Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Strickland v. *Apap, from the Court of Appeal of the Island of Malta, delivered* 10*th February* 1883.

Present:

SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

The question to be determined in this appeal arises thus.

Canon Dr. Don Gio. Francesco Maria Mangion made a will on the 10th of June 1737, the material parts of which are as follows. After constituting Count Pietro Gaetano Perdicomati Bologna his universal heir, the will proceeds:—

"Voluit tamen jussit ordinavit atque mandavit dictus Dominus Testator, prout vult jubet ordinat et mandat, quod prænominatus Dominus Hæres universalis ut supra institutus infra annos duos a die sui obitus in antea computandos teneatur et debeat de omnibus bonis stabilibus hæreditarijs ipsius Domini Testatoris, et in quibus dictus Dominus Petrus Caietanus fuit ut supra institutus hæres universalis, erigere et fundare in valida et subsistenti forma perpetuam primogenituram, sub arcto et perpetuo fideicommisso, favore masculi legitimi et naturalis ex legitimo matrimonio procreati et descendentis ex dicto Domino Petro Caietano, cum prohibitione quod dicta bona stabilia hæreditaria eorumque fructus etiam durante vita possessoris non possint alienari subjugari hypotecari neque in specie neque in genere nec aliter quomodocumque, in quascumque personas quovis sub prætexta transferri ex quacumque causa quantumvis necessaria, excludens expresse idem Dominus Testator a fruitione huiusmodi primogenituræ perpetrantes aliquod delictum, et hoc in odium delicti, ac etiam omnes et singulos religionem ingressuros ibique regularem professionem emissuros, nedum a proprietate dictorum bonorum, verum etiam ab eorum usu-

fructu, dans et concedens dictus Dominus Testator facultatem dicto Domino Hæredi Universali in erectione et fundatione huiusmodi primogenituræ pactum legem et conditionem apponendi, quod sit in libertate ipsius Domini Petri Cajetani, qui vita sua durante usufructuare debet bona stabilia hæreditaria prædicta pro fruitione bonorum ad primogenituram erigendam spectantium nominare quem voluerit ex proprijs filijs masculis legitimis et naturalibus, etiam postposito primogenito, et talis nominatus haberi debeat pro primogenito quamvis non fuisset major natus taliter ut filius primogenitus, et quilibet alius nullum jus habeat ad primogenituram nisi fuerit ad eam nominatus a dicto Domino Petro Cajetano a cuius libero arbitrio dependere debet nominatio, quam liberam facultatem nominandi unum ex filijs masculis legittimis et naturalibus dictus Dominus Testator dedit et concessit cuicumque possessori bonorum dictæ primogenituræ. Prout quoque idem Dominus Testator facultatem dedit dicto Domino Hæredi Universali legem pactum et conditionem apponendi in erectione huiusmodi primogenituræ, quod si ultimus masculus illius possessor non haberet masculos, tunc bona ad primogenituram spectantia pervenire debeant ad alium masculum ex ipso Domino Hærede Universali descendentem quamvis remotiorem, in exclusionem fæminarum etiam ex ultimo masculo descendentium, vel quod debeant transire ad fæminam donec et quousque ex ea nasceretur masculus; quatenus tamen nullus masculus per directam lineam masculinam descendens ex dicto Domino Hærede Universali reperiretur, tunc admitti debeat ad primogenituram fœmina ex descendentibus ex dicto Domino Hæredi Universali ex proximiori ultimo masculo possessori primogenituræ, donec et quousque ex ipsa fœmina nasceretur masculus, et ita in perpetuum observari, excludens dictus Dominus Testator a dicta primogenitura omnes qui non sunt legitimi et naturales et ex legitimo matrimonio procreatos. Similiter dictus Dominus Testator amplam et liberam facultatem dedit dicto Domino Hæredi Universali apponendi in erectione dictæ primogenituræ quæcumque alia pacta leges et conditiones sibi benevisa, quæ habeantur ac si ab initio fuissent a dicto Domino Testatore apposita, etiamsi non compaterentur cum superius expressis, dummodo tamen non sint derogatoria perpetuo fideicommisso et primogenituræ et supra ordinatis, ac substitutionibus et vocationibus de quibus infra, et non alias aliter nec alio modo."

If Count Pietro Gaetano fails to found the primogenitura "tunc illius filius primogenitus "teneatur et debeat eamdem primogenituram "erigere infra tempus supra prescriptum, et cum "omnibus pactis, legibus, conditionibus, vocation-"ibus, prohibitionibus, facultatibus, et fidei-"commissis supra expressis, et non alias."

