80, 1947

No 76 of 1947

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL, MALTA

BETWEEN

THE NOBLE GIORGIO CASSAR DESAIN (*Plaintiff*) APPELLANT

AND

THE MARCHESE JAMES CASSAR DESAIN VIANI; and, by decree given on the 21st January, 1944, Anthony and Lawrence Cassar Desain, minor children of the Defendant, and the male children which may yet be begotten by said Defendant, called as parties to the suit; and the Marchesa Evelyn Cassar Desain Viani, appointed curatrix, by Decree given on the 12th February, 1944, on behalf of the male children which may yet be begotten by the Marchese James Cassar Desain Viani, and on behalf of the minors Lawrence and Anthony Cassar Desain (*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from a Judgment of His Majesty's Court of Appeal in the Island of Malta and its Dependencies dated the 25th day of June, 1945, which Judgment dismissed the Appellant's Appeal from the Judgment of the Civil Court, First Hall, given on the 6th day of May, 1944. p. 81 p. 27

2.—The issues to be determined in this Appeal are :— pp. 2 and 123

(1) Whether on the true interpretation of the Testament of the Noble Dr. Gio Batta Cassar, Cleric, published on the 2nd day of April, 1781, the first Respondent having been found by the Court of Appeal, affirming the Judgment of the Civil Court on this part of the Appellant's claim, to have p. 35
10 contravened the dispositions of the said Testament by using and bearing in public and in private the surname of Viani in addition to the surname Cassar Desain incurred forfeiture of the Tenure of the Primogeniture, and the property with which it is endowed as the result of the said contravention.

RECORD

The Material clause in the said Testament is as follows :—

p. 2 p. 127 " I will then and expressly ordain that the holder of the said " Primogeniture founded by me as above, shall always bear " the surname of Cassar Desain without the admixture " of any other surname and that he shall, at the same time, " make use of the Coat-of-Arms of the same family of Cassar " Desain, on pain of Forfeiture in the event of contravention ; " and in that case, it is my will that, from that moment, " he who would succeed after the death of the contravener, " shall succeed to the said Primogeniture and not otherwise." 10

(2) Whether the Court of Appeal was wrong in law in adjudging that the said disposition of the said Testament was not a condition resolutive pp. 91 and 92 but a modus and that a breach of the said terms by the first Respondent was not such a contravention of the Will of the Testator as to involve forfeiture as from the date of contravention but an error scusabilis, which does not involve forfeiture unless, and until, the said Respondent fails to observe p. 35 within one month from the day on which the Judgment of the Civil Court becomes res judicata, the condition imposed on him by the Court, namely, never to bear the name of Viani together with the surname Cassar Desain.

(3) Whether the Court of Appeal was not in error in affirming the 20 Judgment of the Civil Court which failed to limit its Judgment to the interpretation of the words of the Founders' Testament and to the declarations claimed by the Appellant in his Libel.

(4) Whether the Court of Appeal was not in error in dismissing the Appellant's claim that, in as much as the first Respondent contravened the p. 96 Testator's conditions, the said Primogeniture devolved on the Appellant as the next in the vocation, as from the date of the said contravention, and in holding that it devolved on the eldest son of the said Respondent and whether such part of the judgments of both Courts was not ultra Petita. 30

(5) Whether the Court of Appeal was not in error in view of the p. 96 Judgments of both Courts on the issue of forfeiture in refusing to order the first Respondent to pay the costs in the Civil Court and in the Court of Appeal.

3.—The material facts are as follows :—

The Testament of the Noble Dr. Gio Batta Cassar, Cleric, p. 123 was opened and published by notary Paola Vittorio Giammalva on the 7th day of April, 1781 ; therein the Testator founded a perpetual Primogeniture in favour of the lawful male line p. 127 descending from the heir instituted and appointed by him namely 40 the Noble Salvatore Testaferrata who died without issue. By p. 2 the Judgment of Her Majesty's Civil Court, First Hall, on the 25th day of February, 1848, the Primogeniture devolved upon Filippo Giacomo Testaferrata first born son of Maria Teresa Cassar Desain thereupon the holder renounced the surname of Testaferrata and assumed that of Cassar Desain in accordance with the conditions of the said Testament.

