Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Giovanni Gera v. *Eduardo Ciantar, from Her Majesty's Court of Appeal for the Island of Malta; delivered* 18*th June* 1887.

Present:

LORD WATSON.
LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.

This appeal relates to the right of succession to certain real estate in Malta, under the limitations of a *fideicommissum* or entail created by the last will and testament of the deceased Paolo Ciantar.

In the year 1801, the testator, who was at that time a married man, had a son, afterwards named Paolo Antonio, born to him by a single woman. The testator had no lawful issue, and in October 1810 he presented a petition to the Governor of Malta, praying His Excellency to declare his illegitimate child to be his son, "so that the said Paolo "Antonio, *quibuscumque non obstantibus*, to the "exclusion of whatsoever person, may succeed to "your petitioner *ab intestato*, or by will, and "enjoy all the honours and effects of law and "grace." After receiving a favourable report from the Civil Judge, to whom the application was remitted for inquiry, His Excellency, on the 7th November 1810, granted the prayer of the petition. Thereafter, upon the 23rd November 1810, the testator executed a formal notarial act, by which, after narrating the procedure which

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had taken place, and the fiat of the Governor, he accepted and recognized Paolo Antonio as his legitimate son, "giving and granting to the said "Paolo Antonio ample, full, and free power and "authority to exercise whatsoever acts of such "legitimation, and to succeed to his property "and rights, either by will or *ab intestato*, as he "*de jure* might or should succeed if he was born "his legitimate and natural son and born of "lawful marriage."

The wife of Paolo Ciantar died in January 1812, and on the 30th May of that year he executed the will in question, by which his legitimated son, Paolo Antonio Ciantar, was nominated as his universal heir. The testator, however, directed that Paolo Antonio should be a pure and simple usufructuary heir during his lifetime of the hereditary real estates, without the power of disposal either *inter vivos* or *mortis causâ;* and that after his death these estates should "go to the children and other descen-"dants, legitimate and natural, of his said son "and universal heir." In the event of his son dying, without leaving children or other descendants, legitimate and natural, these estates were devised, "free from any entail, to the testators "nearest next of kin according to the rules of "succession *ab intestato*, and not otherwise."

The testator did not long survive the execution of his will; and on his death, Paolo Antonio entered into possession of the hereditary real estates, of which he enjoyed the usufruct until his decease in 1877.

Paolo Antonio was married in 1815 to Carolina Theij, and they had one child, who died in 1818. In the year 1833, during the subsistence of their marriage, he had a son named Eduardo, the Respondent in this appeal, by Teresa Izzo, a single woman. In August 1839, being then without lawful issue, he presented an application

to the Third Hall of the Royal Civil Court of Malta and its Dependencies, setting forth his desire of recognizing the Respondent, so that he might enjoy all the rights and privileges attributed by the law to legitimate and natural children, and craving the permission of the Court " to enter into an act of legitimation in favour " of the said Eduardo, his natural son, for all " the effects of law, and in the best manner " which the law allows." The Court, after obtaining the necessary information, granted the required permission, and appointed the act of legitimation to be made with the intervention of the Judge. Accordingly, on the 31st August 1839, Paolo Antonio Ciantar appeared before one of Her Majesty's Judges, sitting in the Third Hall of the Royal Civil Court, and executed an act of legitimation, by which he declared the Respondent to be his legitimate and natural son, and gave and granted him, *inter alia*, full power and liberty "to succeed him, his father, both " by will and *ab intestato*, to all and whatsoever " his property, and equally to all his rights, " actions, claims, and pretensions to which he " should and can succeed according to law, as if " the said Eduardo had from the beginning been " born natural and legitimate."

It may be proper to notice here, because they are circumstances relied on by the Appellant, that the proceedings in 1839, with a view to the legitimation of the Respondent, were conducted *ex parte*, in so far as no one representing the next of kin of the testator Paolo Ciantar was cited as Respondent; and also that, neither in the petition to the Third Hall, nor in the written proceedings which followed upon it, was the fact disclosed that, at the time of the Respondent's conception and birth, his father Paolo Antonio Ciantar was a married man.