In default of the whole line, male and female,

of Count Pietro Gaetano, the property is to go to the Baroness Mompalao "retento tamen "semper et religiose observato ordine primo- "geniturae et fideicommissi ut supra ordina- "tum."

Canon Mangion died soon after the date of his will, and Pietro Gaetano, on the 3rd November 1739, purporting to act in execution of the powers conferred upon him by the will, executed a deed, of which the most material passages are the following:—

"Hinc prædictus Dominus Petrus Caietanus Perdicomati Bologna, filius quondam Domini Martini Antonij, Civis Civitatis Vallettæ, mihi Notario cognitus præsens coram nobis, adimplendo volumtatem prædicti Domini Testatoris, et utendo facultate sibi ab eodem concessa, vigore præsentis instrumenti erexit et erigit constituitque in primogenituram perpetuam et individuam, omnia stabilia hæreditaria dicti Domini Canonici, sub legibus et conditionibus infrascriptis, quæ inviolabiliter observari voluit et vult cunctis futuris temporibus, reservata tamen sibi vita sua naturali durante usufructu eorumdem bonorum, et non aliter.

"Et primo, quod dicta bona in primogenituram erecta sint simplici absoluto et perpetuo fideicommisso subjecta favore totius descendentiæ dicti Domini Petri Cajetani servato ordine infrascripto; ita ut nullo unquam futuro tempore, nec inter vivos, nec per ultimam voluntatem, nec in totum, nec in partem, possint vendi subjugari, hypotecari, transferri, et alienari in alios, alienationis vocabulo latissime sumpto, quovis titulo et ex quavis causa etiam necessaria et privilegiata, scilicet detractione etiam legittimæ alimentorum dotis et alia qualibet etiam per Rescriptum et dispensationem Principis, ac de ejus plena potestate; neque quoad fructus, et eorum commoditatem etiam in vita possessoris; sed integra et indiminuta semper conserventur; pro decore suæ familiæ ad commodum tamen infra vocatorum, et juxta ordinem primogenituræ inferius designandorum; quod si quis ex possessoribus pro tempore dictorum bonorum per se vel per alium directe vel indirecte præmissis vel alicui præmissorum contravenerit, statim, et ipso jure, cadat a commodo dictorum bonorum eorumque fructuum etiam pendentium, illaque devolvantur ad alios vocatos, servato ordine quo infra: licitum tamen erit possessori pro tempore eorumdem bonorum illa permutare cum alijs bonis æquivalentis valoris, sitis tam in hoc dominio quam in alijs ditionibus, quæ bona censeantur hoc casu subrogata et in totum subjecta præsenti dispositioni et non aliter.

