Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Strickland and others v. *Strickland, from His Majesty's Court of Appeal for the Island of Malta and its Dependencies; delivered the 8th July* 1908.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

SIR J. H. DE VILLIERS.

SIR ARTHUR WILSON.

[*Delivered by Sir J. H. de Villiers.*]

This is an appeal from a judgment of the Court of Appeal of Malta confirming, with a variation, a judgment of the First Hall of the Civil Court in an action in which the Appellant, Sir Gerald Strickland, was the Defendant and the Respondent, his brother, Paul Strickland, was the Plaintiff. The parties are both sons of Captain Walter Strickland by his wife Louisa Bonici, and she was the daughter of Pietro Bonici Junior, who was the son of Giovanni Bonici, and he was the grandson, on his father Ugolino's side, of Daniele Bonici. The questions in dispute between the parties relate to the meaning and legal effect of certain clauses in a will made by Daniele Bonici in the year 1790. At the date of the making of his will Daniele had several children, including two sons, Pietro and Ugolino, and three daughters, Vincenza, Maria, and Dorotea. After assigning certain

1 (22)55373. [32.] 100.—7/08. Wt. 243. E. & S. A

immoveable property to Pietro, Maria, and Dorotea, the will proceeded as follows:—

> "The said testator . . directs and commands that the said immoveables . . . be subject to an entail and *fidei-commissum* unto the fourth degree in terms of the . . new Municipal Code [Book 4, Chapter 2, §§ 3 and 4], so that each of them may not dispose during the time of the said entail except in favour of his or her legitimate and natural children and descendants, and in default of this or in the absence of their said legitimate and natural children and descendants, in favour of his or her brothers and sisters, or of their children, grandchildren and great-grandchildren, so that each of the said Maria Saveria, Pietro Paolo and Dorotea may also dispose of his or her landed property in favour of the aforesaid Ugolino and Vincenza, other brother and sister of theirs, and in favour of their respective legitimate and natural children and descendants; power being, however, granted to the said Maria Saveria, Pietro Paolo and Dorotea, and to their successors to dispose in favour of the persons aforesaid, by giving and bequeathing more to one and less to the others and, on the contrary, the whole to one and nothing to the others at will; each of the said Maria Saveria, Pietro Paolo, and Dorotea having also the power to create primogenitures in favour of each of his or her brothers and of their legitimate and natural descendants, the testator directing that the said landed property during the time of the entail be always preserved in his family and hence forbidding any alienation or abatement whatsoever."

After the death of Daniele, his son Pietro, who had no children, in the exercise of the power of appointment given to him by his father's will, introduced the following clauses into his own will, which was made in 1839:—

> "As the said testator also wishes . . to avail himself of the full powers granted by the . . will of the 28th January 1790 and to create and found on a part of the said paternal immoveables another *primogenitura* in favour of his . . universal heir and grandnephew the Chev. Dr. Pietro Paolo Bonici Mompalao" —to be hereafter termed Pietro Junior—"in terms always of the said paternal will and unto the fourth degree contemplated in the said paternal will and allowed by the laws now in force: wherefore

> the said testator, the Noble Pietro Paolo Bonici"—to be hereafter termed Pietro Senior—"in virtue of his present will availing himself of the powers granted to him by his father, has founded and erected, as he does found and erect, a *primogenitura* to endure as long as the *fideicommissum* founded by his said father . . under the fetters pacts laws and conditions hereinafter stated."

Among the "fetters, pacts, laws, and conditions" were the following: Pietro Junior was to be first stock of the *primogenitura*, and hold during his natural life only. Upon his death the property was to pass to his male descent from first-born to first-born until the termination of the four degrees contemplated in the will of Daniele Bonici. In default of the male descent of the first-born the second-born of the stock was to succeed, and so on successively. In case Pietro Junior died without male descent, or in case his male descent became extinct, the *primogenitura* was to go to the daughters in the first degree of Pietro Junior, the first stock, to be enjoyed by them conjointly, until the first male child was born to any of them, which male child when born was to enjoy the *primogenitura* during his natural life and after his death it was to pass to his male descent from first-born to first-born until the exhaustion of the four degrees, and so on, with the proviso "that any holder of the said "*primogenitura* descended from a female shall be "bound to add the surname 'Bonici' to his own "on penalty of forfeiting the possession of the "said *primogenitura* which, on such contingency "occurring, shall pass *ipso facto* to the person "next called thereto." Pietro Junior had no sons, and he died in 1877, after Pietro Senior, leaving an only daughter, Louisa. At the date of her father's death she had sons living, including the Plaintiff and the Defendant, and consequently the entailed property never came into her possession. The Defendant, being her first-born male child, came into possession, and on his

