that the succession, according to the Radziwiłł's charter, had to be regarded as inheritance within the meaning of civil law, and the trustee as the independent owner of the estate. For that, they could rely on the already published judgment of the Supreme Court entered in 1937 on the petition brought by the descendants of Dominik Radziwiłł (LCSA, ACV, No. 5692, pp. 39v–40). Secondly, they offered the sober observation that Albrecht's testament had given Leon only a 'general devise' – covering 'the totality of estates, rights, and obligations expressed in general form, without specific designation of the articles of the inheritance'. Thirdly, Elżbieta's counsels correctly estimated the risk of a different interpretation of the provisions of the applicable inheritance law. Thus, they protected themselves by suggesting that, 'at the most, one could say here (…) that Albrecht Radziwiłł had appointed two universal heirs, Leon Radziwiłł and Elżbieta Czartoryska'. In the event of the most unfavourable ruling – one recognising Leon as no more than a 'legatee' – they emphasised that, under Article 1259 of the DLRE, such a legatee was also liable for the debts of the inheritance estate, 'according to the assets inherited'. This was a brilliant move that relativised Elkind's claim that Elżbieta was her father's sole heir. Notwithstanding the determination of this matter and the legal title on which Prince Leon assumed the estates left by the deceased, it followed that the new trustee of both of the entails ought to pay his brother's debts either in whole or in significant part (having assumed the bulk of his assets, especially the most valuable estates of the two fideicommissa) (LCSA, ACV, No. 5692, pp. 40v–41). Fourthly, Elżbieta's counsels endeavoured to demonstrate that Elkind's promissory notes were not Albrecht's personal debts, but liabilities accruing against the assets of the fideicommissum. This is because they were 'payable at the office of the entail', affixed with 'the entail's stamps and numbering', and 'recorded in the entail's promissory note ledgers'. Accordingly, they could only be paid by the trustee (LCSA, ACV, No. 5692, pp. 31v–42).

This rationale was very logical. The first two arguments account for a tendency to dispute the legally separate status of the fideicommissum estates. It thus appears to be highly surprising that the court of first instance entered a judgment highly unfavourable to Elżbieta. She was found to be the sole heir and ordered to pay all of Elkind's promissory note claim – 21,250 zloties. Only the appellate court found both Leon and Elżbieta to be Albrecht's heirs. Simultaneously, since the bulk of the decedent's assets and the fideicommissa had gone to Leon, it reduced the payment adjudicated from Elżbieta five-fold (LCSA, ACV, No. 5692, pp. 35–36).

A similar action was brought against Elżbieta (jointly and severally with her uncle Leon) by another promissory note creditor of Albrecht's, an enterprise styled Amstelbank. This legal problem was analogous to the above,

but the argument touching on the essence of the institution of fideicommissum was articulated and substantiated in a more thorough fashion. In a preserved first-instance judgment, the regional court in Warsaw resolved two significant problems important to understanding the essence of familial fideicommissa. Firstly, the judges had to decide whether the trustee had been competent to assume an obligation secured with a promissory note against the assets of the fideicommissum and the next trustee. As we already know, Prince Albrecht issued his promissory notes with the 'stamp' of the fideicommissum administration. He recorded the resulting debts in the books and ledgers the entail's clerks kept. The Radziwiłłs' counsels attempted to take advantage of this fact in order to assert that the late prince had incurred the promissory note debt as a trustee. Simultaneously, they argued that incurring such debts violated the restrictions of the DLRE and the charter on indebting the fideicommissum. Accordingly, they could not be enforced against the civil heirs or even the new trustee. The resolution of this point was more categorical than profound. The court judgment mentions only that 'one must ignore the objections alleging the promissory notes on file not to be promissory notes due to the entail's status as a separate estate' (LCSA, ACV, No. 5692, p. 162v). Such an outcome was likely determined by the general principles of civil law – the protection of the creditor's interests and the abstract nature of a debt secured by a promissory note.

