80, 1947

Appeal No. 76 of 1946.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL, MALTA.

BETWEEN

THE NOBLE GEORGE CASSAR DESAIN - *Plaintiff-Appellant,*

AND

THE MARCHESE JAMES CASSAR DESAIN VIANI,
ANTHONY CASSAR DESAIN } minors,
LAWRENCE CASSAR DESAIN }
children of the Defendant and the male children which may yet be begotten by the said Defendant, and
MARCHESA EVELYN CASSAR DESAIN VIANI, 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 RESPONDENTS.

RECORD.

1. This is an appeal from a judgment of the Court of Appeal of Malta, dated the 25th June, 1945, which affirmed the judgment of the Civil Court of Malta (First Hall) of the 6th May, 1944.

2. The questions raised on this appeal depend on the true construction of a formal notarial Will made by Gio. Batta Cassar of Valletta, Malta, and published on the 7th April, 1781, whereby he erected the "whole of his hereditary immovable property" in the Island of Malta and Gozo into a "perpetual primogeniture in the line, posterity and male descent" of his universal heir, the noble Salvatore Testaferrata. pp. 123—131

3. The most material clauses of this instrument of foundation of the Cassar Desain primogeniture are set out below in their English translation from the original text in the Italian language. For convenience of reference, the clauses in the said Will are numbered consecutively, although not so numbered in the original text.

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4. *Clause* 1 of the instrument of foundation directs that after the death of the said universal heir, the whole of the property shall devolve "by the aforesaid law and title of primogenitura, upon his first-born son and his first-born male descendants in the male line, lawfully and naturally born and begotten of lawful marriage, in the successive order of first-born male to first-born male in perpetuity," always excluding females and not otherwise.

5. *Clause* 4, after providing for the failure of issue of males descending from a male "of the first-born males of the said Salvatore and of males descending from a female," proceeds to state that

> "the collateral male nearest to him by consanguinity, whether descending from a male or a female, shall succeed to my primogenitura aforesaid. And then his male descendants *ex masculo* shall succeed thereto, and, on failure of these, his descendants *ex foemina*, in the successive order of first-born male to first-born male as above, always excluding females; and, where there are two or more collaterals in the same degree, I prefer the male descending from a male to the male descending from a female; and between several males descending from a male in the same degree, I prefer the eldest; and not otherwise."

p. 125. *Clause* 5:—

> "It is my will however that the first-born males descending from a female cannot and shall not succeed to the enjoyment and usufruct of my aforesaid primogenitura before they have completed the twentieth year of age."

Clause 6:—

> "And therefore until the last-named are born, and they attain and complete the twentieth year of age aforesaid, it is my will that the property of my said primogenitura shall be faithfully administered by their respective mothers, who shall be bound to invest the income therefrom, punctually each year, in the *Massa Frumentaria* (Dollar Investment Fund) and in the *Monte della Pieta'*, or in the purchase of immovables to the advantage and augmentation of the said primogenitura, subject to the retention, in that intervening period, for personal use, every year, from the income aforesaid, of the sum of five hundred *scudi* only; and not otherwise."

Clause 7:—

> "Then, in case of failure of all the males descending from the first-born son of the said Salvatore Testaferrata, that is to say, on failure of those descending from a male as well as those descending from a female, so that his male descent shall be totally extinguished and evacuated, it is my will that the second-born male of the said Salvatore Testaferrata, and then the third-born male, and their male descendants *ex masculo*, in perpetuity, shall succeed to my aforesaid primogenitura; and,

on failure of these, the male descendants who are or shall be born *ex foemina* (shall succeed thereto) in the successive order of first-born male to first-born male, as above, always excluding females, by the aforesaid title and law of primogenitura, and under the same conditions, namely, that of investing the annual income from the said primogenitura, until the first-born males *ex foemina* are born and attain and complete the twentieth year of age, as well as that of deducting every year the sum of five hundred *scudi* in favour of their mothers, as above stated; and not otherwise."

