80, 1947

In the Privy Council.

On Appeal from the Court of Appeal, Malta.

BETWEEN

THE NOBLE GEORGE CASSAR DESAIN

Appellant (Plaintiff).

AND

THE MARCHESE JAMES CASSAR DESAIN VIANI AND OTHERS

Respondents (Defendants).

RECORD OF PROCEEDINGS

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DOCUMENTS

In

H.M. CIVIL COURT

First Hall.

In the Privy Council.

On Appeal from the Court of Appeal, Malta.

BETWEEN

THE NOBLE GEORGE CASSAR DESAIN

Appellant (Plaintiff).

AND

THE MARCHESE JAMES CASSAR DESAIN VIANI AND OTHERS

Respondents (Defendants).

RECORD OF PROCEEDINGS

TRANSLATION

No. 1.

Plaintiff's Libel

His Majesty's Civil Court,

First Hall.

The Noble GEORGE CASSAR DESAIN

vs.

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.

No. 1.
Plaintiff's Libel.
—*Continued.*

Libel of the Noble Giorgio Cassar Desain.

Respectfully sheweth:—

That the Noble Dr. GioBatta Cassar, Cleric, by Testament opened and published by Notary Paolo Vittorio Giamalva on the 2nd April, 1781, founded a perpetual primogeniture in favour of the lawful male line descending from the heir instituted and appointed by him, the Noble Salvatore Testaferrata, and subjected thereunto the urban and rural property mentioned in the annexed Nota (Exhibit "A"), besides such other property as may be established during the proceedings;

That the Noble Salvatore Testaferrata aforesaid died without issue, in consequence of which, the primogeniture, by judgment given by Her Majesty's Civil Court, First Hall, on the 25th February, 1848, devolved upon Filippo Giacomo Testaferrata, first-born son of Maria Teresa Cassar Desain — whereupon the holder renounced the surname Testaferrata, and assumed that of Cassar Desain, in accordance with the dispositions of the Testator who ordered:— "I will then and expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed after the death of the contravener shall succeed to the said primogeniture"; —

That this disposition thus made by the Testator is in the clearest terms and the penalty attaching thereto in respect of contravention admits of no question and of no remedy; —

That after the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain, who died, without issue, on the 26th August, 1870, and then, after the death of the last-named beneficiary, the primogeniture devolved upon the Cavaliere Marchese Lorenzo Antonio Cassar Desain, on whose death, on the 14th Febuary, 1886, it devolved upon his first-born son, the Marchese Filippo Giacomo Cassar Desain, and, after the latter's death, which took place on the 8th October, 1906, without issue, upon the Marchese Giorgio Riccardo Cassar Desain, the father of the contending parties, who died on the 21st July, 1927, survived by his three sons, namely, the Defendant, who was born on the 29th May, 1907, the Noble

Filippo Cassar Desain, who was born on the 27th November, 1908, and the Plaintiff, who was born on the 19th February, 1915; —

That by judgment given by His Majesty's Privy Council on the 20th January, 1925 (No. 150/1923), the primogeniture Viani, founded in the records of Notary Paolo Vittorio Giammalva on the 28th May, 1775, was adjudicated in favour of the said Marchese Giorgio Riccardo Cassar Desain who, therefore, at the time of his death, which took place on the 21st July, 1927, held two primogenitures, that is to say, the primogeniture Cassar Desain, at issue in the present suit, and the primogeniture Viani; —

That, in his Testament of the 21st February, 1927, published by Notary Dr. Carmelo Farrugia, the said Marchese Cassar Desain nominated his son, Filippo, as the holder of the primogeniture Viani, and declared that his one and only reason for so doing was that his first-born son, the Defendant, had the right to the primogeniture Cassar Desain; —

That, on the death, on the 22nd July, 1927, of the said Filippo Cassar Desain, the brother of the contending parties, the primogeniture became vacant; —

That the Defendant, after the death of the said Filippo Cassar Desain, assumed the surname Viani, besides the surname Cassar Desain, whether in instruments in public form or under private signature — and this contrary to the precise order of the Testator — as established by the documents annexed to the present Libel, and several others which the Plaintiff reserves producing at a later stage; —

That, on the 13th August, 1934, the Plaintiff entered formal Protest against the illegal action of the Defendant, enjoining him to surrender to him the property appertaining to the primogeniture Cassar Desain, which he had forfeited by reason of default in complying with the explicit order of the Testator, to the effect that the holder, on pain of forfeiture, shall not bear the surname Cassar Desain admixtured with any other surname; —

That there is no room for any doubt as to the person who is entitled to the primogeniture Cassar Desain: the words of the foundation are clear, and the founder laid down the penalty of forfeiture against the holder, and in favour of he who, on the holder's death "when the holder incurrs forfeiture", would succeed him — and succeeds him, as stated by the founder, "from that moment" **(fin d'allora).**

No. 1.
Plaintiff's Libel.
—*Continued.*

That, at least since 1931, the Defendant has been regularly using the surname Viani in addition to that of Cassar Desain, as established by the documents produced, and, therefore, at that time, the one and only person entitled as consanguineous next-of-kin was the Plaintiff, his only brother ;—

Wherefore the Plaintiff, tendering the undermentioned security for costs, respectfully prays that this Honourable Court may be pleased to declare: (1) that the Defendant, in view of 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 thereform — 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 sententiae.**

And Plaintiff prays that justice be thus administered according to law.

(signed) G. PACE, Advocate.

(signed) ROB. DINGLI, Legal Procurator

This fourth of September, 1942.
Filed by Rob. Dingli, L.P., with twenty-two Exhibits.

(signed) CARM. VELLA,
Dep. Registrar.

No. 2.

List of the Exhibits produced with the Libel

Exhibit "A" — True copy of the Instrument of Foundation enrolled in the Records of Notary P. V. Giammalva on the 2nd April, 1781 — saving the production of an authenticated copy as soon as the original deeds are recovered from the debris of the Notarial Archives.

Exhibit "B" — A list of the primogenial property.

Exhibit "C" — Genealogical table.

Exhibits "D", "E", "F", "G" and "H" — Death Certificates of the Marchese Riccardo Cassar Desain and Philip Cassar Desain; and Birth Certificates of the contending parties and of Philip Cassar Desain.

Exhibit "I" — Copy of the Testament of the Marchese Riccardo Cassar Desain, the father of the contending parties.

Exhibits "J", "K", "L", "M", "N", "O", "P", "Q", "R". "S", "T", "U", "V" — Authenticated copies of instruments in public form, wherein the Defendant signed his name as Cassar Desain Viani.

The Plaintiff makes reference to the Protest entered on the 13th August, 1934, and reserves the right to produce other documents wherein the Defendant consistently assumed the name of Cassar Desain Viani.

The Plaintiff also makes reference to the authenticated copy of the Testament (whereof Exhibit "A" is a true copy) filed at fol. 5 of Record No. 137A/1849 (H.M. Court of Appeal).

(signed) G. PACE, Advocate.

ROB. DINGLI, Legal Procurator.

No. 3.
Defendant's
Answer.

No. 3.
Defendant's Answer

In His Majesty's Civil Court,
First Hall

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Defendant's Answer.
Respectfully sheweth:—

Firstly, the Plaintiff has no interests of his own in bringing the present action, and much less in demanding Defendant's forfeiture of the Cassar Desain primogeniture. As the instrument of foundation makes clear, that primogeniture, though it may possibly devolve upon Defendant's children, can never devolve upon the Plaintiff.

The Plaintiff himself betrayed doubts in regard to the alleged right he is now exercising when, in the Protest entered on the 13th August, 1934, he thus expressed himself: "Even if the complainant" — the Plaintiff in the present case — "has no immediate right to the primogeni-"ture, 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, it being possible that, later "on, a male will be born of the said female" — Defendant's daughter. And he ended by calling upon the Defendant to relinquish the property of the primgeniture to the son yet to be born of Defendant's daughter should it ever be determined that that son is entitled to that primogeniture (Exhibit "A").

Furthermore, and without prejudice to the foregoing, forfeiture of the primogeniture does not occur **ipso jure,** but in pursuance of a Court judgment, especially when the prohibition that has given rise to the claim for forfeiture is not a **condition** but simply "modus". Consequently, the Defendant is entitled to justify his actions, and to obtain from the Court, if necessary, a period of time within which to conform to the terms of the foundation.

Wherefore, the Defendant prays that Plaintiff's claims be dismissed with costs.

(signed) A. MAGRI, Advocate
G. MANGION, Legal Procurator.

The Fourteenth September, 1942.
Filed by G. Mangion, L.P., with one Exhibit.
(signed) V. PANDOLFINO, Dep. Registrar.

No. 4.

No. 4. Plaintiff's Minute filing Note of Submissions.

Plaintiff's Minute Filing Note of Submissions

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

Plaintiff's Minute.

The Plaintiff hereby produces the annexed Note of Submissions (Exhibit "A").

(signed) G. PACE, Advocate.

This first of February, 1943.
Filed at the Sitting by Dr. G. Pace with a Note of Submissions.

(signed) J. CAMILLERI CACOPARDO,
Deputy Registrar.

No. 5.

No. 5. Plaintiff's Note of Submissions.

Plaintiff's Note of Submissions

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

Plaintiff's Note of Submissions.
Respectfully sheweth:—

1. On the plea of lack of interest tendered by the Defendant:

The Plaintiff, by the Protest entered on the 13th August, 1934, called upon the Defendant to relinquish to him the property of the primogeniture in question and to desist drawing in his own behalf the income deriving therefrom,

No. 5. Plaintiff's Note of Submissions. —*Continued.*

and this on the ground that he had transgressed the order made by the founder to the effect that, on pain of forfeiture, the holder of the primogeniture had to bear the name Cassar Desain **without the admixture of any other surname** and, at the same time, to make use of the family coat-of-arms.

The defendant, systematically and intentionally, has been using the name Viani in addition to that of Cassar Desain since the year 1930. The reason is that he is also the holder of the Viani primogeniture, founded by the Baron Giovanni Battista Viani, and his sisters, Angelica, Madalena and Olimpia, in the records of Notary Paolo Vittorio Giammalva of the 28th May, 1775 — since, according to the instrument of foundation of that primogeniture, the holders thereof, on pain of the forfeiture of a year's income, must always, whether privately or publicly, bear the name Viani together with their own surname and add their own insignia to that of the Viani family.

In 1934, when the Plaintiff filed the aforesaid Protest, the Defendant still had no children, and, according to the instrument of foundation, in the event of contravention of the disposition that the holder must bear only the name of Cassar Desain, **then, and from that moment,** he who should succeed after the death of the contravener, shall succeed to the primogeniture.

It is beyond doubt that, if the Defendant had died in 1934, "then" the successor to the primogeniture, according to the instrument of foundation, would have been the Plaintiff; and therefore Plaintiff's interest in the suit is obvious.

The fact that, after 1934, children were born to the Defendant who are likewise called to the primogeniture does not lessen Plaintiff's interest in instituting the present suit.

The Defendant, besides the primogeniture Cassar Desain and the primogeniture Viani, holds also the Testaferrata primogeniture, founded by the Reverend Canon Giuseppe Testaferrata in the records of Notary Dr. Cristoforo Frendo of the 15th October, 1804, and, according to the instrument of foundation of that primogeniture, the two primogenitures Testaferrata and Viani must never meet in one and the same person, excepting only in the case of failure of other descendants of the Baron Don Giuseppe Testaferrata. This primogeniture became vacant with the death of the Noble Lorenzo Antonio Testaferrata and is at present being held by the Defendant.

Consequently, the Plaintiff, as one who is seeking to enforce his rights against the Defendant in respect of the possession of the Cassar Desain primogeniture, cannot be turned back on the alleged ground of lack of interest on his part.

It is a settled principle that he who is within the vocation derives his rights directly from the founder, and not from the last holder — and that as one who is within the vocation he has the right to insist upon the observance of the founder's dispositions.

His Majesty's Privy Council, in re "Marquis R. Cassar Desain v. the Noble Pietro Paolo Testaferrata Moroni Viani" (No. 150/1923), determined on 29th January, 1925, held on a similar plea put up in that suit:— "Their decision means " that, on failure by a beneficiary from whatsoever interested " motive to claim primogenial property, that property is at " the mercy of any person whether within or without the " vocation who succeeds in obtaining possession of it. He may " hold it as against all comers, even those next in the vocation " — freed and discharged from all primogenial obligations, " precise and serious as in this case they are. A more complete " frustration of founder's intentions as set forth in such an " instrument of foundation as that here in question can hardly " be conceived ".

That the eventual rights of third parties are no bar to the claim of the Plaintiff in this suit is borne out by the following authoritative opinions:—

" Quando tale jus pendet a voluntate tertii, qualia sunt " jura fedecommissària, quae ad aliquem non spectant nisi illo " volente, hoc enim casu, quod non nisi ipso tertio volente, est " exclusivum juris agenti, illi non opponente, opponi nequit ". (De Valentibus. De Ultimis Voluntatibus 1744, Tom. II Part I, Vol. XXVIII p.307).

Similarly, Peregrinus, De Fedecommissis (1599) art. 41, p. 576 (Edit. 13a, 1725), says:—

" Ubi distinguit, quondam esse jura, nobis facto, et re " ipsa quaesita et adversus haec mala fides impedit " praescriptionem, — quaedam vero jura esse quae demum " nobis competunt, facta declaratione, ut in casu jure " emphyteutico, et in fideicommissis et legatis quae effectuali- " ter non acquiruntur, nisi praevia animi declaratione, et " volentibus legataris et fideicommissariis ".

Joannes Torre Variarum Juris Quaestionum (1705 Tom. I Tit. II p. 465):

No. 5. Plaintiff's Note of Submissions —*Continued.*

"Et tale non potest esse jus fideicommissarii, cum "requiratur eum velle succedere et in puncto, quod propterea "possessor non valeat excipere de jure fideicommissii, tertio "competenti".

Any rights on the part of Defendant's children, therefore, cannot upset the present proceedings, in which the Plaintiff is seeking to enforce his claims against the self-same Defendant, unlawful holder of the primogeniture in question.

2. On Defendant's forfeiture of the possession of the Cassar Desain primogeniture.

It is a settled principle that, in the matter of interpreting testamentary dispositions, it is the clear will of the Testator that must prevail above all, and the Testator, as the **moderator et arbiter rei suae,** has the right, so long as he does not go against the law, to dispose as and how he thinks best, even if the conditions may appear vexatious or exaggerated. The will of the Testator is that expressed in the Testament, and this, therefore, is the law that must govern the heir's possession of the property.

The disposition runs as follows:— "I will then and expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed as above after the death of the contravener, shall succeed to the said primogeniture".

At the time that that condition was imposed, it was the custom here in Malta to lay down the obligation that the heir to the testator's property should bear the testator's name, and this obligation recurs in the three primogenitures which the Defendant is unlawfully holding at present. In the Cassar Desain primogeniture, the obligation, as stated above, is clear, and the surname is to be borne without the addition of any other. The Viani primogeniture carries with it the obligation of taking the surname Viani together with the holder's own surname, and the Testaferrata primogeniture stipulates that the primogeniture must not be held together with any other and that the holder must bear only the surname Testaferrata.

It clearly ensues, therefore, that the defendant is not using the name Viani, in addition to that of Cassar Desain,

No. 5.
Plaintiff's Note of Submissions.
—*Continued.*

either through error or ignorance. In fact, he assumed the name Viani when he succeeded his father, and he continued to use it systematically in instruments in public form as well as in instruments under private signature — exactly because he knew that if he did not do so he would forfeit the income from the Viani primogeniture.

That the Defendant has incurred forfeiture is therefore beyond doubt.

The condition of bearing the surname without the admixture of any other is a condition true and simple — and not a "modality". And the Plaintiff will file a further Note of Submissions on this point at the next Sitting.

(signed) G. PACE, Advocate.

1st February, 1943.

No. 6.

No. 6.
Plaintiff's further Note of Submissions.

Plaintiff's further Note of Submissions

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

Plaintiff's further Note of Submissions.
Respectfully sheweth:—

It is not illicit that the founder of a primogeniture, as a condition governing the possession of the property attaching thereto, should impose the obligation that the holder shall bear the founder's name, whether by itself or together with the holder's own name.

As stated by De Valentibus (De contractibus, Vol. XXVI, No. 77) and others: "conditio etenim assumendi cognomen "et insignia testatoris justissima et honesta reputatur et quod "ea sit ad unguem observanda tradunt Doctores".

"Ubi quod talis conditio justissimam continet causam "conservandae scilicet memoriam defuncti".

No. 6. Plaintiff's further Note of Submissions —*Continued.*

" Tangit quidem omnes ea cura nominis sui proferendi, et " testator, morti proximus, et de morte cogitans, dum sui " definitionem naturaliter refugit, gaudet si vel in nomine " supervivat. Et pervetustum hunc fuisse morem relinquendi " haereditatem cum tali onere, probatur ex eo quod de Octavio " Augusto scribit Svetonius, in ejus capitulo ultimo, ibi " Haeredes instituit primus Tiburtium ex parte dimidae et " sextante Liviam ex parte tertia, quos et ferre nomen suum " jussit ".

Similarly Cicero pro Archia:
" Commune est desiderium non cum vitae tempore demetien- " dam esse commemorationem nominis nostri, sed cum omni " posteritate adaequandam ".

In the case at issue, the founder's will is clear and there can be no doubt as to his intentions:—

" I will then and expressly ordain that the holder of the said " primogeniture, founded by me as above, shall always bear " the surname 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 " should succeed as above after the death of the contravener, " shall succeed to the said primogeniture, and not otherwise ".

The better to understand it, this disposition should be compared with that in the instrument of foundation of the primogeniture Viani, which is being held by the Defendant together with the primogeniture Cassar Desain. In fact, in the case of the Viani primogeniture, founded on the 28th May, 1775, in the records of Notary Paolo Vittorio Giammalva, the founder willed and ordained that, on pain of forfeiting one year's income from that primogeniture, the beneficiaries "are bound ever and always to bear the name Viani in addition to their own in public and private instruments and in their signature, and to add their own insignia to the insignia of the Viani family ".

It is a settled principle that **"ubi nulla ambiguitas verborum sit non est facienda voluntatis quaestio".** Therefore, the first thing to be established in the case at issue is whether, once the founder of the Cassar Desain primogeniture had ordered that he who wished to be the holder thereof should "always bear the surname Cassar Desain, without admixture of other surnames", it were possible at any time for the Defendant — who, on the death of his father, the

Marchese Riccardo, inherited the Viani primogeniture, and began to style himself Marchese Cassar Desain Viani — to be the lawful holder of the Cassar Desain primogeniture, when this primogeniture, from the moment the contravention occurred, had devolved upon the Plaintiff who, at that moment, in terms of the instrument of foundation, was the only claimant entitled thereto, as "male from male".

This case cannot be compared with that where the founder has ordained that the holder shall use the founder's name in addition to his own, inasmuch as, in this latter case, the holder may act in good faith for some time, or plead an involuntary omission on his part, which will perhaps entitle him to the benefit of a degree of relief — such as when, for instance, the holder alternately uses his own name, and his own together with that of the founder. In such cases, the Court, satisfied that the contravention has been momentary and involuntary, may well mitigate the consequences attendant upon contravention by according a measure of equitable forbearance, as was done by this Court in the case referred to in Vol. XVIII p. 106.

The present case, however, admits of no such benefit. In fact, as rightly held by His Majesty's Court of Appeal in re "Page v. Stagno Navarra" (Vol. XXIV, p. 461) — "to form a just appreciation of the true significance and real purpose of an instrument recording the last wishes of a Testator, including that wherein the foundation of a primogeniture is ordained, it is necessary to examine the terms and the order of the various dispositions so as to penetrate into the mind of the Testator, since it is primarily from his own words that his intentions and his wishes may and must be inferred. It is not permissible to go beyond the meaning of the words that he has used, unless it be manifest that what he wanted and intended was something different to what his words convey. There should be no questions regarding principles and text-books on the subject of **fideicommissa** when the Testator's words are clear. It is only in those cases where the dispositions are mute, or obscure or ambiguous, or incapable of conveying their true meaning, that he who has to make the interpretation thereof may have recourse to such principles and text-books, and in such cases it is to be presumed that the Testator himself had wished to make reference thereto".

The founder of the Cassar Desain primogeniture expressed his wishes in words that leave no doubt that the Defendant is to be considered as having forfeited the

No. 6. Plaintiff's further Note of Submissions —*Continued.*

primogeniture, for the Defendant, with the precise intention of disregarding the dispositions thereanent, assumed the name Viani together with that of Cassar Desain — a surname which, after all, he was obliged to assume so as to retain the income from the Viani primogeniture.

It cannot be held that the Defendant so acted without bad intent, or **dolus,** or **culpa gravis** or because of a mistaken view of his rights. In fact:

i). the contending parties are the sons of the Marchese Riccardo who bore the surname Cassar Desain. The Marchese Riccardo Cassar Desain was the son of the Marchese Cavaliere Lorenzo Antonio Cassar Desain, who was the son of the Marchese Filippo Giacomo, who, as the son of Lorenzo Antonio Testaferrata, first bore the name of Testaferrata, and then, on succeeding to the Cassar Desain primogeniture, relinquished his own name of Testaferrata, in obeisance to the wishes of the founder, and assumed that of Cassar Desain by itself; and his descendants, mentioned above, continued to bear that name.

ii). By the Protest lodged on the 13th August, 1934, the Defendant was formally warned that he had no right to the primogeniture in question, inasmuch as he had failed to observe the precise dispositions of the Testator; this notwithstanding, he continued to make use of the name.

In the humble opinion of the Plaintiff, therefore, it is beyond doubt that the Defendant is to be held as having forfeited the Cassar Desain primogeniture.

In the event of forfeiture, the Testator ordered that, from that moment, the primogeniture should go to him who would have succeeded the holder after his death, in accordance with the rules of succession ordered in the instrument of foundation.

In a previous Note of Submissions, it was pointed out that, according to recent judicial practice, as established in a judgment given by His Majesty's Privy Council (No. 150/1923), the rights of the Plaintiff derive to him **ipso jure,** and that, before disputing the right of the holder, it was not necessary for the Plaintiff to enquire whether anyone else had any rights preferable to his own. If any party has a right, and, in the event that he has such right, fails to come forward, the ensuing position is as described by the Supreme Court: " on failure of a beneficiary from whatever interested

" motive to claim primogenial property, that property would " be at the mercy of any person whether within or without the " vocation who succeeds in obtaining possession of it. He may " hold it as against all comers, even those next in the vocation " — freed and discharged from all primogenial obligations, " precise and serious as in this case they are. A more serious " frustration of founder's intentions as set forth in such an " instrument of foundation as that here in question can hardly " be conceived ".

This apart, the Plaintiff came into the right of holding the primogeniture in preference to the Defendant on the day the Defendant succeeded to and simultaneously took possession of the Viani primogeniture, that is to say, on the death on the 21st July, 1927, of the Marchese Riccardo Cassar Desain, at which time the Defendant had no children. According to the Testator, default on the part of the beneficiary brings about the same position as that occurring upon his death, and therefore the Testator said: "succeeds from that moment". Now, if it had so happened that the Defendant had died on the day mentioned above, without children, the primogeniture would naturally have gone to the Plaintiff as "male from male".

This is the only way in which the words of the Testator — "he who should succeed after the death of the contravener shall succeed from that moment, and not otherwise" — can be understood. In fact, it is not possible to interpret the founder's intentions in this respect as meaning that, in order to determine upon the next successor to the primogeniture, one has to wait upon events to see whether the defendant will have any children, and whether such children will be living after his death. An interpretation such as this would render nugatory the forfeiture ordained and thus stultify the wishes of the Testator who wanted the primogeniture to be held by a beneficiary who would ever and always bear the Testator's name.

The Plaintiff, therefore, holds that, in this case, no plea respecting want of interest should come from the Defendant, seeing that, in this case, the only issue at stake is whether, as between the Plaintiff who is claiming the primogeniture, and the Defendant who has it in his possession against the will of the Testator, the former is to be preferred to the latter, or vice-versa. It does not concern the merits of the present case whether or not there is anyone else who has a better right than the Plaintiff. That is something to be

No. 6. Plaintiff's further Note of Submissions —*Continued.*

discussed in another lawsuit, if there should be another lawsuit.

As regards the income that has unlawfully derived to the Defendant, there is not the least doubt that the Plaintiff is entitled thereto from the date of the Protest aforesaid, that is, the 13th August, 1934, inasmuch as it was from that date that the Defendant was held answerable for bad faith — and he had no right to that income.

(signed) G. PACE, Advocate.

Filed on 3rd May, 1943.

No. 7. Defendant's Minute producing Note of Submissions.

No. 7.

Defendant's Minute producing Note of Submissions.

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

Defendant's Minute.

The Defendant hereby produces the annexed Note of Submissions, marked "X".

(signed) A. MAGRI, Advocate.

This eighteenth June, 1943.

Filed at the Sitting by Dr. A. Magri with a Note of Submissions and three Exhibits.

(signed) J. CAMILLERI CACOPARDO,
Deputy Registrar.

No. 8.

No. 8.
Defendant's Note of Submissions.

Defendant's Note of Submissions

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

Defendant's Note of Submissions.
Respectfully sheweth:—

The Plaintiff has no interests of his own at stake in the present case, for even if the Defendant were to forfeit the Cassar Desain primogeniture, that primogeniture would not devolve upon the Plaintiff, but upon Defendant's children. Interest must be actual and direct — never eventual or hypothetical.

In order to lay claim to an interest in the issue, however, the Plaintiff alleges that, once forfeited by the Defendant, the primogeniture would go to him in accordance with the founder's dispositions — "from that moment, he who should succeed **as above** after the death of the contravener, shall succeed to the said primogeniture, **and not otherwise".** It is therefore necessary first of all to interpret and apply the rules of the Cassar Desain foundation, and, more particularly, the dispositions preceding **("as above")** the penalty clause in question.

According to these rules, the primogenial line **ex masculo** is to be followed as far as possible: "It is my will that the whole of my hereditary immovable property aforesaid.... shall.... by the law and title of primogeniture be enjoyed by the said Salvatore, my universal heir, throughout his lifetime.... and that, after his death, it shall, by the aforesaid law and title of primogeniture, devolve 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".

In the event of the Testator's heir having no male, but only female children, "the first-born male who is or **who shall** be born of his first-born female shall succeed to the said primogeniture"; and if his first-born daughter will have no male children "the first-born male who is or shall be born of

No. 8. Defendant's Note of Submissions. —*Continued.*

his second-born female, and then of his third-born female, shall succeed.....".

It was only in the absence of children or descendants from the first-born child, male or female, that the Testator wanted "that the said primogeniture shall devolve upon the second-born male of the said Salvatore Testaferrata and then upon his third-born male, and their descendants males from males, in perpetuity".

The founder attached great importance to the prerogative of the line. — "Declaring expressly that it is my will that the said primogeniture, **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 he went so far as to ordain: "that it is 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, as 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 primogeniture."

The founder even foresaw the case where there would be no first-born males, **ex masculo** or **ex foemina,** and it was only in that case that the primogeniture was to devolve upon the **collateral male nearest to him** by consanguinity, whether descending from a male or a female.

This guiding principle was reaffirmed by the Testator when he declared: "the descendant of the holder of the said primogeniture **shall always be preferred to his brother conjunctus."**

The foregoing makes it obvious that, so far as he could, the founder accorded preference to the primogenial line, even at the cost of calling the descendants **ex foemina.**

In this respect, the founder merely adhered to the principle that has been enshrined in judicial practice: "In the absence of rules to the contrary laid down by the founder, primogenitures must be deemed regular, so that a female, if she be the daughter or descendant of the last holder, must be preferred to the brother of the last holder". (Collection of Judgments, XIV, p. 285; and XXIV, I, 461, quoted by the Plaintiff). And we find the text-books upholding the same principle: "Nihil porro interest, utrum testator ad fideicom-" missum vocaverit **solos masculos,** an sub conditione

" quosdam invitaverit, si gravatus vel primo vocatus cum " **solis filiabus** moriatur: in utroque casu fideicommissi petitio " et adjudicatio differtur, **si adsint filiae,** ex quibus masculos " procreari possint: quia in utroque eadem viget ratio, propterea " idem ius servari debet " (Richeri, Jurisprudentia Universalis, Vol. II, Lib. II, No. 9630).