RECORD

4.—It is not in dispute that after the death of the said Filippo Giacomo Cassar Desain the Primogeniture devolved in regular succession in accordance with the terms of the said Testament, and ultimately upon the Marchese Georgio Riccardo Cassar Desain, the father of the Appellant and of the first Respondent, who died on the 21st day of July, 1927, leaving three sons him surviving, namely, the said Respondent who was born on the 29th day of May, 1907, the Noble Filippo Cassar Desain who was born on the 27th day of November, 1908, and the Appellant who was born on the 19th day of February, 1915. p. 2 p. 132 p. 3

By the Judgment of His Majesty's Privy Council on the 20th day of January, 1925 (No. 150/1923), the Primogeniture Viani devolved on the said Marchese Georgio Riccardo Desain the father of the parties hereto, who at the time of his death on the 21st day of July, 1927, held two Primogenitures that is to say that of Cassar Desain in issue in the present suit, and that of Viani. p. 3

5.—That by his Testament of the 21st day of February, 1927, the said Marchese Cassar Desain, nominated his son Filippo as the holder of the Primogeniture Viani, and therein declared that his one and only reason for so doing was that his first born the first Respondent had the right to the Primogeniture Cassar Desain. p. 39

6.—The said Filippo Cassar Desain, the brother of the Appellant and the first Respondent, died on the 22nd day of July, 1927, and the Primogeniture Viani became vacant. p. 39

7.—The first Respondent after the death of the said Filippo Cassar Desain, assumed the surname Viani, in addition to the surname Cassar Desain in public form and under private signature, in contravention of the Testament of the founder of the Cassar Desain Primogeniture. p. 3 p. 39

8.—On the 13th day of August, 1934, the Appellant, entered a formal protest against the contravention by the first Respondent of the disposition of the Founder, and called upon the said Respondent to relinquish to him within thirty days the possession of the property belonging to the Primogeniture and to desist from drawing income on his own behalf therein alleging that the said Respondent had used the surname Viani in addition to that of Cassar Desain for over a period of six years. p. 162

9.—On the 21st day of January, 1944, the Civil Court, First Hall, ordered that the two sons of the first Respondent, Anthony and Lawrence who were minors, born respectively on the 23rd day of September, 1938 and the 24th day of April, 1940, be called as parties to the suit through Curators, to appear on their behalf. p. 23

10.—The first Respondent's Answer filed in the Civil Court, First Hall on the 14th day of September, 1942, submitted :— p. 6

> Firstly—that the Appellant had no interests of his own in bringing the present action and that the Primogeniture can never devolve on the Appellant.

RECORD

Secondly—that forfeiture of the Primogeniture does not occur ipso jure but in pursuance of a Court Judgment.

Thirdly—that the prohibition in the Testament is not a condition but simply a "modus."

p. 25 11.—The Curatrix the Marchesa Evelyn wife of the first Respondent in her Answer pleaded :—that the Appellant has no interests of his own at stake in the present suit, that the succession to the Primogeniture is rooted in the line of the Marchese James Cassar Desain, that because there are females as well as males in the line descending from the Marchese James Cassar Desain, even if the first Respondent incurs forfeiture, the Primogeniture will devolve on his children or on the child next in the Vocation.

pp. 25 and 26 The Curatrix prayed for a declaration that the successor, in the event of their father the said Respondent being divested, should be one or other of the two sons aforesaid.

pp. 27 to 35 12.—On the 6th day of May, 1944, His Majesty's Civil Court, First Hall, adjudged as follows :—

It allowed the Appellant's first claim that the first Respondent had infringed and contravened the Testators' dispositions, and declared that the said Respondent had not incurred forfeiture, but that he should incur

p. 35 forfeiture if, within one month after the present Judgment becomes res judicata, he fails to declare and formally undertake, by Nota filed in the Record, never more to bear the name Viani together with the name Cassar Desain, whether in public or in private.

p. 35 And Further Declared that in the event of forfeiture as above such forfeiture should have effect only from the date of expiration of the aforesaid period and that in that case, the Primogeniture should not be deemed as devolving on the Plaintiff (the Appellant) in as much as the Appellant is not the next in Vocation, but upon the first Respondent's eldest son.

The Civil Court disallowed the other claims and ordered each party to bear its own costs, and that the Registry fees be paid by the said Respondent.

13.—The Appellant deemed himself to be aggrieved by the said Judgment and entered an appeal in the Court of Appeal and made *inter alia* the following submissions :—

p. 50 (A) That the Civil Court, having declared that the first Respondent in certain circumstances would incur forfeiture, further declared that the Primogeniture should not be deemed as devolving on the Appellant because

p. 44 the Appellant is not the next in vocation, but upon the eldest son of the said Respondent and that such declaration was contrary to the Laws of

p. 51 Civil procedure of Malta and therefore null and void in that the Court cannot adjudicate beyond the claims in the Libel.

