Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Apap v. *Strickland, from the Court of Appeal of the Island of Malta, delivered* 21*st January* 1882.

Present:

SIR ROBERT J. PHILLIMORE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

The suit giving rise to this appeal was brought by Mrs. Strickland, widow of Captain Strickland, on her own behalf, and as tutrix and curatrix of her son Geraldo, in order to have it declared that she, or her son, is entitled to certain lands in Malta, settled in primogeniture by Canon Bologna, together with other lands since annexed thereto, and to recover possession of them from the Defendant, the Marchese Felicissimo Apap. The Court of the First Hall, in Malta, gave judgment for the Defendant. On appeal, the Court of the Second Hall reversed this judgment so far as it was against Geraldo, and gave judgment in his favour. Mrs. Strickland has not appealed, and the contest is now between Geraldo and the Marchese Apap.

Canon D. Alessandro Bologna, by a deed dated the 23rd of October 1673, gave all his property to his nephew Pietro Perdicomati Bologna, reserving the right, *quoad* the "bona stabilia," to

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establish a "primogenitura," and charging the donee to do this if he survived the donor.

The Canon, having survived Pietro, executed on the 11th of May 1686 the deed on the construction of which this cause depends. After reciting the previous deed, and the death of Pietro without establishing the primogenitura, the deed proceeds thus (the clauses are numbered for convenience of reference):—

1. "Hinc est, quod hodie presenti die pretitulato prefatus Perillustris et Admodum Rev. D. Don Alexander Bologna J. U. D. Canonicus Cathedralis Ecclesiæ Melivetanæ Prothonotarius Apostolicus cognitus presens coram nobis per se et suos non vi sed sponte declaravit, et declarat dictam primogenituram regulari debeat modo infrascripto, scilicet quod bona stabilia omnia et singula per eundem Dominum D. Alexandrum dicto quondam D. Petro donata post obitum dicti D. Don Alexandri perveniant et pervenire debeant ad dictum Dominum Martinum Antonium Perdicomati Bologna primogenitum natum et procreatum ex dicto quondam D. Petro et D. Eugenia olim jugalibus, et deinde censeantur bona predicta vinculata et fideicommisso perpetuo supposita pro omnibus primogenitis maribus legittimis et naturalibus et ex legittimo matrimonio nascituris per directam lineam ex dicto Martino Antonio de primogenito in primogenitum in infinitum, cunctisque futuris temporibus, et sine ulla temporis perfinitione.

2. "Cum hoc quod ipse Dominus Martinus Antonius possit et libere valeat et sui possint et libere valeant in infinitum, eligere et nominare in locum primogeniti alterum ex alijs filijs maribus legittimis et naturalibus.

3. "Et in defectu primogeniti maris ex dicto Domino Martino Antonio dicta bona pervenire debeant ac perveniant et pervenire debeant ad filios ejusdem Domini Martini Antonj, legittimos et naturales, et ex legittimo matrimonio nascituros quousque in secundo gradu nepotum dicti Domini Martini Antonij nasceretur masculus ex aliqua de filiabus dicti D. Martini Antonij legittimis et naturalibus et ex legittimo matrimonio, cui nepoti nato statim dicta bona devolvant cum onere ut supra transeundi de primogenito nepote dicti Martini Antonij in primogenitum nepotem legittimum et de legittimo matrimonio nasciturum.

4. "Et sic tam cum extiterint mares quam cum non extiterint ipse D. Donator jussit et mandavit observari perpetuo et cunctis futuris temporibus et sine ulla perfinitione temporis in linea descendentium ex supradicto Domino Martino Antonio.

5. "Et casu quo dictus Dominus Martinus Antonius decesserit sine filijs nepotibus pronepotibus alijsque ex eo descendentibus legittimis et naturalibus ac ex legittimo matrimonio natis maribus et feminis, vel cum talibus descendentibus et

eisdem morientibus sine similibus descendentibus in infinitum, dicta bona ut supra donata devolvantur ad filium primogenitum marem legittimum et naturalem de legittimo matrimonio nasciturum ex dicta Domina Anna Maria sorore dicti Domini Martini Antonij si tunc extaret. Ita ut transeat de tali primogenito mare in primogenitum marem in omnibus et singulis gradibus descendentium legittimorum et naturalium ex legittimis matrimonijs ex ipsa Domina Anna Maria, et si talis filius non extaret ex dicta Domina Anna Maria perveniant et pervenire debeant ad illum seu illos ad quorum favorem dictus Dominus Don Alexander disposuerit, et si non disposuerit ad proximiorem in gradu consanguinitatis ipsius D. Don Alexandri primogenitum.

No other part of the deed was much relied upon by the Counsel on either side, and in their Lordships' opinion the clauses above set out are alone material.