6. By *Clause* 8 of the instrument of foundation, the Testator provided that in the event of the total extinction of the male descent from males, as well as from females, of all the sons of the said Salvatore Testaferrata, or in the event of his death without issue (an event which has happened), then

> " I give and grant to the last holder of my said primogenitura or to the said Salvatore, the power to appoint, in his absolute discretion, as his successor to the said primogenitura, the one whom he may be pleased to choose of the male descendants from males or of females" of the three relatives named in Clause 8, but " under the same conditions above ordained and expressed and by the same title and law of primogenitura in the successive order of first-born male to first-born male in perpetuity, always excluding females; and not otherwise."

7. By *Clauses* 10 *and* 11 of the instrument, the Testator declared expressly that

> " it is my will that my said primogenitura, having made its ingress into one line, shall continue in that line until there shall be or may be males descending from a male or males descending from a female, and not otherwise" (Clause 10); p. 127.

and it was only

> "when a female has completed the fiftieth year of age that it can be said that males cannot be born of that female, so that, so long as that female has not completed the fiftieth year of age, the contrary is to be presumed always and in every case, and it is my will that this shall be observed as an invariable rule standing by itself respecting successions to the said primogenitura; and not otherwise." (Clause 11 of the instrument.)

8. *Clause* 12 of the instrument further declares that in the succession to the said

> " primogenitura, where the holder is predeceased by his first-born son, the grandson, that is to say, the first-born male of the deceased first-born, shall succeed, to the exclusion of the paternal uncle; and not otherwise."

9. *Clause* 13 of the instrument provides that the holder

> " of the said primogenitura, founded by me as above, shall always bear the surname Cassar Desain, without the admixture

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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 Desayn, on pain of forfeiture in the event of contravention; and, in that case, it is my will that, from that moment, he who should succeed as above after the death of the contravener, shall succeed to the said primogenitura; and not otherwise."

10. The Noble Salvatore Testaferrata, the first holder of the primo-
p. 28. geniture, died without issue on a date which is not disclosed in the Record, whereupon, by a judgment delivered by the Malta Civil Court (First Hall)
p. 133. on the 25th February, 1848, Filippo Giacomo Testaferrata, first-born son of Lorenzo Antonio Testaferrata and of Maria Teresa Cassar Testaferrata was adjudged to be entitled to the primogeniture. It appears that thereafter the said Filippo Giacomo renounced his surname of Testaferrata and assumed that of Cassar Desain under Clause 13 of the instrument of foundation.

11. On the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain who
p. 28. died, without issue, on the 26th August, 1870, and thereafter on his brother, the Cavaliere Marchese Lorenzo Antonio Cassar Desain. The latter left two sons surviving him: (1) Marchese Filippo Giacomo, who succeeded to the primogeniture on his father's death on the 14th February, 1886, and (2) Marchese Giorgio Riccardo (the father of the contending parties), who succeeded to the primogeniture on his brother's death, without issue, on the 8th October, 1906.

12. Marchese Giorgio Riccardo Cassar Desain died on the 21st July,
pp. 28—29. 1927, leaving him surviving: (1) Marchese James Cassar Desain, the first-named Respondent, who was born on the 29th May, 1907; (2) the Noble Philip Cassar Desain, who was born on the 27th November, 1908, and died, unmarried, on the 22nd July, 1927; and (3) the Noble George Cassar Desain, the present Appellant, who was born on the 19th February, 1915.

p. 160. The first-named Respondent was married on the 26th April, 1928, to Miss Evellina Cassar Torreggiani, and has issue living at the present
pp. 171—183. time—four daughters and two sons, viz.: (1) the Noble Mary Rose, born on the 25th April, 1934; (2) the Noble Anna, born on the 20th October, 1936; (3) the Noble Anthony, born on the 23rd September, 1938; (4) the Noble Lawrence, born on the 24th April, 1940; (5) the Noble Veronica, born on the 15th June, 1941; and (6) the Noble Christine, born on the 21st July, 1942.

13. Since his father's death in 1927, the first-named Respondent has held the Cassar Desain primogeniture, and is in the first limitation established by the instrument of foundation, viz., he is the first-born son of the last holder of the primogeniture from whom he descends through an unbroken line of males. The Appellant, on the other hand, is the third-born son of the last holder of the primogeniture and is therefore in the "collateral male line" with respect to the present holder.

