

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of Sceberras D'Amico v. Sceberras Trigona, and Sceberras Trigona v. Sceberras D'Amico, from the Court of Appeal, Malta; delivered 4th August 1888.*

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Present :

THE EARL OF SELBORNE.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by the Earl of Selborne.*]

In this case there are cross appeals; the one relating to a Maltese *primogenitura*, or perpetual entail of lands, founded by a deed dated the 8th February 1695; the other to a Neapolitan barony, of Castel Cicciano, to which certain civil and criminal jurisdictions were formerly annexed, but which now appears to be a mere title of honour.

The *primogenitura* and the barony were both held by the Baron Alessandro Sceberras, half brother of the Respondent, and father of the Appellant, in the first appeal. He died without male issue, on the 15th October 1880, leaving two daughters, of whom the Appellant, the elder, is his lineal heir general. The Courts below have adjudged the *primogenitura* to the Respondent, as the nearest male heir to Alessandro, entitled to succeed by descent (under

what those Courts have held to be the true construction of the deed) from Clara Sceberras, the common ancestress, all the intermediate descents down to Alessandro having been through the direct male line. The barony also was adjudged by the Court of First Instance to the Respondent, but that judgement was reversed on appeal.

The deed of the 8th February 1695 is an elaborate instrument, executed upon the first marriage of Fabrizio (called in the deed Fabritius), the eldest son of Baron Paolo Testaferrata and Beatrice his wife, the founders or settlors. Its construction depends very much upon the effect of words of reference, found in all the substitutional clauses, to the clause or clauses preceding them. It limits the succession, after Fabritius, first to his eldest and other sons, and their respective male lines; then, on failure of all those lines, to his female issue and their respective descendants after them, in an order upon which the determination of the question in the first appeal turns; and, lastly, on failure of all the male and female issue of Fabritius, to his younger brothers and their respective issue.

The question is whether, under this deed, when the agnatic male line descended from Fabritius was exhausted (or in the event, which happened, of his having daughters only), the descendants of females, taking each in her turn as the head of a new line, were to take in what the Maltese law regards as a "regular" course of succession, which admits females descended from the last holder in preference to all collaterals; or whether the male line of descendants from a female ancestress through males was to take, exclusively of females, till that male line was exhausted.

The general presumption of Maltese law is in favour of the "regular" order of succession; some authorities say that, if the construction be doubtful, that presumption must prevail. But

the founder of a *primogenitura* might displace the "regular" order of succession, if he pleased; and such an intention, if sufficiently manifested, must receive effect. The question, therefore, is merely one of the proper construction of the deed; and, to ascertain this, all parts of the instrument may properly be taken into account.

Upon a careful consideration of the deed of the 8th February 1695, and all its parts, their Lordships have come to the conclusion that the judgement appealed from (in the first appeal) is right; and that the succession from females, under this *primogenitura*, is in lines of the kind described by Cardinal Luca ("De Linea Legali," Lib. 1, Art. 10, p. 216) as lines "of artificial agnation."

In the first place, it is to their Lordships clear, that no female could succeed, under this *primogenitura*, until all the male lines descended through males from Fabritius were exhausted. The learned Judge, who dissented in the Court below from the judgement under appeal, was not of that opinion; perhaps he might have been right, if there had been no such clauses in the deed as those numbered 2 and 3 in the print, and if the clause numbered 1 had ended with the words "*in infinitum*." But the words which follow in that first clause, "*Ita ut, durante linea masculina dicti filii primogeniti*," &c., are, in their Lordships' judgement, sufficient to show that the preceding words, "*filius primogenitus nepos, pronepos primogenitus aliquæ descendentes unus post alium de primogenito in primogenitum*," were not used in any flexible, but in their proper masculine sense, and were meant to be exclusive of females. The clauses numbered 2 and 3 appear to their Lordships to place this beyond the possibility of reasonable doubt; the former of which, together with other plain and unequivocal expressions, contains the words,

"*exclusis semper, ut supra, feminis.*" The phrase, "*linea masculina*," properly means a line commencing with a male, and continued through males. 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 continuatur in masculos; cum autem pervenerit ad feminas, statim finitur;*" to which the Cardinal adds, "*Linea masculina etenim est, quæ componitur simpliciter ex masculis, absque intermixtione feminarum.*" It requires some explanatory context to give it the narrower meaning of a line commencing only with a male; and the context here is all the other way.

