Privy Council Appeal No. 150 *of* 1923.

Marquis Riccardo Cassar Desain - - - - - - - - *Appellant*

v.

The Noble Pietro Paolo dei Baroni Testaferrata Moroni Viani - *Respondent*

The Noble Pietro Paolo dei Baroni Testaferrata Moroni Viani - *Appellant*

v.

Marquis Riccardo Cassar Desain - - - - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE COURT OF APPEAL, MALTA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1925.

Present at the Hearing:

LORD BLANESBURGH.
MR. JUSTICE DUFF.
SIR ADRIAN KNOX.

[*Delivered by* LORD BLANESBURGH.]

This is an appeal and cross-appeal from a judgment and order of the Court of Appeal for the Island of Malta and its Dependencies dated the 29th of January, 1923, which, while in the result affirming a judgment of the First Hall of the Civil Court of Malta dated the 16th of December, 1918, did, incidentally reject all but one of the grounds of substance on which that judgment had been based. Each Court actually absolved the defendant—the present respondent—from the instance. But, in the First Hall, the *absolvitur* proceeded on a decision in the defendant's favour of all the main issues canvassed in the suit: in the Court of Appeal on the decision in his favour of one of these issues only. This appeal by the plaintiff is confined to so much of the order of the

Court of Appeal as was adverse to himself. Objection to the rest of that order is taken by the defendant in his cross-appeal by which he seeks to have the judgment of the First Hall on every point restored. Thus it happens that all the questions raised in a suit commenced so long ago as the 10th of August, 1911, are now either on the appeal or the cross-appeal brought to His Majesty in Council for final decision.

These questions depend for the most part upon the true construction of a formal notarial deed executed on the 28th of May, 1775, whereby certain Maltese properties were erected into a "perpetual" primogenitura by the Baron Giovanni Batista Viani and his three sisters, the Noble Angelica, Maddalena and Olimpia Viani. Of these founders, the three ladies were spinsters, while the Baron at the date of the deed was a widower, with a family of two daughters, the Donna Francesca and the Donna Anna Maria Viani Bonnici, wife of the Marchese di San Vincenzo Ferreri. The Donna Francesca was, it appears, unmarried, but of the marriage of the Donna Anna there were three sons, all living, viz., Giuseppe, born in 1767; Lorenzo, born in 1769; and Filippo, born in 1774. At the date of the deed therefore these three sons of the Donna Anna were the only male descendants of any of the founders, and it is well to note that they were all in the female line.

It will be convenient at the outset to set forth textually those clauses of the deed upon which the discussion has mainly turned. They will thus stand for reference as this judgment proceeds. An English translation, accepted by both parties as accurate, has been used throughout the proceedings. Their Lordships will quote from that translation.

> 3. . . . all holders of the "primogenitura" shall at all times bear in all public and private acts, and in their signature, the surname Viani in addition to their own and unite always to their own insignia the insignia of the Viani family.
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> 5. As stock of this "primogenitura" (the founders) have nominated Donna Francesca Viani legitimate and natural first-born daughter of the said Baron and of the late Baroness Maria Teresa Bonnici Falzon, appointing her first holder of the property. and after her they call all her descendants in the order of a regular primogeniture in the manner hereunder mentioned, to wit, her first-born son and his male descendants in the male line (per lineam masculinam) up to the twentieth and thirtieth degree and in perpetuity; after these, they call the second-born son together with his male descendants in the male line also in perpetuity; and after these the third, fourth, fifth and sixth-born son together with his male descendants in the male line, always in the order of a regular perpetual primogeniture.
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> 6. In default of the male line of the male children (figli maschi) of the said Donna Francesca, the female children (figlie femmine) of her male children (figli maschi) and all their descendants shall succeed in the same order of primogeniture, with preference always of males to females, and of the first-born to the second and ulterior born son, and in every respect as has been established above for the first limitation (vocazione) of the male children (figli maschi), provided, however, that the succession shall restart from the first line of the first-born son, first called, preferably to the females nearer in degree to the person last called, and so on successively and gradually.

7. In case of failure both of the male and female lines of the said male children (figli maschi) the said Baron and his sisters direct that the female children (figlie femmine) of the said Donna Francesca Viani and all their descendants shall succeed in the very same order laid down above for the limitation of females descended from male children (figli maschi), which order is to be held as repeated here word for word.