RECORD

(B) That the Civil Court erred in Law in making a Declaration in the interest of a Third Party not taking part in the suit as brought forward by the Plaintiff in his Libel. p. 44 p. 53

The Judgment of the Court of Appeal in Malta in *Grech* v. *Scerri* on the 16th day of February, 1934 (Vol. XXVIII, p. 532), on the admissibility of the jus tertii was relied on among other authorities, by the Appellant. p. 51

The Appellant further submitted on this point that he was entitled to the Primogeniture and the property attached thereto, not as heir to the first Respondent but as one directly called thereto by the Testament of the Founder in the event of contravention by the holder. p. 52

(C) That the case is not one of competing claims in respect of a vacant Primogeniture but one of recovery—rivendica—in which the Appellant seeks a remedy against the first Respondent who has infringed the conditions of the Testament. p. 50

(D) That the condition imposed by the Founder is a resolutive and not a suspensive condition, and one which on the event of a contravention thereof taking place, rescinds the right of the holder in favour of the person who is immediately in the Vocation and who is in existence at the moment the event takes place. p. 54

(E) That the Civil Court was wrong in not applying to the facts adduced in evidence in the Civil Court, an established principle in the interpretation of wills " ubi nulla ambiguitas verborum sit, non est facienda " voluntatis quaestio," as expressed by the Court of Cassation, Turin, on the 15th day of June, 1871, in *Re Canavese* v. *Viani d'Oraino*. p. 42 p. 55 p. 57

(F) That the Court of Appeal was wrong in not applying the principle of construction as expressed in the above Judgment by the Court of Cassation, namely :—

> " The Judgment that, on the grounds of interpretation, alters the " literal and obvious sense of the words of a Testament or " a contract, and substitutes its own concept for that of the " Testator, or the contracting parties, is not a judgment based " on fact but a transgression of the Law, the contract or " Testament, such as to deserve censure on appeal to the Court " of Cassation." p. 55

(G) That the Testator selected the successor to the Primogeniture in the event of a contravention of his dispositions, and that the words therein " after the death of the contravener " refer to him who would succeed to the Primogeniture in the case of the death of the holder at the moment of the contravention of the terms of the Testament and that he who would succeed after the death of the contravener should succeed as from that moment. p. 57

(H) That the first Respondent on the death of his father the Marchese Riccardo Cassar Desain on the 21st day of July, 1927, and of his brother on the 22nd day of July, 1927, assumed the Primogeniture

RECORD.

p. 122

18.—On the 3rd day of June, 1946, His Majesty's Court of Appeal for the Island of Malta and its Dependencies granted final leave to appeal from the aforesaid Judgment to His Majesty's Privy Council.

It is respectfully submitted that this Appeal should be allowed for the following :—

REASONS.

(1) Because the Court of Appeal was wrong in Law in rejecting the Appellant's contention that the disposition in issue in the Suit was a condition resolutive and not a modus.

(2) Because the Court of Appeal was wrong in Law in holding that the first Respondent did not forfeit the Primogeniture by contravening the express disposition of the Testator.

(3) Because the Court of Appeal as a Court of Construction was in error in affirming the Judgment of the Civil Court imposing the condition that a time limit be given to the contravener within which to confirm the disposition before he incurs a forfeiture.

(4) Because the Court of Appeal was wrong in holding that the first Respondent was not affected by dolus or culpa gravis after contravening the disposition of the Testament with full knowledge of its terms for a period of more than twelve years.

(5) Because the Court of Appeal was in error in holding that the Appellant, as the only male in the Vocation alive on the date of the first Respondent's contravention, was not entitled to succeed according to the terms of the Testament.

(6) Because on the true interpretation of the Testament, the Court of Appeal should have declared a forfeiture in favour of the Appellant as from the date of the first Respondent's contravention.

(7) Because the issues in this case are between the Appellant and the first Respondent and the Court of Appeal was in error in declaring that the Primogeniture in the event of forfeiture by the said Respondent should pass to the said Respondent's male issue who had not been born when the contravention took place.

(8) Because the Court of Appeal was wrong in Law in holding that the Civil Court had not adjudged ultra petita in so declaring the succession to the Primogeniture.

RICHARD O'SULLIVAN.