marriage to Lady Edeline Sackville, he made a settlement in favour of the children who might be born of the marriage. He had been advised that, as he was in the fourth generation after that of the first fiduciary legatee, he acquired the property free from entail, and it was upon this assumption, shared in by his intended wife as well as by himself, that the provisions of his marriage settlement were made. On the 22nd July 1899 the Plaintiff wrote to him as follows :—

> "Dear Gerald,
>
> "On consideration I have come to the conclusion that I am bound to claim the Bonici *primogenitura* on the following grounds :—You have failed to comply with the condition imposed by the will of Pietro Paolo Bonici, founding the Bonici *primogenitura*, which required that you should bear the surname of Bonici. . . Consequently I, as 'prossimo vocato,' am entitled to the said *primogenitura*.
>
> "I am willing to fulfil the said condition as to bearing the surname of Bonici. I should be glad to have your views on the matter."

The Defendant then compelled the Plaintiff to bring the present action. By his libel the Plaintiff, after alleging that the Defendant had been in possession of the entailed property for twenty-two years without taking the name of Bonici, sought to have it declared that the Defendant had forfeited his right to the *primogenitura* and that the *primogenitura* had, under Pietro Senior's "deed of foundation," devolved *ipso facto* to the Plaintiff. The defence raised by the answer in effect was that Pietro Senior could not by any deed of foundation impose conditions on the holders of the property not warranted by the will of Daniele Bonici, the original founder of the *fideicommissum*, that the Defendant, as the holder of the property in the fourth degree after that of the instituted legatee, was entitled to keep the property free from any burden and that, even if Pietro Senior

could impose the condition, the Defendant had not forfeited his rights, inasmuch as he had, out of regard and deference to the settlor, on several occasions added the surname Bonici to his own. The Court of first instance, by its judgment, declared that the Defendant had not forfeited the *primogenitura*, but that he would forfeit it unless he made a declaration within one month that he would in future habitually bear the surname. The Court of Appeal affirmed the judgment with this variation, that the time for making the declaration was extended to a further period of three months, and each party was ordered to pay his own costs of appeal. From that judgment the Defendant has appealed, and with leave of His Majesty in Council the trustees of the marriage settlement (Earl de la Warr and Philip Witham) have been allowed to appear in the appeal, in order that the interests of the Defendant's children might, if necessary, be represented by them on the hearing of the appeal.

Their Lordships entirely concur with the Judges of both the Maltese Courts that the Defendant has not complied with the direction in Pietro Senior's will that every holder of the *primogenitura* descended from a female should be bound to add the surname Bonici to his own. The only proof offered by the Defendant of compliance with the direction was that, in some formal notes for the registration of hypothecs executed after 1882, he used the surname in addition to his own, but, as justly observed by the Court of Appeal, it is not sufficient that a person charged with such an obligation assumes the surname on rare occasions only, but he must do so habitually. The question, however, is, Was it such an obligation as Pietro Senior was empowered by the will of the founder of the *fideicommissum* to impose? Whatever rights or powers Pietro Senior enjoyed in respect of the