8. And should the said Donna Francesca Viani have no children, male or female, then the said Baron and his sisters have substituted and called Donn' Anna Maria Viani Bonnici, wife of Mario Testaferrata, Marchese di San Vincenzo Ferreri, with all those substitutions, limitations, pacts, laws, rules and conditions which have been ordered and established for the limitation of the said Donna Francesca Viani, and not otherwise.

Sections 9 and 10 make provision for the ingress of the primogenitura into the family of de Ollivier Viani, in default of all the lines specified in sections 5 to 8.

13. From the said primogenitura the said Founders exclude all those who perhaps were not born of a true and lawful marriage contracted according to the rites of Holy Church, even if they be legitimated by subsequent marriage or by privilege, be it also of Sovereign Princes or of the Supreme Pontiff, provided, however, that the descendants of the said Donna Francesca and Donn' Anna Maria Viani even if legitimated per subsequens matrimonium or per rescriptum principis to the exclusion of the said Donna Rosa and Donna Vincenza de Ollivier Viani and their descendants, may and shall enjoy the present primogenitura, not however to the exclusion of their brothers born of a true and lawful marriage.

14. Likewise if it should happen that there be one only male of the primogenial line and such male be legitimated per subsequens matrimonium, then he may and shall enjoy without question the present primogenitura to the exclusion of any female born of a true and lawful marriage.

18. Although the intention and will of the Founders is that the present "primogenitura" is to go to the first-born, nevertheless, if the latter's conduct is unbefitting his rank as knight, or what is more, as a good Christian, or if he contracts unequal marriage or against his parent's will, or if from the second-born more decorum to the family is hoped, in such cases the said Baron Viani and his sisters, wishing that the persons called by them be virtuous and moral, grant unto the said Donna Francesca and Donn' Anna Maria Viani and successively unto all the holders of the "primogenitura," the power to prefer the second-born son, and if the latter is also undeserving they give power to prefer the third-born, and so on successively; but the Founders request that this right of preference be not exercised without good cause and mature consideration, or with passion or mere predilection for the sons and daughters under age. The descendants, however, of the person debarred shall not be considered excluded when, on the extinction of the line of the person preferred, there be room for a new substitution.

Until the death of the Baron Dr. Giuseppe Testaferrata Viani, the third holder of the primogenitura, there was no room for doubt as to the proper devolution of the primogenial property. The Donna Francesca had died without issue, and the property devolved upon the Marquis Giuseppe, the eldest born of the Donna Anna's three sons, that lady's line entering into the primogenitura under section 8 of the deed. The Marquis was succeeded by his only son Gilberto, as the second holder, and Gilberto by his only son, the Baron Dr. Giuseppe, who died without issue in April,

1892. It is not in dispute that thereupon the direct male line of the Marquis Giuseppe, the eldest born son of the Donna Anna became extinct; and, if the first limitation established by the third clause of the deed is a purely male agnatic descent from which all males descending from females and females themselves are excluded, as is the contention of the appellant, then, on the death of the Baron Dr. Giuseppe, the primogenitura ought to have made its ingress in the male line of Lorenzo (second born son of the Donna Anna) or, failing that line, in the male line of Filippo —her third son—the line which the present plaintiff claims to represent.

In fact, however, the primogenial property was retained first, by the Noble Rosario, a nephew *ex sorore*, of the Baron Dr. Giuseppe, and second son of his deceased sister Angela. The Noble Rosario appears to have held possession certainly until 1903. Thereafter, in circumstances which are not disclosed in the papers before the Board and which have not been clearly explained to their Lordships, possession was taken by or given to the Noble Salvatore dei Baroni Testaferrata Moroni Viani, the elder brother of the Noble Rosario, and the father of the present respondent. Possession was retained by the Noble Salvatore until his death in September, 1911, about a month after the institution of these proceedings, and since his death it has been retained by his son, the respondent.

In 1910 an attempt to disturb that possession was made by the Noble Nicola Testaferrata de Noto, grandson of the Marquis Giuseppe, and son of the Marquis's daughter, Vincenza. He brought a suit against the Noble Salvatore to recover the primogenial property. In that suit however the Court of Appeal in a judgment dated the 27th June, 1910, after expressing views as to the true effect of the deed of foundation which the learned judges of that Court have repeated and indorsed in their judgment now under consideration, held that, in a question between the Noble Nicola and the Noble Salvatore, the latter was entitled to enjoy the property under an earlier vocation, and that, on that ground alone, the Noble Nicola had no claim to interfere with his possession.