W. D. ROBERTS.

RECORD

(B) That the Civil Court erred in Law in making a Declaration in the interest of a Third Party not taking part in the suit as brought forward by the Plaintiff in his Libel. p. 44 p. 53

The Judgment of the Court of Appeal in Malta in *Grech* v. *Scerri* on the 16th day of February, 1934 (Vol. XXVIII, p. 532), on the admissibility of the jus tertii was relied on among other authorities, by the Appellant. p. 51

The Appellant further submitted on this point that he was entitled to the Primogeniture and the property attached thereto, not as heir to the first Respondent but as one directly called thereto by the Testament of the Founder in the event of contravention by the holder. p. 52

(C) That the case is not one of competing claims in respect of a vacant Primogeniture but one of recovery—rivendica—in which the Appellant seeks a remedy against the first Respondent who has infringed the conditions of the Testament. p. 50

(D) That the condition imposed by the Founder is a resolutive and not a suspensive condition, and one which on the event of a contravention thereof taking place, rescinds the right of the holder in favour of the person who is immediately in the Vocation and who is in existence at the moment the event takes place. p. 54

(E) That the Civil Court was wrong in not applying to the facts adduced in evidence in the Civil Court, an established principle in the interpretation of wills "ubi nulla ambiguitas verborum sit, non est facienda "voluntatis quaestio," as expressed by the Court of Cassation, Turin, on the 15th day of June, 1871, in *Re Canarese* v. *Viani d'Oraino*. p. 42 p. 55 p. 57

(F) That the Court of Appeal was wrong in not applying the principle of construction as expressed in the above Judgment by the Court of Cassation, namely :—

> "The Judgment that, on the grounds of interpretation, alters the "literal and obvious sense of the words of a Testament or "a contract, and substitutes its own concept for that of the "Testator, or the contracting parties, is not a judgment based "on fact but a transgression of the Law, the contract or "Testament, such as to deserve censure on appeal to the Court "of Cassation." p. 55

(G) That the Testator selected the successor to the Primogeniture in the event of a contravention of his dispositions, and that the words therein "after the death of the contravener" refer to him who would succeed to the Primogeniture in the case of the death of the holder at the moment of the contravention of the terms of the Testament and that he who would succeed after the death of the contravener should succeed as from that moment. p. 57

(H) That the first Respondent on the death of his father the Marchese Riccardo Cassar Desain on the 21st day of July, 1927, and of his brother on the 22nd day of July, 1927, assumed the Primogeniture

p. 59 Viani, despite the warning of his mother that the said Respondent could not hold two Primogenitures and that notwithstanding this warning the said Respondent, from the year 1931 onwards, continued to use the surname Viani until the present proceedings were instituted.

The Civil Court, First Hall, accepted the first Respondent's submission that the Provision in the Testament was not a condition resolutive but a modus, and declared that inasmuch as the said Respondent had consulted a member of the Bar of Malta who advised that the surname
p. 59 Viani could be borne by the said Respondent in addition to the surname of Cassar Desain the said Respondent was not guilty of dolus or of culpa gravis but of an error *scusabilis*.

(I) In support of his contention the Appellant quoted Cardinal De Luca in "De fidei commissorum Summa" (No. 348) in which he distinguishes the case when the Testator "Peonam adjiciat" and the case where "Eam a Testatore omissam Lex suppleat" and further stated that
p. 59 "primo casu necessaria non sit judicis monitio quae constituat in dolo "seu contumacia, sed necessaria est in secundo."

(J) The principles laid down by the Rota Romana (March 8th, 1771), Coram Mannelli Romana Caducitatis, held "doli probatio non "requiritur quoties testator caducitatis peonam alienantibus indixit
p. 59 "ipso facto et ipso jure incurrendam. Quia sic jubendi videtur ad "nudum simplexque factum respexisse."

p. 60 The Appellant further submitted the authority of the Roman Rota in Coram de Curiis Ferrarien, Immissionis (March 4th, 1833) Coram De Silvestris Albanon (June 10th, 1853) and Coram Cornelio Ferrarien Primogenituræ (12th May, 1775) which establish the principle that the
p. 60 defaulting beneficiary forfeits possession in the terms of the instrument of foundation.

p. 60 (K) The Appellant submitted that a legacy is left "sub modo" when the purpose for which it is left, is expressed, and therefore the
p. 61 Appellant contended that in this suit that principle does not apply.

(L) As to the answer of the first Respondent and of the Curatrix,
p. 62 that the Appellant has no personal interest in this action, the Appellant submitted that his right to intervene is a jus quæsitum to the possession of the Primogeniture.

p. 61 (M) That the Appellant was the only living male in the family the Marchese Riccardo Cassar Desain the father of the Appellant and of the first Respondent, at the time the said Respondent first assumed the
p. 63 surname Viani together with the surname Cassar Desain both in public and private instruments, and submitted that he had then and still has the right to the said Primogeniture.