property in question he derived from the will of Daniele, which is the real "deed of foundation." That will imposed no condition on the beneficiaries to bear the testator's name, and it did not, at all events in express terms, confer on Pietro Senior the power of imposing the condition on the successive holders of any *primogenitura* which he might create. It has not been suggested before their Lordships that, by the law of Malta, the holder of a power of appointment is entitled to exercise it otherwise than in accordance with the directions of the person who created the power, but it has been contended that authority to impose the obligation now in question must be inferred from the general scope of the original will. The will gives the most minute directions on every detail, and if it had been the testator's intention that the benefits of any *primogenitura* which might be created by his son Pietro should be confined to persons bearing his name, it is not unreasonable to suppose that he would have given some indication of that intention. It is true that power is given to bequeath more to one and less to others and the whole to one and nothing to others, but that power was not given in case a *primogenitura* was created. Their Lordships cannot agree that the power actually given necessarily implies the additional power to clog a bequest when made with a condition or that, if such additional power was given in regard to divisible *fideicommissa*, it may be extended by the fiduciary legatee to the *primogenitura* which he was authorized to create. The learned Judge of the first Court held, upon the authority of the decision of the Court of Appeal in the case of *Testaferrata* v. *Testaferrata*, that the power to give more to one and less or nothing to others authorized the settlor of the *primogenitura* to impose on the party preferred any condition which is not

reproved by law, provided such condition is not incompatible with the *fideicommissum* ordered by Dr. Daniele, but the judgment as set out in the Appendix to the Appellant's Case does not go quite so far. It was held that the power implied a release from the obligation to allow the property to go to all those called to the succession for equal division between them, and that the power necessarily had reference to a disposal of the property during the existence of the *fideicommissum.* The condition which was there actually imposed was not only compatible with the original power given to the donee, but was one which must clearly have been contemplated by the donor. In the present case there exists no indication of any desire on the part of the founder of the *fideicommissum* that the beneficiaries should bear his name, and it therefore is unnecessary to inquire whether, in case he had imposed the obligation, it would have been binding upon them.

The learned Judge of the first Court quoted the following passage from the Digest (36.1.63, s. 10) as showing that the original testator could himself have validly imposed the obligation :—

> "Si vero nominis ferendi conditio est quam Praetor exigit recte quidem facturus videtur si eam expleverit; nihil enim mali est honesti hominis nomen adsumere."

The passage, however, then proceeds thus :—

> "Nec enim in famosis et turpibus nominibus hanc conditionem exigit Praetor; sed tamen si recusat nomen ferre, remittenda est ei conditio."

From these last words many commentators have concluded that, however noble a name may be, a condition that it shall be borne by the successive holders of a *fideicommissum* is not binding upon them, even if imposed in a will whereby a testator disposes of his own property,

but it is not necessary to pursue this question any further, for the condition in the present case was not mentioned by the founder of the *fideicommissum*, but was imposed by the fiduciary who had special powers of appointment. The validity of a condition thus imposed was fully discussed by De Nigris, a Florentine jurist of repute, in his work *De Nominatione*, and he came to the conclusion that the power to impose the obligation did not exist unless the person having the power of appointment had been empowered to impose any conditions that seemed meet to him, and even then he could not impose the penalty of forfeiture. The learned Judge remarked on this as follows :—

> "Notwithstanding the opinion of the weighty writer which the Court does not think it can follow, as the condition is lawful and not difficult to fulfil, and as in this case it is a question of assuming the surname of the testator, not only in substitution for but in addition to one's own."

The question, however, is not whether the condition is lawful or easy to fulfil, but whether the person with power of appointment had authority to impose it. The writers quoted before their Lordships are agreed that where a fiduciary is allowed to choose the objects of the testator's bounty he must make his choice in unqualified terms and without imposing any burden or condition not sanctioned by the instrument creating the *fideicommissum*. On a fair and reasonable construction of Daniele Bonici's will their Lordships are not prepared to hold that he intended to confer upon his son Pietro Senior the power of imposing the obligation now in question on the successive holders, whether of the divisible *fideicommissum* or of any *primogenitura* which the son might create.