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14. It appears from the exhibits filed by the Appellant in the present case, that the first-named Respondent assumed, in addition to the name Cassar Desain, the name "Viani," when signing some legal documents, the earliest of which is dated the 5th March, 1931, and the last, the 9th June, 1942. The name "Viani" is connected with another primogeniture founded in Malta on the 28th May, 1775, which was adjudged to Marchese Giorgio Riccardo Cassar Desain by a judgment of this Board, dated the 20th January, 1925. (No. 150/1923 [1925] A. C. 416.) Clause 3 of the deed of foundation of the Viani primogeniture reads as follows:—"All holders of the 'primogenitura' shall at all times bear in all public and private acts and in their signature the surname Viani in addition to their own and unite always to their own insignia the insignia of the Viani family." pp. 145—158.

15. It was in view of this provision that the said Marchese Giorgio Riccardo appointed his second son Philip to the Viani primogeniture by his Will dated the 21st February, 1927. Philip died, however, as already stated, on the 22nd July, 1927, before being able to be admitted to the Viani primogeniture and it was presumably as a result of his brother's death that the first-named Respondent acquired the belief that he had a right to assume the name "Viani" in addition to that of Cassar Desain. But before doing so, he consulted a leading advocate at the Malta Bar, Prof. E. C. Vassallo, LL.D., who advised him that he was entitled to do so. He also tendered oral evidence to the Court that since the beginning of the present action, he had discarded the name "Viani." On both these points the first Respondent's evidence remained uncontradicted and was accepted as such by both Courts in Malta. p. 144. pp. 26, 34, 93. p. 26.

16. The first objection to be raised by the Appellant against the assumption by his elder brother of the name "Viani" is contained in "a protest" filed by him in the Civil Court on the 13th August, 1934, *viz.*, over three years after the alleged breach by the Appellant of Clause 13 of the instrument of foundation of the present (Cassar Desain) primogeniture. In that protest, the Appellant stated that even if he had "no immediate right to the primogeniture, it is beyond doubt that, as one called to the primogeniture, he has the right, in so far as any future interests of his may be at stake, to insist upon the observance of the terms of the foundation." pp. 162—163.

On the 7th June, 1939, the Appellant filed a second protest in the same Court claiming as against the first-named Respondent that the Testaferrata primogeniture (which should be distinguished from the Cassar Desain and the Viani primogenitures) devolved upon him because the first Respondent was "the holder of other primogenitures which according to their respective terms of foundation, he cannot hold together with the Testaferrata primogenitura." There is no further reference in the Record as to the result of the protest so filed by the Appellant regarding the Testaferrata primogeniture. pp. 164—165.

17. As regards the present (Cassar Desain) primogeniture, no other action was taken by the Appellant until eight years afterwards, *viz.*, pp. 1—4.

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until the 4th September, 1942, when he started the present proceedings by a "Libel" filed in the Malta Civil Court (First Hall) praying that "this Honourable Court may be pleased to declare

"(1) that the Defendant, in view of the non-observance of the conditions laid down by the Testator, that he should bear the surname Cassar Desain without the addition of any other, and at the same time make use of the coat-of-arms of the same family, has contravened and infringed those same conditions, he having used and adopted, together with that surname, the surname Viani; and (2) that, therefore, the Defendant has, since 1931, or other approximate date, forfeited the right to the tenure of the said primogeniture, together with all the property with which it is endowed (Exhibit 'A'), or any other immovable appertaining thereto, as may be established during the proceedings; (3) that the Plaintiff, as the Defendant's and the Testator's next-of-kin, has the right, with effect from such date as shall be established, to the aforesaid primogeniture, in preference to the Defendant; and (4) that the Defendant be condemned to surrender the aforesaid primogeniture to the Plaintiff, together with the income which he has derived, or which, as a good *paterfamilias*, he should have derived therefrom—within a peremptory period of time to be given to him by the Court; or, in the event of the Defendant failing so to do, that the Plaintiff, by virtue of the same judgment, be put into possession thereof *ope sententia*."