The case of forfeiture envisaged by the Plaintiff cannot be deemed on a par with that of the death of the Defendant, for whilst in the latter case there would be no further possibility of his begetting children, in the former case, that possibility would still persist even after forfeiture has been incurred. Thus Demolombe: "If there is still no one (i.e. within the vocation) at the time forfeiture is pronounced against the defaulting beneficiary, substitution does not lapse, as it would in the case of death: this is evident". (Cod. Civ. Vol. XI, no. 622, 1879 Edition, Naples). In fact, it was the founder's will that, so far as possible, the line would not fork out into another branch, and that, on the contrary, it should continue in progress in preference to and to the exclusion of others "so long as there are or may be males descending **from males,** or males descending **from females".** And, always with that possibility in view, the founder wanted that one should wait until the female descendant completed the fiftieth year of age, when presumably her procreative capacity was to be deemed at an end.

Without prejudice to what follows, if the Defendant, at the time service was made upon him of the Protest of the 13th August, 1934, had no other children but a daughter, the fact would have sufficed to preclude Plaintiff's right; and, after all, he still had the possibility of begetting other children, as he did in actual fact — and therefore his alleged forfeiture of the primogeniture would not have prejudiced his children and much less cause the loss of the rights deriving to them from the instrument of foundation:

a) Because his children succeed to the founder **ex jure proprio,** and since forfeiture is but a relinquishment of rights (Collection XVI, II, 335), it is prejudical only to the person who relinquishes " but not to those who succeed **ab intestato** " in their own right to the **fideicommissum** " (Collection XXVI, I, 698). In this judgment, Peregrinus is quoted as follows: Jus nostrum nobis **quaesitum etiam in spe,** sine facto nostro nobis auferri nequit" (loc. cit. p.698 in fine); — as also Baldus: "Quando sumus in casibus renunciationis, renunciatio prodesset solum confideicommissaris et filiis confideicommis-

No. 8. Defendant's Note of Submissions. —*Continued.*

sarii, non autem fideicommissum posset dici sublatum in **praejudicium filiorum renunciantis, vocatorum ex fideicommisso post patrem"** (loc. cit. p. 699 in princ.);

b) because Defendant's forfeiture cannot have any other effect but that the primogeniture will devolve upon those successors, even **"in spe",** called thereto by the founder. This is the principle upheld by the text-books, which make no difference between forfeiture and relinquishment. Laurent says: "relinquishment (i.e. by the beneficiary) has the effect of transmitting the property to those who in his absence are entitled thereto... It will be objected that he who relinquishes is one who has presumably never been an instituted holder, and that, consequently, his substitution has never taken place. We reply... that relinquishment implies a right which has been renounced. Therefore there has been institution, and the person instituted has at least been vested with the right to the legacy; it follows that substitution has been operative and may produce its effects; and it must therefore produce its effects **according to the well-defined will of the Testator.** How shall substitution be made? If there are those who are called to the legacy, they shall take the property by virtue of their title as substitutes. In other words, they shall not have an **exclusive** right upon the legacy and must hold the benefits thereunder open to **such children as may yet be begotten, since all children born and who may yet be born have a right to the property that has passed to substitutes"** (Principii, Vol. XIV No. 583). Still more typical is Duranton who envisages the case where relinquishment takes place after the possessor has vested himself with the right devolving upon him: "His relinquishment cannot be of prejudice to any of those in the vocation who would have had a right to the succession **in accordance with the will of the deceased** — whether they are born or yet to be born; and no matter whether they are in the first or second degree of relationship..." **(Diritto Civile,** Vol. V, No. 602). He also goes so far as to consider the case where relinquishment is made in favour of the heirs of the founder and he comes to the conclusion that "relinquishment can never be of prejudice to any of those in the vocation, **even when they have not yet been born,** for their case is entirely within the rules of fideicommissary substitution (Work quoted, p.176, column 2nd). Demolombe holds the same view: "It is evident that, **by his act,** the defaulting beneficiary could not have divested of their rights those in the vocation **who have come afterwards (Cod. Civ.** Vol. XI, No. 629, Edition 1879, Naples); so that, as the writer concludes "if there are any already within the

vocation, their rights shall be provisionally kept open; and if there is none, the property shall devolve upon the Testator's heirs, subject to the burthen of restoring it to the first in the vocation who may make his appearance later". (Work quoted, No. 644).

Therefore, if it is true that forfeiture is nothing else but relinquishment of rights, which harms only the person who forfeits or relinquishes, and not anyone else in the vocation, then one must proceed to determine who were those who, even **"in spe",** were entitled to succeed in the stead of the Defendant, always according to the rules of the foundation. And there is no doubt that the Testator wanted that Defendant's children and descendants consistently in the same line were to be preferred to the Plaintiff, who is a collateral and who would therefore start off another line.

Consequently, once the Plaintiff is not entitled to succeed to the primogeniture in the stead of the Defendant, he has no interests of his own at stake in the present suit.

Moreover, any such interests disappear altogether when it is considered that the disposition challenged by the Plaintiff is not conditional, but **modal,** so that the alleged forfeiture does not occur **ipso jure,** but from the day the Court determines that it has occurred, and after the Defendant has failed to conform to the disposition in question within the period of time given to him by the Court.

It was the Plaintiff himself who after all evinced some doubts in regard to the alleged right which he is now exercising when, in the Protest lodged on the 13th August 1934, he thus expressed himself: "Even if the complainant has 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, **it being possible that, later on, a male will be born of the said female"** — Defendant's daughter who was born on the 25th April, 1934. And he ended by making a forecast of the possibility that — in the event of a decision to the effect that the son yet to be born of Defendant's daughter is entitled to the primogeniture — the property will have to be surrendered to **that child.**

Once the right to a primogeniture devolves upon the children that may yet be born, Defendant's children were vested with that right from the moment the Defendant is

No. 8. Defendant's Note of Submissions. —*Continued.*

supposed to have incurred forfeiture, **without a break in the continuity,** and, therefore, even if they were born afterwards, the right was vested in them from the day on which forfeiture took place on the principle: **"Nascituri pro iam natis habentur, quomodo de eorum comodo agatur".** Consequently, **at no time** has the Plaintiff been entitled to the primogeniture, because Defendant's children have ever and always been called thereto. They have, and have always had, their own right **per se stans,** without having ever had the necessity of exercising it. If the Defendant has forfeited it, the primogeniture goes to his children **tanquam sagitta,** without any obligation on their part to recover it judicially. Their inertia only means undisturbed possession of their right and there is no need for them to seek a judicial declaration endorsing their substitution to the Defendant. After all, the Court, if it deems fit, has it in its powers to call them as parties to the suit **ex officio.**

The Plaintiff lacks interest in the suit also by reason of the fact that he too has forfeited the primogeniture, if he is entitled to it — for he has added and, without protesting, permitted others to add, the surname Testaferrata to his own name (Exhibits A, B and C produced **animo ritirandi).**

The Defendant therefore prays that Plaintiff's claims be dismissed with costs.

(signed) A. MAGRI, Advocate.

Filed on the 18th June, 1943.

No. 9. Defendant's Minute filing Statements showing Cassar Desain Income.

No. 9.

Defendant's Minute filing Statements showing Cassar Desain Income.

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain

vs.

The Marchese James Cassar Desain Viani.

Defendant's Minute.

Said Defendant produces two Statements showing the income deriving from the immovable property belonging to the Cassar Desain primogeniture (Exhibits A and B).

(signed) A. MAGRI, Advocate.

The 11t1h October, 1943.

Filed at the Sitting by Dr. A. Magri with two exhibits.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 10.

No. 10. Defendant's Evidence on preceding Statements.

Defendant's Evidence on preceding Statements

In His Majesty's Civil Court,
First Hall.

Monday, 11th October, 1943.

The Defendant, at his own request, states on oath:—

I confirm that the two Statements produced to-day are correct.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 11.

No. 11. Decree calling Defendant's children to the suit.

Decree calling Defendant's children to the suit

HIS MAJESTY'S CIVIL COURT — FIRST HALL

Judge:—

The Honourable Mr. Justice A. J. MONTANARO GAUCI, LL.D.

Sitting held on
Friday, the twenty-first January, 1944.

No. 15.
Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

The Court,

Whereas it is agreed the Defendant has two sons, Anthony and Lawrence, both of whom are minors;

Having seen the acts in the record and heard Counsel on both sides;

Orders that, at the instance and provisionally at the expense of the Plaintiff, the said two minors of the Defendant, as well as the male children that may yet be born to said Defendant, be called as parties to the suit, through Curators to appear on their behalf.

Costs reserved.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 12. Plaintiff's Application for appointment of Curators.

No. 12.

Plaintiff's Application for appointment of Curators

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Plaintiff's Application.
Respectfully sheweth:—

That by Decree given on the 21st January, 1944, the two minor sons of the Defendant, Anthony and Lawrence Cassar Desain, as well as the male children that may yet be born to said Defendant, were called as parties to the suit aforesaid. 10

Wherefore the Plaintiff respectfully prays that this Court may be pleased to appoint Curators to appear on behalf of the said two minors and Defendant's future male issue.

(signed) G. PACE, Advocate.
The twenty-first January, 1944.
Filed by Dr. G. Pace without exhibits.
(signed) J. DINGLI, Dep. Registrar. 20

No. 13. Decree appointing Curatrix.

No. 13.

Decree appointing Curatrix

HIS MAJESTY'S CIVIL COURT — FIRST HALL
Judge:—
The Honourable Mr. Justice T. GOUDER, LL.D.

The Court,

Having seen the Application;

Having seen the preceding Decree;

Having seen the Ban and the Marshal's Certificate of Service; 30

Having seen the Minute whereby the Marchesa Evelyn Cassar Desain Viani accepted the Curatorship;

Appoints the said Marchesa Evelyn Cassar Desain Viani curatrix in terms of the Application.

This twelfth February, 1944.
(signed) VINC. PANDOLFINO, Dep. Reg.

No. 14.

The Answer of the Curatrix

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

The Answer of the Marchesa Evelyn, the wife of the Marchese James Cassar Desain Viani, in her capacity as Curatrix on behalf of her minor sons, Anthony and Lawrence Cassar Desain, and on behalf of the male children that may yet be born to the said Marchese James Cassar Desain Viani — appointed by Decree given by this Court on the twelfth February, 1944.

Respectfully sheweth:—

That, firstly, the Noble Giorgio Cassar Desain has no interests of his own at stake in the present suit, since the primogeniture Cassar Desain, of which he seeks to divest the present holder, can never devolve upon him.

That, at the present day, the succession to the aforesaid primogeniture is rooted in the line of the Marchese James Cassar Desain, to the exclusion of any other line.

That there are females as well as males in the line descending from the said Marchese Cassar Desain, and this fact, in the event of his forfeiture of the primogeniture under a Court order, is enough for the primogeniture to go to his children, and, specifically, to the child who is next in the vocation according to the terms of the foundation — to the exclusion of any collaterals of the said Marchese Cassar Desain.

That, in actual fact, the first-born child of the Defendant Cassar Desain was a female, and, even if he had had no other children, this would have been enough for the primogeniture to go to her and be held by her until she were delivered of a male descendant.

That it so happens, however, that the present holder has two sons, and the possibility of his begetting others is not to be ruled out.

Wherefore, the Defendant, in her aforesaid capacity, submits that, in the event of a judicial pronouncement

No. 14. The Answer of the Curatrix. —*Continued.*

divesting their father of the primogeniture, the two minor sons aforesaid, the Noble Anthony and the Noble Lawrence Cassar Desain, or the one or the other of them, should be declared the successors, or the successor, to the primogeniture in question, to the exclusion of the Noble Giorgio Cassar Desain.

(signed) F. APAP BOLONGNA,
Advocate.

The twenty-sixth February, 1944.
Filed by Dr. F. Apap Bologna without exhibits.

(signed) A. GHIRLANDO,
Dep. Registrar.

No. 15. Defendant's Evidence.

No. 15.

Defendant's Evidence

In His Majesty's Civil Court,
First Hall.

1st April, 1944.

The Defendant, at his own request, states on oath:—

When I entered into possession of my father's inheritance, I bore the name Cassar Desain. Later, when my mother told me not to use the name Viani, I consulted Professor Vassallo and Professor Vassallo told me "You may use it". I did not know what I could or could not do, since my mother had always left me in the dark about the matter. Since the case started, I discarded the name Viani. In connection with the present case, a Protest has been served upon me. After I was served with that Protest, not knowing whether I was doing right or not, I retained the name and continued to bear it up to the time I consulted my Legal Adviser. Now that we have this case before the Court, I have dropped it and no longer sign "Viani". I had spoken to Professor Vassallo previously and he told me that I could use it. As I have stated, however, I am not using the name any longer. My son, Tony, is six years old. The other boy is three years old. We had two girls before them, Rose Marie, who is ten, and the other who is seven. I have been married fifteen or fourteen years. My father died in 1927, and my younger brother died at the very same time. I do not think I have signed contracts under the

name Viani. There have been occasions, since the case started, when I have been obliged to sign Viani, since it was claimed that I should do so. With the exception of these transactions with the Military Authorities, I have signed no other contracts. I have signed receipts under the name Cassar Desain only. Up to the present day, I still hold the primogenitures Cassar Desain and Viani and I consider that I have a claim upon the Testaferrata primogeniture.

Read over to the witness.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

(signed) JAMES CASSAR DESAIN.

No. 16.

Judgment of H.M. Civil Court, First Hall

HIS MAJESTY'S CIVIL COURT — FIRST HALL

Judge:—
The Honourable Mr. Justice A. J. MONTANARO GAUCI, LL.D.

Sitting held on Saturday, sixth May, 1944.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain

vs.

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.

No. 16. Judgment of H.M. Civil Court, First Hall. —*Continued.*

In the Libel, the Plaintiff, premising:—

That the Noble Dr. GioBatta Cassar, Cleric, by Testament opened and published by Notary Paolo Vittorio Giammalva on the 2nd April, 1781, founded a perpetual primogeniture in favour of the lawful male line descending from the heir instituted and appointed by him, the Noble Salvatore Testaferrata, and subjected thereunto the urban and rural property mentioned in the annexed Nota (Exhibit "A"), besides such other property as may be established during the proceedings; —

That the Noble Salvatore Testaferrata aforesaid died without issue, in consequence of which, the primogeniture, by judgment given by Her Majesty's Civil Court, First Hall, on the 25th February, 1848, devolved upon Filippo Giacomo Testaferrata, first-born son of Maria Teresa Cassar Desain — whereupon the holder renounced the surname Testaferrata, and assumed that of Cassar Desain, in accordance with the dispositions of the Testator, who ordered:— " I will then and " expressly ordain that the holder of the said primogeniture, " founded by me as above, shall always bear the surname " 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 should succeed " after the death of the contravener shall succeed to the said " primogeniture "; —

That this disposition thus made by the Testator is in the clearest terms and the penalty attaching thereto in respect of contravention admits of no question and of no remedy; —

That after the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain, who died, without issue, on the 26th August, 1870, and then, after the death of the last-named beneficiary, the primogeniture devolved upon the Cavaliere Marchese Lorenzo Antonio Cassar Desain, on whose death, on the 14th February, 1886, it devolved upon his first-born son, the Marchese Filippo Giacomo Cassar Desain, and, after the latter's death, which took place on the 8th October, 1906, without issue, upon the Marchese Giorgio Riccardo Cassar Desain, the father of the contending parties, who died on the 21st July, 1927, survived by his three sons, namely, the Defendant, who was born on the 29th May, 1907, the Noble Filippo Cassar Desain,

who was born on the 27th November, 1908, and the Plaintiff, who was born on the 19th February, 1915; —

That by Judgment given by His Majesty's Privy Council on the 20th January, 1925 (No. 150/1923), the primogeniture Viani, founded in the records of Notary Paolo Vittorio Giammalva on the 28th May, 1775, was adjudicated in favour of the said Marchese Giorgio Riccardo Cassar Desain who, therefore, at the time of his death, which took place on the 21st July, 1927, held two primogenitures, that is to say, the primogeniture Cassar Desain, at issue in the present suit, and the primogeniture Viani; —

That, in his Testament of the 21st February, 1927, published by Notary Doctor Carmelo Farrugia, the said Marchese Cassar Desain nominated his son, Filippo, as the holder of the primogeniture Viani, and declared that his one and only reason for so doing was that his first-born son, the Defendant, had the right to the primogeniture Cassar Desain; —

That, on the death, on the 22nd July, 1927, of the said Filippo Cassar Desain, the brother of the contending parties, the primogeniture Viani became vacant; —

That the Defendant, after the death of the said Filippo Cassar Desain, assumed the surname Viani, besides the surname Cassar Desain, whether in instruments in public form or under private signature — and this contrary to the precise order of the Testator — as established by the Documents annexed to the present Libel, and several others which the Plaintiff reserves producing at a later stage; —

That, on the 13th August, 1934, the Plaintiff entered formal protest against the illegal action of the Defendant, enjoining him to surrender to him the property appertaining to the primogeniture Cassar Desain, which he had forfeited by reason of default in complying with the explicit order of the Testator, to the effect that the holder, on pain of forfeiture, shall not bear the surname Cassar Desain admixtured with any other surname; —

That there is no room for any doubt as to the person who is entitled to the primogeniture Cassar Desain: the words of the foundation are clear, and the founder laid down the penalty of forfeiture against the holder, and in favour of he who, on the holder's death "when the holder incurs forfeiture", would succeed him — and succeeds him, as stated by the founder, from that moment **(fin d'allora); —**

No. 16. Judgment of H.M. Civil Court, First Hall. —*Continued.*

That, at least since 1931, the Defendant has been regularly using the surname Viani in addition to that of Cassar Desain, as established by the documents produced and, therefore, at that time, the one and only person entitled as consanguineous next-of-kin was the Plaintiff, his only brother; —

And prayed for a judicial declaration: (1) that the Defendant, in view of 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 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 sententiae.**

The Defendant submitted that, preliminarily, the Plaintiff has no interests of his own in instituting the present proceedings, and much less in pressing for Defendant's forfeiture of the primogeniture Cassar Desain, inasmuch as that primogeniture can never devolve upon him, but upon Defendant's children — as the foundation deed makes clear; that the Plaintiff evinced his own doubts as regards the alleged right which he is now exercising when, in the Protest lodged on the 13th August, 1934, he stated: "Even if the complainant has 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, it being possible that, later on, a male will be born of the said female" — and he then proceeded to enjoin the Defendant to surrender the property of the primo-

geniture **to the male child** yet to be born of his (Defendant's) daughter in the event of it being adjudged and determined that that child is entitled to that primogeniture (Exhibit "A"); — that, subordinately, and without prejudice to the foregoing, the forfeiture of the possession of the primogeniture does not occur **ipso jure,** but has to be pronounced by the Court, especially as the prohibition laid down by the founder, whereon the claim for forfeiture rests, is not a **condition,** but merely "modus"; — and that, consequently, the Defendant is entitled to prove justification for his action, and to obtain from the Court the grant of a period of time within which to conform to the terms of the disposition, if it should prove to be the case that he should do so.

Therefore the Defendant prayed that Plaintiff's claims be dismissed with costs.

By Decree given on the 21st January, 1944, the minors Anthony and Lawrence, Defendant's children, as well as the male children which may yet be begotten by the Defendant, were called as parties to the suit.

By Decree given on the 12th February, 1944, the Marchesa Cassar Desain Viani was appointed Curatrix on behalf of the minors Anthony and Lawrence and on behalf of the male children which may yet be begotten by the Defendant.

The Marchesa Cassar Desain Viani submitted that, preliminarily, the Noble Giorgio Cassar Desain has no interests of his own in instituting the present proceedings or in bringing about forfeiture on the part of the Marchese James Cassar Desain, inasmuch as the primogeniture Cassar Desain can never devolve upon him; that at the present day the succession to the aforesaid primogeniture is rooted in the line of the Marchese James Cassar Desain, to the exclusion of any other line; that there are females as well as males in the line descending from the said Marchese Cassar Desain, and this fact, in the event of his forfeiture of the primogeniture under a Court order, is enough for the primogeniture to go to his children, and, specifically, to the child who is next in the vocation according to the terms of the foundation — to the exclusion of any collaterals of the said Marchese Cassar Desain; — that, in actual fact, the first-born child of the Defendant Cassar Desain was a female, and, even if he had had no other children, this would have been enough for the primogeniture to go to her and be held by her until she were delivered of a male descendant; — that it so happens, however, that the present holder has two sons, and the possibility

No. 16. Judgment of H.M. Civil Court, First Hall. —*Continued.*

of his begetting others is not to be ruled out; — and that, therefore, the Defendant, in her aforesaid capacity, submits that, in the event of a judicial pronouncement divesting their father of the primogeniture, the two minor sons aforesaid, the Noble Anthony and the Noble Lawrence Cassar Desain, or the one or the other of them, should be declared the successors, or the successor, to the primogeniture in question, to the exclusion of the Noble Giorgio Cassar Desain.

The Court has heard Defendant's sworn evidence, examined the acts and the documents in the record and heard Counsel.

According to the acts in the record, the Plaintiff and the Defendant are brothers. When their father died, the Defendant, as the eldest son, inherited the primogeniture Cassar Desain. Their other brother, Filippo, died the following day, and thereupon the Defendant inherited also the primogeniture Viani which the father had in his Testament left to the deceased, Filippo. According to the instrument of foundation of the Cassar Desain primogeniture, the holder of this primogeniture has to assume the surname Cassar Desain without the addition of any other surname, on pain of forfeiting the primogeniture **ipso facto** and **ex tunc.** But whereas, according to the instrument of foundation of the Viani primogeniture, the holder of this primogeniture has to add the surname Viani to his own, the Defendant added the surname Viani to the surname Cassar Desain, and continued so to do until at least the commencement of the present suit. The Plaintiff, therefore, claims that the Defendant has forfeited the primogeniture Cassar Desain and that he has succeeded thereto, on the ground that, when the Defendant had contravened the will of the founder, the Defendant still had no children. At present the Defendant has two sons, both of whom were born before the present suit was instituted, as well as two daughters who were born previously.

It has been held in a parallel case, on the authority of De Valentibus **(De Contractibus,** Vol. XXVI, No. 77), that: "There is nothing illicit in the disposition whereby, even on pain of forfeiture, the heir or the legatee is enjoined to assume the Testator's surname; and therefore it places upon the beneficiary the burden of fulfilling the obligation imposed upon him and, if he fails to fulfil it, he is deprived of the income". (Judgment, H.M. Civil Court, First Hall, in re "Caruana v. Strickland", 31st January, 1902 — Vol. XVIII, P.II, p.119). In the case at issue, not only is there the obligation

to bear the surname, but there is also the prohibition of adding any other name thereto. Whether, speaking in general terms, such a prohibition is to-day to be considered licit when its effect is to compel the beneficiary to relinquish his father's name, may perhaps be doubted by the Court, for **"indecens est etiam primogenito haeredi dimittere nomen et arma suae familiae"** (A. Meres, **"De Majoratibus Hispaniae"**, tom. I, P. II, quaest. iv, n.315))— notwithstanding that the changing of surnames is permitted by legislation in many parts of the world. In this case, however, the Defendant carried, and has the obligation of carrying, the surname which his father bore and chose to bear, and "Viani" is not his father's surname, but a surname imposed by the founder of another primogeniture. In these circumstances, the Court entertains no doubt whatever in regard to the validity of the prohibition imposed by the founder of the Cassar Desain primogeniture in so far as Defendant's case is concerned; and therefore the Defendant has to bear that burden if he wishes to enjoy that primogeniture.

However, as the Testator showed by the manner in which he made his dispositions, the burden in question had to be undertaken on succession to the primogeniture, and not before, and therefore the disposition is to be considered as made **sub modo** and not **sub conditione.** In fact, there are in this case the three requisites which are required by the text-books for a disposition to be modal and not conditional: (1) **quod institutio sit pura;** (2) **quod extet praeceptum de aliquid faciendo vel non faciendo;** (3) **quod adsit ademptio in casu contraventionis** (Fierli — **Celebriorum Doctorum Theoricae** p.18). If there had been any doubt as to whether the disposition were **sub modo** or **sub conditione,** it would have had to be considered as being **sub modo.** (Vide judgment above quoted). Indeed, it has been said by Voet: "magis pro modo quam pro conditione praesumendum est, quia modus puram facit dispositionem quae perfectior pleniorque est quam conditionalis: in dubio autem pro eo quod perfectius est conjectura voluntatis capi debet" (Ad Pandectas, lib. XXXV, tit. 1 no. 14).

As this Court, on the authority of Fierli and De Valentibus, Cardinal De Luca, Torre and Molina, held in the judgment abovementioned: "Where the disposition imposing a burden upon the beneficiary is **sub modo** and not **sub conditione,** it is necessary, in order to bring about forfeiture of the property on the part of the holder, and in order to put the substitute in possession thereof, that a summons be taken

No. 16. Judgment of H.M. Civil Court, First Hall. —*Continued.*

out and a lawsuit instituted so as to determine whether the contravener had entertained an erroneous and inexact idea of his obligation, or whether he had contravened by deliberate intention contrary to the will of the Testator. If the contravention is not the result of **dolus** or **culpa gravis,** but simply of an **error scusabilis,** then the holder does not forfeit possession of the property, even though forfeiture in respect of contravention may have been prescribed **ipso facto"** (Vol. XVIII, P.II, p.106-107). The Court of Appeal of Bologna, in the judgment given on the 18th March, 1885, which is quoted in the judgment mentioned above, held that: "Any excuse worthy of the name may be deemed good in order to avoid the forfeiture which is odious. And this is the prevailing practice of the Rota".

It having been established that the burden is **sub modo** — and the foregoing principles having been established — it is incumbent upon the Court to determine whether there has been **dolus** or **culpa gravis** on the part of the Defendant in his failure to observe the terms of the disposition — that is to say, in assuming the name Viani together with that of Cassar Desain.

The Defendant was still young when his father and then his brother Filippo died, but he was warned by his mother not to take the name Viani. On the other hand, the Defendant made no arbitrary decision of his own, but sought the advice of one of the foremost Advocates in Malta in order to ascertain whether he could also take the surname Viani. He was advised by Professor Enrico Vassallo that he could also take that name, and the Defendant followed that advice, and continued to follow it even after he was served with the Protest of the 13th August, 1934. Once the Defendant had sought the advice of a leading legal consultant, and had rested on that advice, the Court is unable to discern either **dolus** or **culpa gravis** on his part, but only **error scusabilis** which, so long as the question is not finally determined by the Court, and so long as the Defendant is not held answerable under a Court order for bad faith and delay, does not occasion forfeiture.

At the present day, the Defendant has two sons, and therefore those immediately next in the vocation are, first, the elder, and then the younger, of the two — and not the Plaintiff. Therefore, if the Defendant fails to abide by the terms of the disposition, and will continue, or will again, bear the name Viani together with that of Cassar Desain, the primogeniture in question will not devolve upon the Plaintiff;

and, on the grounds set forth above, the fact that the Defendant still had no children when he contravened the will of the founder is not enough for the Plaintiff to win over the primogeniture.

None the less, the Defendant and the party called to the suit are wrong in affirming that the Plaintiff has no right to insist that the Defendant should, on pain of forfeiture, observe the terms of the founder's disposition. The Plaintiff is within the vocation and he is therefore entitled to see to it that the disposition is faithfully adhered to. In the long run, subject to certain contingencies that are within human possibility, he may one day benefit personally.

On these grounds, the Court adjudges: allowing the first claim, and, in regard to the second claim, declaring that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — that, in the event of forfeiture as above, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon the Defendant's eldest son; — and, disallowing the other claims, orders each party, in view of the circumstances of the case, to bear its own costs, and that Registry fees be paid by the Defendant.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 17.
Plaintiff's Note of Appeal.