Upon the death of his father, in 1877, the

Respondent assumed, and he still retains, possession of the real estates settled by the will of Paolo Ciantar.

The parties who, in this suit, are represented by the Appellant Giovanni Gera, allege themselves to be four of the five nearest next of kin by blood, in equal degrees, to the testator, who were living at the time of his son Paolo Antonio's decease; but the Respondent does not admit that their relationship to the testator has been proved. In the libel filed on their behalf in the First Hall of the Civil Court, on 13th October 1877, they claim from the Respondent four fifth shares of the real estates, with a corresponding proportion of mesne profits. The Judge of the First Hall, on 2nd January 1880, held that they had established their propinquity to the testator; that the legitimation of the Respondent in 1839 was, according to Maltese law, invalid; and gave them decree in terms of their libel, restricting their claim for mesne profits to rents accruing after 5th April 1878. Upon appeal to the Second Hall, the learned Judges of that Court reversed his decree, and gave judgement for the Respondent. They were unanimously of opinion that the legitimation of the Respondent was valid, and that he was consequently entitled to take, under the will of 1812, as the legitimate and natural child of Paolo Antonio Ciantar. In that view, it became unnecessary to decide whether the Appellant's constituents had proved their title as nearest next of kin to the testator.

Legitimation *per rescriptum principis* was first introduced into the written law of Rome by the Emperor Justinian, who enacted (Nov. 89, cap. 9), that natural children should be legitimated, on the requisition of the father, in certain special circumstances, as in the case when he had no lawful issue, and marriage with their mother

had become impossible. The same right was given (Nov. 89, cap. 10), when the father, who, from some fortuitous cause, had been prevented from legitimating his natural offspring during his lifetime, declared in his testament that they should succeed to him as his lawful children and legal heirs. The effect of the new relation constituted between children so legitimated and the father is thus expressed,—"*Ut sub "potestate ejus consistant, nihil a legitimis filiis "differentes.*" (89 Nov., cap. 9, ad fin.) The privilege conferred by these *novellæ* was limited to children who were *naturales* in the sense of Roman law; it being expressly declared (Nov. 89, cap. 15) that children born *ex complexibus aut nefariis aut incestis aut damnatis* were not to be considered *naturales*, and were not to participate in the benefit of the new law. Notwithstanding that exception, the Emperor, in the exercise of his plenary power, was in use to legitimate children of the latter class by special rescript. What was given to one species of illegitimates as matter of legal right, was only extended to the other as matter of Imperial grace.

After the dissolution of the Roman Empire, the principle of Justinian's law was generally adopted by Christian States, but in course of time it became subject, in different countries, to various modifications which were suggested either by the altered condition of domestic relations, or by the constitution of the Government. Under the new civil law of Europe, concubinage was not recognized as a legal relation, and there was consequently no class of children precisely corresponding to *filii naturales*, according to the strict acceptation of that term in the jurisprudence of Rome. By analogy, the illegitimate offspring of parents who were free to marry at the time of their conception and birth were regarded as

naturales. On the other hand, children born of an incestuous connection, or of the adulterous intercourse of two married persons, or of a *solŭtus* and a *conjugata*, were not so regarded, but it was frequently a vexed question to which of these classes children *ex conjugató et solutâ* belonged. Legitimacy was conferred upon both classes, with this difference, that, in the case of natural children, legitimation was said to be *intra ordinem*, or in terms of the municipal law, and was generally attended by the same legal consequences; whereas, in the case of those born *ex damnato coitu*, legitimation was *extra ordinem*, and dependent on the will of the autocratic ruler, who could, and not unfrequently did, qualify his act by reservations which protected the interests of heirs lawfully born.