Such, in his own view, at least, was not the present appellant's position, and he, on the 10th August, 1911, instituted these proceedings against the Noble Salvatore. Upon his death the suit was by decree dated the 3rd November, 1911, transferred to his son, the present respondent, the Noble Pietro Paolo Testaferrata Moroni Viani, and the appellant asks in it for a declaration that he has a stronger claim than the respondent to the enjoyment of this primogeniture and for consequential relief.

The respondent's place in the order of descent has already been described. The appellant's position in relation to him can only be appreciated on reference to the facts concerning the male line of Lorenzo, the second son of the Donna Anna, and concerning also the male line of Filippo, her third son, of which line, as their Lordships have already said, the appellant claims to be the present representative.

Lorenzo, the second born son of the Donna Anna, had an only son, Mario Filippo, and he by his marriage with Donna Vincenza Testaferrata had four sons of whom the three eldest died without issue. The fourth son, the Noble Lorenzo Antonio dei Marchesi Testaferrata is still living, descended, as thus appears from his grandfather Lorenzo through an unbroken series of males. The Noble Lorenzo Antonio, however, has since 1874 held a primogenitura, distinguished in these proceedings as the "Testaferrata primogenitura," one condition of which is that the holder of the Viani primogeniture must never succeed to it and that the two primogenitures shall not meet in the same person. There have been at least three appropriate occasions since 1874, on which the Noble Lorenzo Antonio could have elected to abandon the Testaferrata primogenitura and claim the Viani primogenitura, and the judgment of the Court of Appeal in the present case shows, as did its judgment in 1910 in the case already referred to, that in the opinion of that Court there would be no answer to his claim if he made it. He has, however, never made the claim, presumably for very good reasons, which in view of the facts just stated are easy to conjecture. But he still lives, a not remote kinsman of both parties to the present proceedings. And in the view of the Court of Appeal—not of course shared by the respondent—the existence of the Noble Lorenzo Antonio is the one existing effective obstacle to the appellant's immediate success in this suit. Of that, however, hereafter.

Filippo, the third born son of the Donna Anna, married on the 19th August, 1807, Vincenza Fallanca. The appellant's case is that to these persons, before their marriage, viz., on the 26th August, 1805, was born their only son Lorenzo who was legitimated by the subsequent marriage of his parents. It is not suggested by the respondent or by anyone else, that there was any subsequent issue of that marriage or any issue of Filippo other than Lorenzo. Lorenzo was the great grandfather of the appellant—his grandfather, Filippo, being Lorenzo's only son, and his father—the Marquis Lorenzo Cassar Desain Testaferrata, being Filippo's only son. The appellant is the second but only surviving son of his father, the Marquis Lorenzo, his elder brother, the Marquis Filippo Giacomo, having died without issue on the 8th October, 1906.

With regard to the appellant's status it has throughout been contended by the respondent, as a preliminary objection of fact, that there is no sufficient evidence that the appellant's great-grandfather Lorenzo was in fact Filippo's son, and the learned Judge of the First Hall took that view. His judgment on this matter, however, did not commend itself to the learned Judges of the Court of Appeal and little was urged in support of it before the Board. Their Lordships have carefully considered all the evidence upon the subject, and they concur unhesitatingly in the view of that evidence taken by the Court of Appeal. It is in their judgment established beyond the range of judicial doubt that Lorenzo

was the son of Filippo and Vincenza Fallanca, and that he was duly legitimated and acquired the full status of legitimacy by the marriage of his parents on the 19th August, 1807. This objection, to the appellant's status, their Lordships accordingly reject. When rejected, it becomes indisputable that, subject to the effect upon Lorenzo and, separately, upon his line, of the fact that he was only legitimated by the subsequent marriage of his parents, the appellant is, under the deed of foundation here in question, the present representative of the line of Filippo, descended from him through an unbroken series of males. It is in that character that as against the respondent he sets up in these proceedings the stronger claim to the enjoyment of the primogenial property.