If the Defendant has not forfeited his rights to the *primogenitura*, it is difficult for their Lordships to perceive what further interest the

Plaintiff has in the case. He based his whole claim upon such forfeiture, and it was only in the Defendant's answer that the question was raised whether the property was released from all burdens upon its coming into his possession as being of the fourth degree. The Defendant's sons have died, but he may have more sons and he has several daughters alive. The Court of Appeal regarded it as a doubtful point, which could not be settled on the appeal, whether the existence of daughters only of the Defendant was not an obstacle to the Plaintiff's being held to be the person next called to the *primogenitura* in case the Defendant forfeited the same, and it is not necessary for their Lordships to express any opinion on the point. Both the Courts below, however, expressed an opinion that the Plaintiff's interest, however remote, was sufficient to allow him to contest the Defendant's right to hold the property free from any burden, and as this question has been fully argued before their Lordships, they feel bound to express their opinion thereon. It is common cause between the parties that the question whether the Defendant now holds the property unincumbered must depend upon the construction to be placed on the provisions of the Code of Rohan (Book 4, c. 2, ss. 3 and 4). If there had been any doubt upon this point, it would have been removed by the fact that the original testator himself, in limiting the *fideicommissum* to the fourth degree, stated that the limitation was to be in terms of the provisions of the Code. It appears to be common cause also that, if the degrees mentioned in the Code are to be construed as meaning degrees of generation, the Defendant would be entitled to hold the property free from "every "tie and burden." But for the agreement between all parties on this point, it might have been necessary for their Lordships to inquire

more closely whether or not the property only becomes unburdened after it has passed to the heirs of the fourth and last substitute. Notwithstanding the concurrence of the trustees of the marriage settlement with the Defendant, their Lordships do not wish to intimate that any decision arrived at in the present case would necessarily be binding upon the Defendant's heirs. The present dispute is between him and the Plaintiff, and the question to be determined is, whether the Plaintiff has established any right to prevent the Defendant from keeping the property as his own. The provisions of the Code, so far as applicable, are as follow :—

> Sect. 3. Majorats, *primogenituraе* and *fideicommissa* shall hold good up to the fourth degree inclusively, after which every tie and burden shall cease, and the property shall pass unburdened to the heir of the fourth and last substitute.
>
> Sect 4. The four degrees shall be counted *in capita* and not *in stirpes* without including therein the instituted heir.
>
> Sect. 6. It is not forbidden to found *fideicommissa* so that they shall last less than four degrees, likewise the last possessor shall be allowed to renew them for a further period of four degrees or less.

The Plaintiff's contention is that the four degrees thus mentioned are degrees of actual possession and not of generation. If this contention is right, it would follow that the generation of the Defendant's mother cannot be counted, inasmuch as she never took possession of the property. It is clear, however, that if Pietro Senior had never exercised the power of appointment conferred upon him by his father's will, the Defendant's mother would have been entitled to possession of her share of the divisible *fideicommissum* and she would have been regarded as occupying one of the degrees. But Pietro Senior expressly stated that the *primogenitura* founded by him was to endure only as long as the *fideicommissum* founded by his

father. Even if he had not so directed, the property could not have been tied up for a longer period than that which was authorized by Daniele Bonici in regard to the *fideicommissum*. Upon this ground alone the Plaintiff's contention appears to their Lordships to fail altogether. But it is further said on his behalf that the term "degrees" — "gradi" in the original—can not mean generations because the 4th Article enacts that "the four degrees shall "be counted *in capita* and not *in stirpes* without "including therein the instituted heir." This view was upheld by the learned Judges of the Court of Appeal, who remarked that this provision—

> "is intended not to exclude always the right of representation in successions to *fideicommissa*, but to establish that the substitute, who in relation to the testator is in the same degree of cognation as the preceding possessor, that is, in the same generation, is to constitute a distinct degree of succession, to be reckoned by itself, in the duration of the *fideicommissum*, for the ends of the law.

Their Lordships regret that they cannot follow this reasoning. If the fourth Article has any bearing upon the particular question in dispute, it would rather support the Defendant's contention that he did not take the *primogenitura* as representing his mother, and that consequently her generation ought to be counted as well as his own. There is no reason to believe that the expressions *in capita* and *in stirpes* are used in a different sense in the Law of Malta from that in which they were used by the Civilians; and, indeed, in the later legislation of the Island it was made clear that the terms were used in exactly the same sense. The 490th Article of Ordinance No. 7 of 1868 enacts and declares that "Proximity of relationship is determined "by the number of generations. Each generation "forms a degree. A series of degrees forms a