The clauses which introduce females, after the exhaustion or for want of agnatic male descendants of Fabritius, are two; the former improperly divided in the print under the numbers 4 and 5; the latter numbered 6. Between the former of these, which really governs the interpretation of the latter, and the second of the three earlier clauses which regulate the agnatic descent of the *primogenitura* from Fabritius, there is a close parallelism, continued from the beginning to the end, with such adaptations only and differences of phrase as the substitution of females, as new heads of line, rendered proper, and with the interjection (at the point numbered 5 in the print) of a conditional clause corresponding exactly with that appended to the original words of institution at the end of Clause 1. The phrase "*linea masculina*" would be inappropriate to a line commencing with a female, though continued exclusively through males; it is therefore no longer used; and, doubtless, for the same reason, the words, "*exclusis semper, ut supra, feminis,*" are not repeated.

But to show that lines of unbroken male succession from each female head of the new line are intended, the words "*ejusdemque feminae filii masculi primogeniti, eorumque descendentes masculi in perpetuum et infinitum gradatim et ordine successivo,*" are used; which, in the judgement of their Lordships, signify, in this context, an unbroken male line of descent through males from the female ancestress, as "*linea masculina*" did from the male ancestor. In an extract from Cardinal Luca (quoting with approval a decision of the Roman Rota), which is printed at page 227 of the Record, "*descendentes masculi*" is treated as an expression equivalent, for the purpose of excluding females descended from males, to "*linea masculina*" or "*sexus purus masculinus.*"

It should be added, that the same expression, "*descendentes masculi,*" occurs in several other parts of this deed; once in each of the clauses numbered 2 and 6; and twice in that numbered 7, which provides for the succession, on failure of all descendants male and female of Fabritius, of Hyacinthus, his next brother, and his issue. Under the scheme of the preceding clauses, on failure of the "male descendants" of one female, the next female descendant of Fabritius, and her "male descendants" were to succeed; and so on, *toties quoties, ad infinitum*, until all the issue, male and female, descended from Fabritius were exhausted.

More might be said as to other indications of exclusively male lines of descent, though traced from female heads of line, in these clauses. If a "regular" course of descent had been intended, different and much simpler phraseology would doubtless have been used, because it would have been sufficient, and more appropriate, for that purpose. But the words of reference which are found in these and other clauses, and which

play an important part in them, are sufficient, in their Lordships' judgement, to make the intention to deviate from that 'regular' course as clear as any general presumption in its favour can be held to require. Before adverting to them particularly, it seems proper to observe, that when the interpretation of the preceding clause (improperly divided in the print) is known, that of clause No. 6, which provides for the case which happened of Fabritius having daughters and no son, is also determined. That case might probably have been covered by the preceding clause, if No. 6 had not been in the deed; but it was thought better to provide expressly for it, "in like manner" (*pariter*) with what had gone before. "Et si dicto domino Fabritio nascerentur solum feminæ, *pariter* major nata succedat et succedere debeat in dictis bonis primogenituræ prædictæ, ejusque filii et descendentes masculi, gradatim et ordine successivo, servato semper ordine primogenituræ, in perpetuum ac in infinitum," &c., very nearly the same words, as those of the earlier part, numbered 4, of the preceding clause.

The words of reference, found in these clauses and elsewhere, relate to two subjects,—the order or "series," and the regulations and conditions (*modi et conditiones*), of the *primogenitura*. These are incorporated by reference, as to the descent from each head of a new line, as much as if they had been repeated in full detail, *toties quoties*, from those earlier portions of the deed which relate to the agnatic male lines descended from Fabritius. In the part numbered 4 of the clause which precedes the sixth, this is done by the words "*cum serie primogenituræ et cum conditionibus superius expressis*;" in the part of the same clause which is numbered 5 by the words "*modis et conditionibus superius expressis*;" and in Clause 6, by the words

*“servata tamen semper serie primogenituræ  
“prædictæ, cum modis et conditionibus superius  
“expressis, et non aliter.”*

What, then, are the “*series primogenituræ*,” and the “*modi et conditiones*,” thus referred to; where are they to be found? The “*series primogenituræ*” can be nothing else than the leading clause (called in the argument at the bar, institutional) with which the deed opens, providing for the first line of succession from Fabritius:—

“Succedat et succedere debeat . . . filius primogenitus [ipsius domini Fabritii], et post mortem dicti primogeniti ejusdem filius primogenitus nepos pronepos primogenitus aliique descendentes, unus post alium de primogenito in primogenitum servato semper gradu primogenituræ in perpetuum, etiam ultra decimum vigesimum gradum et in infinitum; ita ut, durante linea masculina dicti filii primogeniti [præfati domini Fabritii] de primogenito in primogenitum, ille qui primogenitus erit succedat et primogenitus intelligatur etiam quando unicus esset.”