No. 17.

Plaintiff's Note of Appeal

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
vs.
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.

Plaintiff's Note of Appeal

The Plaintiff, deeming himself aggrieved by the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944, in the suit aforesaid, hereby enters appeal therefrom to His Majesty's Court of Appeal.

(signed) G. Pace, Advocate.
Rob. Dingli, Legal Procurator.

This thirteenth May, 1944.

Filed by R. Dingli, L.P. without exhibits.

(signed) A. Ghirlando,
Dep. Registrar.

In

H.M. COURT OF APPEAL

No. 18. Introducing Record into H.M. Court of Appeal.

No. 18.

Introducing Record into H.M. Court of Appeal

HIS MAJESTY'S COURT OF APPEAL.

The Record of the present case has been introduced this day into this Court on the application of Rob. Dingli, L.P., on behalf of the Plaintiff.

This 30th May, 1944.

(signed) J. N. CAMILLERI,
Dep. Registrar.

No. 19. Plaintiff's Petition.

No. 19.

Plaintiff's Petition

In His Majesty's Court of Appeal.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
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.

The Petition of the Plaintiff.

Respectfully sheweth:—

That the Plaintiff submitted in the Libel (No. 6/1942):—

No. 19. Plaintiff's Petition. —*Continued.*

That the Noble Dr. GioBatta Cassar, Cleric, by Testament opened and published by Notary Paolo Vittorio Giammalva on the 2nd April, 1781, founded a perpetual primogeniture in favour of the lawful male line descending from the heir instituted and appointed by him, the Noble Salvatore Testaferrata, and subjected thereunto the urban and rural property mentioned in the Nota annexed to the Libel (Exhibit "A"), besides such other property as may be established during the proceedings; — that the Noble Salvatore Testaferrata aforesaid died without issue, in consequence of which, the primogeniture, by judgment given by Her Majesty's Civil Court, First Hall, on the 25th February, 1848, devolved upon Filippo Giacomo Testaferrata, first-born son of Maria Teresa Cassar Desain — whereupon the holder renounced the surname Testaferrata, and assumed that of Cassar Desain, in accordance with the dispositions of the Testator who ordered:— "I will then and expressly ordain " that the holder of the said primogeniture, founded by me as " above, shall always bear the surname 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 should succeed after the death of the " contravener shall succeed to the said primogeniture "; — that this disposition thus made by the Testator is in the clearest terms and the penalty attaching thereto in respect of contravention admits of no question and of no remedy; — that, after the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain, who died, without issue, on the 26th August, 1870, and then, after the death of the last-named beneficiary, the primogeniture devolved upon the Cavaliere Marchese Lorenzo Antonio Cassar Desain, on whose death, on the 14th Febuary, 1886, it devolved upon his first-born son, the Marchese Filippo Giacomo Cassar Desain, and, after the latter's death, which took place on the 8th October, 1906, without issue, upon the Marchese Giorgio Riccardo Cassar Desain, the father of the contending parties, who died on the 21st July, 1927, survived by his three sons, namely, the Defendant, who was born on the 29th May, 1907, the Noble Filippo Cassar Desain, who was born on the 27th November, 1908, and the Plaintiff, who was born on the 19th February, 1915; — that, by judgment given by His Majesty's Privy Council on the 20th January, 1925, (No. 150/1923), the primogeniture Viani, founded in the

records of Notary Paolo Vittorio Giammalva on the 28th May, 1775, was adjudicated in favour of the said Marchese Giorgio Riccardo Cassar Desain who, therefore, at the time of his death, which took place on the 21st July, 1927, held two primogenitures, that is to say, the primogeniture Cassar Desain, at issue in the present suit, and the primogeniture Viani; — that, in his Testament of the 21st February, 1927, published by Notary Dr. Carmelo Farrugia, the said Marchese Cassar Desain nominated his son, Filippo, as the holder of the primogeniture Viani, and declared that his one and only reason for so doing was that his first-born son, the Defendant, had the right to the primogeniture Cassar Desain; — that, on the death, on the 22nd July, 1927, of the said Filippo Cassar Desain, the brother of the contending parties, the primogeniture Viani became vacant; — that the Defendant, after the death of the said Filippo Cassar Desain, assumed the surname Viani, besides the surname Cassar Desain, whether in instruments in public form or under private signature — and this contrary to the precise order of the Testator — as established by the documents annexed to the Libel, and several others which the Plaintiff reserved producing at a later stage; — that, on the 13th August, 1934, the Plaintiff entered formal Protest against the illegal action of the Defendant, enjoining him to surrender to him the property appertaining to the primogeniture Cassar Desain, which he had forfeited by reason of default in complying with the explicit order of the Testator, to the effect that the holder, on pain of forfeiture, shall not bear the surname Cassar Desain admixtured with any other surname; — that there is no room for any doubt as to the person who is entitled to the primogeniture Cassar Desain: the words of the foundation are clear, and the founder laid down the penalty of forfeiture against the holder, and in favour of he who, on the holder's death, "when the holder incurs forfeiture", would succeed him — and succeeds him, as stated by the founder, from that moment **(fin d'allora)**; — that, at least since 1931, the Defendant has been regularly using the surname Viani in addition to that of Cassar Desain, as established by the documents produced, and, therefore, at that time, the one and only person entitled as consanguineous next-of-kin was the Plaintiff, his only brother; —

And prayed for a judicial declaration:— that (1) the Defendant, in view of 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 contra-

No. 19. Plaintiff's Petition. —*Continued.*

vened and infringed those same conditions, he having used and adopted, together with that surname, the surname Viani; — (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, 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 sententiae.** — With Costs.

The Defendant, in his Answer, submitted that:— the Plaintiff has no interests of his own in bringing the present action, and much less in demanding Defendant's forfeiture of the Cassar Desain primogeniture. As the instrument of foundation makes clear, that primogeniture, though it may possibly devolve upon the Defendant's children, can never devolve upon the Plaintiff; — that Plaintiff himself betrayed doubts in regard to the alleged right he is now exercising when, in the Protest entered on the 13th August, 1934, he thus expressed himself: " Even if the complainant " — the Plaintiff in the present case — " has no immediate right to the primo- " geniture, 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, it being possible that, later " on, a male will be born of the said female " — Defendant's daughter. And he ended by calling upon the Defendant to relinquish the property of the primogeniture to the son yet to be born of Defendant's daughter should it ever be determined that that son is entitled to that primogeniture; — that, furthermore, and without prejudice to the foregoing, forfeiture of the primogeniture does not occur **ipso jure**, but in pursuance of a Court judgment, especially when the prohibition that has given rise to the claim for forfeiture is not a **condition** but simply "modus". Consequently, the Defendant is entitled to justify his actions, and to obtain from the Court, if necessary, a period of time within which to conform to the

terms of the foundation; — and therefore Defendant prayed that Plaintiff's claims be dismissed with Costs.

That by Decree given on the 21st January, 1944, the minors Anthony and Lawrence, Defendant's sons, and the male children that may yet be born to the Defendant, were called as parties to the suit, through Curators to appear on their behalf.

That by Decree given on the 12th February, 1944, the Marchesa Evelyn Cassar Desain Viani was appointed Curatrix on behalf of the minors Anthony and Lawrence and on behalf of the male children that may yet be born to the Defendant.

That, in her Answer, the Marchesa Evelyn Cassar Desain Viani, in her capacity as Curatrix on behalf of the minors Anthony and Lawrence, and on behalf of the male children that may yet be born to the Defendant, submitted: that, firstly, the Noble Giorgio Cassar Desain has no interests of his own at stake in the present suit, since the primogeniture Cassar Desain, of which he seeks to divest the present holder, can never devolve upon him; — that, at the present day, the succession to the aforesaid primogeniture is rooted in the line of the Marchese James Cassar Desain, to the exclusion of any other line; — that there are females as well as males in the line descending from the said Marchese Cassar Desain, and this fact, in the event of his forfeiture of the primogeniture under a Court order, is enough for the primogeniture to go to his children, and, specifically, to the child who is next in the vocation according to the terms of the foundation — to the exclusion of any collaterals of the said Marchese Cassar Desain; — that, in actual fact, the first-born child of the Defendant Cassar Desain was a female, and, even if he had had no other children, this would have been enough for the primogeniture to go to her and be held by her until she were delivered of a male descendant; — that it so happens, however, that the present holder has two sons, and the possibility of his begetting others is not to be ruled out, — and that, in the event of a judicial pronouncement divesting their father of the primogeniture, the two minor sons aforesaid, the Noble Anthony and the Noble Lawrence Cassar Desain, or the one or the other of them, should be declared the successors, or the successor, to the primogeniture in question, to the exclusion of the Noble Giorgio Cassar Desain.

That His Majesty's Civil Court, First Hall, by judgment given on the 6th May, 1944 — having considered that the

No. 19. Plaintiff's Petition. —*Continued.*

Defendant had not conformed to the disposition whereunder the name Cassar Desain is to be borne in the manner aforestated, and that the Plaintiff, as one who is within the vocation, had the right to insist that the Defendant should, on pain of forfeiture, observe the terms of the foundation of the primogeniture — adjudged as follows:— Allowing the first claim, and, in regard to the second claim, declaring that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — that, in the event of forfeiture as above, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son; — and, disallowing the other claims, ordered each party, in view of the circumstances of the case, to bear its own costs, and that Registry fees be paid by the Defendant.

That Petitioner, deeming himself aggrieved by that judgment, entered appeal therefrom to this Court by Minute filed on the 13th May, 1944.

The grievance is manifest, in that the Court of First Instance, having allowed the first claim, disallowed the other claims and disposed of the second claim as above — and that the Court ordered each party to bear its own costs. The present appeal is, therefore, limited to that part of the judgment appealed from which disallowed the second, third and fourth claims in the Libel, and to the head of costs.

The judgment appealed from held that the obligation imposed by the founder of the Cassar Desain primogeniture — that the holder must throughout the tenure of the primogeniture bear the name Cassar Desain alone and make use of the family coat-of-arms — does not amount to a resolutive condition but to a "modal" condition, under which forfeiture is not incurred **ipso facto,** but by a Court pronouncement.

However, it is a settled principle, which the law itself upholds, that **"ubi nulla ambiguitas verborum sit, non est facienda voluntatis quaestio".** Although, as the text-books affirm, the words whereby a resolutive condition is ordered and those whereby a modal condition is imposed, are often identical, the Courts cannot arbitrarily deprive one of a **jus**

quaesitum to the benefit of a defaulting holder. And it is only in cases of serious doubt in regard to the will of the founder that one must seek to establish that a condition is modal rather than resolutive.

The three families of Viani, Testaferrata, and Cassar Desain which, in the last quarter of the XVIII century founded the three primogenitures the Defendant now claims cumulatively to possess, were resolved that the property of their respective primogenitures, and the heraldic name and insignia thereof, should not on any account be absorbed by any of the other families. This was because it was customary at that time for families of the Nobility to inter-marry. Consequently, the founders of the three primogenitures laid down conditions in order to preserve and safeguard the name and renown of their respective families. Thus, in the Cassar Desain primogeniture, we find the resolutive condition respecting possession, with the express penalty of forfeiture and the designation of the person who is to substitute the holder who fails to observe that condition. Reference to legal authority and case-law in support of the view that the essentials of "condition", as distinct from "modus", are to be found in the case at issue, is reserved to a later stage.

Therefore, the Defendant, by reason of non-fulfiilment, forfeited the benefits of the foundation, and there is no reason why he should be granted a period of time within which to comply with the terms thereof, since the actual occurrence of the resolutive condition foreseen by the Testator brought about forfeiture at the very moment of default.

In fact, forfeiture occurred when, on the death of his father, the Defendant assumed the name "Viani" together with that of Cassar Desain. The fact that the Defendant had consulted his Legal Adviser as to whether or not he should take the name "Viani" does not suffice in the case at issue to deprive the Plaintiff of a **jus quaesitum,** and even if that were in the nature of an extenuating circumstance, it would avail the Defendant only in so far as it affects the income deriving to him up to the time service was made upon him of Plaintiff's Protest in 1934. That Protest challenged any "good faith" he may have had at the time and if he were so unbending as to continue to bear the name Viani together with that of Cassar Desain, **imputet sibi,** since after 1934, in disregard of that Protest, he had not the vestige of a right to persevere in transgressing the orders of the Testator.

No. 19. Plaintiff's Petition. —*Continued.*

The judgment appealed from further aggrieves the Plaintiff by reason of the fact that it is **ultra petita.** The present case is not one of competing claims respecting a vacant primogeniture, wherein the claimants are Plaintiffs and Defendants at one and the same time. It is an action for recovery brought by the Plaintiff who claims the right to recover, **jure proprio,** the primogeniture from the Defendant who has lost it by reason of default. According to the principles of procedure, the Libel, in accordance with the claims the Plaintiff therein sets out, defines and specifies "the object in litigation" and "the persons between whom the litigation has been staged". Now, in the third and fourth claim, the Plaintiff prayed for a judicial declaration **in contradictorio** the Defendant that he is entitled to the primogeniture in preference to the Defendant, and that the Defendant be condemned to relinquish the property thereof, together with the income that he has derived therefrom.

According to Sections 978 and 979 of the Code of Civil Procedure, a third party may, by decree of the Court, be joined in a suit, and the third party joined in the suit shall be considered as a defendant and the claims may be allowed or disallowed in his regard as if he were an original defendant in the suit. But that section of the law does not authorize the Court to vary the claims whereby the Plaintiff prayed for a judicial declaration that he had a better right than the Defendant to the possession of the primogenial property, and that the Defendant must therefore relinquish that property. The judgment appealed from therefore went beyond the limits of the controversy, there where it declared that, in the event of forfeiture, the primogeniture is not to be deemed as devolving upon the Plaintiff, but upon Defendant's eldest son.

The Court was only bound to decide that, in the event of forfeiture, the primogeniture should go to the Plaintiff, saving any rights, if eventually subsistent, on the part of Defendant's children who, in order to recover the primogeniture from the Plaintiff, if they deemed fit so to do, should have to bring an appropriate action against the Plaintiff, in which the Plaintiff would be able to make use of any exception against the party challenging his possession of the primogeniture.

The head of costs is likewise a grievance with the Plaintiff, inasmuch as an order should have been made for all the costs to be borne by the defaulting holder, namely, the Defendant.

No. 19. Plaintiff's Petition. —*Continued.*

Wherefore, tendering the undermentioned surety for the costs of the action, making reference to the evidence adduced, and producing the documents annexed hereto — and reserving the right to produce all further evidence admissible at law, including a submission quoting legal authority and case-law, and including a reference to Defendant's oath, for which purpose said Defendant is hereby summoned — the Petitioner respectfully prays that the judgment appealed from be varied, in the sense, that is, that it be affirmed in so far as the Court below allowed the first claim, and reversed

(1) in so far as that Court, in regard to the second claim, declared "that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof, if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — and that, in the event of forfeiture as above, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son"; — it being instead adjudged and determined that: "the defendant has forfeited, since the year 1931, or any other date as established by the Court, the right to the possession of the aforesaid primogeniture, together with all the property thereof as shown in the Minute filed at fol.113, and that the Plaintiff, as the male nearest to the Testator and to the Defendant, has the right to the possession of the aforesaid primogeniture, from the date established as above, in preference to the Defendant"; — and reversed

(2) in so far as the Court of First Instance "disallowed the other claims"; — it being instead adjudged and determined that: "the Defendant do relinquish to the Plaintiff, within a peremptory period as established by the Court, the aforesaid primogeniture, together with the income which has derived to him, or which, as a good **paterfamilias,** should have derived to him, therefrom"; or, alternatively, in the event that the Defendant fails so to do, that "the Plaintiff, by virtue of the judgment, be put into possession **ope sententiae";** — and reversed

(3) in so far as the head of costs, whereunder that Court ordered "each party to bear its own costs and that Registry fees be paid by the Defendant"; — it being instead adjudged

No. 19. Plaintiff's Petition. —*Continued.*

and determined that: "The costs of both the First and Second Instance shall be borne by the Defendant".

And Petitioner humbly prays that justice be thus administered according to law.

(signed) G. PACE,
Advocate.
ROB. DINGLI,
Legal Procurator.

This thirtieth May, 1944.
Filed by Rob. Dingli, L.P., with Four Exhibits.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 20. List of Exhibits.

No. 20.

List of Exhibits

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani and Others.

List of Exhibits produced by the Plaintiff Appellant together with the Petition.

Exhibit "A" — Extract from the contract enrolled in the Records of Notary Ed. Calleja Schembri on the 21st April, 1941.

Exhibit "B" — Extract from the contract enrolled in the Records of Notary Ed. Calleja Schembri on the 9th June, 1942.

Exhibit "C" — Extract from the contract enrolled in the Records of Notary Ed. Calleja Schembri on the 23rd August, 1941.

Exhibit "D" — Defendant's Marriage Certificate.

(signed) G. PACE, Advocate.

No. 21.

No. 21.
Security Bond.

Security Bond

Maria, the wife of Dr. Frederick William Maempel, acting with the consent and assistance of her husband, appears and stands joint surety with the Appellant, the Noble Giorgio Cassar Desain, for the costs of this Appeal, hypothecating the whole of her present and future property, and renouncing every benefit accorded by law.

(signed) MARIA MAEMPEL.
F. W. MAEMPEL.

The said Maria Maempel has affixed her signature hereto in my presence.

This 30th May, 1944.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 22.

No. 22.
The Answer of the Defendant.

The Answer of the Defendant

In His Majesty's Court of Appeal.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani and Others.

The Answer of the Defendant Marchese Cassar Desain.

Respectfully sheweth:—

That, having no knowledge as to her solvency, he declines the surety produced by the Appellant for the costs of this Appeal.

On the merits, the judgment appealed from is just and should be affirmed.

Wherefore the Defendant respectfully prays that this Court may be pleased to declare the appeal abandoned for lack of security for costs, and, in the event of sufficient security being tendered, to dismiss the appeal and affirm the judgment appealed from. With costs against the appellant.

(signed) A. MAGRI, Advocate.
G. MANGION, Legal Procurator.

This seventh June, 1944.

Filed by G. Mangion, L.P. without Exhibits.

(signed) J. DINGLI,
Dep. Registrar.

No. 23.
The Answer of the Curatrix.

No. 23.

The Answer of the Curatrix

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
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.

The Answer of the Marchesa Evelyn Cassar Desain Viani, Curatrix on behalf of the minors Lawrence and Anthony Cassar Desain, and on behalf of the male children which may yet be begotten by the Marchese James Cassar Desain.

Respectfully sheweth:—

That, having no knowledge as to her solvency, she declines the surety produced.

That the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944, declaring that, in the event of forfeiture of the primogeniture, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation, but upon Defendant's eldest son — is just and should be affirmed.

Wherefore, the Defendant, in her aforesaid capacity, respectfully prays that this Court may be pleased to declare the Appeal abandoned, and, in the event of sufficient security

No. 23. The Answer of the Curatrix. —*Continued.*

being tendered, to affirm the judgment appealed from in so far as it affects the minors and future issue aforesaid.

(signed) F. APAP BOLOGNA,
Advocate.

VICTOR CURMI,
Advocate.

This tenth June, 1944.

Filed by Dr. Victor Curmi without Exhibits.

(signed) A. GHIRLANDO,
Dep. Registrar.

No. 24.

No. 24. Plaintiff's Minute producing Note of Submissions.

Plaintiff's Minute producing Note of Submissions.

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Plaintiff's Minute.

The Plaintiff hereby produces the annexed Note of Submissions.

(signed) G. PACE,
Advocate.

ROB. DINGLI,
Legal Procurator.

This Eleventh April, 1945.

Filed at the Sitting by Dr. G. Pace with a Note of Submissions.

(signed) J. DINGLI,
Dep. Registrar.

No. 25.
Plaintiff's Note of Submissions.

No. 25.

Plaintiff's Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Plaintiff's Note of Submissions.

Respectfully sheweth:—

The following are the questions which are to be gone into:—

1. The Court below, after making the declaration that, in certain circumstances, the Defendant would incur forfeiture, declared further that, in that event, the primogeniture should not be deemed as devolving upon the Plaintiff, inasmuch as the Plaintiff is not the next in the vocation — but upon the elder son of the Defendant.

This judicial declaration is contrary to the Laws of Civil Procedure and is consequently null and void.

In point of fact, the case is not one of competing claims in respect of a vacant primogeniture, in which several claimants are concerned and in which the contending parties are all "Plaintiffs" and "Defendants" — as in cases of partition of property. The present case is a case for "recovery" **("rivendica")** in which the Plaintiff has brought forward the claim that the Defendant has gone against the will of the founder and has consequently incurred forfeiture, and that, therefore, as between the Plaintiff and the Defendant, the primogeniture should go to the Plaintiff in preference to the Defendant. No amount of argument will suffice to turn this clear and unequivocal claim into a case for the adjudication of competing claims. The Courts cannot go beyond the terms of the Libel and their one task is to determine whether the primogeniture, in view of its alleged forfeiture, should devolve upon the Plaintiff or upon the Defendant.

Therefore, any declaration which the Court below deemed fit to make in favour of Defendant's children should have taken the form of a "reservation", if it deemed it proper to mention them in the judgment; and that Court should never have adjudged and determined **ultra petita** and declared that, in the event of forfeiture on Defendant's part, the primogeni-

ture should devolve upon Defendant's children, and not upon the Plaintiff.

According to article 978 of the Laws of Procedure "a third party may, by Decree of the Court, in whatever stage of the cause before sentence, be called to take part in a suit pending between other parties in a Court of primary instance, whether upon, or without, a demand of the parties".

Such is the provision respecting "compulsory intervention" whereby a person who has not been in the case at the outset, and who, in the opinion of the Court, should take part therein, may be called as a party in the litigation.

Why does this happen? The answer is to be found in article 979 of the Laws of Procedure, according to which the party called to the suit "can, according to circumstances, be liberated or condemned in the same manner as if the cause had been originally brought forward against him".

This shows clearly that, having called Defendant's children to the suit **marte proprio,** on the ground that their interests were involved therein, the Court, in delivering judgment, could not have gone beyond the claim set up in the Libel. The Court could have "liberated" them in respect of Plaintiff's claim, or "condemned" them in the same manner as if they had been summoned at the outset, but it should never have made a decisive declaration on the merits in favour of Defendant's children, against whom no claim whatever has been brought forward by the Plaintiff.

The Courts in Malta have often had occasion to make pronouncement on this point. ("Anastasi v. Pace" H.M. Civil Court, First Hall, 20.1.1910 — Collection of Judgments. Vol. XVI, p.234, and judgments quoted therein).

In making the declaration in favour of Defendant's first-born son, the judgment appealed from admitted what, in judicial practice and in text-books, is known as the **jus tertii.**

As held by His Majesty's Court of Appeal on the 16th February, 1934, in re "Grech v. Scerri" (Vol. XXVIII,, p.532) "the **jus tertii** is inadmissible because it tends to uphold the interests of a third party, and not the interests of a party pleading in the suit, which must supply the grounds for any action and for any plea set up".

Similarly, His Majesty's Civil Court, First Hall, in re "Testaferrata Moroni Viani **utrinque"** (Vol. XIV, 4/10/94,

No. 25. Plaintiff's Note of Submissions. —*Continued.*

p.346) held that "a decision in a lawsuit in respect of a primogeniture affects only the parties who may be called to the enjoyment of the primogeniture. The **jus tertii,** inadmissible in ordinary cases, is much more so in fideicommissary litigation, especially where such rights are uncertain". The judgment quotes Petronio (Vol. 2, p.350) " ad conferendum " proprium jus, quod ex propria persona non habet, juxta " notas regulas, quibus edocemur, nemini licere propriam " intentionem fundare super exceptionibus quae de jure tertii " existunt. Ea ratione quod ubi exceptio talis est, qua tertius " potest, uti, et non uti, tunc non nisi, eo instante, et " reclamante, considerari potest, aut attendi in judiciis ".

His Majesty's Privy Council, in re "The Noble Testaferrata Moroni v. The Marchese Cassar Desain" (No. 150/1923 — 20/1/1925) held that: "The consequences of the view adopted by both Courts in Malta" — that, in the event of a successful outcome, the primogeniture Viani would devolve upon the Noble Lorenzo Antonio Testaferrata, who was not one of the contending parties — "are indeed devastating. Their decision means, that, on failure by a beneficiary, from whatever interested motive, to claim primogenial property — that property is at the mercy of any person, whether within or without the vocation, who succeeds in obtaining possession of it. He may hold it as against all comers — even those next in the vocation — freed and discharged from all primogenial obligations — precise and serious as in this case they are. A more complete frustration of founder's intentions, as set forth in such an instrument of foundation as that here in question, can hardly be conceived."

The foregoing reasons apply still more strongly in cases of a fideicommissary character. He who is in the vocation has a right to the property, not as the heir of the preceding holder, but as one who has been directly called thereto by the founder in the instrument of foundation. If the primogeniture entitles the holder to the enjoyment of the primogenial estate, it also imposes upon him obligations, restrictions and conditions with which he may or may not accept to comply; and he is not therefore bound to come forward to recover the primogeniture if he does not wish so to do. It is certain that, according to the instrument of foundation, the Plaintiff, as a descendant of the founder, has a right to the primogeniture, and consequently he has rights which, to meet all the ends and purposes of the suit, are to be termed "certain". On the other hand, Defendant's male children, supposing that they had been born at the time the Plaintiff initiated the proceedings, would

have had "uncertain" rights in the vocation, in the sense that they had not come forward — whether because they had not wanted to or whether because they had preferred to wait until it was certain which of the primogenitures Cassar Desain, Viani and Testaferrata suited them best. Now, according to the judgment quoted above (Vol. XIV, 1894, p.349, col. 1) the **jus tertii** in this case implies that "the rights of the third party who is not in the suit are not recognised by the Plaintiff. For the present, therefore, those rights are "uncertain rights" and cannot be rendered "certain" in the case at issue.... So that, if allowed, Defendant's plea, anent the inadmissibility of the action in view of the rights appertaining to third parties — who are not in the suit — would deprive the Plaintiff of the opportunity to obtain recognition of his own "certain" rights in the vocation vis-a-vis the Defendant, and all because of the "uncertain" rights that may appertain to those who are not parties in the suit and who may have no intention of availing themselves of such rights. This would be neither just nor legal. It would, in fact, be contrary to law. It is laid down in article 263 of the Laws of Procedure that a judgment shall not prejudice the rights of a third party who has not, personally, or through the party under whom he claims, or through his lawful representative, taken part in the suit in which such judgment is given. According to article 456 of the same laws, any claimant who has not appeared, and who has not been summoned to appear, in a suit, is not debarred by such judgment from proceeding against the successful party in order to assess the rights to which he may be entitled. In both provisions of the law, therefore, the principle is upheld that, in a lawsuit, only points of law or of fact concerning **no one else but the litigants,** and the issue at stake, are to be sifted and determined, in the interests of the litigants themselves".

All this leads to the conclusion that the declaration made by the Court below in favour of Defendant's first-born male is null and void and **ultra petita.**

The **second question** to be gone into is this: Supposing the Marchese Cassar Desain Viani had forfeited (as he undoubtedly did) the right to the tenure of the Cassar Desain primogeniture — which is the moment at which he had incurred forfeiture? Was it when he added the name Viani to that of Cassar Desain? Or has forfeiture still to be incurred if and when he continues to bear the name Viani after the lapse of the judicial period within which he is to discontinue the mixing of both names?

No. 25.
Plaintiff's Note of Submissions.

To answer this important question, it is necessary to settle the point whether the primogeniture Cassar Desain is a conditional or a modal primogeniture.

If conditional, then it is definitely a "resolutive" and not a "suspensive" condition — one which, immediately on the event 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.

If it is a "modal" primogeniture, then forfeiture occurs when the holder fails to make the necessary rectification within the period of grace given to him for the purpose.

However, before going into the question whether the instrument of the Cassar Desain primogeniture imposes a condition or a burden, it is necessary to examine the terms of the instrument itself.