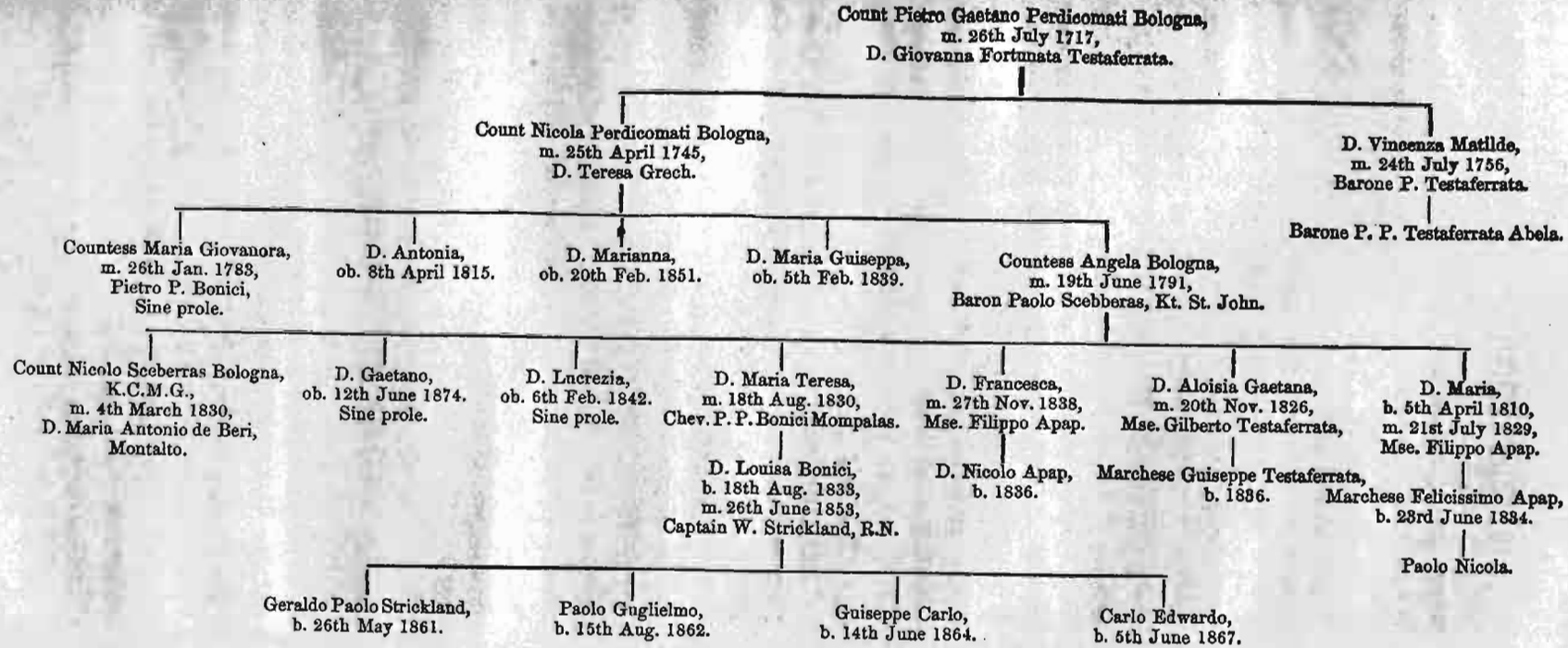
"Secundo, quod dicta bona semper et omni futuro tempore in perpetuum detineri et possideri debeant ab uno ex masculis

descendentibus per lineam masculinam a dicto Domino Petro Cajetano, incipiendo ab illo quem ipse nominaverit, et continuando de uno in alium sive descendentem sive transversalem possessoris pro tempore usque ad ultimum, ita ut omnes et singuli masculi descendentes per lineam masculinam a dicto Domino Petro Cajetana, habeant jus præcipuum consequendi dicta bona privative quo ad alios, sive masculos ex fœminis, sive fœminas ejusdem lineæ masculinæ, unus tamen post alium, servato hoc ordine, quod masculus descendens actualis possessoris præferatur masculo collaterali, et masculus collateralis lineæ magis proximæ ejusdem possessoris præferatur masculo collaterali aliarum linearum, et non aliter.

" Tertio, quod donec adfuerit aliquis etiam remotissimus ex dictis masculis descendentibus per lineam masculinam a dicto Domino Petro Cajetano, numquam admittantur fœminæ aut masculi descendentes ab eis, etiam si sint descendentes ultimi possessoris, vel de ejus linea magis proxima; non extantibus vero vel quandocumque deficientibus et extinctis omnibus masculis prædictis, dicta bona perveniant et pervenire debeant in perpetuum ad unum ex masculis descendentibus a fœminis de eadem linea masculina, et transeant de uno in alium usque ad ultimum, servato eodem ordine prælationis qui supra; et non extantibus vel quandocumque deficientibus hujusmodi masculis ex fœminis, eadem bona perveniant ad unam ex ipsismet fœminis, et transeant de una in aliam usque ad ultimam fœminam de dicta linea masculina, eodem ordine servato; quæ tamen fœminæ semper censeantur vocatæ in subsidium donec nasciturus masculus, ad quem post mortem naturalem fœminæ actualis posseditricis redire debeant dicta bona toties quoties casus dederit, et non aliter.

" Quarto, quod non extantibus vel quandocumque extinctis omnibus masculis descendentibus per lineam masculinam a dicto Domino Petro Cajetano eorumque fœminis et masculis descendentibus ab eis in præcedentibus duobus capitibus respective vocatis, dicta bona semper et in perpetuum perveniant et pervenire debeant ad descendentes per lineam fœmininam a dicto Domino Petro Cajetano, de uno in alium usque ad ultimum tam marem quam fœminam, servatis eodem methodo et eodem ordine præscriptis pro descendentibus per lineam masculinam in dictis duobus capitibus præcedentibus, ita ut primo loco admittantur masculi, et inter istos masculi ex masculis usque ad ultimum etiam remotum et transversalem ultimo possessori præferantur masculis ex fœminis etiam proximioribus, ac secundo loco in defectu omnium masculorum subintrent fœminæ, donec tamen nasceretur masculus qui semper illas excludere debeat salvo usufructu vita durante fœminæ posseditricis, et ulterius inter concurrentes de unaquaque specie respective præferatur descendens ultimi possessoris collaterali et collateralis ejus lineæ magis proximæ collaterali aliarum linearum ut supradictum fuit, et non aliter.