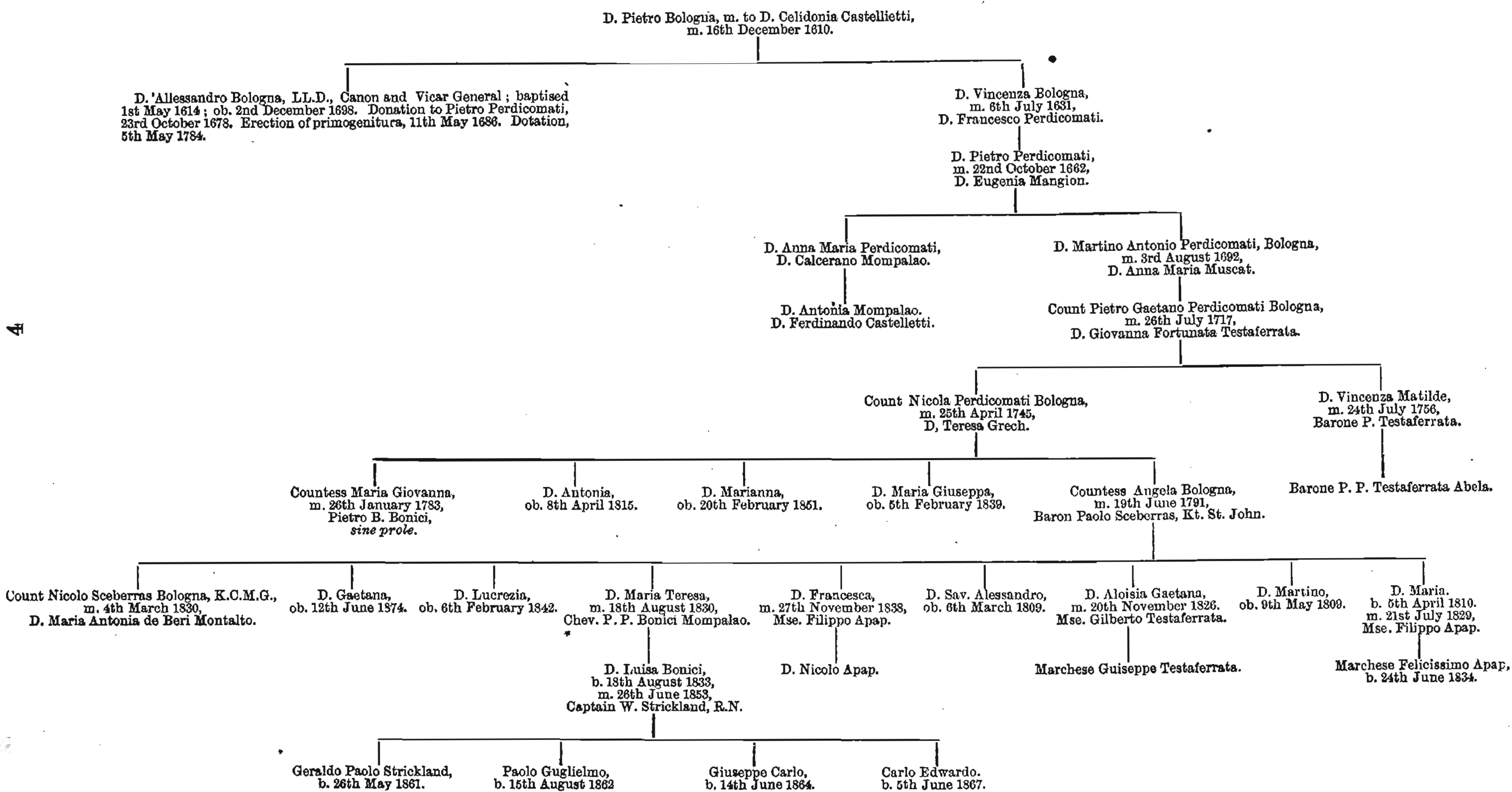
The Canon executed another deed in 1696, confirming the deed of 1686, and containing some further provisions, but neither has this been relied upon, and it will not be necessary further to refer to it.

The material facts to which the questions of law arising have to be applied are the following.

It is convenient here to insert the genealogical table, which is to be found at page 16 of the record.

Document E.

The Pedigree of the Bologna Family.



From this table it appears that Martino Antonio had a son, Gaetano. That Gaetano had a son, who is called in the proceedings Nicola the elder, and a daughter, Matilda.