There is nothing in these words which (if the intention were so) might not easily be incorporated into later clauses by proper words of reference, without changing anything except the name of Fabritius for that of each new head of line. The same may be said of the various other clauses of regulation and substitution (*modi et conditiones*), which follow.

The first clause of substitution (which comes immediately after the words of original institution, at the end of No. 1 of the print) contains the first words of reference:—“*Ordine successivo primogenituræ in perpetuum et infinitum, ut supra, et non aliter.*”

In the clause numbered 2, the next male successor after the exhaustion of the eldest male line of the first born son of Fabritius, and his descendants in the male line, are

to take in a manner, again ascertained by reference to the original words of institution:—

“*cum sua primogenitorum serie in perpetuum et infinitum, prout supra dispositum est.*” The words which follow, providing *toties quoties* for all other younger male lines descending from the first born son of Fabritius, close again with the formula, “*cum serie dictæ primogenituræ, ut supra, et non aliter.*” The next clause, numbered 3, providing for the male lines descending from younger sons of Fabritius, has words of like import:—“*Servato semper ordine primogenituræ in perpetuum et infinitum, modo superius expresso.*”

Similar forms of reference, both as to the “*ordo primogenituræ*,” and as to the “*modi et conditiones*,” are found in the clauses numbered 7 and 8, which provide for Hyacinthus and his younger brothers, and the lines descending from them respectively, if the events should happen on which they were to succeed.

There is no antecedent to which the words, “*cum serie primogenituræ*” of the clause numbered 4, and “*servata tamen semper serie primogenituræ prædictæ*,” of that numbered 6, can reasonably, or indeed possibly, be applied, except the original order of agnatic male descent laid down, in the first clause of institution, as to the line of which Fabritius was the head. These references, therefore, show with as much clearness as the law can require, that the descendants of each female, called as a new head of line to the succession, were to take in like manner; that is (to use Cardinal Luca’s language) as “*lines of artificial agnation.*”

The 12th clause, on which both sides relied, but which is consistent with the construction thus placed on the governing part of the deed, may be passed over without comment. On the whole of this part of the case, their Lordships are of opinion that the judgement in the Re-



spondent's favour, in which the Court of First Instance and the majority of the Judges in the Court of Appeal concurred, was right, and ought to be affirmed.

The question of the barony of Castel Cicciano remains. That barony, to which a territorial jurisdiction, civil and criminal, was anciently attached, was in the old law, established under the Frank Princes in Naples and Sicily, a "hereditary" or "mixed" feud, alienable with, but not without, the Royal consent. The original grant does not appear to be now extant; but by a series of alienations, during the sixteenth and seventeenth centuries, it became vested in Paolo and Beatrice Testaferrata, the common ancestors under whom both the parties to this contest claim. The history of the tenure of such baronies, and of the law applicable to them, was discussed with much learning by Dr. Gasan, the Judge of First Instance; and their Lordships adopt his conclusion, that, however the case may have been before the commutation in the thirteenth century of the military service due from barons, females as well as males were, after that commutation, capable in the ordinary course of law of succeeding to them; and this particular barony appears, at different times, to have been held by females.

If Fabrizio Testaferrata had power to impress upon this barony, by his own sole act, the character of a "majorat," descendible to the male descendants of his daughter Clara, in exclusion of all female heirs as long as there were such male descendants, he did so by his will, dated the 12th August 1744. He thereby nominated her his successor in the barony (as, indeed, she would have been, if he had not done so), annexing it to that *primogenitura*, as to which the opinion of their Lordships has been already expressed. The Court of First

Instance held that this was validly done; but, on appeal, that judgement was reversed. The question which their Lordships have now to consider is, whether it was validly done, so far as relates to the succession now in dispute, or not?