" Quinto, quod quilibet possessor pro tempore præsentis primogenituræ, si fuerit masculus, possit nominare et eligere


Count Pietro Gaetano Perdicomati Bologna,
m. 26th July 1717,
D. Giovanna Fortunata Testaferrata.
Count Nicola Perdicomati Bologna,
m. 25th April 1745,
D. Teresa Grech.
D. Vincenza Matilde,
m. 24th July 1756,
Barone P. Testaferrata.
Barone P. P. Testaferrata Abela.
Countess Maria Giovanora,
m. 26th Jan. 1783,
Pietro P. Bonici,
Sine prole.
D. Antonia,
ob. 8th April 1815.
D. Marianna,
ob. 20th Feb. 1851.
D. Maria Guiseppa,
ob. 5th Feb. 1839.
Countess Angela Bologna,
m. 19th June 1791,
Baron Paolo Scebberas, Kt. St. John.
Count Nicolo Sceberras Bologna,
K.C.M.G.,
m. 4th March 1830,
D. Maria Antonio de Beri,
Montalto.
D. Gaetano,
ob. 12th June 1874.
Sine prole.
D. Lucrezia,
ob. 6th Feb. 1842.
Sine prole.
D. Maria Teresa,
m. 18th Aug. 1830,
Chev. P. P. Bonici Mompalas.
D. Francesca,
m. 27th Nov. 1838,
Mse. Filippo Apap.
D. Aloisia Gaetana,
m. 20th Nov. 1826,
Mse. Gilberto Testaferrata,
D. Maria,
b. 5th April 1810,
m. 21st July 1829,
Mse. Filippo Apap.
D. Louisa Bonici,
b. 18th Aug. 1833,
m. 26th June 1853,
Captain W. Strickland, R.N.
D. Nicolo Apap,
b. 1836.
Marchese Guiseppe Testaferrata,
b. 1836.
Marchese Felicissimo Apap,
b. 23rd June 1834.
Paolo Nicola.
Geraldo Paolo Strickland,
b. 26th May 1861.
Paolo Guglielmo,
b. 15th Aug. 1862.
Guiseppe Carlo,
b. 14th June 1864.
Carlo Edwardo,
b. 5th June 1867.

suum immediatum successorem aliquem vel aliquam ex vocatis in præsenti instrumento ad sui libitum, etiam si sit sibi magis remotus vel remota, vel minor natu, dummodo non pervertat ordinem vocationis et prælationis superius præscriptum; et non facta hujusmodi nominatione et electione censeatur semper nominatus magis proximus ultimo possessori pro tempore in gradu naturæ, et in paritate gradus major ætate, si autem actualis possessor fuerit fœmina hujusmodi nominationem successoris nunquam facere possit, sed magis proximus et major ætate ut supra succedere debeat juxta methodum superius traditum, et non aliter."

Pietro Gaetano proceeded to nominate his son, Count Nicola, who will hereafter be called Nicola the First.

It is convenient here to introduce the pedigree of the family, beginning with Count Pietro Gaetano.

(*See page* 5*a*.)

The actual devolution of the property has been as follows:—

On the death of Count Nicola the First without male issue, the property devolved upon his eldest daughter, Maria Giovanna, (and would seem to have been held under some family arrangement by the Countess Angela (on which subject there is no distinct information);) on her death it devolved on her son Count Nicola Sceberras, hereafter called Nicola the Second. He died in 1875 without issue, and without having made a nomination, leaving sisters (his brothers having predeceased him), and the question to be decided is, whether, under the true construction of the will and the deed of 1739, Geraldo Paulo Strickland born in 1861 the grandson of Maria Theresa an elder sister, or the Marchese Felicissimo Apap born in 1834 the son of Maria a younger sister, is entitled to the succession. The Marquis Apap relies on being nearer in degree to Count Nicola, Geraldo Strickland on being in the nearer line.