It does not seem to admit of doubt that after the Island of Malta was granted by Charles the Fifth to the Knights of St. John, the Grand Master of the Order became *Imperator*, in the fullest sense of the word. During the eighteenth century there are instances of his exercising the power of legitimation, and in 1784 the Code Rohan, which still forms the basis of the municipal law of Malta, was enacted by the Grand Master whose name it bears, with the advice of his Council. When Malta, in 1800, became a British possession, Her Majesty's Governor administered the law of legitimation, of which the case of Paolo Antonio Ciantar, already referred to, is an example. By an Ordinance dated the 25th May 1814, the Governor reconstituted the civil and criminal tribunals of the island, and, *inter alia*, declared that the Third Hall of the Civil Court should in future "perform all acts of voluntary jurisdiction "hitherto performed by the Civil Judge, or by "the Government, on a petition from the party "and a report from the Civil Judge." It is in

virtue of the jurisdiction so conferred upon them that the Judges of the Third Hall now exercise the power of sanctioning acts of legitimation.

It was conceded in argument by the Appellant's Counsel, and it really does not admit of serious dispute, that in deciding the present case effect must in the first instance be given to the municipal law, as it is to be found in the Code Rohan and in Maltese precedents. If the municipal law does not furnish sufficient grounds for a satisfactory decision, then, and in that event only, it becomes legitimate to refer to the principles of the common or civil law. The Code Rohan specially enacts (Vol. 1, c. 8, § 37) that in cases for which the municipal law has made no provision, or no adequate provision, recourse must be had to the common law.

The argument addressed to us on behalf of the Appellant may be summed up in these propositions: that, according to the civil law, and also according to the municipal law of Malta, the Respondent was *natus ex nefario coitu*, so that his legitimation could not be obtained in ordinary course of law, but required a special dispensation from the sovereign authority; that, assuming the legitimation of bastards who were *nefarii* to have been within the competency of the supreme authority in Malta prior to 1814, no such dispensing power was given to the Third Hall of the Civil Court by the Ordinance of that year; that assuming the Court to have had the power of granting legitimation to the Respondent, he is nevertheless by law incapable of taking the estates settled by the will of Paolo Ciantar, in prejudice of the substitution to the testator's nearest next of kin; and lastly, that the authority of the Court was surreptitiously obtained by Paolo Antonio Ciantar in 1839, and that the decree and notarial act of legitimation are therefore null. All these points were fully and ably

argued by Sir Walter Phillimore and Mr. Digby. Copious reference was made by Counsel to treatises on the civil law by Italian, Spanish, French, and Dutch jurists of eminence, and also to the decisions of the Rota Romana. At the conclusion of the argument for the Appellant, their Lordships were clearly of opinion that the case depends upon the municipal law of Malta, and that the judgement appealed from is in strict accordance with that law. It is not necessary to rely upon the common law; although in forming an opinion upon the case their Lordships have been much indebted to the learned Judges of the Second Hall for the learning and ability with which they have discussed the numerous civil law authorities which Counsel brought under their notice.

There are in the papers before us two instances of legitimation by the Grand Master, of children whose parents were not free to marry, taken from the Maltese Records, before the promulgation of the Code Rohan. One of these is the case, in 1753, of Marco Antonio Borg, the son of Dr. Martino Formosa born *ex damnato coitu*, who was declared to have the same rights of succession to his father, as a legitimate and natural son procreated of lawful marriage, *exceptis bonis ex fideicommisso provenientibus, ne legitimis et ex legitimo matrimonio procreatis ad illa vocatis præjudicium inferatur.* The other is the case, in 1771, of Anna Maria, the illegitimate daughter of Andrea Dibarro, a married man, by a single woman; and to her also were granted all the privileges allowed by law to natural and legitimate children, in so far as concerned her father's estate, *exceptis bonis fideicommisso subjectis.* The reservation attached to the grant of legitimation in these cases indicates that, but for the exception, the legitimated child would have become *naturalis et legitimus* for all

purposes of succession, and would have taken as its father's legal heir, by substitution as well as *ab intestato*.