(N) That decisions of the Roman Rota hold that the passage from
pp. 62 and 63 the defaulting holder to the substitute occurs "fulminis instar" and that those who are born afterwards cannot dispossess those in whom possession is rooted according to the Will of the Founder.

14.—The Judgment of the Court of Appeal delivered on the 25th day of June, 1945, may be summarised as follows :— RECORD

The Court held that the obligation to bear the Surname Cassar Desain without the addition of other surnames was licit ; and that the obligation had to become binding on succession to the Primogeniture, and not earlier, and therefore the disposition is sub modo and not sub conditione ; that there are three requisites respecting modus namely (1) institutio sit pura, (2) extet præceptum aliquid faciendo vel non faciendo, (3) adsit ademptio in casu contraventionis, and if there had been any doubt, the disposition would have had to be considered a modality. p. 86 p. 86

15.—The Court on this issue, relied (inter alia) on the Judgment in the case of *Caruana* v. *Strickland* (H.M. Civil Court, First Hall, January 31st, 1902) that it is necessary to determine whether there has been dolus or culpa gravis on the part of the first Respondent. p. 86

The Court declared that there was in this case neither the one nor the other but only error scusabilis considering that the first Respondent had sought the advice of an Advocate before contravening the dispositions of the Testament.

16.—The Court held that the Appellant had an interest of his own in the suit, that of ensuring the observance of the obligations imposed by the Testator.

On the claim of the Appellant that as he was in the Vocation, and on the contravention of the dispositions of the Testament was entitled as from the date thereof to the aforesaid Primogeniture, the Court having analysed the relevant passage in the Testament, held that the intention of the Testator as expressed was to ensure the continuity of the Primogeniture in the line descending from the heir appointed by him, and it can never be interpreted that the Testator wished to penalise the whole line on the transgression of a holder of the Primogeniture. p. 87 p. 88

The Court rejected the Appellant's plea on the second claim and affirmed the judgment of the Civil Court thereon.

17.—The Court of Appeal also affirmed the Judgment of the Civil Court in declaring that the first Respondent had not incurred forfeiture but that he should incur forfeiture if he failed to observe the condition imposed by the Civil Court that he formally undertake within one month never more to bear the name of Viani together with that of Cassar Desain and that the Primogeniture should, in the event of non observance by the said Respondent of the Order of the Civil Court, devolve on the eldest son of the said Respondent. p. 95 p. 96

The Court of Appeal held that the said Judgment of the Civil Court was not ultra petita and therefore was not null and void.

RECORD.

p. 122

18.—On the 3rd day of June, 1946, His Majesty's Court of Appeal for the Island of Malta and its Dependencies granted final leave to appeal from the aforesaid Judgment to His Majesty's Privy Council.

It is respectfully submitted that this Appeal should be allowed for the following :—

REASONS.

(1) Because the Court of Appeal was wrong in Law in rejecting the Appellant's contention that the disposition in issue in the Suit was a condition resolutive and not a modus.

(2) Because the Court of Appeal was wrong in Law in holding that the first Respondent did not forfeit the Primogeniture by contravening the express disposition of the Testator.

(3) Because the Court of Appeal as a Court of Construction was in error in affirming the Judgment of the Civil Court imposing the condition that a time limit be given to the contravener within which to confirm the disposition before he incurs a forfeiture.

(4) Because the Court of Appeal was wrong in holding that the first Respondent was not affected by dolus or culpa gravis after contravening the disposition of the Testament with full knowledge of its terms for a period of more than twelve years.

(5) Because the Court of Appeal was in error in holding that the Appellant, as the only male in the Vocation alive on the date of the first Respondent's contravention, was not entitled to succeed according to the terms of the Testament.

(6) Because on the true interpretation of the Testament, the Court of Appeal should have declared a forfeiture in favour of the Appellant as from the date of the first Respondent's contravention.

(7) Because the issues in this case are between the Appellant and the first Respondent and the Court of Appeal was in error in declaring that the Primogeniture in the event of forfeiture by the said Respondent should pass to the said Respondent's male issue who had not been born when the contravention took place.

(8) Because the Court of Appeal was wrong in Law in holding that the Civil Court had not adjudged ultra petita in so declaring the succession to the Primogeniture.

RICHARD O'SULLIVAN.

W. D. ROBERTS.

No 16 of 1946

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL MALTA.

BETWEEN

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AND

THE MARCHESE JAMES CASSAR DESAIN VIANI AND OTHERS (*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANT

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