The primogeniture in question was founded in the records of Notary P. Vittorio Giammalva on the 7th April, 1781, or at about the same time the Viani primogeniture and the Testaferrata primogeniture were founded — the former in the records of the above-named Notary on the 20th May, 1775, and the latter in the records of Notary Cristofaro Frendo on the 15th October, 1804.

In the instrument of the Cassar Desain primogeniture, the Testator ordered: "I will then and expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed as above after the death of the contravener, shall succeed to the said primogeniture".

In the instrument of the Viani primogeniture, copy whereof is printed in the Report of the above-mentioned case (No. 150/1923) determined by His Majesty's Privy Council, there is the following disposition:—

" They further direct and order, on the same penalty of one year's forfeiture of income to be divided as above, that all holders of the primogeniture, 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 insigna, the insigna of the Viani Family ".

In the instrument of the Testaferrata primogeniture, an extract from which appears at page 146 of the above Report, there is a disposition which is conceived as follows:—

"On condition ,however, that as the descent of the said Baron Don Giuseppe is called to the primogeniture founded by the late Don GioBatta Viani, Baron of the Royal Fief of Tabria, his maternal grandfather, in the acts of Notary P. V. Giammalva on the 20th May, 1775, there shall not succeed to the said primogeniture Testaferrata his first born son, that is the holder pro tempore of the said Viani Primogeniture, even in case that part of the property be dismembered from the said primogeniture — but there shall succeed his second born son and his masculine and feminine descent in infinitum, so that these two primogenitures Testaferrata and Viani may never meet in the same person, except in the one case of default of other descendants male or female of the said Baron Don Giuseppe, and on the cessation of such default (the two primogenitures) shall again become disjoined and separated, in all other respects, the laws of succession and the laws established above regarding the descent of the said Don Lorenzo being observed....."

When one compares these primogenitures, which the Defendant is holding promiscuously against the will of the founders, one cannot but come to the conclusion that the founders expressed their will in the clearest possible manner, such as to leave no doubt in regard to their intentions. The founder of the Cassar Desain primogeniture, not only wanted to make it clear that to bear the surname Cassar Desain by itself was a condition **sine qua non** for the holder to retain possession, and thereafter to forfeit possession if he contravened the will of the founder, but he also proceeded to say, after prescribing the penalty of forfeiture, who should benefit in the event of forfeiture and at which moment.

It is a settled principle in case-law and in text-books that, consistently with the provisions of the law, **ubi nulla ambiguitas verborum sit, non est facienda voluntatis quaestio.** The Court of Cassation, Turin, on 15th June, 1871, in re "Canavese v. Viani d'Oraino", held that: "The judgment that, on 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 and the testament, such as to deserve censure on appeal to the Court of Cassation".

No. 25.
Plaintiff's Note of Submissions.
—*Continued.*

The same volume, under No. 444, p.838, quotes a judgment given by the Court of Cassation, Palermo, in re "Finanza v. Anci", on 24th January, 1871, wherein it is stated: "When the wishes of the founder are clear, the Courts which have to judge on the merits cannot, by way of interpretation, substitute therefor other wishes; and where they do so, their judgment is censurable on appeal to the Court of Cassation".

The judgment given by the Court of Appeal of Ancona on 12th March, 1881, in re "Bevilacqua v. Revedini," which is quoted in the same Volume (No. 473 — p.840) held that: "In order to determine the meaning and purport of a testament, the first criterion to be followed is that of consulting — not otherwise than as the text of law is consulted — the words of the Testator". And, further on, in re "Molino v. Castellalfero" (No. 476) — "When investigating the Testator's intentions, it is not permissible to ascribe thereto a meaning different to that which is conveyed by the words used; and when, following the words of the Testament, it is possible conclusively to establish the contents thereof, it is not permissible to have recourse to other means" (Vide also judgments referred to in nos. 477, 478, 479, 484, 485, 497, 498, 499, 500, 503 and 504).

This Court had occasion to affirm the same principles in the judgment given on 26th February, 1945, in re "Asciak v. Asciak". Therein, following the principles already established in local and foreign judicial practice, the Court upheld the principle **"non aliter a significatione verborum recedi oportet, quam cum manifestum est aliud sensisse testamentum"** (Dig. Lis. XXXIII — III — **De Legatis et Fideicommissis,** Leg. 69). Hence, in re "Mallia v. Mamo" (Collection XXIV, part I, p.729), this Court held that: "It is only where it is certain that the word of the testament is in conflict with the wishes of the Testator that any departure therefrom is to be made. So long as his wishes are clearly and formally expressed, it is not permissible to interpret the words that he himself has used to make his wishes known. Otherwise, the risk would be incurred of rendering predominant an intention which is at variance with the certainty of the written word".

Again, in re "Dimech v. Sant Cassia" (Collection, Vol. IX, p.558) it was held that: "In testamentary issues, the supreme law to be followed is that of the lawful will of the Testator. Abstract rules are to be reconciled between themselves and applied in accordance with the varying nature of the facts as they occur in actual practice; but where the words of a testamentary disposition offer no ambiguity, the clear mean-

ing thereof must not be altered in the estimation of the individual. Such, and not otherwise, is the teaching of ancient learning. It is on good grounds that one is to believe that the Testator had intended the words used in a sense different to that naturally attaching to them, that is to say, the sense that is ascribed to them in ordinary parlance". In the light of these principles, which after all are of an elementary character, and which are based on the general principles informing the rules of interpretation — **ubi nulla ambiguitas verborum sit, non est facienda voluntatis quaestio** — one cannot fail to come to the conclusion that the founder of the primogeniture, in ordering that no one may have the enjoyment of the primogeniture who does not bear the surname Cassar Desain without the admixture of any other surname, expressed his intention in the clearest possible manner. This order is clear and precise, so much so that the family of the contending parties who, up to the year 1848, bore the surname Testaferrata, relinquished that surname and assumed that of Cassar Desain, exactly in order to conform to the conditions **sine qua non** laid down by the founder.

There is not the least doubt that that order is clear and univocal. Furthermore, the founder, in order the more clearly to make manifest his wish that it should be complied with, prescribed the penalty of forfeiture against the defaulting beneficiary, and wanted that forfeiture be incurred **ipso facto** on default and from the moment of default, and selected the next successor to the primogeniture in the event of default and forfeiture on the part of the holder. In other words, the Testator wanted that: "he who should succeed after **the death of the contravener** shall succeed as above from that moment".

The Testator who prescribed forfeiture selected the successor to the primogeniture, and the expression "after the death of the contravener" is to be understood to refer to he who "in the case of the death of the holder at the moment of the transgression of the will of the Testator" would succeed to the primogeniture according to the testamentary table. This disposition, therefore, cannot be interpreted to mean that one must wait until the death of the holder in order to determine who, amongst the living, is entitled to the primogeniture. The disposition means that the Testator wanted that the holder who contravenes his will shall be considered as having died from that moment, and that the primogeniture shall, from that moment, devolve upon the next in the vocation who, at that moment, is entitled thereto.

To attempt to give any other meaning to the expression "he who should succeed after the death of the contravener

No. 25. Plaintiff's Note of Submissions. —*Continued.*

shall succeed as above from that moment" is to render ineffective and inefficacious the disposition of the Testator who, of a certainty, never wanted that his will should be set aside with impunity and that none should succeed to the enjoyment of the primogeniture before the death of the holder.

This literal and natural sense of the disposition is underlined by the word "should" vis a' vis the words "shall succeed from that moment". If the Testator had wanted that one should wait until the death of the defaulting beneficiary, he would not have used the words "shall succeed from that moment", and he would not have used the words "should", but would have said "must", inasmuch as the use of the word "should" precisely indicates that the person who would succeed is he who, normally, would be entitled to succeed if the holder died at the moment of forfeiture.

The Testator gave expression to the same concept in the succeeding paragraphs, wherein he envisaged the commission of a crime on the part of the holder — a crime which exposed the holder to the punishment of confiscation. In that case, the founder ordained: "It is my will that the delinquent shall **ipso jure** and **ipso facto**... be deemed deprived and excluded from the possession and enjoyment of the primogeniture, and it is my will that that primogeniture shall then devolve upon he who is immediately next in the vocation as above after the death of the said delinquent". It is beyond doubt that the only interpretation to be given to this disposition is that the words **"ipso facto"** and "after the death" have no other meaning but that, although the holder who has committed the crime is not literally and actually dead, the Testator wanted that, so far as forfeiture is concerned, he should to all intents and purposes be considered as dead, and that, at that moment, the primogeniture should go to the next-of-kin who, in terms of the instrument of foundation, is entitled thereto, at that moment. Any other interpretation would but stultify the intention of the founder and would render the primogenial property liable to confiscation — which is exactly what the founder wanted to avoid.

It having been established that the founder wanted that his dispositions should be obeyed on pain of forfeiture, and that he who is entitled to the primogeniture in terms of the instrument of foundation should succeed thereto from the moment forfeiture is incurred in the same way as if the contravener had died at the moment of the contravention, one must proceed to establish:—

1) At what time the Defendant contravened the disposition;

2) Who was entitled to the primogeniture at that moment.

The first question is clear. The Marchese Riccardo Cassar Desain, the father of the contending parties, died on the 21st July, 1927. The deceased, nothwithstanding that he had secured the primogeniture Viani by the judgment given by His Majesty's Privy Council on 20th January, 1925, was still transacting with the previous holder the transference of the possession of the primogenial property, and effecting settlement of the respective rentals. In actual fact, up to his death, he never assumed the name Viani, either by itself or in addition to the name Cassar Desain. In his testament, he left the Viani primogeniture to his second-born son, Philip, explaining that he had done so in view of the fact that his other son, the Defendant, was already provided with the primogeniture Cassar Desain. On the death of Philip Cassar Desain, which took place on the 22nd July, 1927, the Viani primogeniture again became vacant, and the Defendant took up possession also of that primogeniture. The mother of the contending parties warned him that he could not hold both. This notwithstanding, from the year 1931 onwards, and even before, he assumed the surname Viani in contracts and other instruments, and continued so to do after the Protest served upon him by the Plaintiff on the 31st August, 1934 — and until a short time before judgment was given by the Court of First Instance. The Defendant contravened the order of the founder when he first adopted the surname Viani after that his mother had warned him that he could not retain possession of both primogenitures. It is not enough to say that he consulted a senior and capable member of the Bar, since the fact that he did so fails to alter the position. Cardinal De Luca, in **"De fideicommissorum Summa"** (No. 348), distinguishes between the case when the Testator "poenam adjiciat" and the case where "eam a testatore omissam lex suppleat" and determines "primo casu necessarja non sit judicis monitio quae constituat in dolo seu contumacia, sed necessaria est in secundo".

Similarly, the Rota Romana, 8th March, 1771, **Coram Mannelli Romana Caducitatis,** held "doli probatio non requiritur quoties testator caducitatis poenam alienantibus indixit "ipso facto et ipso jure" incurrendam. Quia sic jubendi videtur ad nudum simplexque factum respexisse".

No. 25.
Plaintiff's Note of Submissions.
—*Continued.*

Again, the Rota Romana, 4th March, 1833, **Coram de Curiis Ferrarien, Immiissionis,** held amongst other things that: "Nulla opus erat interpellatione aut judicis declaratione quae scientiam Victorii statuerat, quum certum sit nullam necessariam fore interpellationem ad onus implendum quod ille cui imponitur jam cognoverit". And in the same judgment, the **Rota Romana** continues: "Quum sane caducitas fuerit a testatore ipso jure indicta vocatis, opus non erat ad eadem evincendum ut de dolo et contumacia afferentur probationes. Tunc enim videtur testator nudum simplexque factum contraventionis respicere, secus ab omni dolo culpaeve concursu".

Similarly, the **Rota Romana, Coram De Silvestris Albanon, Caducitatis et Immissionis,** 10th June, 1853, held that when the holder who has incurred forfeiture prays that he be granted the benefit of conforming to the disposition "Tamen Utraquam quod enim.... rem conficit quod proposita caducitas ex testamento descendat ac resolutive conditionis vices gerat, ita ut suas illico vires exercere debeat, quin ulla opus sit interellatione vel termini praefixione."

In the same manner, the **Rota Romana, "Coram Cornelio" Ferrarien Primogeniturae,** 12th May, 1775, held: "Nullum vero praesidium constitui valet in defectu interpellationis. Tunc enim interpellatio, ac judicis monitio necessaria existimatur, quando haeredi satis nota non esset Testatoris Lex, vel Lex ipsa aliquam contineret super secuta contraventione ambiguitatem: sed aliter res se habet, quando innegabilis est, prout in casu de quo agitur, in Trasgressore plenissima scientia dispositionis, ac onus per Testatorem injunctum ita perspicuum, apertumque sit, ut omnem reiciat dubitationem, quo siquidem in casu incurritur illico, et ipso jure caducitas sine ulla praecedente interpellatione, ac Judicis monitione ut distinguendo firmant: Paris Consil. 19 n.190 and the other authorities therein quoted.

Having established this point — that the defaulting beneficiary forfeits possession in terms of the instrument of foundation — it is necessary to go into the question whether forfeiture occurs in the fulness of time or immediately after the wishes and the orders of the Testator are contravened. The point whether the order given to the holder is **sub conditione** or **modo** is not of absolute importance in the present case. In the first place, as Heineccio holds: "The legacy is left **sub modo** when the purpose for which it is left is expressed. For instance: I give and bequeath to Terzio 3000 ducats in order

that he may become a doctor. Provided the legatee guarantees the attainment of the end in view, and, in default, to make restitution, the legacy matures and becomes payable from the moment of the Testator's death".

This shows that the Cassar Desain foundation is not subject to **modo** but to a resolutive **condition** to the effect that possession comes to an end and the holder incurs forfeiture as soon as he contravenes the will of the founder. In fact, how is a Testator who wants to make a "conditional" bequest to express himself if not in the manner the Testator in this case has expressed himself — that is to say, ordering the adoption of the surname, prescribing forfeiture, naming the substitute and establishing the time of substitution? There should not be any doubt, therefore, that the Testator did clearly make manifest his wish that at no given moment should the defaulting beneficiary retain enjoyment of the primogenial property and income.

So far as this point is concerned, therefore, one must follow the established principle that possession of the property devolves **uti sagitta** upon the substitute, for fideicommissary successions admit of no suspension.

The Plaintiff would now respectfully proceed to make his submissioms in regard to the second point, namely: Who was entitled to the primogeniture at the moment the Defendant contravened the instrument of foundation?

It is beyond doubt that, in 1931, the Plaintiff was the only living male in the family of the Marchese Riccardo Cassar Desain, the father of the contending parties, when the Defendant, publicly and systematically, began to assume the name Viani together with the name Cassar Desain, both in public and private instruments. In fact, although the Defendant married in 1928 **(vide** Defendant's evidence), his two male children are respectively 6 and 3 years of age, so that, in 1931, there were no other males in the family besides the Plaintiff.

The **Rota Romana,** "Decis Divers Auditor, Rot. Rom. Pars. L. Decis 28 Rubei. Cavallice. Baroniae De Thoro. 14th Nov. 1575, **"Fundamentum autem Dominorum fuit, quia in fideicomissis conditionalibus admittunt, qui reperientur** nati **vel** concepti **tempore evenientis conditionis et** non nati **excluduntur, etiam quod si tempore purificati fideicommissi nati fuissent proximores essent; etiam quod postea nascantur ut tamquam vocati velint venire ad fideicommissum".**

No. 25. Plaintiff's Note of Submissions. —*Continued.*

Again, in the decision of 5th December 1650. **Coram Corrado "Fideicommissi de Barbariis"** (Rot. Rom. in Bononien P. XI Dec.) held: **"Ac proinde cessat, quando dispositio in tempus advenientis conditionis collocata respicit certas personas tunc extantes, seu certam prescriptam qualitatem habentes et alios successive vocat, nam 'ex eo instanti' operatur effectum suum, ita ut, illi admissis, ex supervenienti aliorum nativitate retractari non valeat".**

Similarly, in the decision of the 6th June, 1678, **Coram Mattheo** (Dec. 232 Rec. P. XIX T.I.), it was held: **Nec demum idem Fabius venire potest ex ultima substitutione pueri attinentis, quia non erat in "rerum natura" de tempore purificatae conditionis et, per consequens, haereditas deferri debebat Joannis Baptistae tunc nato et proximiori, attento quod in similibus fideicommissis licet conceptis in remotissimum tempus succedunt solum illi, qui existunt de tempore purificatae et delatae successionis, nec post modum nati habentur in consideratione et non avocant bona a jam admissis..... Et categorica semper est responsio, quod 'non natus' de temporae delatae successionis, "quamvis proximior" si superveniat, "non avocat" fideicommissum a remotiore nato iam admisso...."**

The right deriving to the Plaintiff upon Defendant's default is a **jus quaesitum** to the possession of the primogeniture, and, therefore, any extenuating benefit granted to the Defendant is repugnant to this **jus quaesitum.** Thus the **Rota Romana** in **Primogenitura de Medico,** 23/1/1673, Dec. 398, P.XV R.P.D., Taja: "Non obstat nativitas Joannis Baptistae Guiccardi filii Mariae Hieronymae Reae, et ex ea nipotis Guiccardi ultimi defuncti. Quia cum fierit 'jus quaesitum' Aeneae existenti tempore purificatae conditionis quod semper consideravit testator in verbis 'tunc substituit' proximiorem sibi, ideo admittendum est ad exclusionem dictum Joannem Baptistam Guiccardi, praesertim quod fideicommissa hujusmodi, quae respiciunt certas personas 'tunc extantes' vel certam qualitatem habentes, sive ex una, eademque linea, sive ex diversis provenientes, ex eo **instanti operantur** effectum suum.

In the clearest terms, the **Rota Romana,** on 22nd June, 1674, Dec. 400 **coram Taja,** P. XV, held:

"Verior opinio est quod in fideicommissis conditionalibus non admittur nisi illi, qui sunt nati vel concepti tempore purificatae conditionis, et ultra, alios Doctores qui hanc opinionem, uti magis tutam sequuntur, — ita tenent Fusarius

"de substitutione, quaestio 328 num. 55 cum segg. etiam transeundo ad alias quaestiones et declarationes maxime No. 78. Exemplum afferri posset et sequentia et ibi videri possunt doctores sine numero et adduci quam plures evidentissimas rationes pro hac opinione et repellit contrariam tenentes respondendo singulariter objectis et in his terminus Primogeniturae qualificatae cum onere assumptionis familae:" et Insignum, Rota dec. 85 no.29; and others.

The Plaintiff is appending to this Note of Submissions other decisions of the Rota Romana, all of which hold that the passage from 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. All that is necessary is that the Plaintiff should have the "capacity to succeed" as ordered by the founder, that is to say, that he should belong to the family which, in accordance with the instrument of foundation, is in lawful possession — in other words, the family of the Marchese Cassar Desain. Now, obviously, the Plaintiff is the only son of the Marchese Cassar Desain who was in being when the Defendant incurred forfeiture — that is to say, he is the second-born son of the Marchese Riccardo Cassar Desain, the Noble Filippo Cassar Desain having died on the day following that of the death of the father of the contending parties. The founder ordained that, in the event of forfeiture on the part of the holder, the primogeniture shall go to him who is at that moment entitled thereto; and since the Defendant had no children in 1931, we consider the Defendant, so far as substitution is concerned, as having died childless. In that case, the founder ordered: "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 extinct, 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 primogeniture."

It is therefore beyond doubt that the Plaintiff holds the qualifications required by the founder, that is to say, that he is the only male who at the moment of forfeiture had the right to the primogeniture.

Finally, as regards the income itself, one must consider that the Plaintiff is entitled to the primogenial rentals from

No. 25. Plaintiff's Note of Submissions. —*Continued.*

the moment the Defendant contravened the terms of the foundation, on the well-known principle **fructus augent hereditati** and **accessorium sequitur principale.** Therefore, from the day he added the name Viani to that of Cassar Desain, and, more clearly still, from the day on which service was made upon him of the Protest of the 13th August, 1934, the Defendant had no further right to the primogenial income, which he must return to the Plaintiff, together with the possession of the primogeniture.

(signed) G. PACE, Advocate.

Filed on the 11th April, 1945.

No. 26. Defendant's Minute producing Note of Submissions.

No. 26.

Defendant's Minute producing Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Defendant's Minute.

The Defendant hereby produces the annexed Note of Submissions, marked "X".

(signed) A. MAGRI,
Advocate.

This twenty-first May, 1945.

Filed by Dr. A. Magri, with a Note of Submissions.

(signed) J. N. CAMILLERI,
Dep. Registrar.

No. 27.

Defendant's Note of Submissions

In His Majesty's Court of Appeal.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Defendant's Note of Submissions.

Respectfully sheweth:—

There are no good grounds for Plaintiff's allegations in regard to the third party summons that has been issued. The directions given by the Court below now constitute **res judicata** and are irrevocable. In fact, an appeal from an interlocutory decree (such as the one in question) may be entered before as well as after judgment has been given. In the first case, it is entered by an Application within two days from the date on which the decree is given. In the second case, the ordinary provisions relating to appeals from judgments must be followed, or, in other words, the appeal is entered either by a separate notice, or in the same notice of appeal from the judgment, provided the decree is expressly mentioned therein (article 255 Laws of Procedure). This has not been done. On the contrary, the Plaintiff acquiesced and caused service to be made upon Defendant's wife, as the representative of Defendant's children. No mention is made of the decree in the notice of appeal and it has therefore been idle to refer to it in the Petition, since it had then already become **res judicata.** Our Courts have constantly made pronouncements to this effect. (Collection of Judgments, XXIII, I, 492; XXVII, I, 118 and 116).

Then, without prejudice to the plea tendered above, it was meet and proper that Defendant's children should be called as parties to the suit, and it was within the **discretion** of the Court below so to call them, once it had been established that their interests were involved. (Article 978 Laws of Procedure). It is enough that there be "prima facie" evidence of **possible** interests to make it incumbent upon the Court to order that the parties concerned be called to the suit (Collection, XXIII, I, 154). Such interests may be in connection with the claim as well as in connection with the **exception**

No. 27. Defendant's Note of Submissions. —*Continued.*

(Digesto Italiano, **Intervento in causa,** no.28) and it suffices even when there are no grounds for judgment to be given for or against the party called to the suit. Article 979 of the Laws of Procedure has thus been explained by this Court: "Although according to article 979, the third party called to the suit is considered to be in the same position as any other defendant, and although judgment may therefore be entered for or against him, it does not follow that, by that expression, it was sought to confine the provisions thereanent only to those third parties for or against whom judgment may be entered.... since the **power** given to the Court to adjudge for or against the person called to the suit.... article 979 says 'he **can,** according to circumstances, be liberated or condemned'..... does not rule out the possibility that he may be called to draw other advantages.... The concept clearly emerges that that provision of the law extends also to the third party who, supporting the views of the Plaintiff or of the Defendant, and at times his own rights vis á vis the one or the other, prompts a decision.... which establishes certain facts and certain rights, favourable to him or otherwise, without judgment being entered for or against him." (Collection, XVII, I, 117). The same interpretation was given by this Court in re "Antonio Degabriele v. Antonio Barbarusso", determined on 20th June, 1938.

The third party summons in question was necessary and impellent also in view of the fact that, **ex admissis,** the Plaintiff is seeking recovery **(azione rivendicatoria);** and after all he was entitled to no other action in the circumstances. It has in fact been held that: "In an action against the holder of a tenement subject to **fideicommissum,** the successor to the **fideicommissum** is not entitled to a right of preference on the property, but to a right for the recovery thereof". (Collection VII, p.453 1st col.). One of the requisites for an action for recovery is for the Plaintiff to prove that the property he seeks to recover is **exclusively** his own. It is not enough for him to prove that the Defendant has no title to it. In other words, he has to show that no one else but himself has or may have a right to that property. Pacifici Mazzoni says: "In actions for recovery, the Plaintiff must prove **his ownership,** which is the basis for his claim; and he may not instead seek to prove that the right of ownership is lacking in the Defendant" **(Dei Beni,** No. 99 p.116). "Lack of proof of ownership on the part of the Plaintiff in an action for recovery does not give rise to the necessity of determining to whom the property belongs, **even where it has been ruled out that**

it is owned by the Defendant" (Work quoted, No. 99, p.119). Among other pleas, the Defendant submitted that the Plaintiff had no interest in bringing the action, inasmuch as, even if forfeiture were to be incurred by the Defendant, the primogeniture would go to Defendant's children as of right; and therefore the proceedings would have been defective if they had been conducted without an appearance being entered by Defendant's children, who had the **greatest interest** in refuting Plaintiff's allegations and in securing a judicial declaration that they would be entitled to the primogeniture in the event of Defendant's forfeiture.

The case of competing claims in respect of a primogeniture is different, since the party who has not been summoned, if he considers that he has a better right than that of the claimant who has been granted priority, is always entitled to assert his own rights against the successful party.

The judgment referred to by the Plaintiff (Collection XIV, p.346) is not applicable to the case, for it presupposes that the third party was not in the suit, whilst Defendant's children, although they are third parties, are actually taking part in the suit, and now irrevocably so; and their rights are not "uncertain rights", inasmuch as, by their presence in the suit, they may become "certain" — whilst the judgment in question envisages the case of parties who are not in the suit, so that, naturally enough, their rights cannot be discussed in their absence.

In his Petition, the Plaintiff submitted that the judgment of the Court of First Instance is **ultra petita** or **extra petita** and consequently null and void, his contention being that the judgment had assigned to Defendant's children the right to the primogeniture, when the matter in dispute was between the Plaintiff and the Defendant, and that, if at all, that judgment should have made a mere reservation in favour of the party called to the suit.

The plea is untenable:— 1) because the Court expressed itself hypothetically and declared: **in the event of forfeiture,** this shall have effect from the date of expiration of the period aforesaid, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff... but upon Defendant's eldest son; 2) because the judgment was intended to exclude Plaintiff's claim; 3) because the declaration was necessary in view of Defendant's plea of lack of interest on the part of the Plaintiff.

No. 27. Defendant's Note of Submissions. —*Continued.*

No argument is to be drawn by the Plaintiff from the judgment given by His Majesty's Privy Council on the 20th January, 1925, since it would not appear that the pre-requisite in all actions for recovery, that is to say, the **exclusiveness** of Plaintiff's right, had been kept well in view. The fact that the lawful owners fail to move in the matter, as in the case referred to in that judgment, does not imply that the primogeniture is to remain without a holder. What it means is that an **Administrator** will be appointed until the party called thereto is vested with the primogeniture, as will be stated further on, and as, in fact, the Plaintiff himself admitted in the Protest of the 13th August, 1934 (Exhibit "A", produced together with Defendant's Answer to the Libel).

The Plaintiff has also raised the question regarding the moment at which Defendant's forfeiture has to occur, and he came to the conclusion that, according to the will of the Testator, the forfeiture in question was incurred **ipso facto** from the moment the contravention took place, that is to say, from the time the Defendant assumed the surname Viani; and, according to the Plaintiff, once the contravention had its commencement in 1931, when the Defendant still had no children, the primogeniture had devolved upon him as from that date, to the exclusion of Defendant's children.