The Code Rohan does not prescribe the mode of procedure with a view to the legitimation of children born illegitimate; that was left to the operation of the law as it then stood. But provision is made by Section 60 of Book 4, cap. 1, with regard to the effect of future grants of legitimation by the Grand Master, expressed in general terms, upon the interests of substitutes under *fideicommissa* or entails. In order to appreciate the meaning of Section 60, it is necessary to refer to the context of the preceding Sections, 57, 58, and 59. These clauses are as follows:—

Section 57.

"It shall not be permitted to parents to give, leave by will, or in any other manner whatsoever cause to pass out of their substance to legitimated children more than the smallest portion that shall fall to any one of their children, grandchildren, and great grandchildren, legitimate and natural born of lawful marriage."

Section 58.

"Then to children who are natural, spurious, or in any other way whatever illegitimate, if there are legitimate and natural children, alimony must be left by will, and in default of legitimate and natural children, or of their descendants, also legitimate and natural, it shall be lawful to devise to them one half of the estate, and the other half shall go to such ascendants or other relations as are poor and next of kin, the rule of succession *ab intestato* being observed, if there be such relations, and failing them, it shall be lawful to leave by will to the said illegitimate

children the entire estate to the exclusion of others."

Section 59.

"Parents will also be bound to leave by will to incestuous, adulterous, and similar children what is necessary for their aliment."

Section 60.

"Any legitimation whatever of the children mentioned in the foregoing Sections 57 and 58 that shall be granted by us shall always be, and be understood to be, granted without any prejudice to legitimate and natural children, in respect also of such property as is subject to entail founded by an ascendant or a collateral."

It appears to their Lordships to be clear, in the first place, that, as pointed out by the learned Judges in the Court below, legitimated children are, in Sections 57 and 58, dealt with as "*legitimi* "*et naturales.*" Otherwise there would have been no occasion for introducing, in Section 57, the words "born of lawful marriage" in order to distinguish children legitimate by birth from children having the *status* of legitimacy by force of rescript. Then to hold that, in Section 58, children *legitimati* are not included in the expression "legitimate and natural" would, in the case of parents who had legitimated children and no lawfully born offspring, give one half of their estate to needy next of kin by force of law, and enable the parents to devise the remaining half to their bastard issue, to the entire exclusion of the *legitimati.* It was unnecessary to repeat the qualifying expression "born of lawful marriage" in Section 60, where the context plainly shows that legitimated children are contrasted with those who are legitimate by birth.

In the second place, it is, in the opinion of their Lordships, equally clear that the provisions

of Section 60 apply to bastards of every denomination, who may be admitted by rescript to the *status* of legitimacy. In that section, the recipients of the benefit of legitimation are described as "the children mentioned in the "foregoing Sections 57 and 58." Section 57 simply mentions "legitimated children," or, in other words, all legitimated children. Section 58 makes mention, not only of children who are natural or spurious (a definition which would not have exhausted the category of bastards), but of those who are "in any other way what-"ever illegitimate." Now "illegitimate" is not a term confined to any particular class of bastards, it includes every child born out of lawful wedlock, irrespective of the character of the connection to which it owes its birth.

In the third place, their Lordships are satisfied that the provisions of Section 60, with respect to property entailed by an ascendant or collateral, were merely intended to protect the interests of the lawfully procreated descendants of the same parent in a question with his legitimated children, and that they were not intended to prevent the legitimated children from taking under an entail, as his heirs *legitimi et naturales*, in priority to his collateral heirs. The limitations of a *fidei-commissum* may nevertheless be so expressed as to exclude from succession children not born in lawful wedlock, and in that case collateral heirs must be preferred to descendants *legitimati*, not under the provisions of Section 60, but by force of the limitation. In cases where the terms of the entail do not exclude them, the Code Rohan by plain implication recognizes the legal right of *legitimati* to take as substitutes, failing lawfully begotten issue of their parent. Section 60 is not intelligible except upon the assumption that by the law of Malta the *legitimatus* had that right, and that, in order to give a preference, in

entailed succession, to the issue of his parents' lawful marriage, express legislation was necessary. The enactments of Section 60 annex to every subsequent act of legitimation an implied restriction of the legitimated child's rights of succession, which, prior to 1784, would, if the Grand Master had thought proper to enforce it, have been inserted in his fiat authorizing the Act. Indeed, the enactments go farther than that, because they convey to the lieges of Malta the intimation that in future the Grand Master will grant legitimation in terms of the Code, and upon no other condition.