The necessity for the Royal consent to the creation of such a majorat of such a feud is said by the Appellant Salvatore to have been removed by a constitution of Philip the Fourth, King of Naples, dated in 1655, and known as the "Pragmatic," No. 34; and it is admitted that, as to "feuds which were still governed by the law only," and the succession to which "had not been already established by a disposition legally laid down" by a prior holder, this might be done, for four generations or degrees. But it was held by the Court of Appeal that it could not, even in that case, be done beyond the fourth degree from Fabrizio; and that the Appellant Salvatore (and Alessandro his brother) were more than four degrees removed from Fabrizio. And it was also held that the course of succession to this barony had been established in favour of the "regular" lineal descent by a prior disposition, made in 1613, which Fabrizio was not enabled, by the Pragmatic No. 34, or otherwise, to alter; and, therefore, that his will did not, and could not, give Salvatore any title as against Alessandro's female lineal heir. Their Lordships, having to examine the correctness of these propositions, will first consider under what title the barony was held by Fabrizio, when he made his will. He took it from his parents, Paolo and Beatrice Testaferrata. Beatrice, who was the youngest of five daughters of Pietro Cassia (all married, whether in their father's lifetime or not), took it by way of donation or dotation from her father, by a settlement made on her

marriage on the 20th January 1674, which had the Royal assent. Pietro took it as heir of his parents, Giacinto Cassia, and Maddalena, daughter of Ascanio Surdo. Maddalena (who had brothers then living—see Record, p. 145, lines 45—47), took it on her marriage on the 28th February 1613, by a dotal settlement, from her father, Ascanio. That settlement was conditional on the Royal assent. It provided, by way of *fidei-commissum*, that the barony should descend “*ad filios mares ipsius dominæ*” “*Magdalenæ sponsæ, nepotes ac posteros per*” “*directam lineam legitime descendentes primogenitos, et in defectu secundogenitos, et*” “*in gradu et ordine successivo; ita quod*” “*mares semper feminis præferantur usque ad*” “*infinitum, ordine primogenituræ de primogenito*” “*in primogenitum servando.*” It also contained an absolute prohibition against alienation:—but, on the other hand, it was expressed to be “*feudi*” “*natura in aliquo non mutata.*” (Record, p. 142, lines 43, 44.) This destination has been interpreted by the Court below to be “regular,” *i.e.*, to carry the succession to female lineal heirs as against male collaterals, giving a preference to males only when they were in the same line and in equal degree; and their Lordships assume the correctness of that construction. They also agree with the Court below in thinking that as the barony was actually enjoyed under this settlement for more than sixty years, and came by virtue of it to Pietro Cassia, who made the settlement on the marriage of Bearice, all reasonable presumptions in its favour, necessary to support that enjoyment, ought to be made. So far, therefore, as the Royal assent was necessary for that purpose, their Lordships agree in thinking that it ought to be presumed. But the principle does not require their Lordships to presume more than was necessary for that purpose, especially if it

would be inconsistent with the actual possession and enjoyment, after 1674, when the settlement on Beatrice was made. If, for example, the prohibition of alienation could not take effect without altering "the nature of the feud" (for which proposition there seems to be authority in Sorge, Tom. V., p. 50), and if to the Royal assent the condition "*feudi natura in aliquo non mutata*" (found in the deed itself) might have been annexed, the presumption most consistent with all the facts of this case might be, that the Royal assent was given in that form; in which case there would seem to be enough to support the course of succession of the feud prescribed by the dotal deed but not enough to make the prohibition against alienation effectual. Sorge says:—"Animadvertendum est, quod feudatarius "non potest absque Assensu prohibere alienationem seu pignorationem. . . . Idque omnino "confirmatur ex eo, quia si hoc esset, staret "in facultate defuncti mutare feudi hereditarii "naturam, et de feudo hereditario illud absque "Domini Assensu ex pacto efficere, quod de jure "nullo modo sine Regis expresso consensu fieri "potest. . . . Est enim indubitatum, quod "feudum ex pacto illud dicitur, quod nec "alienari, nec pignorari, nec in aliquo successoribus a prædecessoribus prejudicari potest." There is an example of Royal Assent under the condition, "*natura feudi in aliquo non mutata*" in the Record (p 57, lines 8, 9). Before their Lordships could decide this case upon the ground that the deed of Ascanio Surdo established an order of succession which no subsequent holder of the feud could alter, even with the Royal assent, they would desire to receive more light than has been afforded them in the judgements below, or by the arguments at the bar. Both parties put the deed of Ascanio Surdo in evidence; but their Lordships do not think that the Appellant, Salvatore, did so for any purpose which should

estop him from maintaining (if he can) that it was not operative after the 20th January 1674.