In order to penetrate into the mind of the Testator and ascertain his presumable wishes in the event of forfeiture on the part of the actual holder, it is necessary properly to examine the instrument of foundation and to set out the following considerations:—

i) In case of contravention, the Testator willed and ordained that: "from that moment, he who should succeed **as above** after the death of the contravener, shall succeed to the said primogeniture, **and not otherwise".** In other words, the founder wanted that the rules he himself had previously laid down in regard to the **transmission** or **devolution** of the primogeniture should be observed, and he therefore wanted that those rules should be applied even in the event of forfeiture.

ii). The Testator insists most emphatically that, so long as it may be possible, the primogeniture shall remain in the primogenial line and that it shall pass on from "first-born male to first-born male in perpetuity".

iii). He wills and ordains also that, when there are no males, but **only females,** the primogeniture shall go to "the

first-born male of the **first-born** female"; and only in their absence is the **second-born** male to succeed thereto.

iv). The whole instrument of foundation shows the importance, indeed, the preponderance, the Testator wanted to give to the prerogative of the line: "The said primogeniture, 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". He was so anxious to inculcate this as a necessity, that he ordered that the primogeniture should not devolve upon anyone else until a female remained in the vested line and until that female had completed the fiftieth year of age — that is to say, so long as and until it should be possible for her to give birth to males upon whom the primogeniture would devolve.

v). Finally, the founder emphasized the same disposition and said: "The descendant of the holder.... shall always be preferred to his **brother utrinque conjunctus;"** and, to avoid all equivocation in regard to his wishes, he ordered further: "It is my will that this shall be observed as an invariable rule standing by itself respecting succession to the said primogeniture".

vi). Obviously, the founder adhered to established principles relating to primogenial succession, in the sense that the primogeniture is to be considered **regular,** so as also to include **females** and to prefer females (children of the last holder) to the brothers and sisters of the holder (Collection XI, 275; X, 873; XI, 4 and 190); and that the substitute in the same line is always to be preferred to he who is not. **"Si instituto substitutum dederit testator, tunc non dubium quominus** hic praeferri debeat coeteris" (Richeri, **Jurisprudentia,** Tom. II n.5424).

On these premises, it is clear that it was the founder's wish that, if possible, the primogeniture should not go out of the primogenial line, so long as hope remained that there would be persons entitled in that line to hold it. It is therefore an untenable argument of the Plaintiff's that forfeiture is to be considered as the same thing as the **death** of the holder. In fact, death without children and descendants brings to an end the possibility of the primogeniture remaining in the primogenial line, which does not happen in the case of forfeiture, since in this latter case there is always the hope that the holder, though he has incurred forfeiture, will yet have children and descendants to bring the founder's wish to realisation.

No. 27. Defendant's Note of Submissions. —*Continued.*

However, even if death were to be regarded as equivalent to forfeiture, it is necessary to determine at which moment the holder is to be considered as having lost the primogeniture. In this connection, it is to be decided whether, when the founder ordered that no other surname shall be added, he wanted to impose a **condition** or **modus.** This is a vital question, even though in his last Note of Submissions the Plaintiff stated it was not of absolute importance. It is vital because, if it were a condition, forfeiture would have effect from the day on which the contravention occurred, whilst if it were **modus,** the contravener would incur forfeiture from the day he fails to conform to the disposition under a Court order which is made against him in judicial proceedings instituted for the purpose.

Here, where what is known as Aretino's theory has remained famous throughout, it is necessary to seek enlightment from one who has been its leading commentator, Fierli. Fierli begins by saying: " Ad dignoscendum vero an modus " vel conditio apposita fuerit, inspici debet **substantia** non " cortex et structura verborum, et in dubio verba potius ad " **modum** quam ad conditionem referenda sunt" (Celebriorum Doctorum Theoricae p.18). The commentator makes this difference between the two theories: In the case where the obligation has to be fulfilled **before** the holder takes possession of the primogeniture, there is a **condition;** in the case where the obligation has to be fulfilled **after,** there is **modus.** In respect of this latter case, he establishes three conditions: " ut " dispositio dicatur **modalis** paenamque privationis importet, " requiritur 1) quod institutio sit pura; 2) quod extet prae- " ceptum de aliquid faciendo vel non faciendo; 3) quod adsit " ademptio in casu contraventionis ". Molina holds the same view: " **Conditio** suspendit effectum dispositionis in tempus " ipsius conditionis impletae. **Modus** autem non impedit, nec " etiam suspendit perfectionem dispositionis, sed obligat **post** " **dispositionem perfectam** ad implendum **in futurum** illum " quod in vim modi praecipitur " (De Hispanis Primogeniis, p.372 no.4). Identical views are held by Troplong: **"Modus** is a law attached to the disposition, obliging the beneficiary to do or give something **after he has received** the bequest.... **Modus** (as distinct from **conditione)** does not suspend the disposition, and the beneficiary is under the obligation of conforming therewith **only after he has received the bequest (Donazione e Testamenti,** Vol. 1, No. 352). The same author applies this theory to negative potestative conditions: "Negative potestative conditions are regarded rather as **modus** than

conditions" (Work quoted no. 354). Italian text-books adopt the same principles: "The modality which is attached to a disposition for the purpose of **restricting the freedom of the successor** as regards the use of the property received, and not for the purpose of suspending or eventually rescinding that disposition.... is usually called burden or **modus** (Digesto Italiano, **Successioni Testamentarie** No. 628). Such a limitation may be imposed solely in the interests of the Testator or in order to perpetuate his memory "to satisfy a possible and licit desire.... In these cases, equivocation is no longer possible. The burden imposed upon the successor is markedly and exclusively **modus** in character." (Dig. Ital. Chapter quoted, No. 638).

In cases of doubt, the interpretation which is the more favourable to the contravener is to be adopted, in the sense, that is, that **modus** and not **conditione** is to be understood as having been imposed by the founder. In fact, Troplong states: **"Modus** is no bar to the **purity** of a disposition. Whereas a pure disposition is fuller and more perfect than one which is conditional, it is as well to take the interpretation which is the more favourable of the two (Work quoted, no.354). Consequently, the interpretation which leaves the disposition intact and efficacious is to be adopted (Dig. Ital. Chapter quoted, no.635); in other words, the disposition is to be held to be **sub modo.** Richeri was of the same opinion: "In dubio, an conditionem, an modum legato, vel fideicommisso adjicerit testator, passim tradunt interpretes, **modum** potius quam conditionem praesumi; tum quia dispositio sub modo **magis perfecta** est, utpote pura quam conditionalis; tum quia benignior ultimarum voluntatum interpretatio fieri debet; atque ita explicandae sunt ut, quod fieri potest et verba patiuntur, **honorato prosint"** (Op. cit. no.9227).

The same interpretation was adopted by the local Courts in cases of doubt (Collection VIII, 705, 1st col.; X, 345; XVIII, II, 106).

According to these principles, the conclusion to be arrived at is that forfeiture in the event of contravention was ordained by the Testator, not as a condition, but simply as a burden or **modus.** In fact, in the case at issue, the institution is pure and simple, without any limitation. The prohibition refers to **the future** and not to the time forerunning the succession to the primogeniture. It is beside the point that the founder wanted that forfeiture be incurred "from that moment", that is to say, from the moment at which the contravention occurs,

No. 27. Defendant's Note of Submissions. —*Continued.*

for it has been held that even where they are used, the words **ipso facto** do not suffice to render the disposition conditional. (Collection XVIII, II, 106).

It follows that forfeiture has not as yet occurred, and that it may occur only when, and after, the Defendant has failed to comply with an appropriate order made by the Court in a suit instituted for the purpose. In fact, ruling out the possibility that the Defendant had taken the name Viani with the deliberate intent of flouting the founder's wishes (it has been established that he adopted it on the advice of one of the best lawyers of that time) the most that can be ascribed to him is **error scusabilis,** which of itself is enough to afford him justification at law and to authorise the Court to grant him a period of time within which to conform to the instrument of foundation. As established by the Court of Appeal of Bologna, on the 14th March, 1885, any excuse "may be deemed good in order to avoid the forfeiture which is odious. And this is the prevailing practice of the Rota" — a principle which has been followed in local judicial practice (Collection XVIII, II, 106).

In any case, forfeiture on Defendant's part is never prejudicial to his children or his other descendants within the vocation. In fact, it is equivalent to renunciation, which is prejudicial only to he who renounces — and never to those who are next in the vocation, because these "succeed to the fideicommissum ab intestato, in their own right". (Collection XXVI, II, 335; XXVI, I, 693). Says Torre: "Recusando adimplere voluntatem testatoris (and, in that case, the holder declined to adopt the founder's surname and coat-of-arms), cum est in eius potestate, videtur haereditati renunciasse" (De Successione in Majoratibus et Primogenituris Italiae, Vol. I, p.392, no.88).

It is beside the point that, at the time he is supposed to have incurred forfeiture, the Plaintiff had no children, for there was then always the possibility of his begetting children — and even here **"nascituri pro natis habentur".** Molina says: **"Nascituri idem ius habent ad fideicommissum quod iam nati"** (Work quoted p.4, no.18); and that the founder wanted to call to the primogeniture the children yet to be begotten is made clear by the words **"in perpetuo"** used in the instrument of foundation. "Ex particula quod semper filii **in infinitum....** inducitur vocatio nasciturorum" (Torre, work quoted, Vol. II, p.387, no.29). Consequently, Torre maintains: "In dispositione habente tractum temporis successivum,

filii **quocumque tempore nati,** avocant fideicommissum a possessore" (Work quoted Vol. II, p.387, no.28). Therefore, always according to the same author "non obstat quod non esset natus aut conceptus tempore purificatae conditionis... quia, sufficit, in hoc casu, quod natus fuerit **pendente lite** super purificatione primogeniturae." (Work quoted Vol. III p.192, no.1). And the children who are born **pendente lite** are entitled to preference over the person who has brought the action, if his right is not better than theirs. "Natus pendente lite super contraventione, praefertur tertio **majoratum** vindicanti" (Molina, work quoted, p.533 no.45).

This principle is stretched to the point where it is held that the party seeking recovery is not vested with **perfect possession** ("acquisitionem perfectam" (Torre, work quoted, Vol. II, p.187, no.30) and that he would be merely an administrator in the interests of the future issue in the vocation — "tenetur tamquam administrator" (Torre, work quoted, no.34).

As regards the point that forfeiture does not prejudice the children who may yet be begotten, the Defendant makes reference to the Note of Submissions filed by him in the Court of First Instance.

If children yet unborn are not prejudiced by the holder's forfeiture, much less are those who are already born. In the case at issue, it has been established that, at the time the Plaintiff sought the recovery of the primogeniture — that is to say, when on the 13th August, 1934, he filed a judicial Protest — the Defendant already had a daughter, who, according to the instrument of foundation, had the possibility, until she completed at least the fiftieth year of age, of having children and retaining the **fideicommissum** in the primogenial line.

Another reason which rules out the prejudice in question is that forfeiture is due to the use of the name "Viani", and not to any **"real incapacity"** on the part of the Defendant. This prohibited use of the name Viani produces **personal incapacity,** and never so-called **lineal** incapacity, and the consequences affect only the contravener. "Est bona distinctio", says Torre, "in hujusmodi materia, quod, vel exclusio paterna est **personalis** respiciens tantum ipsius patris personam, ve l est **linearis** influens in totam lineam et descendentiam: primo casu excluso patre, non excluditur filius; secus vero secundo casu" (Work quoted, Vol.II, p.387, no.10). The author exemplifies this incapacity in the **incompatibility** of the possession of two primogenitures: "At linealis non dicitur, sed

No. 27. Defendant's Note of Submissions. —*Continued.*

personalis exclusio, quando provenit privatio ex eo quod disponens non vult **ut duo maioratus uniantur"** (Work quoted no.12); and, further on, he reiterates the same prrinciple in connection with another case of incompatibility: "non obstat quod Maschio teneas Carolus reddiderit se incapacem huius primogeniturae per **ritentionem** primogeniturae Magnanae; quia incapacitas patris uti personalis, non autem **realis** sive **linealis,** non nocet filio ex **jure proprio venienti** et qui in nihilo peccavit" (Work quoted, Vol. III, **Decisione** XXVII no.6). The same author thus summarises the distinction in question: "Incompatibilitas non datur in habitu, sed in actu". (Work quoted, Vol.II p.387 n.49).

Having established the point that the prohibition in question was made in the instrument of foundation **sub modo,** and that any contravention on the part of the holder is prejudicial to no one else but himself, and never to those who are within the vocation in the same line, even where they are still unborn — the natural conclusion to be arrived at is that, in the event of Defendant's forfeiture, the primogeniture would devolve upon Defendant's elder son, and not upon the Plaintiff. The fact that Defendant's elder son was in being before the suit was instituted is one more reason why the Plaintiff should not have continued to press his claim, especially when he himself had expressed eloquent doubt thereanent in the first judicial act that he filed against the Defendant. In fact, we find these doubts heavily stressed in the Protest of the 13th August, 1934, which may well be quoted again: "Even if the complainant has 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, it being possible that, later on, a **male** will be born of the said female" (the daughter whom the Defendant had at the time); and he ends by enjoining the Defendant to surrender the property of the primogeniture to the male child **yet to be born of Defendant's daughter** in the event of it being adjudged and determined that **that child** is entitled to that primogeniture. Two precious admissions are to be drawn from this document. One is that the Plaintiff acknowledged the right of Defendant's daughter to the primogeniture, in view of the fact that, until she was fifty years of age, it was possible for her to give birth to a male capable of securing possession of the primogenial property. The other is that he was prepared to relinquish all the property held under that primogeniture as soon as that male child had been born

No. 27. Defendant's Note of Submissions. —*Continued.*

— which meant that, until that time, the Plaintiff was going to be merely an **administrator.** Now, this admission applies, **a fortiori,** to the male children that the Defendant has at the present moment, inasmuch as, if the male children both of the Defendant and of Defendant's daughter were **in spe** at the time of the Protest in question, the Defendant now has a son, and the rule respecting succession laid down in the instrument of foundation is to be respected — "from first-born male" (the Defendant) "to first-born male" (the elder of Defendant's sons).

In case of doubt, the interpretation which is the most favourable to the line already in possession of the primogeniture, and to those who are in that line, is to be adopted, for that is the will of the Testator.

The Appeal entered by the Plaintiff should therefore be dismissed with costs.

(signed) A. MAGRI, Advocate.

Filed by R. Dingli, L.P., with a Note of Submissions.

No. 28.

No. 28. Plaintiff's Minute producing Note of Submissons.

Plaintiff's Minute producing Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani et.

The Minute of the said Noble Giorgio Cassar Desain, whereby he produces the annexed Note of Submissions.

(signed) G. PACE, Advocate.
ROB. DINGLI, Legal Procurator.

This 28th May, 1945.

Filed on the 21st of May, 1945.

(signed) J. DINGLI,
Dep. Registrar.

No. 29.
Plaintiff's Note of Submissions.

No. 29.

Plaintiff's Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani et.

Plaintiff's Note of Submissions.

Respectfully sheweth:—

The points raised by the Defendant in his Note of Submissions are the following:— 10

1). The Plaintiff did not enter appeal from the Decree calling third parties to the suit and therefore the Decree has now become **res judicata.**

The argument that the Defendant draws therefrom is that in the present suit Defendant's children have a right to the judicial declaration that they, and not the Plaintiff, are entitled to the primogeniture Cassar Desain.

There was no need for the Plaintiff to appeal from the Decree in question, inasmuch as, according to law, the third party summons does not alter the claim put forward in the 20 Libel. The Plaintiff prayed for a judicial declaration that the Defendant had forfeited the right to the tenure of the primogeniture on the ground that he had contravened the will of the founder, and that, consequently, the primogeniture had devolved upon the Plaintiff from the day on which the contravention had occurred.

The fact that the Court below had called as parties to the suit the male children of the Defendant who were born after the Plaintiff had already acquired the right to the primogeniture (as the Plaintiff understands it), does not imply that 30 those children may, on the claim set up by the Plaintiff, be held entitled to the primogeniture which their father had forfeited.

Therefore the judgment of the Court of First Instance, in so far as the judicial declaration that, in the event of forfeiture on Defendant's part, the primogeniture would devolve upon Defendant's sons, is **extra** or **ultra petita.**

2). The Defendant submitted that the present is a suit

for recovery, as distinct from a suit of competing claims in respect of a vacant primogeniture, and that, therefore, the Plaintiff must produce proof of his right to the primogeniture according to the instrument of foundation.

In order that this Court may decide upon this point, it is necessary to determine at which moment the Defendant had incurred forfeiture, and who, at that moment, was entitled to the primogeniture according to the instrument of foundation.

Defendant's contention that, in case of doubt, the more favourable interpretation is to be adopted, and that, in that case, the bequest is to be deemed **sub modo** and not **sub conditione,** holds good, **si et quatenus,** only where the disposition is not clear and where in fact there is room for doubt. But if the disposition is clear, no one has the right to say that there is room for doubt in order that he might have recourse to an interpretation different from that implied by the wording of the disposition, and no one should seek a benignant interpretation where the founder's wishes are precise and univocal.

Now it is clear that, just as the founder could have given an order **sub modo,** he had every right to make a disposition **sub conditione,** and, in making this latter disposition, he could not have expressed his will except in the manner in which he did express it. In fact, if a testator wants to leave a legacy on condition that the legatee would bear his name and that he would continue to enjoy the legacy so long as he continued to bear his name — which expression must he use in order that his wishes might be obeyed and carried out? There is no doubt that he can express himself in no other way. Supposing he had said: "I want that the holder shall bear my name, that this shall be a condition **sine qua non** governing possession, that no Court and no authority shall, if he disobeys, allow him a period of grace within which to conform to my wishes, and that, in that case, my nearest kinsman by blood shall from that moment take possession in his stead, for such is my wish". — According to the Defendant, not even in that case would the holder be deemed to have incurred forfeiture. And why? Because he must adopt the name when and after he comes into the enjoyment of the property.

This is against all principles of justice and all respect for the founder's wishes.

The Defendant admits, and the Court below has declared,

No. 29.
Plaintiff's Note of Submissions.
—*Continued.*

that the imposition of bearing the testator's surname as a condition governing the enjoyment of the property is a licit and lawful condition. Therefore this Court need only determine whether the founder's disposition is clearly worded, and worded in such a manner as to convey the meaning of the founder's wishes to whosoever reads it. The Testator had every right to give that order and he gave it in clear words. And he fully understood what he wanted — that the holder should irretrievably forfeit the primogeniture from the very same moment that he should contravene his wishes and that his place should be taken by the person who at that moment **(fin d'allora)** is entitled thereto according to the instrument of foundation.

Therefore, Defendant's submissions regarding **modo** and **conditione** are out of place, because the disposition is clear, (**vide** Judgment given by this Court in re "Asciak v. Asciak" on 26th February, 1945, and the highly authoritative opinions therein quoted).

In 1927, when the father of the contending parties died, and the Defendant had no children, and was not even married, the Defendant could not, according to the instrument of foundation, take both the primogeniture Cassar Desain and the primogeniture Viani, since to take the former he had to adopt the surname Cassar Desain without the admixture of any other surname, and to take the latter he had perforce to adopt the surname Viani. At the very outset, therefore, he was cautioned by his mother, as he has admitted in evidence, against adopting both surnames. But he obtained legal advice and adopted both names. The upshot is that, ever since 1927, the Defendant has contravened the will of the founder and forfeited the primogeniture in terms of the instrument of foundation. At that moment, the only male descendant of the founder who was in being was the Plaintiff, and, as such, the Plaintiff had the right to the primogeniture.

Therefore, once the Defendant, at the moment of forfeiture, had no children, the primogeniture passed **uti sagitta** to the Plaintiff who, according to the instrument of foundation, was the collateral nearest to him by blood, descending from a male or a female.

It is the Defendant's claim that that has not happened, and that the primogeniture devolves upon the Plaintiff only if the Defendant happens to have no children at the moment of his death, and not at the moment foreseen by the Testator, namely, at the moment of the transgression of the Testator's

order — for forfeiture, according to the Defendant, must not serve to penalise future descendants.

This argument, however, is incompatible with the instrument of foundation. Not only did the Testator prescribe forfeiture in the clearest manner, but he established who should take the primogeniture in the stead of the defaulting beneficiary; and therefore Plaintiff's claim that he should succeed to the primogeniture should not be hindered in this case by any argument bearing on the possibility that children may be born to the Defendant. The only question before the Court in this case is whether the one or the other of the two contending parties is entitled to the primogeniture, in view of forfeiture. The judgment in re "Testaferrata v. Testaferrata" (p.847) established this principle, and in the other judgment (No. 150/1923) the Privy Council declared: "On failure of a beneficiary from whatever interested motive to claim primogenial property, that property would be at the mercy of any person whatsoever within or without the vocation who succeeds in obtaining possession of it. He may hold it against all comers, even those next in the vocation, freed and discharged from all primogenial obligations, precise and serious as in this case they are. A more serious frustration of founder's intentions as set forth in such an instrument of foundation as that here in question can hardly be conceived".

It is common knowledge that Defendant's children, especially if they are still young and **filius familias,** are not likely to come forward to help undoing the illegal possession of a primogeniture held by their father.

But this does not legalise their father's possession of the primogeniture, and therefore their father cannot set up the plea that, if there are third parties who do not wish to move in the matter, he can continue in the enjoyment of the primogeniture against the terms of the instrument of foundation.

The abovementioned judgment in Volume XIV and the judgment of His Majesty's Privy Council on the **jus tertii** is therefore just and legal. How far more just and legal appears the right of the Plaintiff who, when forfeiture took place, was the only male from male descending from Riccardo Cassar Desain, the previous holder!

According to the various judgments quoted by the Plaintiff in his previous Note of Submissions, where forfeiture is ordered by the Testator **ipso jure** or **ipso facto,** it is not necessary to prove **dolus** on the part of the holder. The

No. 29. Plaintiff's Note of Submissions. —*Continued.*

Testator envisaged only **"nudum simplexque factum contraventionis secus ab omni dolo culpaeve concursu"** and similarly the Sacra Rota itself held that when the fideicommissum is descendent, and there is an order which has to be carried out on pain of forfeiture, the obligation imposed upon the beneficiary so burdened is nothing else but a resolutive condition which affects also the holder's descendants and **eam veluti a radice infecta promanentem a fideicommisso excludit."**

Defendant's argument, to the effect that so far as possible any excuse should be accepted in favour of the defaulting beneficiary in order that he may be spared the consequences of the penalty, is not applicable to the case at issue, inasmuch as the Testator's order is precise and admits of no tergiversation; and therefore the claim rests perfectly on the will of the founder and on law and the Plaintiff prays that it be allowed with costs.

(sd.) G. PACE, Advocate.

Filed 28th day of May, 1945.

No. 30. Defendant's Minute producing Certificates.

No. 30.

Defendant's Minute producing Marriage & Birth Certificates

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain

vs.

The Marchese James Cassar Desain Viani.

Defendant's Minute.

The Defendant produces the annexed Act of Marriage and Acts of Birth (Exhibits "A" to "J").

(signed) A. MAGRI,
Advocate.
G. MANGION,
Legal Procurator.

This sixth June, 1945.
Filed by G. Mangion, L.P. with ten Exhibits.

(signed) J. CAMILLERI CACOPARDO,
Dep. Registrar.

No. 31.

Judgment of H.M. Court of Appeal

HIS MAJESTY'S COURT OF APPEAL.

JUDGES:

His Honour Sir George Borg, M.B.E., LL.D., Chief Justice and President.

The Honourable Mr. Justice Prof. E. Ganado, LL.D.
The Honourable Mr. Justice L. A. Camilleri, LL.D.

Sitting held on
Monday, 25th June, 1945.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
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.

The Court,

Upon seeing the Libel, filed in His Majesty's Civil Court, First Hall, whereby the Plaintiff, premising, — that the Noble Dr. GioBatta Cassar, Cleric, by Testament opened and published by Notary Paolo Vittorio Giammalva on the 2nd April, 1781, founded a perpetual primogeniture in favour of the lawful male line descending from the heir instituted and appointed by him, the Noble Salvatore Testaferrata, and subjected thereunto the urban and rural property mentioned in the annexed Nota (exhibit "A"), besides such other property as may be established during the proceedings; —

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

that the Noble Salvatore Testaferrata aforesaid died without issue, in consequence of which the primogeniture, by judgment given by Her Majesty's Civil Court, First Hall, on the 25th February, 1848, devolved upon Filippo Giacomo Testaferrata, first-born son of Maria Teresa Cassar Desain — whereupon the holder renounced the surname Testaferrata, and assumed that of Cassar Desain, in accordance with the dispositions of the Testator who ordered:— "I will then and expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed after the death of the contravener shall succeed to the said primogeniture"; — that this disposition thus made by the Testator is in the clearest terms and the penalty attaching thereto in respect of contravention admits of no question and of no remedy; — that after the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain, who died, without issue, on the 26th August, 1870, and that, after the death of the last-named beneficiary, the primogeniture devolved upon the Cavaliere Marchese Lorenzo Antonio Cassar Desain, on whose death, on the 14th February, 1886, it devolved upon his first-born son, the Marchese Filippo Giacomo Cassar Desain, and, after the latter's death, which took place on the 8th October, 1906, without issue, upon the Marchese Giorgio Riccardo Cassar Desain, the father of the contending parties, who died on the 21st July, 1927, survived by his three sons, namely, the Defendant, who was born on the 29th May, 1907, the Noble Filippo Cassar Desain, who was born on the 27th November, 1908, and the Plaintiff, who was born on the 19th February, 1915; — that by judgment given by His Majesty's Privy Council on the 20th January, 1925 (No. 150/1923), the primogeniture Viani, founded in the records of Notary Paolo Vittorio Giammalva on the 28th May, 1775, was adjudicated in favour of the said Marchese Giorgio Riccardo Cassar Desain who, therefore, at the time of his death, which took place on the 21st July, 1927, held two primogenitures, that is to say, the primogeniture Cassar Desain, at issue in the present suit, and the primogeniture Viani; — that, in his Testament of the 21st February, 1927, published by Notary Dr. Carmelo Farrugia, the said Marchese Cassar Desain nominated his son, Filippo, as the holder of the primogeniture

Viani and declared that his one and only reason for so doing was that his first-born son, the Defendant, had the right to the primogeniture Cassar Desain; — that, on the death, on the 22nd July, 1927, of the said Filippo Cassar Desain, the brother of the contending parties, the primogeniture Viani became vacant; — that the Defendant, after the death of the said Filippo Cassar Desain, assumed the surname Viani, besides the surname Cassar Desain, whether in instruments in public form or under private signature — and this contrary to the precise order of the Testator — as established by the documents annexed to the present Libel, and several others which the Plaintiff reserves producing at a later stage; — that, on the 13th August, 1934, the Plaintiff entered formal Protest against the illegal action of the Defendant, enjoining him to surrender to him the property appertaining to the primogeniture Cassar Desain, which he had forfeited by reason of default in complying with the explicit order of the Testator, to the effect that the holder, on pain of forfeiture, shall not bear the surname Cassar Desain admixtured with any other surname; — that there is no room for any doubt as to the person who is entitled to the primogeniture Cassar Desain: the words of the foundation are clear, and the founder laid down the penalty of forfeiture against the holder, and in favour of he who, on the holder's death, "when the holder incurs forfeiture", would succeed him — and succeeds him, as stated by the founder, from that moment **(fin d'allora).** — that, as least since 1931, the Defendant has been regularly using the surname Viani in addition to that of Cassar Desain, as established by the documents produced, and, therefore, at that time, the one and only person entitled as consanguineous next-of-kin was the Plaintiff, his only brother; — prayed for a judicial declaration: (1) that the Defendant, in view of 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

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

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 sententiae.**

Upon seeing the Defendant's Answer, submitting:— that, preliminarily, the Plaintiff has no interests of his own in instituting the present proceedings, and much less in pressing for Defendant's forfeiture of the primogeniture Cassar Desain, inasmuch as that primogeniture can never devolve upon him, but upon Defendant's children — as the foundation deed makes clear: that the Plaintiff evinced his own doubts as regards the alleged right which he is now exercising when, in the Protest lodged on the 13th August, 1934, he stated: "Even if the complainant has 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, it being possible that, later on, a male will be born of the said female" — and he then proceeded to enjoin the Defendant to surrender the property of the primogeniture **to the male child** yet to be born of his (the defendant's) daughter in the event of it being adjudged and determined that that child is entitled to that primogeniture (Exhibit "A"); — that, subordinately, and without prejudice to the foregoing, the forfeiture of the possession of the primogeniture does not occur **ipso jure,** but has to be pronounced by the Court, especially as the prohibition laid down by the founder, whereon the claim for forfeiture rests, is not a **condition,** but merely "modus". Consequently, the Defendant is entitled to prove justification for his action, and to obtain from the Court the grant of a period of time within which to conform to the terms of the disposition, if it should prove to be the case that he should do so — and therefore the Defendant prayed that Plaintiff's claims be dismissed with costs.