" line." Article 503: "If the children or " descendants of brothers or sisters are found " to be in an equal degree they all succeed " *per capita* without representation." Article 504: "In all cases in which representation " is admitted the partition is made *per stirpes*." Before the enactment of the Code of Rohan it had been a moot point with the commentators on the Digest whether representation was admissible in the computation of degrees where a *fideicommissum* had to be restored to a family. The majority, according to Gothofredus, were in favour of the principle of representation, but even where this principle was adopted, it was not allowed to lengthen the existence of *fideicommissa* according to the doctrine that *fideicommissa* are *stricti juris* and odious. The following passage from Voet (36.1.7, McGregor's Translation) makes the point perfectly clear:—

> "If the testator had provided that there should be no alienation of the property so long as blood relations of the second degree were in being, and if the inalienable property were to go to the brothers and to the son of another predeceased brother, by virtue of the principle of representation, it is doubtful whether only the brothers of the second degree of relationship or the brother's son also, though of the third degree, should be held burdened with the *fideicommissum*. At the first blush we might consider the son equally bound, because in the same way as he is understood to be placed not in the third but in the second degree in the succession by virtue of the principle of representation and takes rank in the second degree . . so also he shares with those of the second degree in the burdens attaching to that which is acquired by virtue of representation, the more since it is equitable that the burdens of a thing should fall on him who enjoys the advantages thereof. But the Supreme Court of Utrecht has held otherwise in a judgment which was upheld on appeal because, as Johannes van Someren elegantly and forcibly puts it, representation operates to one's advantage and not to one's disadvantage. The son, indeed, attains to the inheritance by virtue of the *fidei-*

> *commissum*, but he stands in a degree of relationship wherein the restraint on alienation has ceased to be operative. It is by operation of law and not by virtue of the will that he occupies a place in the second degree, but the restraint on alienation is derived from the will and not from the law. A *fideicommissum* is *stricti juris* and odious in so far as it affects the burdened party, nor shall its existence be lightly presumed."

The effect of the 4th Article of the Code of Rohan is to remove all doubt upon the point thus discussed by the commentators. The degrees are not to be counted *in stirpes*, there is to be no representation, and, consequently, there can be no question of a person of a later generation stepping into a degree occupied by any of the previous generations. The further provision of the Article that the instituted heir was not to be included among the four degrees was obviously introduced with the object of settling another question upon which there had been some diversity of opinion. The 159th Novel of Justinian, which established the rule against perpetuities, fixed the fourth degree as the limit, but in those four degrees it seems to have included the instituted heir. The Code of Rohan makes it clear that by the law of Malta he is to be excluded in counting the number of generations. The Novel itself is so verbose, and the reasoning upon which it is founded is so loose, that it is not surprising that the commentators thereon arrived at conflicting conclusions as to its true meaning and import. It contained a decision upon an actual case submitted to the Emperor, and a direction that the rule thus established should extend to all future similar cases, but it is difficult to extract the exact rule intended to be established. The testator had directed that certain suburban property of his should always and for ever

remain in his family, and never go out of the possession of those who bore his name, but the Emperor held that, inasmuch as four generations had passed (quod quattuor jam generationes praeterisse viderentur) when the holder alienated the property, such alienation was permissible. Among the questions upon which the commentators differed was, strangely enough, one whether a testator might not, by the use of appropriate words, bind property in perpetuity, and in many countries, including the Netherlands, according to the testimony of Sande (Decis. Fris. 4.5.4), Huber (Hed. Rechtsgel. 11.19.64), Voet (36.1.33), and others, a perpetual *fideicommissum* could be extended beyond the fourth degree where the testator's intention to that effect had been emphatically expressed. But whatever divergence of opinion there was upon other points, the commentators whose works have been cited before their Lordships appear to be unanimous that the limit of time fixed by the Novel was to be counted by generations. Owing probably to the influence of feudalism, the rule laid down in the Novel appears not to have been incorporated in the common law of Malta, although that law was admittedly based on the Roman law. It was clearly with the view of bringing the law of Malta into line with the laws of other countries which had adopted the rule, that the articles in question of the Code of Rohan were enacted. They introduced such modifications as the circumstances of the country required, but they contained no indication whatever that the four degrees were not to be counted by generations. The word "gradi" is used, and the utmost that can be said is that in the Digest a few passages are to be found in which the term *gradus*—the Latin equivalent for "grado"—might be held to signify something different from a degree of