If neither of these parties can be heard to deny that the deed of Ascanio Surdo was so far effectual as to govern the title from 1613 to 1674, still less is it open to either of them to call in question the title created by the settlement of the 20th January 1674. If Beatrice took under an alienation of the barony made by her father on the assumption that he could so alienate it with the Royal assent, and not as successor to him in the order of succession appointed by the deed of 1613, it seems to their Lordships impossible to hold that the question between the present parties can depend upon that order of succession. There had been, at the time of Alessandro Sceberras' death, an enjoyment of more than 200 years under Pietro's settlement on Beatrice and her descendants; and, as between these parties, the earlier could not be set up against the later deed, under which they both claim.

Their Lordships have already mentioned, that Beatrice was the youngest of five daughters of Pietro Cassia, all married (as for this purpose they are willing to assume) in his lifetime. A pedigree was put in evidence (prepared, manifestly, for the purpose not of this, but of some other litigation between other parties), by which it appears that Domenica, the eldest sister of Beatrice, left issue, the line of whose descendants continued at least as late as 1856. It was probably not necessary, for the purpose for which that pedigree was prepared, to show, either when the other sisters married, or whether they had issue or not. Their Lordships have no materials before them on which to found any presumption, one way or other, as to those facts. The pedigree shows that there was also a brother, Paolo, who died without issue; his death before

the marriage of Beatrice might perhaps have been presumed, if that had been the only difficulty in the case.

It seems, at first sight, clear, that according to the course of succession to the barony established by the settlement of Ascanio Surdo, if that was a perpetual primogenitura, unalterable even by an alienation made with the Royal assent, it never could have come to Beatrice. All her sisters, and all their issue, in the order of seniority, were entitled to take before her; and her eldest sister, at least, left issue, whose line may be yet in being. In the judgement of the Court below it is expressly stated, that "the passage of the barony from Pietro Cassia to Beatrice was not in conformity, either with the rules of feudal succession in the kingdom of Naples, or with the primogenial *fidei-commissum* established by Ascanio Surdo." But, nevertheless, "the acquiescence of Domenica Cassia, and her descendants, up to the present day," was regarded by that Court as placing "the legality of that apparently irregular succession" beyond doubt, in whatever way it might have occurred; the view of the Court being, that it ought still to be regarded as governed, in some way, by the deed of Ascanio Surdo. The Court suggested, as a possible explanation, that there might have been a renunciation by Domenica, for herself and her descendants; referring to a passage in Sorge's Treatise (Tom. V., cap. 41, num. 6,) as authority for the proposition, that it was competent to her to make such a renunciation, and that it would not require the Royal assent; and they proceeded to speculate on the possibility of its having been made after the death of Pietro (the authority quoted seeming to show, that it could not be made so as to bind her descendants unless she were living when she might have succeeded),

by reason of some bequest in Domenica's favour in his will.

Their Lordships have examined the section of Sorge's work, to which the Court for that purpose referred; but it appears to them to refer only to the renunciation, by a parent for his issue, of a succession depending upon the ordinary law of feuds, and not to one inalienably settled by a perpetual *primogenitura*. If the effect of Ascanio's deed was to establish a course of succession unalterable by any holder of the feud, even with the Royal assent, their Lordships would desire to be satisfied by some more clear authority that Domenica could alter it, so as to exclude not herself only but the whole line of her descendants, by renunciation either in her father's lifetime or afterwards,—much more, that mere acquiescence, under the circumstances of this case, could be held equivalent in legal effect to such renunciation. And it would further have to be shown, even if such a renunciation might be effectual against the issue of Domenica, how it could enable her father, passing over his second, third, and fourth daughters, and all their actual or possible issue, to give the barony to Beatrice. To presume renunciations by them all, for themselves and all their issue (if the law would have given effect to them), seems to their Lordships less reasonable, than to suppose, either that the quality of inalienability was never effectually attached to the feud, or that all those members of the family were simply passive and acquiescent in an act of alienation prejudicial to them, which their father had taken upon himself to make, to which the Crown had assented, and which they might not have thought open to challenge, even if it was so in law. The internal evidence of the deed of 20th January 1674 seems to their Lordships adverse to the supposition that it