That Nicola had five daughters, and Matilda a son; that of Nicola's daughters, the eldest had a son who died without issue; that the 2nd, 3rd, and 4th died without issue; that the 5th, "Angela," had nine children, of whom Count Nicola Sceberras (called Nicola the younger) was the eldest; that the two next (daughters) died without issue; that the fourth (Theresa) had a daughter, Luisa, who became Mrs. Strickland, and is the mother of Geraldo, the Plaintiff, who was born in 1861; the 5th, Francesca, had a son, Nicolo Apap, who must have been born after 1838; that the 6th, Alessandro, died without issue; that the 7th, Aloisia, had a son, the Marchese Testaferrata, who appears to have been born in 1838; that the 8th died without issue; and lastly, that Maria, the youngest, was the mother of the Defendant, who was born in 1834.

Count Nicolo the younger succeeded to the estate on his birth, in pursuance of Clause 3, the effect of which will be hereafter discussed; on his death in 1875 without issue the succession now in question opened.

The Plaintiff claims as the male descendant in the nearest collateral line to Nicolo.

The Defendant claims by priority of birth under the 3rd clause; he further denies that the Plaintiff, who must recover by the strength of his own title, is a *primogenitus mas* within the meaning of the deed.

An event in the history of the family should be here narrated.

On the death of Count Nicolo the elder, A.D. 1770, a dispute arose relating to the succession between Maria Giovanna, his eldest

daughter, and the Barone Testaferrata Abela, the son of his sister.

On an action being brought by Giovanna against the Baroness Matilde Testaferrata, who defended in her own behalf and in that of her son, the parties agreed by a "compromissum" to submit their respective claims to the "Sacra Rota Romana," and to be bound by an unanimous judgment upheld on a rehearing.

The cause was heard twice before Judge Origo, and he on each occasion decided in favour of Giovanna.

A third decision in her favour was given by Cardinal Herzan.

This decision was reversed by a fourth, given by the same Judge. Whereupon—probably to avoid the effect of *res judicata*—her four sisters joined Giovanna. In the result two further successive decisions were given by Herzan in favour of Testaferrata.

These three decisions were again reversed by Judge Riminaldo, and the first three decisions were re-habilitated, with this difference, that all five daughters were declared entitled to the succession. The decision of Riminaldo was twice reheard and twice re-affirmed. The litigation, which had extended over 12 years, was then stopped by the order of the Grand Master, and the five daughters of Nicolo seem to have held possession of the estate, until Nicolo the younger was born to Angela, the youngest, whereupon Nicolo succeeded to the possession.

These decisions cannot, of course, be relied upon by either party as constituting *res judicata*, neither the parties to the then suit nor the point decided being the same as in this. Yet reference may be advantageously made to some of the principles of law laid down by a tribunal of much learning and authority. The *ratio de-*

cidendi of the judgment given in favour of the daughters of Nicolo the elder is that in this settlement superiority of line is preferred to all other considerations.

It now becomes necessary to examine the provisions of the deed of 1686, and it will be convenient, in the first instance, to ascertain the meaning of Clanse 1—if it had stood alone, unaffected by any subsequent clauses.

It has been contended by the Appellant either that the clause establishes a primogenitura completely regular, in which case Mrs. Strickland would take in preference to her son, or that it establishes an agnatial primogenitura, in which case, of course, she could not take, nor could her son, inasmuch as he claims through a female.

The preference of Geraldo to his mother is thus dealt with by the Second Hall:—

> "Considering, that in consequence of the enactment contained in the said Code Rohan, whereby the male sex is to be preferred to the female sex, in default of a contrary rule, and in consequence of the dispositions of the said Canon, who called males when they existed, from first born to first born in perpetuity, it is evident that the said Luisa had no vested right on the said 'primogenitura,' in competition with the other Plaintiff, her son, whatever her rights might have been if no males had existed."

It is to be observed that the Court do not decide, nor is it necessary to decide, whether, if on the opening of the succession, Mrs. Strickland had not had a son, and the primogenitura had vested in her, it would have been divested by the subsequent birth of Geraldo.

A primogenitura with an expressed preference for males seems to be a well known form of settlement, and this preference is not regarded as such a deviation from regularity as to make the primogenitura irregular.

The present primogenitura is accordingly treated by the Rota Romana, in six decisions,

and by the Court of Appeal in Malta, as a regular primogenitura, with a qualification, as it is termed, in favour of males.

The effect of such a primogentura is thus described by Origo in a judgment which was subsequently affirmed:—

"Masculorum vocatio nil aliud operatur quam eorum prælatione supra fœminas distributive in qualibet linea.

"Minus enim quam fieri potest recedendum est a juris ordine in primogenituris præscripto.

"Jus namque nullo modo patitur, ut ob datam masculis prælationem tota invertatur primogenialis successio."