The course of litigation has been as follows:—

An action was brought by the Marchese Apap in the Court of First Instance in the Island of Malta, against Mrs. Strickland, a daughter of Maria Theresa, and the mother of Geraldo, both in her own name and as tutrix and curatrix of her son Geraldo, then a minor. Chevalier Bonici Mompalao, a curator of the minor, was added as a Defendant. The Court gave judgment for Mrs. Strickland so far as regarded the claim to the property made by her on behalf of her son, to the exclusion of Mrs. Strickland as claiming in her own right, and of the Marchese Apap.

From this judgment the Marchese Apap appealed, and the Court of Appeal, by a majority of two Judges against one, reversed the judgment of the Court of First Instance, and gave judgment in his favour.

From this judgment Geraldo Strickland has appealed.

It is, in the first place, to be observed that the deed of 1739, which, in their Lordships' view, did not exceed the powers conferred by Canon Mangion's will, constituted a "primogenitura," and not a "majoratus."

The presumption of law in the construction of settlements of this class favours "primogenitura" as against "majoratus," and the deed has been treated by all the Judges as establishing a primogenitura.

The primogenitura is undoubtedly in some respects irregular, but it has been observed by this Board in the case of the Bologna primogenitura, "By a well known rule a de-"viation from the ordinary mode in which a "primogenitura descends is not to be con-"strued as interfering with that mode of descent "more than is necessary to give effect to that "deviation."

The general rule governing the succession to a primogenitura is thus expressed in Rohan's

"Dritto Municipale di Malta," B. iv., c. ii., s. 10, "To succeed in primogenitures, in the "absence of any particular rule, one must con- "sider, in the first place, the line, in the second "place the degree, in the third place the sex, "and in the fourth place the age."

The same rule is to be found in many other books of authority.

The present primogenitura differs from a strictly regular primogenitura by preferring sex to line and degree, and by giving powers of nomination. The rule must, therefore, be modified in its application so far as such preference and such powers render necessary, but no farther; the principle still obtains, when it is not at variance with the terms of the instrument, that line is to be preferred to degree and age. The difference of the application of the rule, as far as concerns line and degree, to "primogenituras" and "majoratus" respectively, is thus clearly illustrated by Torre, vol. i., sect. 5, page 51.

After expressing his opinion that, in a majoratus, the younger son of the last possessor would take in preference to the son of the elder son deceased, because he is nearer in degree, he proceeds to state, as an uncontroverted proposition, that in a primogenitura the nephew, because he is in a better line, would exclude the uncle.

It may be added that this primogenitura has been before the Sacred Roman Rota, of which high tribunal two decisions are before their Lordships, one by Judge Herzan, the other by Judge Origo.

It appears that, on the death of Nicola the First, Vincenza Matilde, his sister, and her son, the Baron Testaferrata Abela, claimed the succession as against Maria Giovanna Nicola's eldest daughter, mainly relying on a second nomination which Pietro Gaetano had made

(15 years after his former nomination of Nicola) of Matilde, in the event of Nicola dying without male issue. Both Judges held that the second nomination was invalid, the power of nominating having been exhausted by the first. Both treated the deed of 1739 as establishing a primogenitura, and Judge Origo further stated that, independently of the question of nomination, Maria Giovanna had the better title, because she was in the better line, *i.e.*, the male line of Pietro Gaetano, and the direct line from Nicola, as distinguished from the collateral. He further dwelt upon the lines as pointed out in the settlement, evidently treating them as of great importance. These authorities are all opposed to the contention of the Respondent, that, in determining the succession on the death of Nicola the Second, the question of line is not to be considered.

But apart from authority and technical rules of construction, their Lordships are of opinion that the language of the deed, in its ordinary and natural sense, is sufficient of itself to solve the question in the cause.

The second clause, if it had stood alone, would have established an agnatial primogenitura, *i.e.*, of males from males, and the order of descent is thus described,—

"Servato hoc ordine, quod masculus descendens actualis possessoris præferatur masculo collaterali, et masculus collateralis lineæ magis proximæ ejusdem possessoris præferatur masculo collaterali aliarum linearum, et non aliter."

The third clause deals with the very case before us :—

"Non extantibus vero vel quandocumque deficientibus et extinctis omnibus masculis prædictis, dicta bona perveniant et pervenire debeant in perpetuum ad unum ex masculis descendentibus a fœminis de eâdem lineâ masculina."