In these circumstances, it is not remarkable that not a single instance has been produced, of legitimation *per rescriptum principis* after the enactment of the Code Rohan, in which a *salvo jure* clause has been inserted, as in the previous cases of Marco Antonio Formosa and Anna Maria Dibarro. In cases occurring under the Code, legitimation seems to have been invariably granted in terms of law; and the decree of the Court legitimating the Respondent forms no objection to that rule. He is simply declared to be legitimate "for all the effects of law, and in " the best possible way known to the law."

That it was the practice of the British Governor of Malta, and afterwards of the Third Hall of the Civil Court, to confer the *status* and privileges of legitimacy (so far as allowed by the Code) upon children born, like the Appellant, *ex uxorato et soluta*, is attested by the cases which have been put in evidence. In point of fact, the Governor and the Court have, in such cases, successively exercised the same power of conferring legitimacy which admittedly belonged to the Grand Master. The Respondent and his father *Paolo Antonio* were illegitimates of the same class. Whatever may have been the case in regard to the Respondent, it is obvious that the whole circum-

stances of his father's birth were known to the Civil Judge, to whom the petition of Paolo Ciantar was referred for inquiry. The learned Judge reported in favour of the application, upon the special ground that "such a benefit is not in "these days customarily denied either to spurious, "adulterous, or even to incestuous children;" and acting upon that advice the Governor granted the prayer of the petition. It also appears that His Excellency had previously, in December 1809, granted legitimation to the child of Vincenzo Mattei, a married man. the mother being unmarried.

After the transfer of jurisdiction, it is proved that the Court, in the exercise of its new functions, legitimated, "in the terms prescribed by the "municipal law," two more of Vincenzo Mattei's children, bastards of the same class, and by the same mother, the one in February 1815, and the other in June 1820. On the 23rd June 1824 the Court granted the like privilege, in terms of law, to Marianna Naudi, the daughter of an unmarried man and a married woman, and therefore an adulterous child, there being, in the case of such illicit connection, what the civilians term *invasio tori*. In April 1837, upon the petition of Mariantonia, the wife of Vincenzo Mattei, no less than three of her adulterous issue were legitimated in terms of the municipal laws; and, in the same year, a similar favour was extended to the bastard children of married women in the three other cases of Luigi Tedesco, Salvatore Ellul, and Filippo Manicolo.

These cases are conclusive in regard to the practice followed by the Court between 1814 and 1839; but it is a necessary consequence of the Appellant's argument that, in every one of them, the Court exceeded its jurisdiction, and usurped the sovereign authority of the State. Their Lordships are unable to come to that conclusion.

If the granting of legitimation to children in the position of the Respondent had been a matter wholly dependent upon the arbitrary exercise of Imperial power, it might have been plausibly contended that the right was a prerogative of, and could not be severed from the supreme authority. But that was not the case in Malta. An application for the legitimation of a child, whether born *ex conjugato et solutâ* or of two persons free to marry, was a *quasi* judicial proceeding, and was disposed of by the head of the State, upon well recognized considerations, and with the assistance and advice of a Judge of the Civil Court. Power or jurisdiction of that kind may, with perfect propriety, and without any violation of constitutional principles, be delegated to a court of justice. Their Lordships do not doubt that the exercise of such jurisdiction was within the competency of the Governor of Malta, or that he had the power to transfer it to the Civil Court. In their opinion, the terms of the Ordinance of 1814 are so framed as to give jurisdiction to the Court in the case of every petition for legitimate rights, which, according to previous practice, would have been referred to a Judge, for inquiry and report, by the Grand Master or the Governor. The practice of remitting to a Judge in such cases as that of Anna Maria Dibarro in 1771, or that of Paolo Antonio Ciantar in 1810, being sufficiently established, it necessarily follows that, in 1839, the Court had jurisdiction to grant legitimation to the Respondent.