18. By a decree given on the 21st January, 1944, the Civil Court ordered, on the first Respondent's application, that his two minor sons, the Noble Anthony and the Noble Lawrence, as well as the male children which may yet be born to the first Respondent, be called as parties to the present suit. By a further decree issued on the 12th February, 1944, the same Court appointed the first Respondent's wife, the Marchesa Evelyn Cassar Desain, curatrix of the said two minor sons as well as of the first Respondent's future male issue.

p. 23.

p. 24.

19. The judgment of the Civil Court of Malta (First Hall) was delivered on the 6th May, 1944, by the Honourable Mr. Justice Montanaro Gauci, who held that:—

pp. 27—35.

(1) the obligation imposed upon the holder of the primogeniture not to add any other name to the name of Cassar Desain was valid;

(2) that that obligation was to be considered as made *sub modo* and not *sub conditione;*

(3) that accordingly it was necessary, in order to bring about forfeiture of the property on the part of the holder and to put the substitute in possession therefor, that a summons be taken out and a lawsuit instituted so as to determine if the contravention was not the result of fraud or gross negligence, but simply of an excusable error, in which latter case the holder did not forfeit possession of the property, even though

forfeiture in respect of contravention may have been prescribed *ipso facto;*

(4) that the Court could not discern either fraud or gross negligence, but only an excusable error, on the part of the Defendant which, so long as the question was not finally determined by the Court and so long as the Defendant was not held answerable under a Court order for bad faith and delay, did not occasion forfeiture;

(5) that the Defendant had at present two sons and therefore those immediately next in the vocation were, first, the elder, and then the younger, of the two sons, and not the Plaintiff. Therefore if the Defendant failed to abide by the terms of the disposition of the primogeniture in question, it would not devolve upon the Plaintiff;

(6) that the Plaintiff was nevertheless within the vocation and was therefore entitled to see to it that the terms of the founder's dispositions were faithfully adhered to;

(7) that, on these grounds, the Defendant had not forfeited the primogeniture, but that he would incur such forfeiture if, within one month after the present judgment became *res judicata*, he failed to declare and formally to undertake by Note filed in the Record, never more to bear the name Viani together with the name Cassar Desain, whether in public or in private;

(8) that in the event of forfeiture as above, such forfeiture should have effect only from the expiration of the aforesaid period and that, in that case, the primogeniture shall not be deemed to devolve upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation, but upon the Defendant's elder son;

(9) that the Defendant's other claims should be disallowed, and, in view of the circumstances of the case, each party should bear his own costs and that Registry fees be paid by the Defendant.

20. Against this judgment, the Appellant entered an appeal on the 13th May, 1944, to the Court of Appeal of Malta (His Honour Sir George Borg, C.J., the Hon. Mr. Justice Ganado and the Hon. Mr. Justice Camilleri) which, on the 25th June, 1945, dismissed the Appellant's appeal and affirmed the judgment of the Court below. p. 36. pp. 81—96.

21. In disallowing the Appellant's appeal, the Court of Appeal held that:—

(1) the words used by the founder in the forfeiture clause that the person substituting the holder is to be " he who should succeed as above, after the death of the contravener and not otherwise," read with the other clauses in the Will, should be construed as referring to the situation that would arise on the death of the holder, who had incurred forfeiture;

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(2) that the instrument of foundation clearly showed the founder's predilection for the primogenial line and his wish that once the primogeniture made its ingress into a line, it should continue in that line until it became certain that there were no males descending from a male and no males that may be born of a female in that line, and that so long as there was that possibility, the primogeniture could not devolve upon a collateral line;

(3) that the said forfeiture clause constituted a " modus " and not a resolutive condition. In so holding, the Court of Appeal followed and approved the leading case of *Caruana* v. *Strickland* (1902) reported in the Collection of Maltese Judgments, Vol. 18, Part II, p. 106;

(4) that the Court agreed with the finding of the Court below that the Respondent, in using the name " Viani " in addition to that of " Cassar Desain," incurred an excusable error only and was not guilty of any fraud or gross negligence, and should, therefore, be given the opportunity to conform to the provision regarding the use of names contained in the instrument of foundation, within a specified time-limit;