Nicola the second is the "unus" answering this description, whereupon it is distinctly directed how the property is to descend from him :—"De "uno in alium usque ad ultimum servato eodem

" ordine prælationis qui supra," that is to say, that the direct line from him (the last possessor) is to be preferred to the collateral line, and the nearer collateral line to the more remote. The fourth clause, relating to the devolution of the property on females in the absence of any male (which has not happened), has no bearing on the case, except as it further illustrates in the last paragraph the importance which the settlor attached to line. If the settlement had concluded with Clause 3 (or Clause 4, which would have made no difference), it seems clear that Strickland being in the nearer collateral line would have succeeded in preference to Apap in the more remote. There can be no question that each of the sisters of Nicola was capable of originating a line.

The question in the cause is then reduced to the effect of Clause 5.

If the words in this clause, which the Respondent relies upon, are taken without the context, and the clause be read thus,—" Quod quilibet " possessor pro tempore præsentis primogenituræ, " si fuerit masculus, possit nominare, et eligere " suum immediatum successorem aliquem vel " aliquam, ... ad sui libitum, etiam si " sit sibi magis remotus vel remota, vel minor " natu, ... et non facta hujusmodi " nominatione et electione censeatur semper " nominatus magis proximus ultimo possessori " pro tempore in gradu naturæ, et in paritate " gradus major ætate," there would be no restriction on nomination, and in the absence of nomination (the present case), Mrs. Strickland being equal in degree with the Marchese Apap, and the elder, would take in preference to him.

Such a construction, therefore, would not suit his case, and would, indeed, be manifestly inadmissible. These words must be read with their context, whereupon the power of nomina-

tion is limited, firstly, by the words "ex vocatis "in præsenti instrumento;" secondly, by the words "dummodo non pervertat ordinem voca- "tionis et prælationis superius prescriptum," words, the signification of which does not seem to have been sufficiently appreciated by the majority of the Court of Appeal. These words necessitate the inquiry, what is the order above prescribed? This is to be found in Clause 3, which adopts the order of line prescribed in Clause 2, *i.e.*, the direct before the collateral line, the nearer collateral line before the more remote.

It follows that Nicola the Second could not have nominated the Marchese Apap in the more remote collateral line in preference to Geraldo Strickland in the nearer collateral line without "perverting the order of vocation and preference "above prescribed." But if this is the effect of the prohibitory words, what effect is left for the words empowering nomination "ad sui libitum?" The answer to this question is not difficult. The order of lines had been expressly prescribed, but not the order of succession within those lines, which, if not interfered with by the power of nomination, would have been governed by the ordinary rules. The power enables the nominator to disregard these rules as far as degree and age are concerned. Nicola, if he had had sons, could have nominated the younger, in pursuance of the express provision in the Canon's will; he might probably have nominated his grandson in preference to his son, he might have nominated a younger brother of Geraldo.

This construction gives effect both to the power and to the prohibition, and reconciles all the clauses of the deed.

The remainder of the clause relative to the devolution of the primogenitura in the absence of nomination must, in their Lordships' judg-

ment, be construed relatively to the power of nomination. It is almost incredible that the settlor should have restricted the latitude of nomination within certain limits, and should have desired the devolution of the property in the absence of nomination, to go beyond those limits; still less that it should go so far beyond those limits as to destroy the whole character of the primogenitura he was founding, nor is such a construction consistent with the strict language of the clause. In default of actual nomination one is to be deemed nominated: "censeatur nomi-"natus." The natural meaning of that expression is that this imported or supposed nomination is to be of the same nature as the real nomination might have been. The limit of line must be taken to apply to devolution in the absence of nomination, and the effect of the provision on this subject is that whereas the last possessor might, with due regard to the prescribed order of sex or line, give a preference to the more remote in degree, or to the younger in age; in the absence of nomination, the nearest in degree, or, if there be equality of degree, the eldest in that degree shall take. Thus the power of nomination and the gifts in default of nomination have precisely the same range of objects. The gifts in default of nomination apply the ordinary rules of primogenituras to the cases not before expressly provided for; the power of nomination gives to its possessor a free choice in those same cases; but neither the nomination, nor the gifts in default of it, operate to displace the order of vocation or preference expressly prescribed by the previous parts of the deed. This construction is fortified by the provision at the end of the clause, that, on the succession to a woman (who cannot nominate), "magis proximus et major ætate, ut "supra, succedere debeat, juxta methodum su-"perius traditum, et non aliter."

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Appeal Court of Malta be reversed, and the judgment of the Court of First Instance be affirmed. The Respondent should pay the costs in the Courts of Malta and of this appeal.