To that claim the respondent, beyond the objection to the appellant's status with which their Lordships have just dealt, puts forward three separate answers :—

> Firstly.—He asserts in himself a right prior to that of the appellant to hold the " primogenitura."
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> Secondly.—He contends that the appellant as a person descended from an ancestor whose legitimacy was due only to the marriage of his parents subsequent to his birth is not within the vocation at all and can assert no claim under the deed of foundation.
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> Thirdly.—He urges that if, contrary to his second contention, the appellant is within the vocation, his claim, as against a person, like himself, in actual possession of the primogenial property, is barred by the right thereto of the Noble Lorenzo Antonio which, on the appellant's view of the deed of foundation, is necessarily prior to his own.

Each of these answers was accepted by the learned Judge of the First Hall, as well founded and sufficient to defeat the appellant's claim. In the Court of Appeal, the third answer only was entertained favourably. The others were rejected. They will now be dealt with in their order.

Their Lordships, as a result of the argument before them, are left in some doubt as to the ground on which the first contention of the respondent is now rested. In the First Instance, the contention they think must have been—it was accepted by the learned Judge—that by the limitation of the primogenial property successively to the first, second and subsequently born sons of—in the event—the Donna Anna " and his male descendants in the male line up to the 20th and 30th degree and in perpetuity . . always in the order of a regular perpetual primogeniture," the founders meant only successive lines of substance from which the female is not excluded, although she is postponed to the male. Marked as is the contrast in language, and presumably in content, between the apparently restricted words " male descendants in the male line " in this vocation and the corresponding words " all their descendants " in the second and third vocations set forth in sects. 6

and 7 of the deed there is, in the learned Judge's view, identity of devolution within each vocation. The words, "per lineam masculinam" in the first, merely mean a line beginning with a male as contrasted with what in sect. 7 is described as the linea feminina of sect. 6—a line beginning with a female. The first like the other vocations is governed by the words "always in the order of a regular primogeniture" by which is meant a primogeniture in which although males rank before females they do not exclude them, and even their priority is qualified by the rule that preference must always be given, first to the line, secondly to the degree within the line and thirdly only to sex in case of equality of degree.

Now as to this, it is first of all a little difficult to see how in sect. 5 the words "per lineam masculinam," part of the expression "her first born son and his male descendants in the male line" can only mean a line beginning with a male when the first born son, a male, has already been named as the first person in the line. On that view the words are merely tautologous or redundant. But, further, a line beginning with a male is not in Maltese law the natural or ordinary meaning of the words "linea masculina." The phrase, says Lord Selborne, in *D'Amico v. Trigona* 13 *A.C.* 806 properly means "a line commencing with a male and continued through males" and he continues :—

> "Many authorities on that point were quoted at the Bar, but it is sufficient to mention the definition of the Roman Rota approved and adopted by Cardinal Luca (De Linea Legali lib. 2, art. 76 num. 5). "Linea masculina inchoatur a masculis et continuat in masculos; cum autem pervenerit ad feminas statim finitur," to which the Cardinal adds: "Linea masculina etenim est quae componitur simpliciter ex masculis absque intermixtione feminarum."

In other words, if the phrase is to have attributed to it the limited meaning of a line commencing with a male—and no more—some context is required. And here the context is all the other way.

Again, as to the references in the section to a regular primogeniture, which formed the essential basis of the learned Judge's decision—and there are, it will be seen, two such references—these do, their Lordships recognise, carry one step further in the case of this primogenitura the usual presumption in favour of a primogeniture being regular which apart from these references altogether would by Maltese law apply to it. It must, however, in this connection, also be remembered that by the same law founders of a primogenitura may, if they please, displace the regular order of succession, and an intention to do so, if sufficiently manifested, will be acted upon, subject to this, that a prescribed deviation will not be construed as interfering with the regular order more than is necessary to give effect to the deviation. In the result, the question really becomes one of the proper construction of the deed, to ascertain which all parts of the instrument may rightly be taken into account. See *D'Amico v. Trigona* ubi supra at p. 814 : *Strickland v. Marchese Felicissimo Apap* 8 A.C. 106.