Upon seeing the Decree of the 21st January, 1944, whereby the minors, Anthony and Lawrence, Defendant's children, as well as the male children which may yet be begotten by the Defendant, were called as parties to the suit, through the appointment of Curators.

Upon seeing the Decree of the 12th February, 1944, whereby the Marchesa Cassar Desain Viani was appointed curatrix on behalf of the minors Anthony and Lawrence and on behalf of the male children which may yet be begotten by the Defendant.

Upon seeing the Answer of the Marchesa Cassar Desain Viani whereby she submitted: that, preliminarily, the Noble Giorgio Cassar Desain has no interests of his own in instituting the present proceedings or in bringing about forfeiture on the part of the Marchese James Cassar Desain, inasmuch as the primogeniture Cassar Desain can never devolve upon him; that at the present day the succession to the aforesaid primogeniture is rooted in the line of the Marchese James Cassar Desain, to the exclusion of any other line; that there are females as well as males in the line descending from the said Marchese Cassar Desain, and this fact, in the event of his forfeiture of the primogeniture under a Court order, is enough for the primogeniture to go to his children, and, specifically, to the child who is next in the vocation according to the terms of the foundation — to the exclusion of any collaterals of the said Marchese Cassar Desain; — that, in actual fact, the first-born child of the Defendant Cassar Desain was a female, and, even if he had had no other children, this would have been enough for the primogeniture to go to her and be held by her until she were delivered of a male descendant; — that it so happens, however, that the present holder has two sons, and the possibility of his begetting others is not to be ruled out; — and that, therefore, the Defendant, in her aforesaid capacity, submits that, in the event of a judicial pronouncement divesting their father of the primogeniture, the two minor sons aforesaid, the Noble Anthony and the Noble Lawrence Cassar Desain, or the one or the other of them, should be declared the successors, or the successor, to the primogeniture in question, to the exclusion of the Noble Giorgio Cassar Desain.

Upon seeing the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944, allowing the first claim, and, as regards the second claim, declaring that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the judgment becomes **res judicata,** he fails to declare and formally to 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; — that, in the event of forfeiture as above, such forfeiture shall have effect from

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son; — and, disallowing the other claims, ordered each party to bear its own costs and that Registry fees be paid by the Defendant.

That Court having considered:—

It has been held in a parallel case ("Caruana vs. Strickland", H.M. Civil Court, First Hall, 31st January 1902 — Collection of Judgments, Vol. XVIII-11-106) that a disposition such as the one at issue, requiring the holder to bear the Testator's name, is not illicit. In the present case, there is the obligation to take and bear the name Cassar Desain without the addition of other surnames. The surname Viani is not his father's, but that of the founder of another primogeniture, and the obligation in question, therefore, is certainly licit. That obligation had to become binding on succession to the primogeniture, and not earlier, and therefore the disposition is **sub modo** and not **sub conditione,** inasmuch as there are present the three requisites respecting **modus,** namely: (1) **institutio sit pura;** (2) **extet praeceptum aliquid faciendo vel non faciendo;** (3) **adsit ademptio in casu contravventionis** (Fierli Celebriorum Doctorum Theoricae p.18), and if there had been any doubt, the disposition would have had to be considered as a modality. As has been established in text-books and case-law (especially in the judgment quoted above), it is necessary to determine whether there has been **dolus** or **culpa gravis** on Defendant's part. In the case at issue, there was neither the one nor the other, but only **error scusabilis,** considering that the Defendant had sought and obtained the advice of one of the foremost Advocates in Malta. At the present day, the Defendant has two sons, the elder of whom is next in the vocation — and not the Plaintiff; and, therefore, in the event of forfeiture, the primogeniture is to go to Defendant's first-born son. Nevertheless, the Plaintiff, as one of the founder's descendants, had an interest of his own in the suit, namely, that of ensuring the observance of the obligations imposed.

Upon seeing the Note of Appeal of the Plaintiff, and his Petition, praying that that judgment be varied, in the sense, that is, that it be reversed (1) in so far as the pronouncement on the second claim — it being instead adjudged and determined that the Defendant has incurred forfeiture since 1931, or other approximate date, and that the Appellant, as the

next in the vocation, has the right to the aforesaid primogeniture — and (2) in so far as the other claims were disallowed, with all the costs against the Defendant.

Upon seeing the documents produced together with the Petition.

Upon seeing Defendant's Answer, praying that the judgment be affirmed, with all the costs against the Appellant.

Upon seeing the Answer of the Marchesa Cassar Desain **nomine,** praying that the judgment be affirmed, with costs.

Upon examining the elaborate Notes of Submissions filed **hinc inde** by the parties.

Having heard Counsel on both sides.

Having examined all the acts in the Record.

Considering, —

The first question to be gone into is that regarding the purport and true significance of the forfeiture clause which the founder inserted in the Testment and which is conceived as follows: " I will then and expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed as above, after the death of the contravener, shall succeed to the said primogeniture; and not otherwise ".

To interpret and properly to evaluate the will of the Testator, it is necessary to read this disposition together with the other dispositions in the Testament, for, as has been said by Fusarius Quaest. (242, no.123) — **"dispositio testamenti alteram declarat",** which, by analogy, is upheld by the other principle: **"Incivile est nisi tota lege perspecta, de una particula ejus judicare vel respondere".** In fact, the Testator, in laying down the penalty of forfeiture, stated that the person substituting the holder who has incurred forfeiture is to be "he who should succeed as above, after the death of the contravener; and not otherwise." Thus the Testator made reference to all the preceding dispositions made in regard to the substitution of beneficiaries. If the case were otherwise, he would not have used the words "he who should succeed as above and not otherwise" — words which

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

clearly show that he wanted to ensure that his wishes and his dispositions in regard to the primogeniture would not be brushed aside. Otherwise, the words "as above" would have been, not only ambiguous and purposeless, but also very dangerous, for they are clearly indicative of something to which the Testator wanted to refer, that is to say, that all the rules he had laid down would be observed, and "not otherwise" — and he would have no exceptions to bear upon this envisaged case of forfeiture. The word "should" **(dovrebbe)** stresses this interpretation, inasmuch as, if he had wanted to refer to the moment of forfeiture, he would have used the words "is to succeed **("deve succedere"),** whilst the dispositions, taken as a whole, show that he wanted to refer to the situation that would arise on the death of the holder who had incurred forfeiture. This interpretation is borne out by the following considerations, namely: (1) Once forfeiture is prescribed, the clause partakes of the character of a penalty clause, and such clauses may have effect against the contravener, but never against his line which, if the contrary interpretation were to be held, would be penalised in respect of an infringement on the part of the holder who was in that line, to the prejudice of the whole line — which is contrary to sane reasoning and every sense of justice. (2) As regards renunciation, it has been established in case-law and text-books consonant therewith that he who would deliberately go against the obligations devolving upon him, and is aware of what he is doing — that is to say, he who would renounce this primogeniture — is capable of prejudicing only himself, and not somebody else who is next in the vocation to that right — in this case, the primogeniture in question. In fact, supposing the Defendant had wanted deliberately to use the name Viani together with that of Cassar Desain, he would certainly have known that, by so doing, he would not be able to retain that primogeniture, and it would therefore have to be presumed that he had wanted to renounce the right — but he could never have renounced it in respect of his descendants, who were expressly called thereto by the Testator. (3) In the various cases of substitution that were envisaged, the Testator showed clearly that it was no wish of his to leave out any of the male descendants, even if descending from a female. In fact, after making his dispositions for the substitution of the universal heir, he stated that "if the said Salvatore Testaferrata shall have no male issue, but only female issue, of whom males shall or **may be born,** then in that case...." And he proceeded to order another substitution. In referring to females, he did not merely say "of whom males shall" but

"to whom males may be" born, and, therefore, according to the intention of the Testator, there is no prejudice as regards the child yet to be begotten, and it is only a question of waiting to see whether a male is born of that female. And he uses the same diction in the succeeding paragraph: "Similarly, if any of the said first-born males of the said Salvatore Testaferrata, my heir, shall have no male issue, but only female issue, of whom males are or **may be** born, then it is my will that...." and further on he states: "And on failure of such male descendants, the first-born male who is or who shall be born", etc.

As may be seen, the line was the Testator's predilection. In fact, he then continued to state: "If it should then happen that any of the said first-born males of the said Salvatore Testaferrata shall have no males descending from a male, and shall not or **cannot** have males" (he still reiterated the possibility that the holder may have males, or that males may be born of a female) "descending from a female, then it is my will that the collateral male nearest to him by consanguinity, whether descending from a male or a female, shall succeed to the said primogeniture". In this case, the Testator envisaged the transmission of the primogeniture from one line to another, and its devolution upon the nearest collateral — that is to say, the case where the first-born of the first holder of the primogeniture shall not have, and shall have no possibilty of having, any males, whether descending from the male or the female line. Which means that it was only after making sure that it would no longer be possible for any males to be born either to the male or female branch of the line of the first-holder that the testator ordered and permitted the transmission of the primogeniture to the collaterals.

Notwithstanding that those dispositions render his intentions only too clear, the Testator, in order to be still more explicit and still more certain, ordered further: "It is my will that the said primogeniture, 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". A disposition which is clear enough, showing as it does that once the primogeniture is held by the Defendant's line, it must continue in that line until it is certain that, in that line, there are no males descending from a male (such as Defendant's sons) and no males that may be born of a female — and that so long as there is that possibility, the primogeniture cannot devolve upon another line. Since doubt would arise until what time

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one should have to wait to ascertain whether males are born of a female, the Testator made a further disposition and willed: "that it is 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 primogeniture".

After making this disposition, which is conceived in general terms and is therefore comprehensive of all cases that may occur — "as an invariable rule standing by itself respecting successions to the said primogeniture" — and after stating also that the grandson shall succeed to his father's father, notwitstanding that his father is dead, to the exclusion of the paternal uncle, the Testator proceeded to make the disposition regarding the adoption of the surname in question, on pain of forfeiture. This shows clearly that once it was the Testator's will to favour the line — in such a way as to ensure the continuity of the primogeniture in that line, until such time as it could no longer be possible, after the female in that line had completed the fiftieth year of age, to expect the birth of a male descendant, and until it would no longer be possible for any male descendants to be born in that line, either from the male or female branch — the forfeiture in question can never be interpreted to mean that, in this special case, the Testator had wished to penalise the line on account of the holder's transgression and to revoke the dispositions regarding the possibility of the birth of male descendants in that line. If such had been the case, the penalty in respect of the holder's transgression would have ceased to be a personal penalty and would have included the whole line. But such was not the wish of the Testator who, on the contrary, made it very clear that he wanted the primogeniture to remain in the line until every possibility was exhausted of male descendants being born into that line.

Considering, —

Therefore, even if forfeiture had taken place then, in 1931, when the Defendant contravened the will of the Testator, or even if it had taken place earlier, the primogeniture would have come under the tutelage of an Administrator who would have safeguarded the rights of those males who might possibly be born in that line at a future time.

Considering, —

The Court below held that forfeiture had not taken place then, but that it would take place now, if the Appellant fails to conform to the terms of the judgment. To determine this question, it is necessary to establish whether the forfeiture clause at issue is a resolutive condition or **modus.** The law that is applicable in this case is that obtaining at the time of the foundation, as held by this Court in a parallel case (Formosa Montalto v. Attard Montalto, 15th Nov. 1895 — Collection of Judgments, Vol. XV p.281). In Common Law, it was a controversial issue whether a potestative condition on the part of the debtor (in this case, the holder who is subject to an obligation) can prevail where the condition is resolutive, since the nature of that condition is such that, even in Roman Law, there were text-books writers who maintained that a resolutive condition is not conditional, but pure, and there were judges as well as writers who held that, in this case, a potestative condition cannot have effect. But a distinction is made in modern text-books, as well as in Maltese Law (article 762 of Ordinance VII of 1868) between the condition which is purely and metaphysically potestative, dependent on the **"merum arbitrium"** of the debtor, **in ipsa et mera voluntate,** and the condition which is simply or physically potestative, dependent on fact — **in facto ac voluntate pendente.** (Vide Giorgi, **Delle Obbligazioni,** Vol. 4 No. 268; and Demolombe and Larombiere, therein quoted).

Taking into consideration the serious doubts that were entertained in Ancient Law on the validity of a similar condition if attached to a disposition as a resolutive condition (even where dependent on fact), it is hardly to be presumed that the Testator — who, no doubt, before making a Testament of such importance, had as usual the benefit of legal advice — would have laid a condition which, according to the legal principles then predominating, might one day be challenged; on the contrary, it is more likely that he would have subjected a disposition of such great importance to a firm modality. Then the clause, even taken intrinsically, is clearly not a condition, but modus. In fact, condition relates to a future and uncertain event on which depends the existence of the disposition, or which may, when it occurs, rescind the whole disposition — whilst the Testator had no wish to resolve that disposition, even as against the contravener, but ordered that, if he failed to bear the name Cassar Desain, he would thenceforward incur forfeiture, **ex nunc** and not **ex tunc.** It is therefore more reasonable to hold that the Testator had

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wished to impose a burden on the beneficiary who already held and was enjoying the primogeniture. So he set him the obligation, and this obligation cannot be aught else but a burden — **modus** — to which the possession of the primogeniture was subjected — an obligation to the effect that the holder should bear no other name but that of Cassar Desain. If the Testator had wished to make a resolutive condition, he would have said clearly that, in case of contravention, the holder would lose all and go out of the primogeniture **ex tunc,** just as if he had never been the holder thereof — for this is the real nature of a resolutive condition; but, on the contrary, the Testator stated that the holder would incur forfeiture from the moment the contravention occurred, saving what is laid down further on.

There is then the theory of Aretino which has remained famous in Common Law and which that writer based on L.134 Dig., expounded by Fierli **(Oss. pratiche** tom. 5 osser. 118). Reference to it has been made by the Court below in this suit and in the suit "Dr. Caruana v. Sir Gerald Strickland" (Collection of Judgments, Vol.XVIII-II-p.106), wherein it was held that a clause such as the one in question is to be considered as a burden — **modus** — and not as a resolutive condition, and that **modus** should take the benefit of any doubts that there might be, for **"in re dubia benigniorem interpretationem sequi non minus iustius est quam tutius",** (L.192, par.1 Dig.L.17), and **"In poenalibus causis"** (and the one at issue is undoubtedly a penalty clause against the contravener) **benignius interpretandum est"** (L.155, par.2 Dig.L.17).

Considering, —

It having been established that the disposition constitutes **modus** and not condition, the question arises as to whether the Court below should have declared that forfeiture occurred "from that moment", as stated in the disposition (and as the Appellant holds) or whether the Defendant should have been given the benefit of conforming to the disposition. The Testator's words are "on pain of forfeiture in the event of contravention", but to establish forfeiture it is necessary to determine whether the contravention did occur, and for what reason. In other words, it has to be seen whether, as held in the aforesaid judgment in re "Caruana v. Strickland", the contravention was the outcome of a deliberate intention, **dolus,** or at least **culpa gravis,** since **culpa lata dolo comparabitur** (L.I par. I. D.XL 6), or the outcome of **"error scusabilis"** — for

if it were the outcome of **error scusabilis,** mitigation would be called for, not only by justice and equity, but also by the Testator himself, since the Testator decreed forfeiture only in the event of contravention, and there can be no contravention without **dolus** or at least **culpa gravis.** In the case of **error scusabilis,** therefore, it is necessary for the Court to give the involuntary contravener a time-limit within which to conform to the disposition, thus placing him "in default" in order that he may not plead error at any future time.

This Court agrees with the Court below in holding that the Defendant incurred **error scusabilis.** In fact, although he was aware of the prohibition, and although he had been told by his mother that he could not take an additional surname, he sought and obtained legal advice from his legal adviser — perhaps prompted by the fact that in this case he had taken the name of Viani, not because he wanted to, or out of choice, but because, as the holder of another primogeniture, he had the obligation so to do. Hence the question arose whether the the two primogenitures are compatible together, or whether he should give up the one or the other. He was advised by his legal adviser that he could continue to bear the name Viani. In these circumstances, the Court below was right in holding that, in following the advice of one of the leading Advocates we have in Malta, who has done honour to the profession to which he belongs, the Defendant could never have had it in his mind deliberately to go against the terms of the foundation.

The Court of First Instance, therefore, did right to give the Plaintiff the opportunity to conform to the disposition.

Considering, —

Another grievance of the Appellant is that the Court below adjudged **ultra petita** where, under the second head, and on the second claim, the declaration was made that, in the event of forfeiture — that is to say, in the event of the Defendant failing to adhere to the terms of that judgment — the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as the Plaintiff is not the next in the vocation — but upon Defendant's eldest son. In the Libel, the second claim is for a judicial declaration that the Defendant forfeited the primogeniture, together with all the property with which it is endowed, since the year 1931, or other approximate date, and the third claim is for a further judicial declaration that the Plaintiff, as the next-of-kin of the last holder, the Defendant, and of the Testator, has the right, as from such

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

date as shall be established, to the primogeniture, in preference to the Defendant. As above stated, the judgment below was to the effect that the Defendant had not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the judgment becomes absolute, he fails formally to undertake never more to bear the name Viani together with the name Cassar Desain; and, in view of the third claim, whereunder the Appellant sought to be put into possession in substitution of the Defendant, the Court could not but have declared that, in the event of forfeiture, the primogeniture should not devolve upon the Plaintiff, who is not the next in the vocation, but upon someone else.

The Appellant has submitted that since the present is an action for recovery, and not one of competing claims, the primogeniture, once there is or there may be the forfeiture thereof, should go to him and not to someone else. There is no justification, however, for this complaint. In fact, exactly because it is an action for the recovery of the primogeniture, an essential and principal requisite thereof is that the Plaintiff seeking recovery should substantiate his right **"actu"** to that primogeniture, to the exclusion of other parties — as was determined by this Court in re "Cassar Desain v. Testaferrata Viani" (29.1.1923) and in other cases. It is a principle in actions for recovery which is universally accepted and which has come down from Roman law. According to Paulus (L.23 D.VI-1) **"In rem actio competit et, qui aut jure gentium aut iure civili dominium adquisivit"**, and Ulpianus (L.8 D. eodem) states: **"Officium autem judicis in hac actione hoc erit, ut judex inspiciat an reus possideat: nec ad rem pertinebit ex qua causa possideat, ubi enim probavi rem meam esse necesse habebit possessor restituere, qui non objecit aliquam exceptionem"** (Vide Borsari, Vol.II p.152, **Commentario del Codice Civile Italiano).** Like all other text-book writers, Pacifici Mazzoni, in **Istituzione di Diritto Civile Italiano** (and the Italian Civil Code has a provision similar to that of our own law) states that: "In actions for recovery, the Plaintiff must prove his ownership, which is the basis for his claim; and he may not instead seek to prove that the right of ownership is lacking in the Defendant. Where the Plaintiff does not succeed in proving ownership, the action against the Defendant is to be dismissed on the well-known principle: **"actore non probante reus absolvitur"; "in pari causa melior est conditio passidentis"** (Vide also Leg.128 **De Reg, juris** L.17, Leg.9, Dig, and Leg.21 Cod. de rei vind.).

The Plaintiff rests this action on the provisions of article 18 of Ordinance VII of 1868, wherein it is laid down that: "The owner of a thing has a right to recover it from any possessor". According to the clear words of the law, therefore, he must be the owner, or at least possess the right which he seeks to recover; and if he fails to prove that he is the owner or that he has that right, his action will be shorn of its essential and principal element and his claim will be dismissed. It avails him naught to prove that the Defendant has incurred forfeiture or that he is the unlawful holder — exactly because under the law as laid down in the above-quoted article, which has its origin in the text-books on Roman law and Common law, it is not within his rights to move in the matter. And therefore the Court below rightly held that, if forfeiture of the primogeniture were incurred by the Defendant, the primogeniture would not devolve upon the Plaintiff, once the Plaintiff, as stated above, had not proved his title thereto — indeed, once it had been proved that someone else has the right to the substitution.

The facts of the case which was decided by the Judicial Committee of the Privy Council in 1925 (to which the Plaintiff has made reference) were quite different. In that case, the person who, according to the foundation, was entitled to the primogeniture, would not take any action, whilst in this case, in the event of forfeiture, the primogeniture should not, against the expressed will of the Testator, go to a remote collateral, but rather to Defendant's first-born son, who has been called as a party to the suit, and who, through the Curatrix appearing on his behalf, has laid claim to the benefits that may derive to him.

It is true that judgment may be entered for or against parties called to a suit, but as was held by this Court in re "Stepton v. Spiteri" on 23rd November, 1898, (Collection of Judgments Vol. XVII, p.117), "the provision of the law that empowers the Court to adjudge for or against the person called to the suit, in the same way as if he had appeared as a Defendant at the outset, does not rule out the possibility that he may be called to draw other advantages therein envisaged; on the contrary, the concept clearly emerges from the whole context of that provision of the law that it extends also to the third party who, supporting the views of the Plaintiff or of the Defendant, and at times his own rights vis-á-vis the one or the other, **prompts a decision, within the limits of the action proposed,** which establishes certain facts and certain rights, favourable to him or otherwise, without judgment

No. 31. Judgment of H.M. Court of Appeal. —*Continued.*

being entered for or against him." In the case at issue, the party called to the suit, acting in conformity with the principles established in that judgment, supported the views of the Defendant, and the Court, in holding and declaring that, in the event of forfeiture, the primogeniture should not go to the Plaintiff, but to Defendant's first-born son, who is also a party to the suit, did not adjudge **ultra petita.**

In fact, the Court simply made a declaration to the effect that the party called to the suit had a right to succeed in the event of forfeiture, as against the claim put forward by the Appellant. The presence of the party called to the suit would otherwise have been purposeless and against the very nature of the institution which, as the above-quoted judgment affirmed, is there for the purpose of avoiding as far as possible multiplicity of cases. It would have been a pronouncement **ultra petita** if the Court had adjudged the last claims likewise in favour of the party called to the suit, since that would have been a judgment against the Defendant and for the party called to the suit, as distinct from a mere declaration respecting a right.

On these grounds:

Dismisses Appellant's plea that the Court of First Instance, in that part of the judgment mentioned above, had determined **ultra petita;** and orders each party to bear its own costs in respect thereof.

Dismisses the Plaintiff's appeal and affirms the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944; — the costs of this appeal, barring those ordered as above, to be borne by Plaintiff Appellant, and the Registry fees in respect of this Second Instance to be paid by the parties one moiety each.

(signed) J.N. CAMILLERI,
Dep. Registrar.

PLAINTIFF'S PETITION FOR LEAVE TO APPEAL TO THE JUDICIAL COMMITTEE OF H.M. PRIVY COUNCIL

No. 32.

No. 32. Plaintiff's Petition for leave to appeal.

Plaintiff's Petition for leave to Appeal to H.M. Privy Council.

In His Majesty's Court of Appeal.

Libel No. 6/1942.

The Noble Giorgio Cassar Desain
vs.
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.

The Petition of the Plaintiff, Noble Giorgio Cassar Desain.

Respectfully sheweth:—

That the Plaintiff submitted in the Libel (No. 6/1942), that the Noble GioBatta Cassar, Cleric, by Testament opened and published by Notary Paolo Vittorio Giammalva on the 2nd April, 1781, founded a perpetual primogeniture in favour of the lawful male line descending from the heir instituted and appointed by him, the Noble Salvatore Testferrata, and subjected thereunto the urban and rural property mentioned in the Nota annexed to the Libel, Exhibit "A", besides such other property as may be established during the proceedings; — that the Noble Salvatore Testaferrata aforesaid died without issue, in consequence of which, the primogeniture, by judgment given by Her Majesty's Civil Court, First Hall, on the 25th February, 1848, devolved upon Filippo Giacomo Testaferrata, first-born son of Maria Teresa Cassar Desain — whereupon the holder renounced the surname Testaferrata, and assumed that of Cassar Desain, in accordance with the dispositions of the Testator who ordered:— "I will then and

No. 32. Plaintiff's Petition for leave to appeal. —*Continued.*

expressly ordain that the holder of the said primogeniture, founded by me as above, shall always bear the surname 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 should succeed after the death of the contravener shall succeed to the said primogeniture", — that this disposition thus made by the Testator is in the clearest terms and the penalty attaching thereto in respect of contravention admits of no question and of no remedy; — that, after the death of Filippo Giacomo Cassar Desain, the primogeniture devolved upon his son, the Marchese Riccardo Roberto Cassar Desain, who died, without issue, on the 26th August, 1870, and that, after the death of the last-named beneficiary, the primogeniture devolved upon the Cavaliere Marchese Lorenzo Antonio Cassar Desain, on whose death, on the 14th February, 1886, it devolved upon his first-born son, the Marchese Filippo Giacomo Cassar Desain, and, after the latter's death, which took place on the 8th October, 1906, without issue, upon the Marchese Giorgio Riccardo Cassar Desain, the father of the contending parties, who died on the 21st July, 1927, survived by his three sons, namely, the Defendant, who was born on the 29th May, 1907, the Noble Filippo Cassar Desain, who was born on the 27th November, 1908, and the Plaintiff, who was born on the 19th February, 1915; — that, by judgment given by His Majesty's Privy Council, on the 20th January, 1925 (No. 150/1923), the primogeniture Viani, founded in records of Notary Paolo Vittorio Giammalva on the 28th May, 1775, was adjudicated in favour of the said Marchese Giorgio Riccardo Cassar Desain who, therefore, at the time of his death, which took place on the 21st July, 1927, held two primogenitures, that is to say, the primogeniture Cassar Desain, at issue in the present suit, and the primogeniture Viani; — that, in his Testament of the 21st February, 1927, published by Notary Dr. Carmelo Farrugia, the said Marchese Cassar Desain nominated his son, Filippo, as the holder of the primogeniture Viani, and declared that his one and only reason for so doing was that his first-born son, the Defendant, had the right to the primogeniture Cassar Desain; — that, on the death, on the 22nd July, 1927, of the said Filippo Cassar Desain, the brother of the contending parties, the primogeniture Viani became vacant; — that the Defendant, after the death of the said Filippo Cassar Desain, assumed the surname Viani, besides the surname Cassar Desain,

whether in instruments in public form or under private signature — and this contrary to the precise order of the Testator — as established by the documents annexed to the Libel, and several others which the Plaintiff reserved producing at a later stage; — that, on the 13th August, 1934, the Plaintiff entered formal Protest against the illegal action of the Defendant, enjoining him to surrender to him the property appertaining to the primogeniture Cassar Desain, which he had forfeited by reason of default in complying with the explicit order of the Testator, to the effect that the holder, on pain of forfeiture, shall not bear the surname Cassar Desain admixtured with any other surname; — that there is no room for any doubt as to the person who is entitled to the primogeniture Cassar Desain: the words of the foundation are clear, and the founder laid down the penalty of forfeiture against the holder, and in favour of he who, on the holder's death, "when the holder incurs forfeiture", would succeed him — and succeeds him, as stated by the founder, from that moment **(fin d'allora);** — that, at least since 1931, the Defendant has been regularly using the surname Viani in addition to that of Cassar Desain, as established by the documents produced, and, therefore, at that time, the one and only person entitled as consanguineous next-of-kin was the Plaintiff, his only brother; —

And prayed for a judicial declaration:— that (1) the Defendant, in view of 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; — (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, or any other immovable appertaining thereto, as may be established during the proceedings; — (3) that the Plaintiff, as the Dependant'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,

No. 32. Plaintiff's Petition for leave to appeal. —*Continued.*

that the Plaintiff, by virtue of the same judgment, be put into possession thereof **ope sententiae.** — With Costs.