was either founded upon any renunciation or renunciations by Domenica or her sisters, or was intended by the parties to it to be governed in any way by the order of succession prescribed in Ascanio Surdo's deed. To presume renunciations afterwards, if there were none before, would not seem to their Lordships reasonable; and, if there had been any before, it is hardly possible that evidence of them should not have been preserved in some notarial acts, and that no mention of them should be made in the deed of the 20th January 1674 itself. In that deed there is no recognition of or reference to Ascanio Surdo's settlement, or the course of succession under it. Their Lordships cannot read or understand it otherwise than as a settlement, which was at least intended by the parties to it to have an independent operation. It says that Pietro Cassia "*dedit, donavit, et donat, et causa dotis concessit et concedit domino Paulo Testaferrata, sponso præsenti et ab eo recipienti in dotem pro dote, ac titulo et causa dotis prædictæ dominæ sponsæ, pro se et suis descenditibus in perpetuum, supra-dictam Baroniam . . . ad habendum per dictum dominum sponsum præsentem, et stipulantem nomine dictæ dominæ sponsæ, pro se et descenditibus suis.*" The effect of these words, as a new destination of the barony, is not altered, in their Lordships' judgement, by the ordinary words of style by which Pietro purported to make the grant, "*modo et forma ac prout et quemadmodum ipse . . . dictam jurisdictionem et officium melius et plenius habuit, tenuit, et possedit,*" and by virtue of every right and title, public or private, which he might have in the premises. The *fidei-commissum* of Ascanio Surdo, established by the previous deed, was not of "the nature of the feud."

The Court of Appeal went further than to



make presumptions which their Lordships cannot see their way to adopt, for the purpose of reconciling the deed of 1674 with that of 1613. They added what, if correct, might make such presumptions superfluous,—that if, by the donation of Pietro to Beatrice, the disposition of Ascanio Surdo was, “*pro hac vice*,” set aside, Beatrice was nevertheless seised under that disposition, as “among the rules governing the barony.” Their Lordships have much difficulty in following this view, or in understanding the application of the words “*pro hac vice*” to the facts. The order of succession appointed by Ascanio Surdo’s disposition, if set aside at all, was set aside permanently, and not only for a time. A particular *fidei-commissum*, established by any holder of the feud with the Royal assent, and not in itself repugnant to the nature of the feud, was (as their Lordships understand the law) a different thing from a “rule governing the barony” for all time, into whatever hands it might come.

Another solution of the difficulty, which does not seem to have been suggested or considered in either of the Courts below, was put forward by the Counsel for the Respondent in the second appeal at their Lordships’ bar. It was contended that, according to the Neapolitan Frank law, the succession to the barony would devolve from Pietro to a younger unmarried, in preference to an elder married daughter; and, therefore, that at the time of her marriage (if her sisters were then already married) Beatrice would have been the heir next entitled to succeed. This contention appears to rest upon a Constitution of the Emperor Frederic II., “*De successione nobilium in feudis*” (Lindenbrog, *Cod. Legum antiquarum: Constitutionum Neapolitanarum sive Sicularum*, Lib. 3, Tit. 24, § 2). It contains provisions regulating the ordinary law of succession to feuds; among which is one in these words:—“*Filiæ autem in*

*“ capillo, post mortem patris in domo manentes,  
 “ majores sorores conjugatas et dotatas de bonis  
 “ patris excludunt. Cæterum si de bonis paternis  
 “ dotatæ non sunt majores, minoribus præferantur,  
 “ si jure Francorum vivant.”*

Their Lordships, for the purpose of considering this argument, will assume (though the fact does not appear, one way or the other), that Beatrice was the only daughter of Pietro Cassia remaining unmarried or unendowed on the 20th January 1674. The first question is, whether this law of Frederic II. applied at all to a succession under a perpetual and unalterable majorat or *primogenitura*, such as the argument assumes to have been created by the settlement of Ascanio Surdo. It does not appear to their Lordships, according to its natural construction, to extend to such a case. What was said in the leading judgement of the Court of Appeal as to the Pragmatic Sanctions appears to be no less applicable to this Constitution. They “ evidently “ referred to feuds which were still governed by “ the law only, and not to feuds the succession “ to which had been already established by a “ disposition legally laid down by one of the “ previous holders.” Even if this had been otherwise, the case of Beatrice, in January 1674, would not appear to fall either within the letter or within the spirit of that Constitution. Not within the letter, for the Constitution dealt only with the succession after the father’s death, and gave a preference only to those daughters who might remain unmarried in their father’s house after his death. And as this dotation was upon the marriage of Beatrice, and made solely with a view to that marriage, it would seem to be altogether opposed to the spirit and substance of that Constitution to found upon it a preference of Beatrice by her father in his lifetime, as a *married* daughter.