And as a matter of construction it seems to their Lordships impossible to include as beneficiaries in this first vocation any females at all, if only because those included in that vocation are confined to " male descendants." Moreover, if females are, as under a regular primogeniture, to be called it would appear that on the death in 1892 of the Baron Dr. Giuseppe without issue his sister, Orade, who survived him was the person in the regular order to succeed instead of either the Noble Salvatore or the Noble Rosario, sons of a deceased younger sister. And it is noticeable that in seeking to establish under the deed the respondent's claim to present possession no attempt has been made to extinguish the prior claim of Orade either as at that or any later date. Their Lordships, however, do not labour this point. They base their conclusion here on broader grounds. It seems to them that it is only by a complete disregard of unambiguous words which, with all respect to the learned Judge of the First Hall, is not permissible to a Court of construction, that females can as beneficiaries be brought within the first vocation of this primogeniture.

And probably, for that reason, a somewhat different view of this vocation was, as it seemed to their Lordships, presented to the Board by learned Counsel for the respondent. That view appeared to be that under this vocation males descended through females, although not females themselves, were called. To take the present case, the Noble Rosario, and the Noble Salvatore descended from Angela, excluded both Angela and Orade, and were called as " male descendants in the male line."

The first observation to be made on this contention is that such a devolution ceases in any sense to be regular, and the respondent by adopting it discards at once the support derived from the references to a regular primogeniture without which the view adopted by the learned Judge of the First Hall could hardly even be stated. The devolution now contended for is as irregular as is an agnatic line of descent. If therefore it is to obtain it can only be on the ground that it embodies as matter of construction the true meaning of the words " his male descendants in the male line."

But these words have, by Maltese law, as their Lordships are satisfied, another and a different meaning. No female, even as a channel of descent, has part or lot in a devolution so defined. Indeed, a female may possibly be excluded with equal completeness by the use of the expression " male descendants " alone. " But this," says Joannis Torre, Variarum Juris Quaestionum (1705) Tom I. p. 419,

> " fortius procedit in nostra hypothesi quia in eodem periodo in quo fit mentio descendentium masculorum exprimitur per lineam masculinam."

And the effect of the full phrase, as found here, is very clearly laid down in two of the authorities referred to by the Court of Appeal

"Si testator vocavit masculos per lineam masculinam descendentes, masculi ex femina non venirent, etc.

Fusarius de Fidei. Substitutione Qu: 346 n. 32.

"Masculi ex feminis in primogenituris et fideicommissis non veniunt quoties testator vocavit lineam masculinam vel masculum descendentem ex masculo, ratio est quia linea masculina non incipit a femina, quae finis est lineae masculinae.

Bichio Decis 493."

In their Lordships opinion, therefore, the view of this first vocation taken by the Court of Appeal both in their judgment in 1910 in the suit already referred to and again in the judgment now under consideration is well founded. The words used are too clear to be doubtful. In this first vocation the founders mean to call only males descended from males.

Nor have their Lordships any difficulty in harmonizing this view with the references made in section 5 to a regular primogeniture. The following passage from the judgment of the Court of Appeal expresses exactly their Lordships' opinion upon this aspect of the matter.

"The said authorities bear out what has been said by this Court in the quoted judgment of the 27th June, 1910, namely, that in the present case the expression masculine line in conjunction with the word "male" leaves no doubt that the founders meant to call only males from males in the first vocation, notwithstanding the expression "regular primogeniture" which, in the face of the clear will of the founders, must be taken in the sense given to it in the judgment of 1910 to wit, "that in the succession of the male lines one must observe the rule of a regular primogeniture with preference to the line, the degree and age, and not that males descended through females and much less females themselves should be held as included in the disposition."

There was, however, one objection urged against this construction of the first vocation with which it is desirable to deal. This construction would, it was said, in the result deprive of all benefit under the deed any females and their descendants—the respondent himself may be taken as an example—proceeding in the second and later generations from the sons of the Donna Anna's sons. And this, although in sect. 5, as above quoted, "all her descendants" are to be called, and although it is in effect only on failure of these descendants that the primogenitura is to enter into the family of de Ollivier Viani. Their Lordships agree that this criticism if it were well founded would be serious. But if the extended construction placed by the Court of Appeal in 1910 on the words "female children" in clause 6 of the deed be correct, as their Lordships think it is, this result would not happen. So much cannot, however, be said of the construction for which the respondent contends. Because unless, as for reasons above given is hardly possible, he can include females as beneficiaries in the first vocation, it seems to follow on his view that so soon as any females are there passed over in favour of male descendants they never again find a place for themselves within the vocations. Yet they are all of them "descendants" of the Donna Anna.