Assuming, in the meantime, that there was no flaw in the proceedings, the effect of the decree and consequent notarial Act of 1839 was to give to the Respondent the character and rights of a child *legitimus et naturalis*, so far as permitted by the municipal law. Upon the decease of his father, without issue lawfully born, who

would have succeeded in priority to him according to the Code Rohan, the Respondent became entitled to take under the *fideicommissum* created by the will of Paolo Ciantar, unless it were shown to have been the intention of the testator to exclude legitimated children from his succession. The will contains no expression which could with the least plausibility be construed as indicating an intention of that kind. On the contrary, the testator, *in gremio* of the instrument, specially refers to the notarial act by which he carried out the fiat of the Governor legitimating Paolo Antonio, his universal heir; and, in that act, he expressly declares Paolo Antonio to be his legitimate and natural son. The Respondent, at the time of his father's death, was, so far as concerned legitimacy, *in pari casu* with Paolo Antonio at the time the will was made; and, were it necessary to decide the point for the purposes of this case, it would be difficult to hold that the testator, whilst he by reference fully recognized his own legitimated son as *filius legitimŭs et naturalis*, intended to deny to a grandson similarly legitimated, the character of a legitimate and natural child.

The Appellant's argument, founded upon alleged irregularities in the proceedings of 1839, requires a brief notice. It is said that the nearest next of kin of Paolo Ciantar ought to have been cited, and that the fact of Paolo Antonio being a married man ought to have been disclosed; that the Court, if the next of kin had appeared for their interest, and explained the circumstances of the Respondent's birth, would, in all probability, have inserted a condition in the decree, in order to prevent their right of succession under the will from being prejudiced by his legitimation. That oppor-

tunity not having been conceded to them, it was argued that the Respondent's legitimation must be treated as surreptitious and void in law. But a petition for the legitimation of a child is not a proceeding *in foro contradictorio*. It is an appeal to the voluntary jurisdiction of the *princeps* or of the Court, whose exercise of that jurisdiction is governed by considerations derived from the state of the parents' family and the interests of the child sought to be legitimated. No case has been referred to, since the date of the Code Rohan, in which persons whose interests might be affected by the legitimation were cited as parties or have appeared for their interest. The suggestion that the Court might have attached a condition for the protection of the next of kin does not commend itself to their Lordships. In their opinion, the Court had no power to impose conditions of that kind. The Ordinance of 1814 gave the Court power to grant legitimation (as it has been in use to do) in terms of law, or, in other words, to grant the *status* of legitimacy, leaving it to the municipal law to determine what its effects are to be.

Then, as to the alleged non-disclosure of Paolo Antonio's marriage. The fact does not appear in the petition or the decree of Court, which, together with the notarial act, form the written record of the proceedings. The decree bears that the Court, before granting the prayer of the petition, had "obtained the necessary in-"formation," but what that information was nowhere appears. Presumably, such information comprehended full details as to the position of the father, and the condition of the family of which Paolo Antonio, then an infant six years of age, was about to be made a legitimated member. It is impossible to affirm that the Court was in ignorance of the fact, or even that

it was probably ignorant. In these circumstances their Lordships are of opinion that the presumption *omnia rite et solenniter acta* applies. It would be contrary to all principle to set aside a decree affecting *status*, after the lapse of thirty-eight years, upon such slender and conjectural grounds. Besides, their Lordships are by no means satisfied that, if it were substantively proved that the Judge who gave the decree had no knowledge of Paolo Antonio's marriage, the decree ought therefore to be set aside. Having regard to the precedents already referred to, it does not appear to their Lordships that his knowledge of the fact would have raised any impediment to the granting of the decree.

Their Lordships will therefore humbly advise Her Majesty that the judgement appealed from ought to be affirmed, and this appeal dismissed, with costs to be paid by the Appellant.