Their Lordships are, therefore, unable at present to accept either the hypothesis of a renunciation by Domenica, or the argument founded upon the Constitution of the Emperor Frederic II.; and it would seem to follow, that the title of Fabrizio Testaferrata to this barony cannot have been governed by the order of succession prescribed by Ascanio Surdo's settlement. But, owing to the course which this part of the argument followed in the Courts below, the difficulties now presented were not dealt with, and it would be more satisfactory to remit the whole case, as to the barony, for further consideration.

Supposing that Ascanio Surdo's settlement is not now operative, the only remaining question would be, what was the effect upon the barony of the will of Fabrizio? He held, under the settlement of the 20th January 1674, not on the terms of any majorat or *primogenitura*, but with a simple destination to his descendants generally; and it appears to their Lordships that, according to the view of both the Courts below, this would have enabled him to settle the barony by his will, so as to create a majorat, in any manner and to any extent authorized by the Pragmatic, No. 34, of Philip IV. The only reason why the Court of Appeal held that he could not do so was, because they considered him to hold under, and upon the terms of, Ascanio Surdo's settlement of 1613. But the Court of Appeal held that any such majorat or *primogenitura*, created by the will of Fabrizio, could not endure, so as to give a preference to male collaterals over female descendants of the last holder of the barony, beyond the fourth degree or generation, reckoned downwards from Fabrizio himself (Clara, the daughter of Fabrizio, being in the first degree); a rule which would exclude the Ap-

pellant Salvatore from the succession. The Court of Appeal treated that point as depending upon the question, whether Clara, as "institute," was to be included in or excluded from the computation of those four degrees; and it seems to have been so argued, on both sides, before that Court, as it was also before their Lordships, until a different view of the meaning of the "fourth degree," in the Pragmatic of Philip IV., suggested itself during the course of the argument. Their Lordships would not differ on this point from the conclusion of the Court of Appeal, if they were satisfied that a correct view had been taken of the meaning of the "fourth degree" in the Pragmatic of Philip IV.; and they would not think it satisfactory finally to decide that point in the Appellant Salvatore's favour, until it had been argued and considered by the Court of Appeal in Malta, where perhaps some new light might be capable of being thrown upon it. On the other hand, as the judgement of the Court of First Instance, as to the barony as well as the *primogenitura*, was in Salvatore's favour, and as their Lordships do not at present see their way to agree with the Court of Appeal as to the materiality of the settlement of Ascanio Surdo to the controversy, they cannot affirm the decision of the Court of Appeal as to the barony, without being first satisfied (which at present they are not) that the construction placed in that Court upon the Pragmatic of Philip IV. was right. They propose, therefore (as has been said), to remit this part of the case (not at present finally deciding any question as to the barony) for further consideration by the Court of Appeal. But for the assistance of that Court, they think it desirable to state on this last, as on the former points, the impression which (subject to any new light which may be

capable of being thrown upon the matter), has been produced upon their minds by the arguments which they have heard.

Three Pragmatics were referred to. The first of these (that of Philip II., made in 1595, and numbered 33) does not appear to their Lordships to be material.

The second, on which the question directly turns, is that of Philip IV., made in 1655, and numbered 34. This appears, on its face, to have been founded upon a petition from the city and baronage of Naples for some reward for services to the Crown; and the King having offered (among other things) "*the enlargement and extension of the succession to feuds up to the fourth degree inclusive, being male descendants of the first acquirer,*" and also "*that each feud holder might create a majorat on his feuds,*" they asked, that both those favours might be granted; and that the former of them should be granted in favour of "*as well males descending from females or from males, as females descending from males or from females, which should be in the said fourth degree, capacitating them for the said succession indifferently, so that all that which was observed in succession to feuds up to the third degree, should be observed in favour of those comprised in the fourth.*" In accordance with this petition, the King granted "*the aforesaid amplification and extension in the succession of feuds . . . , so that all that which was observed about the succession of feuds to the third degree be observed, and ought to be observed, for the benefit of those included in the fourth degree, both males and females,*" derogating "*from any Pragmatic Constitution or other law, royal or municipal, of the kingdom of Sicily, which excluded the aforesaid amplification.*" And he further conceded

“ to the same noblemen, that any of them might  
 “ *found majorats* in their feuds, *within the limits*,  
 “ *however, of the permitted succession, as above*,  
 “ *so that the onus of restitution or fidei com-*  
 “ *missum do not extend any further, in detriment*  
 “ *of the right of devolution,*” competent to the  
 Crown.