The effect of such a primogenitura is further illustrated by this passage from Torre, Part. 1, c. 25, s. 24, No. 268:—

"Nec repugnat quod mater sit exclusa, et non filius ex ea descendens, quia, quando non una est causa exclusionis in matre et filiis, non est inconveniens ut unus admittatur, excludatur altera, ut quando causa exclusionis consistit in qualitate sexus, quo casu excluditur mater quia non est masculus, non vero excluditur filius quia habet hanc prerogativam. Contrarium procedet in fideicommisso agnatitio, in quo, si excluditur mater quia nonest agnata, ita excluditur ejus filius quia non est conjunctus per virilem sexum."

In the 10th volume of the works of Cardinal de Luca de Fideicommissis (Discursus II.), it is stated to have been held that in such a primogenitura the birth of a son operates to exclude the mother, even if the estate had been actually vested in her. Their Lordships understand the Cardinal somewhat to question this decision, but he expresses no doubt that if the son be born upon the opening of the succession, he will take in preference to his mother. But that this preference of males does not make the primogenitura "agnatial" appears from the passage which has been quoted from Torre, to which the following passage from Torre may be added (Book 1, c. 5, s. 98):—

"Inter descendentes vero ex lineâ qualitatis, prout dictum fuit, attenditur regula de quâ in primogeniturâ propriâ et regulari, ut primo et principaliter habeatur respectus in succes-

From this passage their Lordships are disposed to infer that the Appeal Court were of opinion that, according to that clause, females would take in succession, and not collectively, and further, that the exclusion by an after-born male of a female in whom the succession had become vested would be in accordance with the ordinary rules of law applicable to such a primogenitura.

For the purposes of discussion, however, they will assume the Appellants to be right in their contention that in the event contemplated by the clause the daughters will take collectively, and further, that the clause departs from the ordinary rule in directing that a son shall displace an estate actually vested in the possession of his mother.

The main arguments of the Appellant based upon this clause are as follows:—

That, as the estate was vested in all the daughters collectively of Nicolo the elder, no one of them could form a line preferential to the line of all or any of the others, or could, indeed, form a line of descent at all; that the principle of line having been thus destroyed and excluded from the succession, the Marchese Apap takes by priority of birth. It was further argued that Clause 3 takes effect, not only when females are actually in possession of the primogenitura, but when they are entitled to it in expectancy, that during the life of Nicolo the younger, his sisters, on the death of their brothers without issue, were entitled to the estate in expectancy (it being assumed that the clause applies to collaterals), and that, upon the birth of Apap, the estate vested in expectancy in him, subject only to be defeated by the birth of issue to Nicolo, and that the estate thus vested in expectancy could not be defeated by the subsequent birth of Geraldo. And to the objection that Clause 3 cannot apply to this present case at all, because

there has been no moment of time at which a "primogenitus mas" could not be found, the Appellant answers that Clause 4 applies to Clause 3 and to it only, and must be taken to make the provisions of Clause 3 operate even in cases when there is a male ready to take the succession on its opening.

Their Lordships are unable to accede to these arguments.

By a well known rule, a deviation from the ordinary mode in which a primogenitura descends is not to be construed as interfering with that mode of descent more than is necessary to give effect to such deviation.

Assuming that in the event contemplated by the section females are to take collectively, it by no means follows that all or any of them are prevented from forming lines of descent.

Their Lordships are further of opinion that the provisions of Clause 3 apply only to the case therein stated, viz., when, upon the opening of the succession, there is no "primogenitus mas," in which case the estate devolves on females who are to be displaced by the first male born from any of them. They conceive that the intention of Clause 4 is perfectly clear. Up to this part of the deed the settler has provided for, or called, Martino Antonio and his descendants in a certain order, providing for the event of the existence of males, and also for the event of their non-existence. He now expresses his intention that the provisions he has made in both classes of events shall extend to all generations. Clause 4 is not designed to extend the range of Clause 3 to events not contemplated by the introductory words of that clause, but to ensure that all the preceding provisions shall be as applicable to future generations as to Martino Antonio and his children.

If Nicolo had died without issue, leaving sisters only, neither of whom had a son, the estate would (again assuming that the clause applied to collaterals) have devolved upon the sisters, to be divested on the birth of the first male to either of them. But this event has not happened. On the death of Nicolo there was no defect of a "primogenitus mas," inasmuch, as for the reasons before given, Geraldo fulfilled this condition. Their Lordships are therefore of opinion that in the events which have happened Clause 3 had no operation after Nicolo the younger had succeeded, and that Geraldo was entitled to the estate by virtue of the ordinary rules of law applicable to the primogenitura established by Clause 1.

In this view it becomes unnecessary to deal with a further argument that the Appellant was entitled under the ultimate remainder to the nearest in consanguinity to the donor, inasmuch as the previous dispositions have not failed.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal be dismissed, with costs.