There are other considerations leading to the conclusion at which on this issue their Lordships have arrived. Some of them are referred to by the Court of Appeal. But their Lordships do not deem it necessary further to elaborate their judgment on this point. They would only observe that their conclusion that an agnatic line of quality is in fact prescribed by clause 5 of the deed appears to them to be in complete harmony with the scheme of the instrument taken as a whole. The deed discloses throughout an anxious desire on the part of the founders to prescribe an agnatic devolution of the property as closely as circumstances would permit, one of which was that the male representatives of the Viani family in the generation succeeding their own were all in the female line. In their Lordships' judgment the respondent has shown in himself no title under the deed to the present enjoyment of the primogenial property or any part of it. A true representative of the agnatic line of Filippo is in the vocations in clear priority to him. Is, then, the appellant such a representative ? That question is involved in the second of the respondent's contentions, which their Lordships now proceed to consider.

At this point the appellant is confronted with the difficulty created by sect. 13 of the deed of foundation which, subject to provisions which follow, excludes from the primogenitura :

> " All those who perhaps were not born of a true and lawful marriage contracted according to the rites of Holy Church, even if they be legitimated by subsequent marriage or by privilege."

Lorenzo, the appellant's great-grandfather was, as has been seen, such a person. Lorenzo, says the respondent, was excluded from the vocation and his exclusion carries with it that of all persons—and the appellant is one of them—who can come within the vocation only through him.

To this difficulty the answer upon which, it appears, the appellant mainly relied in both Courts in Malta, was that he himself was born of a true and lawful marriage : the exception has no application to any such person as he. In their Lordships' judgment this is not a valid answer. They agree with the Court of Appeal in thinking that the appellant, although himself born legitimate, cannot in this matter be in any stronger position than Lorenzo, from whom he descends.

It is true that while the exclusion of legitimated persons from a primogenitura is permitted to founders, if they desire to make it, nevertheless, such an exclusion is not favoured by the law and its term will be construed strictly.

> Hi namque (legitimati per subsequens matrimonium) speciali nota digni sunt, et eorum exclusio debet esse expressa, concludens et certa, ita ut verba fideicommittentis nominatim eorum exclusionem praeseferant.
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> Joseph Urceolus (Consultationes Forenses) Tom I. Pars II. Cap. 57 (1701) p. 45.

It is true also, that authority can be found for the proposition that such an exclusion applies only to the legitimated persons

themselves and does not extend to their descendants, if they, in other respects, are entitled. But there is preponderant authority the other way—authority the Court of Appeal say, supported by the general opinion of text writers, and authority, which their Lordships agree with that Court in thinking, is according to reason. That view is supported too, in the case of this deed, by a reference to sect. 18, which shows that the founders know how to protect the descendants of an excluded person when it is their desire or intention to do so. In these circumstances their Lordships on this point will content themselves by selecting from the numerous authorities which have been called to their attention the following comprehensive statement of Censalius, "Observationes cum additionibus ad Tractatum de fideicommissis Marci Antonii Peregrini"—Ad Articulum 24, p. 93, where he paraphrases a passage from Fusarius thus :—

> "omnes Doctores cumulat: secundum quos resolvit quod nec filii legitimi et naturales ipsius legitimati admittendi sint ad exclusionem substituti, tamquam nati ex radice infecta, et redarguit contrarium sentientes."

The appellant's first answer to this objection accordingly does not avail him. If Lorenzo was excluded from the vocation so is he. But the appellant has another answer which the Board accepts. In their Lordships' judgment Lorenzo was not so excluded. He comes under both of the exceptions contained in the deed. These exceptions must according to the rule already stated receive a generous construction, and, so regarding the first of them, their Lordships agree with the Court of Appeal in taking its effect to be that a descendant of the Donna Anna legitimated per subsequens is only excluded in favour of a brother born of a true and lawful marriage, and Lorenzo never had such a brother. But they think further that Lorenzo came within the exception of clause 14. He was the last male of his primogenial line—the agnatic line of Filippo. As Filippo was the youngest son of the Donna Anna, the succession, failing Lorenzo, went to or through "a female born of a lawful marriage." As against such a person —and on the principle just discussed, a male descended from such a female is in no stronger position than the female herself— Lorenzo was by sect. 14 entitled to enjoy "without question" the present "primogenitura," and his privilege extends to his agnatic line. On these grounds their Lordships are of opinion that the appellant is, under the deed, the true representative of the male line of Filippo, and that the second contention of the respondent is not well founded.