The question turns upon the meaning of the words limiting the power to found majorats, “ within the limits of *the permitted succession, as above.*” Even if they had not been interpreted by any later Constitution, their Lordships would have understood them as referring to the same “ fourth degree,” which was the limit of the preceding “ amplification and extension in the “ succession of feuds.” The later Pragmatic of the Emperor Charles the VI. (made in 1720, and numbered 38), confirms that construction, saying that, “ by favour of Philip IV. it was “ granted, that the said feud-holders could “ *create fidei commissa and majorats, up to the “ fourth degree only, then only capacitated to “ the succession to the feuds.*”

This being so, it is apparent that this Constitution cannot be properly understood without reference to that previous legal limit, to the *third* degree, which was now to be “ amplified and extended,” so as to include the fourth. The previous law, to which reference was made, appears to be contained in the same Constitution of the Emperor Frederic II., which has been already mentioned for another purpose; which was not (however) referred to at all in the Court of Appeal, nor before their Lordships until a late stage of the argument.

The Constitution of the Emperor Frederic established, as general law, an order of succession to feuds held “ *in capite*” of the Crown, unlimited and extending *ad infinitum* as to all lineal descendants, male and female, of the

holder of the feud; but it limited the right of collateral succession, to the collaterals of the last holder within the third degree inclusive; so that, if on the death of a holder it were found that he had no lineal heir, and no collateral heir of the first, second, or third degree, the feud would lapse, or "devolve" to the Crown. The words are:—

"Nec non majoris ætatis, inter eos qui vivunt in Regno specialiter jure Francorum, ex collateralī linea venientes, ut fratres, sive ex utroque parente, sive ex altero tantum, et sorores in capillo, excluso etiam communi patre superstite, omnino succedant; conjugatæ autem et dotatæ a fratrum successionibus repellantur. Filii autem fratrum, in his quæ communis patris fuerunt, avi eorum scilicet, idem jus quod pater eorum habeant. *In acquisitis autem patruo ex largitione nostra, vel quolibet titulo, jure suo nepotes ex fratribus non succedunt. In ulteriore autem gradu positus, scilicet filiis nepotum ex fratribus et sequentibus, in his etiam quæ communis proavi fuerunt, successio non defertur.*"

Having regard to this law, which did not limit lineal succession at all, but limited collateral succession to the brother's son (reckoned, as their Lordships understand it, from the last holder of the feud, though it might be one which had been inherited from a common ancestor), the effect of the Pragmatic of Philip IV. seems to be to extend and amplify the collateral succession, so as to admit one degree more, leaving the lineal succession unlimited as before. And that construction seems to be supported by the context; the words (as to majorats), "within the limits of the permitted succession, as above," being followed by these, "so that the onus of restitution or fidei commissum do not extend any further in detriment of the right of devolution competent to us and

“ *our Royal Court.*” As long as the lineal succession from the last holder continued, there would be no right of devolution to the Crown; such devolution could only take place when there were no lineals, and no collateral “ within the limits of the permitted succession.”

Applying this rule of succession to the present case, the Appellant Salvatore would seem to be entitled to succeed under the majorat created by the will of Fabrizio, whether the descent were reckoned from Clara, the “ institute” under that will, or (which their Lordships think the more correct view) from Alessandro, the last holder. If reckoned from Clara he is her lineal descendant; and the succession of all lineal descendants, without limit, was allowed. If from Alessandro (as their Lordships think it ought to be), the half-brother is a collateral within the limits of the permitted succession. If, indeed, there were any settled usage or interpretation of these laws, at variance with what appears to be their natural construction, that usage or interpretation might prevail.

Their Lordships will humbly advise Her Majesty to affirm the judgement appealed from, so far as relates to the *primogenitura*; and, as to the barony, to remit the case for further consideration to the Court of Appeal in Malta; discharging in the meantime, without prejudice to any question, the judgement, as to the barony, of that Court. The costs of the first appeal must be paid by the Appellant; those of the second appeal must follow the result.

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