(5) that the Court below was right in declaring that if the Respondent incurred forfeiture by not conforming to that provision within the time-limit laid down by the Court, the primogeniture should not go to the Appellant, who had proved no title thereto, but to the first Respondent's first-born son;

(6) that the Court below in making that declaration did not adjudge *ultra petita;*

(7) that the costs of the appeal (with the exception of that part of the judgment relative to the plea of *ultra petita* in which each party should bear his own costs) should be borne by the Appellant and that the Registry fee should be paid by the parties in equal moieties.

p. 103. 22. By a Minute filed by the first-named Respondent in the Court of Appeal on the 23rd July, 1945, he duly declared and formally undertook " no longer to bear the name ' Viani ' together with the name ' Cassar Desain,' whether in public or in private," in strict compliance with the judgment of the Civil Court referred to in paragraph 19 hereof.

23. The Respondents humbly submit that there is no room for doubt as to the proper devolution of the primogenial property and as to the first-named Respondent being entitled to hold the primogeniture. He is, in fact, in the first limitation called by the founder, to wit " the first-born son of the first-born male descendant in the male line, lawfully and naturally born and begotten of lawful marriage, in the successive order of first-born male to first-born male in perpetuity."

24. The Respondents, further, submit that the obligation imposed by the founder that " the holder of the primogeniture should always bear

the surname " Cassar Desain " without the admixture of any other surname " is not a resolutive condition, but a " modus " and that this interpretation is supported by the instrument of foundation read as a whole and is also in accordance with Maltese law and jurisprudence. It therefore follows that the alleged forfeiture of the primogeniture could not occur *ipso jure*, but solely from the day the Court held that it would occur if the first-named Respondent failed to conform with the Court's order to renounce the name " Viani " within a specified period of time. The said Respondent has, in fact, duly complied with that order within the time limit laid down by the Court.

25. The Respondents, further or in the alternative, submit that, in any event, the Appellant's claim to the primogeniture is excluded by the second-named Respondents (the first-named Respondent's male issue) who are in the first limitation as against the Appellant's line, which is in the collateral or second limitation.

26. The Respondents in the further alternative, submit that a primogeniture is in the nature of a trust or a fidei-commissum under which a person within a substituted vocation cannot claim an interest in himself before making an express declaration of his intention to succeed to the primogeniture. The Appellant's declaration of such an intention was only made at a time when he was already barred by the existence of the first Respondent's issue.

27. The Respondents submit that the judgment of the Court of Appeal of Malta is right and ought to be affirmed and this appeal dismissed with costs for the following, among other,

REASONS:—

1. Because the first-named Respondent is in the first limitation and the present representative of the primogenial line according to the order of vocation established by the instrument of foundation and is therefore entitled to hold the primogeniture.

2. Because the Appellant is in the second limitation or " collateral " line and therefore has no right to the present enjoyment of the primogenial property or to any part of it.

3. Because, in accordance with the well-established rules of Maltese law and jurisprudence, the provision contained in Clause 13 of the instrument of foundation that the holder of the primogeniture shall not bear any name other than " Cassar Desain " is a " modus " and not a resolutive condition.

4. Because, further or in the alternative, the said provision is controlled by the actual words used by the founder in the main or dispositive parts of the instrument of foundation and cannot have the effect of destroying the

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whole character of the primogeniture or of penalising the first Respondent's issue in the primogenial line.

5. Because any other interpretation would be inconsistent with Clause 10 of the instrument of foundation under which the primogeniture "having made its ingress into one line must continue in that line."

6. Because in the further alternative, a deviation from one line to another line requires an express declaration of an intention to succeed to the primogeniture by the person in the substituted line.

7. Because the Appellant's declaration of such an intention was made at a time when his claim was already excluded by the existence of the first Respondent's eldest daughter under Clause 11 of the instrument of foundation.

8. Because, in any event, the Appellant's claim is excluded by the first-named Respondent's male issue.

9. Because the concurrent findings of fact and of law of both Courts in Malta are correct.

C. J. COLOMBOS.

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BETWEEN

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AND

THE MARCHESE JAMES CASSAR DESAIN VIANI AND OTHERS - — *Defendants-Respondents.*

CASE FOR THE RESPONDENTS.

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