This brings them to the third and last of the respondent's answers to this suit. He is in possession, and he says that the claim of the appellant as against him is barred by the right to the primogenial property of the Noble Lorenzo Antonio, which on the appellant's view of the deed of foundation is necessarily prior to his own. In other words, the respondent as against the

appellant sets up an exceptio juris tertii, and the question is whether he is entitled so to do.

Now, with reference to this matter, as it is undoubted that the right of a third party can only be set up by a defendant "quando exceptio est ipso jure exclusiva juris agentis," it becomes important at once to determine what the position of the Noble Lorenzo Antonio in relation to this property has been since 1892. He has made no claim to it: he has accepted in relation to it neither privileges nor burdens. On the contrary, he has been in continuous possession of the Testaferrata primogenitura—a possession competent to him, only on the footing that this Viani primogenitura is not united with it in himself. Is his position in relation to the Viani primogenial property nevertheless this, that "nolens volens" it has vested in him so that his title to it, his "jus," is "ipso jure exclusivum juris" of the appellant, or is it that while under the instrument of foundation he may accept the property with its primogenial obligations as well as its rights, he is entitled also, if he be so minded, to ignore it?

In their Lordships' view he is so entitled. The primogenitura is a development of the fideicommissum: each successive person called is called to a trust created by the founder. Must he not accept that trust by claim or entry before his interest whatever it may be called, vests in himself? De Valentibus (De Ultimis Voluntatibus (1744) Tom II. Pars. I. Votum XXVIII (p. 307)) expressly answers this question in the affirmative with direct reference to the matter now under discussion. He there says that a jus tertii does not exclude a plaintiff's claim

> "quando tale jus pendet a voluntate tertii, qualia sunt jura fideicommissaria, quae ad aliquem non spectant, nisi illo volente, hoc enim casu, jus, quod non, nisi ipso tertio volente, est exclusivum juris agenti illo non opponente, opponi nequit.

Again, in his "De Fideicommissis (1599) Art. 41, p. 576 (13th ed. 1725) Peregrinus cites with approval Acharanus

> "ubi distinguit, quaedam esse jura, nobis facto, et re ipsa quaesita et adversus haec mala fides impedit praescriptionem; quaedam vero jura esse quae demum nobis competunt, facta declaratione, ut in casu jure emphyteutico et in fideicommissis et legatis quae effectualiter non acquiruntur, nisi praevia animi declaratione, et volentibus legatariis et fideicommissariis.

So, again, Joannis Torre, Variarum Juris Quaestionum (1705) Tom I. Tit II.: p. 465, after observing that before this exceptio can be set up by a defendant the right of the third party should *ipso jure* exclude the plaintiff's right whether the third party wishes it or not, proceeds:—

> Et tale non potest esse jus fideicommissarii, cum requiratur eum velle succedere, et in puncto, quod propterea possessor non valeat excipere de jure fideicommissi, tertio competente.

And the following authorities show who is to succeed, if the person entitled in priority makes no claim.

Joannis Torre, Variarum Juris Quaestionum, Tom. 11. Tit VI. Qu. 6, says :—

> ". . . si filius Liberti haereditatem repudiaverit, Patronus admittitur, quamuis alias excludatur a filio Liberti. Et plenissime quod qui non potest succedere habeatur pro non extante, adeo ut sit locus aliis succesive vocatis.

Again, Cardinal de Luca Tom II. (ad Lib. X) Decisio 107, observes :—

> " In primogenituris sequens in gradu admittitur ex propria persona, si praecedens non successerit dummodo aliquo tempore saltem in potentia fuerit habilis.

So Rota Romana Decisio 458, 3 Dec. 1640 :—

> Pars IX. Tom II, p. 273.
>
> Unde cum deficisset linea descendentium Emilii, nec adessent filii, ant nepotes agnatorum ad cujus negativae probationem satis erat, quod nemo compararet, qui diceret se esse in hoc gradu testatori conjunctum, admitti debebat Angelus ad illius successionem, cum in eo concurreret qualitas cognationis requisita a testatore.
>
> *Ibid* : Decisio 255 : 29th Feb. 1643. Pars. IX ; Tom I, p. 512.
>
> si quidem, in substitutionibus fidecommissariis successivis, deficiente primo vel antecedenti vocato sequens subintrat non dependenter ab antecedenti, sed tamquam ex propria persona succedens, perinde ac si expresse vocatus fuisset in locum antecedentis.