The Defendant, in his Answer, submitted that:— the Plaintiff has no interests of his own in bringing the present action, and much less in demanding Defendant's forfeiture of the Cassar Desain primogeniture. As the instrument of foundation makes clear, that primogeniture, though it may possibly devolve upon Defendant's children, can never devolve upon the Plaintiff; — that Plaintiff himself betrayed doubts in regard to the alleged right he is now exercising when, in the Protest entered on the 13th August, 1934, he thus expressed himself: "Even if the complainant" — the Plaintiff in the present case — "has 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, it being possible that, later on, a male will be born of the said female" — Defendant's daughter. And he ended by calling upon the Defendant to relinquish the property of the primogeniture to the son yet to be born of Defendant's daughter should it ever be determined that that son is entitled to that primogeniture; — that, furthermore, and without prejudice to the foregoing, forfeiture of the primogeniture does not occur **ipso jure,** but in pursuance of a Court judgment, especially when the prohibition that has given rise to the claim for forfeiture, is not a **condition** but simply "modus". Consequently, the Defendant is entitled to justify his actions, and to obtain from the Court, if necessary, a period of time within which to conform to the terms of the foundation;—and therefore Defendant prayed that Plaintiff's claims be dismissed with Costs.

That the party joined in the suit, by an Answer filed on the 26th February, 1943, submitted that, firstly, the Noble Giorgio Cassar Desain has no interests of his own at stake in the present suit, since the primogeniture Cassar Desain, of which he seeks to divest the present holder, can never devolve upon him; — that, at the present day, the succession to the aforesaid primogeniture is rooted in the line of the Marchese James Cassar Desain, to the exclusion of any other line; — that there are females as well as males in the line descending from the said Marchese Cassar Desain, and this fact, in the event of his forfeiture of the primogeniture under a Court order, is enough for the primogeniture to go to his children, and, specifically, to the child who is next in the vocation according to the terms of the foundation — to the exclusion of any collaterals of the said Marchese Cassar Desain; — that, in actual fact,

No. 32. Plaintiff's Petition for leave to appeal. —*Continued.*

the first-born child of the Defendant Cassar Desain was a female, and, even if he had had no other children, this would have been enough for the primogeniture to go to her and be held by her until she were delivered of a male descendant; — that it so happens, however, that the present holder has two sons, and the possibility of his begetting others is not to be ruled out, — and that, in the event of a judicial pronouncement divesting their father of the primogeniture, the two minor sons aforesaid, the Noble Anthony and the Noble Lawrence Cassar Desain, or the one or the other of them, should be declared the successors, or the successor, to the primogeniture in question, to the exclusion of the Noble Giorgio Cassar Desain.

That His Majesty's Civil Court, First Hall, by judgment given on the 6th May, 1944, adjudged as follows: Allowing the first claim, and, in regard to the second claim, declaring that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — that, in the event of forfeiture as above, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son; — and, disallowing the other claims, ordered each party, in view of the circumstances of the case, to bear its own costs, and that Registry fees be paid by the Defendant.

That the Plaintiff, deeming himself aggrieved by that judgment, entered appeal therefrom to this Court by Minute filed on the 13th May, 1944.

That, by Petition filed before this Court of Appeal on the 30th May, 1944, the Plaintiff prayed that the judgment appealed from be varied, in the sense, that is, that it be affirmed in so far as the Court below allowed the first claim, and reversed (1) in so far as that Court, in regard to the second claim, declared "that the Defendant has not forfeited the primogeniture, but he shall incur the forfeiture thereof, if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — and that, in the event of forfeiture as above,

No. 32. Plaintiff's Petition for leave to appeal. —*Continued.*

such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son"; — it being instead adjudged and determined that: "the Defendant has forfeited, since the year 1931, or any other date as established by the Court, the right to the possession of the aforesaid primogeniture, together with all the property thereof as shown in the Minute filed at fol.113, and that the Plaintiff, as the male nearest to the Testator and to the Defendant, has the right to the possession of the aforesaid primogeniture, from the date established as above, in preference to the Defendant"; — and reversed (2) in so far as the Court of First Instance "disallowed the other claims", it being instead adjudged and determined that: "the Defendant do relinquish, within a peremptory period as established by the Court, the aforesaid primogeniture, together with the income which has derived to him, or which, as a good **paterfamilias,** should have derived to him, therefrom" or, alternatively, in the event that the Defendant fails so to do, that "the Plaintiff, by virtue of the judgment, be put into possession **ope sententiae";** — and reversed (3) in so far as the head of costs, whereunder that Court ordered "each party to bear its own costs and that Registry fees be paid by the Defendant"; — it being instead adjudged and determined that: "The costs of both the First and Second Instance shall be borne by the Defendant".

That this Court of Appeal, by judgment given on the 25th June, 1945, dismissed Plaintiff's plea that the Court of First Instance, in that part of the judgment mentioned above, had determined **ultra petita,** and ordered each party to bear its own costs in respect thereof; and dismissed the appeal and affirmed the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944, with the following order as to costs, namely, that the Costs of the Appeal, barring those ordered as above, shall be borne by Plaintiff Appellant, and that the Registry fees in respect of that Second Instance shall be paid by the parties one moiety each.

That the Plaintiff deems himself aggrieved by that judgment.

That the matter in dispute exceeds the sum of Five Hundred Pounds.

Wherefore the Petitioner humbly prays that this

Honourable Court may be pleased to grant him leave to appeal from the aforesaid judgment, given on the 25th June, 1945, to the Judicial Committee of His Majesty's Privy Council.

No. 32. Plaintiff's Petition for leave to appeal. —*Continued.*

(signed) G. PACE,
Advocate.

ROB. DINGLI,
Legal Procurator.

The Sixteenth July, 1945.

Filed by R. Dingli, L.P. without Exhibits.

(signed) J. DINGLI,
D/Registrar.

No. 33.

No. 33. Defendant's Pledge.

Defendant's Pledge

In His Majesty's Court of Appeal.
In re

Noble Giorgio Cassar Desain
vs.
Marchese James Cassar Desain Viani
and Others.

(Determined on 25th June 1945.)

The Minute of the Defendant Marchese James Cassar Desain.

The Defendant, in compliance with the judgment given by His Majesty's Civil Court, First Hall, on 6th May, 1944, affirmed by this Court on 25th June, 1945, hereby declares and formally undertakes no longer to bear the name "Viani" together with the name "Cassar Desain", whether in public or in private.

(signed) A. MAGRI, Advocate.
,, G. MANGION, Legal Procurator.
,, J. CASSAR DESAIN.

This twenty-third July, 1945.

The Marchese James Cassar Desain has affixed his signature hereto in my presence.

(signed) CARM. VELLA,
Ass. Registrar.

No. 34.
The Answer of the Defendant.

No. 34.

The Answer of the Defendant

In His Majesty's Court of Appeal.

The Marchese James Cassar Desain Viani
vs.
The Noble Giorgio Cassar Desain

Defendant's Answer.

The Defendant submits that the Appellant has not complied with the provisions of Article 273 of the Laws of Procedure.

As to the rest — whilst holding that, on the merits, the appeal is untenable — the defendant will abide by the judgment of this Court.

(signed) A. MAGRI,
Advocate.

G. MANGION,
Legal Procurator.

This sixth August, 1945.

Filed by G. Mangion, L.P., without exhibits.

(signed) J. DINGLI, Dep. Registrar.

No. 35.

No. 35. The Answer of the Curatrix.

The Answer of the Curatix.

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.
and Others.

The Answer of the Marchesa Evelyn Cassar Desain, in her capacity as Curatrix on behalf of the minors Lawrence and Anthony, and on behalf of the future male issue of the said Marchese James Cassar Desain.

Respectfully sheweth:—

The Appellant has not complied with the provisions of Article 273 of the Laws of Procedure.

As to the rest — whilst holding that, on the merits, the appeal is untenable — she will abide by the judgment of the Court.

(signed) F. Apap Bologna,
Advocate.
Edward Bugeja,
Legal Procurator.

This Eighth August, 1945.

Filed by Edward Bugeja, L.P., without exhibits.

(signed) A. Ghirlando,
Dep. Registrar.

No. 36.

No. 36. Procés Verbal.

Procés Verbal

22nd October, 1945.

Dr. A. Magri addressed the Court in support of the plea that the Petition to the Privy Council is null and void at law.

Dr. G. Pace replied.

... **Omissis** ...

Dr. A. Magri has declared that, apart from the plea mentioned above, he has no further pleas to submit.

Dr. Apap Bologna, for the party joined in the suit, has made the same declaration.

(signed) J. N. Camilleri,
Dep. Registrar.

No. 37.
Plaintiff's Note of Submissions.

No. 37.

Plaintiff's Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Plaintiff's Note of Submissions.

Respectfully sheweth:—

1. The special procedure for appeals to His Majesty the King laid down in the Order-in-Council of the 22nd November, 1909, is governed by the specific rules therein set forth, and not by the rules respecting ordinary appeals from the Court of First Instance (Civil Court, First Hall or Commercial Court) to this Court of Appeal.

2. Article 273 of the Laws of Procedure (Malta) is not applicable to the Petition for "conditional leave" to appeal to His Majesty's Privy Council. In fact, that article of the law is to be read in conjunction with articles 252 and 256 of the same Code. According to Article 252, an appeal from a judgment of the Court of First Instance is entered by means of a note which is to be filed in the Registry of the Court by which the judgment appealed from was delivered, and the note is to be filed within three days or six days, according to circumstances. Article 266 provides that, where an appeal is entered (by means of the Note whereof in article 252), the Appellant shall file a petition or a writ-of-summons within the time-limit therein established. It is then laid down in article 273 that no petition of appeal shall be received unless it is accompanied by security for costs.

It is clear from the foregoing that the provision of the law requiring security for costs together with the petition relates to petitions of appeal from the Court of First Instance, and there is no reason why it should be extended to comprise "any petition", including those governed by the special procedure laid down in the Order-in-Council of the 22nd November, 1909.

That Order-in-Council stipulates for the security to be tendered by the Appellant. In fact, Norman Bentwich in "Practice of the Privy Council in Judicial Matters" (Third

Edition), states: " Where an appeal is admitted by right of " grant, the Court admitting the appeal must fix the amount " of security to be furnished by the appellant for the costs of " the appeal and the other conditions of the appeal **according** " **to the terms of the Order-in-Council which regulates the** " **procedure.** The Court from which the Appeal lies, upon " application being made for leave to appeal, **in the first place** " grants only conditional leave and fixes the security. The " appellant has to see to the completion of the security within " the term limited by the rules.... It is the usual practice for " the Court to order that the appeal be admitted upon the " required security being given, and where the security has " been completed to the satisfaction of the Court, to declare " by a final order that the appeal is admitted ".

Appendix "E" (page 333) of the work quoted above specifies all that the appellant has to do in the Courts, both in the Colony and in England. Firstly, the "Motion" or "Petition" has to be filed within the time prescribed by the Order-in-Council (within twenty-one days in the case of Malta), and, secondly, security has to be given "for the due prosecution of the appeal and for costs", and the security has **"to be given within the time fixed by the Court".** This makes it clear that the security is to be given **when** the Court fixes the amount and within the time **fixed** by the Court, and not, as in the case of ordinary appeals from the Court of First Instance, together with the Petition.

Therefore, Defendants' plea is untenable and should be dismissed with Costs.

(signed) G. PACE,
Advocate.

ROB. DINGLI,
Legal Procurator.

This thirtieth October, 1945.

Filed by R. Dingli, L.P. without Exhibits.

(signed) A. GHIRLANDO,
Dep. Registrar.

No. 38.
Defendant's Note of Submissions.

No. 38.

Defendant's Note of Submissions

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani and Others.

Defendant's Note of Submissions.

Respectfully sheweth:—

In the first place, the Defendant hereby declares that he does not insist upon the plea that the Petition is null and void by reason of the fact that it has been filed without security.

The Plaintiff, however, has failed to state on what grounds he seeks to rest his appeal to the Privy Council, to enter which he is asking for leave — grounds which are usually specified, especially when, as in the present circumstances, he may ask, not for the reversal, but only for the **variation,** of the judgment appealed from. (Argument drawn from article 161 of the Laws of Procedure). In fact, in the Petition for leave to appeal in the suit "Prof. G. Caruana **nomine** vs. Count Sir Gerald Strickland", determined by this Court on 16th June 1905, the Defendant specifically stated: "as regards the said **two heads** of the judgment of the First Hall appealed from to this Court" **(Vide** Petition 28.6.1905).

The necessity of specifying the grounds is based on the principle that no appeal lies to the Privy Council on fresh grounds which were not set out and discussed and therefore much less determined in the judgment. This is the practice hitherto followed before the Privy Council. So, too, this Honourable Court in re "Sir Gerald Strickland vs. Arturo Mifsud and others". In that case, Plaintiff's application for **leave** to appeal, setting forth new grounds, was dismissed (1st April, 1927).

It is a principle which should not be set aside that this Court is bound to exercise its judgment as to whether or not the case is appealable, under whatever aspect. It is therefore necessary that the Plaintiff should specify the grounds and the reasons for the appeal **before this Court** and **before leave to appeal is granted.** "The Court below is **bound** to exercise its judgment as to whether any particular case is appealable or

not" (Bentwich, **Practice of the Privy Council in Judicial Matters,** p.149) — a principle followed by this Court in re "Sir Gerald Strickland vs. Mifsud Bonnici", determined on 15th December, 1933 (Collection of judgments, XXVIII, I, 507).

It is therefore desirable that the Appellant should, before the Petition for leave to appeal is disposed of, declare that the appeal is to rest on the same grounds that were put forward and that were discussed and determined in the judgment to be appealed from, unless the Court deems it expedient to make it a condition that the Appellant should file the aforesaid declaration within a prescribed time-limit before leave to appeal is eventually granted. Otherwise, the Defendant resists the Petition.

(signed) A. MAGRI,
Advocate.
CLO. ELLUL,
Legal Procurator.

This Thirtieth October, 1945.

Filed by Clo. Ellul, L.P., without Exhibits.

(signed) A. GHIRLANDO,
Dep. Registrar.

No. 39.

The Minute of the Curatrix

In His Majesty's Court of Appeal.

The Nobile Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain.

The Minute of the Marchesa Evelyn Cassar Desain **nomine.**

Whereby she waives the plea that Plaintiff's Petition is null and void, raised in the Answer filed on the 8th August, 1945.

(signed) A. APAP BOLOGNA,
Advocate.

The 12th November, 1945.

Filed by Dr. Apap Bologna at the Sitting.

(signed) J. N. CAMILLERI,
Dep. Registrar.

No. 40.
Plaintiff's Note of Submissions.

No. 40.

Plaintiff's Note of Submissions.

In His Majesty's Court of Appeal.

The Noble Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani.

Plaintiff's Note of Submissions.

Respectfully sheweth:—

In the preceding Minute, the Defendant, after renouncing the plea that Plaintiff's Petition is null and void by reason of the fact that it has been filed without security, proceeds to submit that this Court should not grant the Plaintiff conditional leave to appeal to His Majesty in His Privy Council, on the ground that the Plaintiff, in his Petition, has failed to mention the grounds whereon he seeks to rest his appeal.

Apparently, the Defendant is confusing the Petition for leave to appeal, which is filed before the Court that has delivered the judgment, with the Petition of Appeal, which is entered before the Privy Council.

There is no necessity for any special rules to be followed so far as the Petition for leave to appeal is concerned, especially when the appeal is an appeal by right of grant. According to established practice, the Petitioner, in his Petition, having recited the claim and the adjudication thereon, and having declared himself aggrieved and that he wants to appeal, asks only that he may be granted leave to appeal.

As regards the Petition of Appeal, however, other particulars are required. This Petition is not filed in the Court of the Colony, but in the Court in England; and it is filed in accordance with rules 30 and 47 of the Order-in-Council. Bentwich, in **The Practice of the Privy Council,** p.174, states: "The petition contains in general a narrative or abstract of the proceedings in the Court below, with a conclusion alleging that the Petitioner is aggrieved by the judgment; — has obtained leave to appeal from it in the Colony or here (in England); — and now prays for its reversal or alteration. If the appeal is not from the whole judgment, the petition should specify the part of the judgment complained of, and the orders, if any, appealed against".

No. 40.
Plaintiff's Note of Submissions.
—*Continued.*

The petition above referred to, however, is the Petition of Appeal, as distinct from the Petition for grant of leave to appeal, as clearly evinced by Rule 30 of the Order-in-Council.

It would seem that the Defendant, in the submissions made in his afore-quoted Minute, has confused the Petition for grant of leave to appeal with the provisions of Article 161 of the Laws of Organisation and Civil Procedure, which refer to the Petition which is filed before this Court on appeal to this Court from a judgment given by the Court of First Instance. The procedure in Privy Council Appeals, however, is regulated by the Order-in-Council.

The plea tendered by the Defendant has never before been raised in connection with any other appeal to the Privy Council, and all the cases so far submitted to His Majesty's Privy Council bear witness to the fact that the petition for leave to appeal has always been made out in the same way as it has been made out by the Plaintiff.

(signed) G. PACE, Advocate.

The 12th November, 1945.
Filed by Dr. Pace at the Sitting.

(signed) J. N. CAMILLERI,
Dep. Registrar.

No. 41.

No. 41.
Decree granting conditional leave

Decree granting conditional leave to appeal

Judges:—

His Honour Sir George Borg, M.B.E., LL.D.,
Chief Justice and President.

The Honourable Mr. Justice Prof. E. Ganado, LL.D.

The Honourable Mr. Justice L. A. Camilleri, LL.D.

Sitting held on
the Twenty-sixth of November, 1945.

No. 18.

Libel No. 6/1942.

The Nobile Giorgio Cassar Desain
vs.
The Marchese James Cassar Desain Viani; and, by decree given on the 21st January, 1944, Anthony and

No. 41.
Decree granting conditional leave
—*Continued.*

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.

The Court,

Upon seeing the Libel of the Plaintiff, praying for a judicial declaration: (1) that the Defendant, in view of 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 sententiae.** — With Costs.

Upon seeing the Answer of the Defendant, submitting that, firstly, the Plaintiff has no interests of his own in bringing the present action, and much less in demanding Defendant's forfeiture of the Cassar Desain primogeniture. As the instrument of foundation makes clear, that primogeniture, though it may possibly devolve upon Defendant's children,

can never devolve upon the Plaintiff; — that Plaintiff himself betrayed doubts in regard to the alleged right he is now exercising when, in the Protest entered on the 13th August, 1934, he thus expressed himself: " Even if the complainant " — the Plaintiff in the present case — " has 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, it being possible that, later on, a male will be born of the said female " — Defendant's daughter. And he ended by calling upon the Defendant to relinquish the property of the primogeniture to the son yet to be born of the Defendant's daughter should it ever be determined that that son is entitled to that primogeniture (Exh. "A"); — that, furthermore, and without prejudice to the foregoing, forfeiture of the primogeniture does not occur **ipso jure,** but in pursuance of a Court judgment, especially when the prohibition that has given rise to the claim for forfeiture is not a **condition** but simply "modus"; consequently, the Defendant is entitled to justify his actions, and to obtain from the Court, if necessary, a period of time within which to conform to the terms of the foundation. And therefore the Defendant prayed that Plaintiff's claims be dismissed with Costs.

Upon seeing the judgment given by His Majesty's Civil Court, First Hall, allowing the first claim, and, in regard to the second claim, declaring that the Defendant has not forfeited the primogeniture, but that he shall incur the forfeiture thereof if, within one month after the present judgment becomes **res judicata,** he fails to declare and formally to 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; — that, in the event of forfeiture as above, such forfeiture shall have effect only from the date of expiration of the aforesaid period, and that, in that case, the primogeniture shall not be deemed as devolving upon the Plaintiff, inasmuch as said Plaintiff is not the next in the vocation — but upon Defendant's eldest son; — and, disallowing the other claims, ordered each party, in view of the circumstances of the case, to bear its own costs, and that Registry fees be paid by the Defendant.

Upon seeing the judgment whereby this Court dismissed Plaintiff's plea that the Court of First Instance, in that part of the judgment mentioned above, had determined **ultra petita,** and ordered each party to bear its own costs in respect

No. 41. Decree granting conditional leave —*Continued.*

thereof; and dismissed the Appeal and affirmed the judgment given by His Majesty's Civil Court, First Hall, on the 6th May, 1944, with the following order as to costs, namely, that the Costs of Appeal, barring those ordered as above, shall be borne by Plaintiff Appellant, and that the Registry fees in respect of the Second Instance shall be paid by the parties one moiety each.

Upon seeing the Petition filed by the Plaintiff on the 16th July, 1945, praying for conditional leave to appeal from the judgment to His Majesty's Privy Council.

Upon seeing the Answer of the Defendant, submitting that Plaintiff's Petition is null and void inasmuch as it lacks the security required by law.

Upon seeing the **procés verbal** recorded at the Sitting held on the 22nd October, 1945, whereby the Defendant declared that, apart from the plea of nullity, he has no submissions to make on the merits of the Petition.

Upon seeing Plaintiff's Note of Submissions.

Upon seeing Defendant's Note of Submissions, declaring that he does not insist upon the plea anent the nullity of the Petition, filed by the Plaintiff without security; and submitting, however, that it is desirable that the Appellant should, before the Petition for leave is disposed of, declare that the Appeal is to rest on the same grounds that were put forward and that were discussed and determined in the judgment to be appealed from, unless the Court deems it expedient to make it a condition that the Appellant should file the aforesaid declaration within a prescribed time-limit before leave to appeal is eventually granted — and that, otherwise, the Defendant resists the Petition.

Upon seeing the Minute of the Marchesa Evelyn Cassar Desain **nomine,** waiving the plea anent the nullity of the Petition, raised in her Answer of the 8th August, 1945.

Upon seeing the further Note of Submissions of the Appellant, on the fresh plea tendered by the Respondent.

Upon hearing Counsel on both sides.

Considering:

The Defendant impugns the Petition on the ground that it makes no mention of the grounds on which the appeal to the Privy Council is to be based. It is, however, to be pointed out that the petition for conditional leave to appeal, filed by

No. 41.
Decree granting conditional leave to appeal.
—*Continued.*

one of the contending parties, is a different thing from the petition which, subsequent to the grant of conditional and final leave, is filed before the Privy Council and initiates the proceedings before that Council. In the first case, the Court determines whether, in accordance with Sectiion 2 (a) of the Order-in-Council of the 22nd November, 1909, the matter in dispute on the appeal amounts to or is of the value of five hundred pounds (£500) or upwards. In the second case, "the appeal must contain in general a narrative or abstract of the proceedings in the Court below with a conclusion alleging that the petitioner is aggrieved by the judgment, has leave to appeal from it in the Colony — and now prays for its reversal or alteration. If the appeal is not from the whole judgment, the petition should specify the part of the judgment complained of, and orders, if any, appealed against". (Bentwich, p.174).

The afore-quoted Order-in-Council is silent on the subject of the above narrative or abstract in connection with the petition for conditional leave to appeal, and the reason is that that narrative or abstract is left for inclusion in the petition which is filed before the Privy Council.

In his Petition, the Plaintiff (Appellant), submitting that he deems himself aggrieved by the judgment given by this Court, and that the matter in dispute exceeds the sum of five hundred pounds, prays that he be granted leave to appeal to His Majesty's Privy Council. The Court, if it considers that the Appellant has the right to appeal, will grant him leave so to do. It will then lie to the Supreme Court to ascertain whether the Appellant has appealed from the whole or part of the judgment complained of, a matter which may eventually have a bearing upon the incidence of costs.

It is true, as this Court held in re "Arturo Mifsud vs. Ercole Valenzia, L.P." (1st April, 1927) that "it has been "established by His Majesty's Privy Council on more than "one occasion that a point that has not been raised before the "Court in the Colony cannot be raised before that Supreme "Court". "A point that has not been raised in the Courts "below cannot be raised before Their Lordships. Rendwech "v. Australian Cities Investment Corporation 62 L.J. P.C. "(1893). New Digest 1926, Vol. XVI p.610, and a new point "which was not fully raised and considered in the Court "below will not be entertained on the appeal to the King in "Council. Archambault v. Archambault, 71, L.J. P.C. 131 "(1902) ibid." But there is nothing in Plaintiff's Petition to

No. 41. Decree granting conditional leave to appeal. —*Continued.*

indicate, directly or indirectly, that he wishes to raise new points. As stated above, he is appealing from the judgment of this Court because he deems himself aggrieved thereby. If the Appellant raises new points, it will be a matter for the Supreme Court to determine whether, once they were not raised before and considered and determined by this Court, they may be raised at that stage. (Vide Judgments P.C. quoted above, and Halsbury, The Laws of England, Ed. 1909, Vol. 9, p.48, No.88 "Law points").

The case to which the Defendant has made reference ("Arturo Mifsud **nomine** vs. Ercole Valenzia" — determined by this Court on 1st April, 1927) is quite different. In that case, a third person who was not in the suit, but who claimed an interest to appeal, sought to appeal under section 2(b) of the Order-in-Council of the 22nd November, 1909. However, it was not because he wanted to impugn the judgment of this Court on the matter which it had gone into and determined, but because he claimed that it was not within the jurisdiction of this Court to hear the case, and therefore, on a point that had not been raised before, and that had not been determined by this Court. In this case, the Appellant, deeming himself aggrieved by the judgment of the Court, seeks to appeal therefrom. It is therefore to be presumed that he seeks so to do for the reasons set forth in the Libel filed in the Court below and in his Petition to this Court, and not on any point which is not mentioned either in the Libel or in the Petition. This is all the more probable in view of the provisions of Article 143 of the Laws of Organization and Civil Procedure wherein it is laid down that "the Libel shall contain: (1) a clear and concise statement of the facts, without quotation of authorities..... (2) the Demand contained in the libel shall clearly and correctly specify the object in view". It is a fact that he cannot go beyond those terms without going against that provision of the law, by which he is bound.

Considering:

On the merits, it is beyond doubt that the matter in dispute exceeds the sum of five hundred pounds, as the Appellant submits in his Petition and as the Respondent admitted throughout the hearing of that Petition at the Sitting of the 22nd October, 1945.

No. 41.
Decree granting conditional leave to appeal.
—*Continued.*

On these grounds:

(1) Abstains from taking further cognizance of the plea that the Petition is null and void because it lacks the security required by law, which plea has been renounced by the Respondent and by the party joined in the suit; (2) declares that the Respondent's plea resisting the demand in the Petition is groundless; — with the costs hereof against the Respondent; (3) allows the Petition and grants the Appellant leave to appeal from the aforementioned judgment of this Court of the 25th June, 1945, to the Judicial Committee of His Majesty's Privy Council, subject to the condition of his entering into good and sufficient security, within one month, in a sum of Two Hundred Pounds (£200), for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondents in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondents' costs of the Appeal, and subject also to the condition that Appellant shall take the necessary steps to procure the preparation and the translation of the Record within three months and the despatch thereof to the Judicial Committee of the Privy Council in England. Costs, excepting those ordered as above, reserved to the final order.

(signed) J. N. CAMILLERI,

Dep. Registrar.

No. 42.
Security Bond.

No. 42.

Security Bond

Nineteenth December, 1945.

Maria, the wife of Frederick William Maempel, M.D., formerly the widow of the Marchese Richard Cassar Desain, daughter of the late James Turnbull and the late Emilia Preziosi, born in Valletta, residing at Sliema — acting with the assistance and concurrence and in the presence of her said husband, son of the late Ludovico Maempel and the late Carmela Naudi, born at Qormi, residing at Sliema — appears and in terms of and in conformity with the Decree given by His Majesty's Court of Appeal on the 26th November, 1945, in re "The Noble George Cassar Desain vs. the Marchese James Cassar Desain Viani and Others", hereby stands surety for and up to the sum of Two Hundred Pounds for the due prosecution of the Appeal entered by the Plaintiff, the Nobile George Cassar Desain, to His Majesty's Privy Council from the judgment given by His Majesty's Court of Appeal in the suit aforesaid on the 25th June, 1945, and for the payment of all such costs as may become payable to the Respondents in the event of the Appellant not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed, or of His Majesty in Council ordering the Appellant to pay the Respondents' costs of the Appeal.

(signed) MARIA MAEMPEL.
F. W. MAEMPEL.

The said Maria Maempel and Dr. Frederick Maempel have affixed their signature hereto in my presence.

(signed) CARM. VELLA,
Assistant Registrar.

No. 43.

No. 43.
Minute filing and approving Translation.

Minute filing and approving Translation

In His Majesty's Court of Appeal.

The Noble George Cassar Desain
v.
The Marchese James Cassar Desain.

The Minute of the contending parties.

