

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Baron Sceberras Trigona v. the Baroness Sceberras D'Amico (now McKean), from the Court of Appeal of the Island of Malta; delivered 11th December 1891.*

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Present :

THE EARL OF SELBORNE.

LORD HOBHOUSE.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by the Earl of Selborne.*]

The question raised by this appeal is one of the construction of an entail or *primogenitura* of certain lands in Malta, which two Courts and four Judges have agreed in construing to be "regular," so as, in each line of descent, to admit female in default of male issue of the last holder in that line, in preference to male collaterals descended from a common ancestor. As to the general rules and principles of law which regulate the course of succession to such a *primogenitura*, the authorities appear to their Lordships to be agreed. Torre (cited by the Appellant) says that "each son, with his descendants in order of primogeniture, makes a distinct line;" and again, that he who is first called to the succession is "*tanquam stirps et caput primogenituræ designatæ, et successive ejus filii et descendentes ordine primogeniali, eaque linea extincta, secundogenitus cum sua*

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“*linea, eodem ordine primogeniali.*” (Pars. I., p. 26, and p. 80, No. 15.) Carl Antonio de Luca, another of the Appellant’s authorities, says:—“*Filius primogenitus efficit primum caput in linea descendentium, et filius secundogenitus secundum, ac tertius tertium, et hoc ordine ad majoratus successionem admittuntur: et filius secundogenitus nunquam dicitur primogenitus dum aliquis filius aut descendens a primogenito superest*” (p. 155, No. 46). Or, as the law is stated in the judgment of the Court of Appeal, line is first to be considered, then degree; and, among several competitors in the same line, the male is to be preferred, unless the founder of the *primogenitura* has otherwise disposed; every holder of the *primogenitura* forms a line, which includes all his male and female descendants, to the exclusion of his brothers, sisters, or other collaterals; and, consequently, a brother who, as a male, claims to succeed in preference to the daughter of the deceased last holder, is bound to show, “in such a way as to remove all reasonable doubt,” that such was the will of the founder. The founder might, if he pleased, establish a special order of succession deviating from this “regular” order; but the presumption of Maltese law, when a contrary intention is not reasonably clear, is in favour of the regular order.

It was argued, on behalf of the Appellant, that an intention on the part of the founders of this *primogenitura* to deviate from the regular order, so as to give male collaterals of a younger line the preference over daughters of any holder in an elder line dying without male issue, is sufficiently made out. Their Lordships, after fully considering the argument addressed to them, are unable to accept that conclusion. They think the natural construction of the

written instrument in this case, even if it were not aided by the ordinary presumption of law, would be in the Respondent's favour.

Under the Notarial Act of the 26th August 1702 (which created this *primogenitura*, upon the occasion of the marriage of Salvatore Dorell and Teresa Falzon Navarra, from whom both parties to the present contest are descended), the husband, Salvatore, took the lands in question for his life. The material words, providing for the succession after his death, are these:—

*“Et post ejus obitum succedat et succedere debeat . . . filius primogenitus ipsius Domini sponsi, et post mortem dicti filii primogeniti ejusdem filius primogenitus, nepos, pronepos primogenitus, alique descendentes primogeniti, unus post alium, de primogenito in primogenitum, servato semper gradu primogenituræ in perpetuum et perpetuis temporibus; ita ut, durante hac linea masculina dicti filii primogeniti dicti Domini sponsi de primogenito in primogenitum, ille qui primogenitus erit succedat, et primogenitus intelligatur etiam si unus esset; ita quod, si ex primogenito masculo, vel primogenitis masculis, non superessent filii masculi, eo in casu ad primogenituram prædictam censeatur et sit vocata fœmina primogenita,”*  
&c.

It is not necessary to say more of the rest of the deed, than that the succession which it establishes from a female holder of the *primogenitura* is beyond question regular; and that it provides for the event of a total failure of all issue descended from Salvatore and Teresa, in which case the *primogenitura* would come to an end.

It was admitted that the earlier words down to “*perpetuis temporibus*” (if not controlled by any subsequent context), would have created a *primogenitura* of the regular kind; but it was

said that the effect of the next words, "*ita ut, durante hac linea masculina,*" &c., is to place upon those which came before, "*filius primogenitus, nepos, pronepos primogenitus, aliique descendentes primogeniti,*" &c., a strictly masculine interpretation; as was held by this tribunal in the case of *D'Amico v. Trigona* (L. R., 13 App. Ca., p. 806). Their Lordships, for the present purpose, assume that this would be so. But this does not determine *what* the male line is, which must fail before any female can be called to the succession. The argument for the Appellant seems to depend upon the assumption that, for this purpose, all males descended through males from Salvatore and Teresa ought to be reckoned as one line. That assumption appears to their Lordships to be at variance with the general rules and principles applicable to questions of this kind, to which reference has been made, and opposed to the natural sense of the express words. The context, both that which precedes and that which follows, describes, not a line of which Salvatore is the *stirps* or *caput*; but one derived from his *filius primogenitus*,—" *ejusdem filius,*" &c.; and "*hac linea masculina dicti filii primogeniti dicti Domini sponsi.*" On failure of males of that line, the female issue of the last holder are called to the succession, in preference to his brothers, or male issue of brothers. The words "*vel primogenitis masculis,*" (superadded to "*ex primogenito masculo,*") are quite capable of the meaning, that the same course of succession is to take place *toties quoties*, in every line of descent; and their Lordships so understand them. If there had been two sons of Salvatore and Teresa, and the eldest, succeeding after his father's death to the *primogenitura*, and dying without male issue, had left a daughter, that daughter, according to the natural meaning

of the words, would have been expressly called to the succession; as is rightly said by the Court of Appeal. The division of lines did not, in fact, take place till several generations afterwards; but it does not appear to their Lordships to admit of doubt, that the same course and rule of succession was intended to be observed throughout. Their Lordships agree with the learned Judge in the Court of First Instance, that the condition, "*si non super-essent filii masculi,*" does not refer to the "exhaustion of all males in the collateral and habitual lines, but rather to the deficiency of males nearest in degree to the actual first-born male holder."

The Appellant's contention, that the words, "*ita ut durante hac linea masculina,*" ought not to be referred to the line of the eldest-born son, but must receive a wider application, was founded upon the supposed necessity of such a wider construction, in order to admit the lines which might descend from younger sons, in their proper order, to the succession. Their Lordships do not doubt that those younger lines would be entitled to succeed, in their proper order, under this *primogenitura*. They assume that the words, "*servato semper gradu primogenituræ in perpetuum, et perpetuis temporibus,*" and "*servato tamen in his quam cæteris supra expressis semper ordine primogenituræ,*" are equivalent to the clause, "*semper gradu et prærogativa servata,*" of which Carl Antonio de Luca says (p. 249, Art. XX., No. 27), that it "*necessario supponit fidei-commissum reciprocum inter lineas, ut scilicet post unam alia vocetur.*" If more than this were necessary, the plural words "*vel primogenitis masculis,*" superadded to the singular in the context which introduces the gift to a female, and the ultimate provisions contained in this instrument for the

case of a total failure of all issue descended from Salvatore and Teresa, would be enough to prove that the founders of the *primogenitura* so intended. But it does not follow that words which speak of the particular line which stands first in the whole course of succession ought to be interpreted in any other than their natural sense. Full effect may be given to the intention in favour of younger lines, whether implied from the nature of a *primogenitura* of this kind, from the general scheme or particular provisions of the instrument, or from the technical significance of some of its phrases, without imposing upon plain words a sense which they do not naturally bear, and which is not favoured by the general presumption of the law governing the case.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

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