The cumulative effect of these authorities cannot be gainsaid. Neither their relevance nor their weight was in any way challenged by learned Counsel for the respondent, nor were they met by the citation of any authority to the contrary. Unfortunately none of them were brought to the attention of the Court of Appeal, although they displace to a large extent by anticipation the grounds upon which the decision of that Court in favour of the respondent was rested. Stated broadly, the view of the learned Judges there was that this suit to recover possession of primogenial property is in its essence an "*actio rei vindicatoria*," in which the plaintiff if he is to succeed at all must have in himself the " dominium " of the property which he alleges is unjustly detained by the defendant. If that " dominium " is vested in some one else, the plaintiff cannot maintain the suit. Here the " dominium " is outstanding in the Noble Lorenzo Antonio. His " jus " is " exclusivum juris agentis." The exceptio juris tertii accordingly applies.

Now the analogy here relied upon between these proceedings and an "*actio rei vindicatoria*" rests it will be seen on at least two assumptions. The first is that the interest of a person called to the enjoyment of primogenial property can properly be described as " dominium." The second is that that interest vests in each successive holder " ipso jure." As to the first of these their Lordships are not prepared to accept it without devoting to the subject much greater consideration than it has received in these proceedings. An onerous trust coupled with an interest would

certainly describe more aptly than the term "dominium" the nature of each successive holder's interest in primogenial property. But that question may be reserved for consideration on some other occasion, because it appears to the Board that the second assumption of the Court of Appeal, viz., that the existing primogenial interest—describe it how you will—remains outstanding in the Noble Lorenzo Antonio is entirely displaced by the authorities to which reference has just been made. These authorities however go further. They describe in terms apt for the present purpose the existing position of the appellant in relation to this primogeniture and expound the principle upon which, regardless of the Noble Lorenzo Antonio who prefers to stand aside, the claim of the appellant as against the respondent is maintainable. The appellant indeed contended that the Noble Lorenzo Antonio had definitely elected to abandon the Viani primogenitura. Their Lordships cannot so decide in his absence. But his interest in the property in respect of the long period of his refusal to accept its responsibilities is gone. In the result, on this question also, the Board have reached a conclusion favourable to the appellant.

It is a satisfaction to the Board to feel that they are justified by authority in doing so, for that conclusion seems to them to be alone consonant with principle and right. The consequences of the view adopted by both Courts in Malta are indeed devastating. Their decision means that on failure by a beneficiary from whatever interested motive to claim primogenial property that property is at the mercy of any person whether within or without the vocations who succeeds in obtaining possession of it. He may hold it as against all comers—even those next in the vocation—freed and discharged from all primogenial obligations precise and serious as in this case they are. A more complete frustration of founders' intentions as set forth in such an instrument of foundation as that here in question can hardly be conceived.

Accordingly, the orders of both Courts in Malta should, their Lordships think, be discharged except as to costs. The appellant in the opinion of the Board is entitled to the declaration which he seeks, and to an order upon the respondent based upon that declaration to relinquish in his favour all the movable and immovable property constituting the endowment of the primogenitura in question.

As to the appellant's claim to the income accrued or which with the diligence of a prudent man might have accrued from the institution of the proceedings until relinquishment, their Lordships observe that in the earlier suit before the Court of Appeal in 1910 in which the First Hall gave judgment for the plaintiff that Court directed that the liquidation of the income should form the subject matter of a separate suit. It would not be right to adopt that course in the present case, owing to the time which has elapsed since these proceedings were commenced. But this demand is too serious to be disposed of at once. It has not yet been

considered in any Court, and the Board think that this claim of the appellant's should be referred back to the Court of Appeal for adjudication by that Court on the footing of the above declaration.

The orders of both Courts in Malta as to costs should, their Lordships think, remain, in each case, undisturbed. The respondent must pay to the appellant his costs of this appeal and cross-appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MARQUIS RICCARDO CASSAR DESAIN

v.

THE NOBLE PIETRO PAOLO DEI BARONI TESTAFERRATA MORONI VIANI.

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(*Consolidated Appeals.*)

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