generation. No passage, however, has been quoted in which the term as applied to the rules against perpetuities has ever been used in any other sense than that of generations. A case has, however, been quoted from the Florentine Decisions (No. 54), in which it is said to have been held that, under certain articles of the Imperial law promulgated in Tuscany in 1747, which correspond with the articles now in question, degrees mean the persons who actually held the property subject to the *fideicommissum*. The decision is that of Canon Montordi, who had been charged by the Supreme Magistracy to give his opinion on a certain claim. The claim was that, as the claimant was the fourth and last possessor under a *fideicommissum*, he should be declared to hold the property free from any tie, notwithstanding the provision of the Imperial law, which did not put an end to the burden until *after* four degrees, when the property was to go to the heir of the fourth and last substitute. Montordi's decision was in favour of the claimant, and their Lordships would remark in passing that it is a clear authority in favour of the view that, if Sir Gerald Strickland is in the fourth degree, he holds the property unburdened notwithstanding the concluding words of the 3rd Article of the Code of Rohan. The sole point to which Montordi directed his attention was whether the analogous provision of the Imperial law stood in the way of the claimant. He freely quoted Voet, Peregrinus, and other writers, and he came to the conclusion that the object of the Imperial law was—

> "to favour the freedom of property and therefore the doubt whether the fourth substitute has unfettered power to alienate should be decided in his favour."

He seemed to assume that the claimant was in the fourth degree, but the claimant could only

have been in the fourth degree if both his paternal uncles, who of course belonged to one and the same generation, were counted as constituting two degrees. If Montordi did direct his attention to this point, which the report does not show that he did, the inclusion of both the brothers among the degrees to be counted could only have been based upon the doctrine to which he refers, that the construction ought to be in favour of the "freedom of property." It by no means follows that in a case like the present he would have adopted a construction which would greatly prolong the period of restraint on alienation, and thus hamper the "freedom of property." The learned Judge of the Court of first instance in the present case remarked that this construction appeared to him—

> "to be more consonant with the probable intention of the legislator, who evidently intended to restrict the duration of the fetter, and in establishing a duration of four degrees had probably in view a fixed limit, namely the duration of four lives, and not an uncertain limit, such as the time for the extinction of four generations, the number of the components of which cannot be foreseen."

It would, however, appear to their Lordships that the duration of the fetter has not been restricted by a construction which excludes from the four degrees former generations merely because none of those generations has actually come into possession of the property. As to the uncertainty of the duration, there must necessarily be uncertainty where no definite period has been fixed, but the construction adopted by the Courts below appears greatly to increase the uncertainty by making the duration depend upon the further contingency of individuals of some generations not surviving the fideicommissary possessors of previous generations.

The learned Judge of the first Court admitted that until then it had been " commonly held that " the degrees contemplated in the Code were " those which represented the distance between " relations, that is, the generations," and he did not, in the opinion of their Lordships, advance sufficient reasons for departing from the view thus commonly held. In none of the cases cited before their Lordships was this question definitely raised, but, so far as they go, these cases support that view. In the case, for instance, of *d'Amico* v. *Trigona* (L.R. 13 A. C. 806), which came in appeal before their Lordships from the Court of Appeal of Malta, it appeared that the Court of Appeal, in the construction of the will there in question creating a *primogenitura*, had referred to degree and generation as interchangeable terms. Lord Selborne, in delivering the judgment of their Lordships, said (at page 827):—

> " 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 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,"

and there is nothing in their Lordships' judgment to show that they considered the term " degree " as applied to *primogenitura* to have any other meaning than degree of generation.

Their Lordships have not deemed it necessary to review in detail the numerous authorities which, through the industry of Counsel on both sides, have been placed before them, and it is sufficient for them to add to what they have already said that the great weight of authority, especially of such jurists as Torre, Peregrinus, and Mantica, entirely

supports the defence raised by the Defendant's answer. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed and judgment entered for the Defendant with costs in both the Courts of Malta. The Plaintiff, who is Respondent in this appeal, will bear the costs of such appeal, except the costs of the Trustees, as to which there will be no order.