In its judgment, the court also had to decide whether succession to a fideicommissum was tantamount to civil inheritance. Once again, this interpretation was extremely unfavourable to Elżbieta. The court held that the fideicommissa were not part of the estate of the late Prince Albrecht. It took into account that, in line with a practice dating back to Russian times, no inheritance tax was levied on fideicommissum estates. Article 492 of the DLRE was invoked, in accordance with which the new trustee was not under an obligation to pay the predecessor's private debts. The court thus found the trustee not to be the predecessor's civil heir, and the fideicommissum not to be part of the inheritance estate, but a separate estate following a different succession regime. The court asserted simply that an entail could not constitute ordinary inheritance (LCSA, ACV, No. 5692, p. 162v). Similar to the outcome of Elkind's action, the court decided to ignore the stipulation in Albrecht's testament, imposing liability for debts solely on Prince Leon. This meant the recognition of Elżbieta as an aequiordinate heir to her father, provided that the scale of participation in the repayment of the decedent's debts was to be decided solely by the share of the inheritance estate comprising only Albrecht's personal assets. In assessing the percentage of shares in the estate between the daughter and the brother, the court automatically followed the portions of inheritance tax paid by each. Elżbieta was thus ordered to pay almost the entire claim (96.8% of the value of the debt) (LCSA, ACV, No. 5692, pp. 162–162v).

Both judgments against Elżbieta are highly interesting, for at least two reasons. Firstly, they demonstrate the unsteady nature of the courts' approach to separating the assets of a fideicommissum and recognising the specific characteristics of that institution. Contrary to the approach taken in the cases previously discussed, the courts' rulings in the actions brought against Elżbieta were inclined to view fideicommissa as not forming part of the inheritance estate and thus not part of the inheritance procedure. Secondly, the interpretations dealing with the fideicommissa in the two cases involving Albrecht's promissory note debts are surprising on account of the stance taken toward the decedent's daughter, who was precluded from succeeding to the fideicommissa. Each and every problem considered by the courts was decided unfavourably for Elżbieta. Studies in the territorial sphere of Prussian-German law have revealed that in its legal tradition, showing significantly more attachment to the fideicommissum institution, there was a tendency towards an equitable construction aiming to improve the situation of women from fideicommissum families (Kucharski, 2022, pp. 103–107). In the case of the judgments from the former Russian partition, this directive did not enjoy universal acceptance. However, this was probably not a conscious and deliberate concept, nor the giving of effect to an entrenched interpretation. The courts scrambled chaotically to resolve a problem involving an anachronistic and incomprehensible legal institution, giving rise to peculiar and unpredictable practical consequences.

Conclusions

The cases discussed above are interesting from the perspective of social mores and property affairs, painting a fascinating picture of family relations in the aristocratic Radziwiłł family during the first half of the 20th century. A somewhat surprising and multifaceted picture emerges of the attitudes taken by lawyerly elites to the institution of familial fideicommissum itself. We can formulate three general conclusions on this basis. Firstly, the legal construct of familial fideicommissum was incomprehensible to lawyers active in the former Russian

partition (governed by French and Russian law). The source of this lay primarily in the scarce proliferation of this institution in that territory. The legal rules governing fideicommissa sparked enormous interpretative difficulties; their understanding was not uniform, and their application was chaotic. Secondly, lawyers educated on French and Russian law did not perceive fideicommissa as a pan-European legal institution with fixed characteristics deeply rooted in the traditions of continental civil law. The counsels, therefore, made very liberal attempts to adapt the accepted characteristics of fideicommissa to the needs of their clients. The courts, in turn, gave the relevant provisions as narrow a construction as possible, disputing the legal specificity of fideicommissa (the latter trend is especially clear in the Radziwiłł cases). At times, judges recognised the exceptional characteristics of the institution of a fideicommissum, slavishly following the rationale of Russian courts (as is evident in Elżbieta's disputes with her father's creditors). Thirdly, the key element from the perspectives of both judges and trial counsels was the need to apply the obsolete legal monuments of the 16th century in the Radziwiłł litigation. The interpretation of the founding charter in light of the LS required the exegesis of anachronistic, pre-modern, pre-positivist law characterised by its rudimentary nature and its imprecision. An additional challenge came from linguistic aspects – the judges had to interpret instruments drafted in Old Polish, Latin, or Ruthenian in light of the terminology of contemporary Russian and Polish law. Such cases doubtless must have proven labour intensive to the lawyers of the 20th century, requiring them to leave their comfort zones and apply a different body of knowledge and skills compared to addressing typical points of law.

The aforementioned factors forced the judges assigned to the fideicommissum cases to rely on interpretations that were intuitive and as simplified as possible. Logical consistency and interpretative correctness were pushed decisively to the background. This allowed the lawyers and judges to avoid the necessity of risky decisions demanding intense intellectual effort.

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