Whereby they produce a copy of the Translation of the above Record and declare that the translation is correct and has their approval.

(Signed) G. PACE, Advocate
for the Plaintiff.

„ F. APAP BOLOGNA, Advocate
for the Defendant.

„ A. MAGRI, Advocate
for the parties joined
in the suit.

This Fifteenth May, 1946.

Filed by Rob. Dingli, Legal Procurator, together with the respective Schedule of Deposit.

(Signed) J. DINGLI
D/Registrar.

No. 44.
Application for Final Leave.

No. 44.

Application for Final Leave

In His Majesty's Court of Appeal.

The Noble George Cassar Desain
v.
The Marchese James Cassar Desain.

Plaintiff's Application.

Respectfully sheweth:—

That the printing of the above Record has now been completed.

Wherefore the Plaintiff respectfully prays that this Honourable Court may be pleased to grant him final leave to appeal to His Majesty's Privy Council. 10

(Signed) G. PACE, Advocate.

„ ROB. DINGLI, Legal Procurator.

This Fifteenth May, 1946.

Filed by Rob. Dingli, Legal Procurator, without Exhibits.

(Signed) V. PANDOLFINO.
D/Registrar.

No. 45.

No. 45. Decree on preceding Application.

Decree on preceding Application

His Majesty's Court of Appeal.

The Court,

Orders that the Application be put on the Case-List of the 3rd June, 1946, and that service hereof be made upon the Defendants.

This Fifteenth May, 1946.

(Signed) J. N. CAMILLERI.
D/Registrar.

10

No. 46.
Decree granting Final Leave.

No. 46.

Decree granting Final Leave

His Majesty's Court of Appeal.

JUDGES:—
His Honour Sir GEORGE BORG M.B.E., LL.D., President.
The Honourable Mr. Justice Professor E. GANADO LL.D.
The Honourable Mr. Justice L. A. CAMILLERI LL.D.

The Court,

Upon seeing the Decree given on the 26th November, 1945, whereby the Plaintiff was granted conditional leave to appeal to His Majesty in His Privy Council from the judgment given by this Court on the 25th June, 1945 — costs being reserved to the Decree granting final leave.

Upon seeing the Plaintiff's Application for final leave to appeal.

Upon hearing Counsel on both sides.

Whereas the Court is satisfied that the conditions laid down in the aforesaid Decree have been complied with.

Allows the Application and grants the Plaintiff final leave to appeal from the aforesaid judgment to the Judicial Committee of His Majesty's Privy Council.

The Costs of the present Decree, and of the Decree granting conditional leave, to be borne by the Plaintiff, saving recovery thereof, or part thereof, from the Respondent, as may be ordered by the Judicial Committee of His Majesty's Privy Council.

This Third June, 1946.

(Signed) V. PANDOLFINO.
D/Registrar.

EXHIBITS

PLAINTIFF'S EXHIBITS

PLAINTIFF'S EXHIBITS

Exhibit "A"

Exhibit "A" Instrument of Foundation : Cassar Desain primogeniture.

Instrument of Foundation: Cassar Desain primogeniture

Taken from the Official Copy filed in the Record of the Libel "Marchese Filippo P. Testaferrata v. Nobile Gaetano dei Marchesi Testaferrata Desain".

(No. 137a/1849 — fol.5, Exhibit "A")

Extract from the solemn testament of the late Illustrissimo Signor Gio Batta Cassar, son of the late Salvadore Adriano Cassar and the late Caterina Bernardina Haxiak, residing in this city of Valetta, opened, published and registered on the seventh of the month of April, the Fourteenth Indiction, of the year one thousand seven hundred and eighty-one, in the Records of the late Notary Paolo Vittorio Giammalva, conserved in the Archives of this aforesaid City, of which Records I, the undersigned Notary, am the Keeper.

I, GioBatta Cassar, son of the late Salvatore Adriano Cassar and the late Caterina Barnardina Haxiak, residing in this City of Valletta, being, by the Grace of God, sound of mind, sense and intellect, etc.

omissis

And whereas it is my supreme wish that the whole of my hereditary immovable property shall always and at all future times be preserved and safeguarded by the law and title of primogenitura in the line, posterity and male descent lawfully and naturally born and begotten of lawful marriage of my said Universal Heir; so, therefore, availing myself of the powers accorded me by my late mother, the said Caterina Bernardina Cassar Haxiak, in her nuncupative testament as entered in the records of Notary Vittorio Griscti, of the twenty-second June, One thousand Seven hundred and Fifty-nine, as well as of all other rights appertaining to me **ex persona propria,** and as heir of my brother, the late Nicola Antonio Cassar, it is my will that the whole of my hereditary immovable property aforesaid shall not at any future time, for any cause, however urgent or most urgent, and even privileged in respect of dowry or dower and **per rescriptum**

Exhibit "A". Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

principis be sold, alienated, hypothecated, exchanged, or otherwise transferred to extraneous parties, but that it shall, by the law and title of primogenitura, be enjoyed by the said Salvatore, my Universal Heir, throughout his life-time, after that he shall have married, and that, after his death, it shall, by the aforesaid law and title of primogenitura, devolve 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.

That, if the said Salvatore Testaferrata shall have no male issue, but only female issue, of whom males shall or may be born; in that case, it is my will that the first-born male who is or shall be born of the first-born female of the said Salvatore shall succeed to my primogenitura aforesaid; and successively, by the aforesaid title and law of primogenitura, his first-born male descendants, lawful and natural as above, shall succeed thereto, in the successive order of first-born male to first-born male in perpetuity, always excluding females; and, on failure of such male descendants, the first-born male who is or shall be born, and his first-born male descendants, of the second-born female of the said Salvatore, and then of the third-born female, shall succeed thereto, in the successive order of first-born male to first-born male as above, always excluding females; and not otherwise.

Similarly, if any of the said first-born males of the said Salvatore Testaferrata, my Heir, shall have no male issue, but only female issue, of whom males are or may be born, it is my will that the first-born male who is or may be born of his first-born female shall succeed to my primogenitura aforesaid; and successively, by the aforesaid title and law of primogenitura, his first-born male descendants, lawful and natural as above, shall succeed thereto, in the successive order of first-born male to first-born male in perpetuity, always excluding females; and, on failure of such male descendants, the first-born male who is or shall be born, and his first-born male descendants, of his second-born female, and then of the third-born female, shall succeed thereto, in the successive order of first-born male to first-born male as above, always excluding females; and not otherwise.

If it should then happen that any of the said first-born males of the said Salvatore Testaferrata shall have no males descending from a male, and shall not or cannot have males

descending from a female, it is my will 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.

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.

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.

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.

Exhibit "A" Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

Then, in the event of the total extinction of the male descent, **ex masculo** as well as **ex foemina,** of all the sons of the said Salvatore Testaferrata, my Universal Heir, or in the event of the death of the said Salvatore without issue, I give and grant to the last holder of my said primogenitura, or to the said Salvatore, the power to appoint, at his absolute discretion, as his successor to the said primogenitura, the one whom he may be pleased to choose of the male descendants **ex masculo** or **ex foemina** of Signor Enrico Testaferrata, his brother **utrinque conjunctus,** or of the Barone Emmanuele d'Amico Inguanez, his cousin; and where there are no male descendants **ex masculo** or **ex foemina** of the said Signor Enrico and Barone Emmanuele, then the aforesaid last holder of my primogenitura may appoint the one whom he may be pleased to choose of the male descendants **ex masculo** or **ex foemina** of the sons of the Marchese Pandolfo Testaferrata, begotten or to be begotten by his second marriage. He who is so appointed, and his male descendants **ex masculo,** and, in default of these, his male descendants **ex foemina,** shall in like manner enjoy my said primogenitura 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.

Similarly, in default of all the male descendants, whether **ex masculo** or **ex foemina,** of the said appointee, I give and grant to the last of them the power to appoint, likewise in the exercise of his own absolute discretion, as his successor to my said primogenitura, another of his own choice of the said male descendants **ex masculo** or **ex foemina** of the said Enrico Testaferrata and Barone Emmanuele D'Amico Inguanez, and, in default of these, one of the said descendants of the sons born of the second marriage of the said Marchese Pandolfo Testaferrata. Which appointee, and his male descendants **ex masculo,** and, in default of these, his male descendants **ex foemina,** shall in the same manner enjoy the said primogenitura under the conditions aforesaid and by the same title and law of primogenitura, in the successive order of first-born male to first-born male as above, in perpetuity, always excluding females. Which is what I want to be observed every time that the male descent, whether **ex masculo** or **ex foemina,** of the appointee, becomes extinct; and not otherwise. Should the said Signor Salvatore or the last holder of my said primogenitura forego appointing his successor, in that case it is my will that the said Enrico Testaferrata, if still living, and, if not,

Exhibit "A" Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

one of his said male descendants **ex masculo** or males **ex foemina** who is nearest by consanguinity to the said last holder of the said primogenitura and who is the senior in years shall be held and deemed so appointed; and in default of the said Enrico and of his male descendants **ex masculo** or **ex foemina,** the said Barone Emmanuele D'Amico Inguanez shall be held so appointed, and, in his default, one of his male descendants **ex masculo** or **ex foemina** who is nearest by consanguinity to the said last holder of the said primogenitura and senior in years, and lastly, one of the male descendants **ex masculo** or males **ex foemina** of the sons born of the second marriage of the said Marchese Pandolfo who is nearest by consanguinity to the said last holder of the said primogenitura and the senior in years; and that this is what I want to be observed in every case in perpetuity; and not otherwise.

Declaring 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.

Declaring also that, in so far as my said primogenitura is concerned, it is 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.

I declare further 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.

I will then and expressly ordain that the holder of the said primogenitura, founded by me as above, shall always bear the surname 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 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.

Exhibit "A". Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

Further, it is my will that all religious of whatever Order, as well as all Secular Priests and others ordained **in Sacris,** be and be deemed to be excluded from the succession to the said primogenitura, as being incapable of contracting marriage. I want also that the said Salvatore Testaferrata, my Universal Heir, and any other holder of my said primogenitura, shall every year make payment and contribute to their respective sons and daughters, on completing their twentieth year of age, excepting only the first-born son, one hundred **scudi** to each one of them throughout their life-time, so that, on the death of each one of the said sons and daughters, his or her annual contribution shall at once come to an end; and not otherwise.

Furthermore, notwithstanding the prohibition of alienating property ordered by me as above, I give and grant to the said Salvatore, my Universal Heir, and to all the holders of my said primogenitura, the power to grant on emphyteutical lease, for a short period of time, and at most for the period of forty years only, the various property endowing the said primogenitura, at an annual rental acceptable to them; and not otherwise.

Further, should the said Salvatore, my Universal Heir, or any holder of my said primogenitura, wish to leave this Dominion together with his family, and to fix his residence abroad, I give and grant to him the liberty and full power to sell and alienate the said immovable property endowing the said primogenitura at fair and reasonable prices acceptable to them, provided however that the entire sums realised from the aforesaid sales and alienations shall be faithfully invested in the purchase of other immovable property outside this Dominion, which immovable property shall replace and be deemed to replace the alienated property, and shall be subject and deemed to be subject to the said primogenitura ordered by me as above, with all the laws, prohibitions, vocations, declarations and all other dispositions contained in this my present testament; and not otherwise.

And whereas it is my precise will and intention that the holders of my said primogenitura shall live in the manner of true Catholic Christians, in holy fear of God, and with due subjection and obedience to their Princes and Superiors, I recommend to them to abstain from every form of vice and crime; and should any one of them dare to commit any crime, in respect of which he will incur the penalty of confiscation, it is my will that the delinquent, **ipso jure** and **ipso facto,**

without necessity of any sentence or judicial declaration, shall be and deemed to be, eight days before the commission of the crime, deprived and excluded, as I here and now, in advance, deprive and exclude him, from the possession and enjoyment of the said primogenitura; and it is my will that that primogenitura shall devolve upon he who is immediately next in the vocation as above after the death of the said delinquent; should the latter, however, obtain pardon through the generosity of the Prince, it is my will that, **ipso jure** and **ipso facto,** he shall be, and deemed to be, rehabilitated and reinstated, as I here and now, in advance, rehabilitate and reinstate him, in the enjoyment and possession of the said primogenitura, in which case naught else shall happen but that the income drawn in the intervening period shall be retained by the person who had so drawn it; and not otherwise.

If, God forbid, the said Salvatore Testaferrata should die before me, or if he should die before contracting marriage, in either case I institute and substitute as my Universal Heir, the said Enrico Testaferrata, his brother **utrinque conjunctus,** and, in default of the latter, the said Barone Emmanuele D'Amico Inguanez, to whom I likewise prohibit any Falcidian or Trebellian deduction; and it is my will also that the said Enrico and, in his default, the said Emmanuele, shall not enter into the possession and the enjoyment of my inheritance before contracting marriage, and that, during the intervening period, all that I have ordered above in respect of the said Salvatore until he contracts marriage shall be observed, and this whether as regards my gold, silver, pearls and jewels, or as regards my chattels and effects or as regards my immovable property and the yearly income therefrom; and, further, it is my will that the primogenitura ordered by me as above, with all the vocations, prohibitions, declarations, powers and other dispositions therein contained, or expressed, shall have its full effect in the line, posterity and descent of the said Enrico Testaferrata, and, in his default, in the line, posterity and descent of the said Barone Emmanuele D'Amico Inguanez; and not otherwise.

Furthermore, it is my will that the said Salvatore Testaferrata, or, in his default, he who shall be my first and immediate Universal Heir, shall not sell, alienate or otherwise dispose of the gold, silver, pearls and jewels appertaining to my inheritance, but after his death it is my will that the aforesaid gold, silver, pearls and jewels shall go, and go they must, to the one upon whom my said primogenitura shall then devolve; it being my will however that in the possession

Exhibit "A". Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

of the last-named successor such gold, silver, pearls and jewels shall be, and deemed to be, wholly free of all restraint, in such way that he shall be able to dispose of them at his will and pleasure; and not otherwise.

Then, as regards the money that shall be found in the house after my death, and that shall be left over after payment has been made of all the pious and lay legacies ordered by be as above as single and non-recurrent bequests, and as regards also such sums of money as shall be received in payment to the credit of my inheritance, it is my will that same be at once invested at interest in the Massa Frumentaria or in the Monte di Pieta' by the said Marchese Daniele Testaferrata and by the said D. Michel'Angelo Bigeni, administrator appointed by me as above; and it is my will that such capital sums, thus invested, together with the other capital sums, deriving from the income of my hereditary estate, which shall be invested by the said Administrator until my Universal Heir shall have contracted marriage, and also all those capital sums which I hold invested in the Massa Frumentaria, and which shall be found invested in that Fund at the time of my death, excepting only the aforesaid capital sum of twelve thousand **scudi** aggregated by me as above to the Primogenitura Axiach, shall remain, and remain they must, therein invested at compound interest for thirty years from the day of my death; and it is my will also that the annual income deriving from the three blocks of buildings situated in the Island of Gozo, namely, one in the district "tal Hasri", known as "Il Sinterio tal Hasri", at present held on temporary emphyteusis by the heirs of the late Martino Haxiach by virtue of emphyteutical instrument in the records of the late Notary Michele Metalto of the Twelfth September, One Thousand Seven Hundred and Thirty, and the other two in the district of "ta Hamel", known as "tal Horop" and "ta Greigher", at present leased by Giuseppe Mercieca by virtue of instrument in the records of Notary Placido Mizzi of the Twenty-seventh February, one Thousand Seven Hundred and Seventy-three, shall in like manner be invested year by year at compound interest in the said Massa Frumentaria or Monte di Pieta' for the aforesaid period of thirty years from the day of my death; on the termination of which period of thirty years, I want that the said capital sums, together with the other capital sums which shall be invested at compound interest as aforesaid, and together with the said three blocks of buildings known as "Sinterio tal Hasri", tal Horop" and "ta Greigher", shall be and deemed to be aggregated, as I here and now, in advance, aggregate to the said primogenitura founded

Exhibit "A". Instrument of Foundation: Cassar Desain primogeniture. —*Continued.*

by me as above on my hereditary immovable property, subject to the same laws, prohibitions, vocations and all other dispositions ordered by me as above; provided however that if any of the descendants of the holder of the said primogenitura founded by me as above, or a brother, **utrinque conjunctus,** of the holder, should wish to aspire to the Prelacy, he shall, from the day he is admitted into the Prelacy, and during his life-time, enjoy the usufruct of the aforesaid capital which I have as above aggregated to the said primogenitura; so that, after his death, the holder of the said primogenitura shall resume the enjoyment of the said capital; and this is what I want to be observed in perpetuity. And I declare that the descendant of the holder of the said primogenitura shall always be preferred to his brother **utrinque conjunctus.** And I declare further, as an additional safeguard, that the said Prelate shall not enjoy the usufruct of the said three blocks of buildings, known as "Sinterio tal Hasri", "tal Horop" and "tal Greigher", but that these three blocks of buildings shall remain aggregated to my said primogenitura.

Exhibit "B"

List of the primogenial Property

A. GOZO.

1. House, at No. 23, Strada Corsa, Vittoria, Gozo.
2. Lands "ta Blick u Bordin", Ghainsielem, Nadur.
3. Field "ta Breitu", district "tal Fgura", Gharb.
4. Land and building site "tal Calzett", Gharb.
5. Land "ta Kausa u Liebni", district "ta Pinus", Gharb.
6. Lands "ta Cogliat", Zebbug.
7. Lands "ta Dabrani", Zebbug.
8. Lands "ta Dbiegi", San Laurenz, Gharb.
9. Lands "ta l'Entrajen", "Ta Duro", Nadur.
10. Lands "ta Don Arcanglu", district "tal Fgura", Gharb.
11. Lands "tal Fart" district Ghainsielem.
12. Lands "ta Floccos" district ta' San Laurenz, Gharb.
13. Lands "tal Ghammar Zgħair", Gharb.
14. Lands "tal Għammar il-Kbir", Gharb (Portion A)
15. Lands do. do. (Portion B)
16. Lands do. do. (Portion C)
17. Lands do. do. (Portion D)
18. Lands "Ta Ghain Kelment", Kala.
19. Tree planted fields and land "tal Ghaucia", Sannat.

20. Land tal Ggantia", or other property exchanged therefor by the Defendant.
21. Field "tal-Ghasafar", S. Lawrenz, Gharb.
22. Field "tal Gifna", Kercem.
23. Lands "tal Libni", Gharb.
24. Field "ta Mastru Anglu", Zebbug.
25. Field "ta Mastru Xandru", Kercem.
26. Field "tal Mangura", Gharb.
27. Tree planted field "ta Nuffara Zghira", Victoria.
28. Lands "ta Nuffara Gbira", Victoria.
29. Lands "ta San Martin", Victoria.
30. Field "ta Scorra u Floccos", Gharb.
31. Lands "ta Sinjura", Zebbug.
32. Field "ta Tavla", Kercem.
33. Lands "tal Wardija", Kala.
34. Field "ta Xhajma", Ta Nuffara.
35. Groundrent of the Axisa house, Duke of Edinburgh Hotel, Victoria.
36. Legacy — Felice Hasciak.

Besides other property in Gozo, as shall be established; and the following property in Malta:—

B. MALTA.

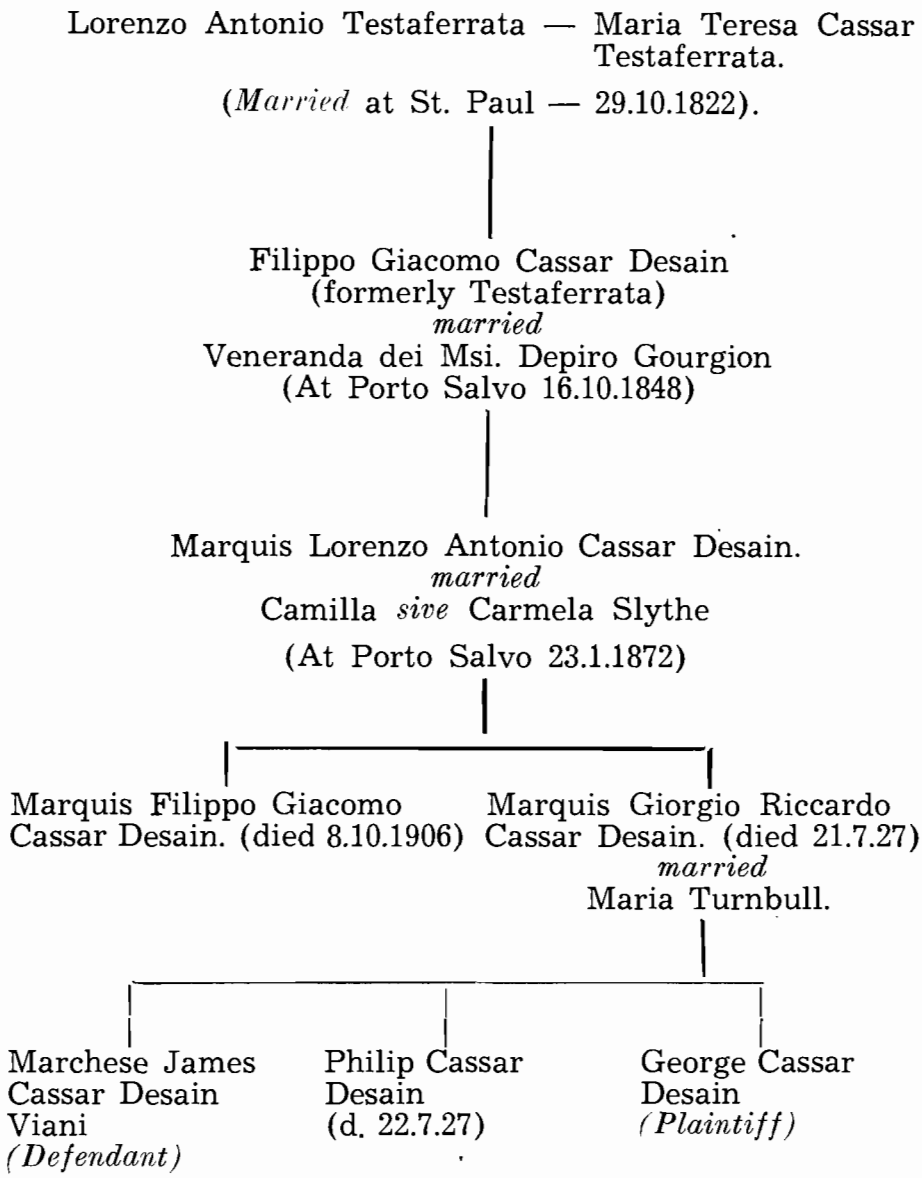
1. A House at Strada del Quartiere, No. , Vittoriosa.
2. House at Strada Alessandria, Vittoriosa.
3. House in Senglea, "Fein is-Sirena".
4. Lands "tal Alfier", **sive** "tal Hofra".
5. "Ta Cleila".
6. "Ta Ghar Meimun".
7. Tree planted field "ta Ramla" **sive** "Ta San Tumas" and Tower annexed.
8. "Ta Manviesa".
9. Lands "ta Rokgha ta Hal Tunin".
10. "Ta xiaghara" **sive** "ta Santa Maria".
11. "Ta Sansun".
12. "Ta Xifer il-Kief".

(signed) G. PACE, Advocate.

ROB. DINGLI, L.P.

Exhibit "C"

Genealogical Table



Revised and corrected by Rev. G. C. MUSCAT, Genealogist.

Zebbug, 27.8.1942.

Death and Birth Certificates

Exhibit "D"

No. 145

Public Registry

I, the undersigned, do hereby certify that the following is a true Translation of an Act of Death registered in the Public Registry Office of Valletta, Malta.

ACT OF DEATH Date of the Act: Tarxien 10th August, 1927.

Particulars respecting the Deceased:

Name & Surname:	Marquis Richard Cassar Desain.
Whether married or unmarried, widower or widow:	Widower of Mary Turnbull.
Profession, trade, or other status:	Of independent means.
Age:	47 years.
Place of Birth:	Valletta.
Place of residence:	Tarxien.
Name and Surname of Parents, whether living or dead:	Marquis Lawrence Cassar Desain and Camilla Slythe — both dead.
Cause, place and time of death; and place of burial:	Died of Chronic Nephritis at Tarxien, Strada Reale No. 57 on the 21st July 1927, at 3.30 p.m. Buried in the Addolorata Cemetery.

PARTICULARS RESPECTING THE WITNESSES TO THE ACT OF DEATH

Name & Surname:	(a)	John Andrew Griscti		
	(b)	Michael Agius.		
Profession &c:	(a)	Police Constable		
	(b)	Police Constable.		
Age:	(a)	25 years	(b)	31 years.
Place of birth:	(a)	Siggiewi	(b)	Senglea.
Place of Residence:	(a)	Pawla	(b)	Senglea.
Name & Surname of the father, and whether living or dead:	(a)	Carmel — alive.		
	(b)	Matthew — alive.		

Signature of the Witnesses: G. A. GRISCTI.
M. AGIUS.

(signed) G. GRIMA, Police Sergeant
Officer in Charge.

Date of the Reception of the Act: 23rd August, 1927.

Progressive number of the Inscription: No. 2992.

Signature of the Director: S. CREMONA, Director.

PUBLIC REGISTRY OFFICE — Valletta,
8th December, 1941.

(signed) G. SCICLUNA,
Asst. Director.

Exhibit "E"

Public Registry

No. 146.

I, the undersigned, do hereby certify that the following is a true translation of an Act of Death registered in the Public Registry Office, Valletta, Malta.

ACT OF DEATH — Date of the Act: Tarxien 10th August 1927.

Particulars respecting the Deceased:

Name & Surname:	Philip Cassar Desain.
Whether married or unmarried:	Single.
Profession, trade &c.:	Of independent means.
Age:	19 years.
Place of Birth:	Valletta.
Place of residence:	Tarxien.
Name & Surname of parents, whether living or dead:	Marquis Richard Cassar Desain — dead and Mary Turnbull, alive.
Cause, place & time of death; & burial place:	Died of Enteric Fever at Tarxien, Strada Reale No. 57, on 22nd July 1927 at 5 p.m. Buried in the Addolorata Cemetery.

PARTICULARS RESPECTING THE WITNESSES TO THE ACT OF DEATH

Name & Surname:	(a)	John Andrew		
	(b)	Michael Agius.		
Profession, trade or other status:	(a)	Police Constable		
	(b)	Police Constable.		
Age:	(a)	25 years	(b)	31 years.
Place of birth:	(a)	Siggiewi	(b)	Pawla.
Place of residence:	(a)	Senglea	(b)	Senglea.
Name & Surname of father; whether living or dead:	(a)	Carmel — alive		
	(b)	Matthew — alive.		

(signature of witnesses) G. A. GRISCTI.
M. AGIUS.

(signed) G. GRIMA, Police Sergeant,
Officer in Charge.

Date of the Reception of the Act: 23rd August 1927.

Progressive Number of Inscription: No. 2993.

Signature of the Director: S. CREMONA, Director.

PUBLIC REGISTRY OFFICE — Valletta,
8th December, 1941.

(signed) G. SCICLUNA, Asst. Director.

Exhibit "F"

Public Registry

No. 5380.

I, the undersigned, do hereby certify that the following is a true translation of an Act of Birth registered in the Public Registry Office, Valletta, Malta.

ACT OF BIRTH — Date of the Act: Valletta 8th March 1915.

Particulars respecting the Child

Birth: Place:	Valletta.
Hour, day, month & year:	4.30 p.m. 19th February, 1915.
Sex:	Male.
Names given:	George, Lawrence, Anthony, James, Giuda Taddeo, Vincent, Calcedonio, Rosario, Marius, Paul, Nazarene, Carmel, Dominic.
Name or names by which the child is to be called:	George.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION	WITNESSES
Name and Surname of the father, and whether living or dead:	Marquis Richard Cassar Desain	Mary wife of the said Marquis Richard Cassar Desain	The father	a) Achilles Farrugia b) Albert Zammit.
Profession, trade or other	Of independent means	Nil		a) Writer b) Police Sergeant.
Age:	35 years	34 years		a) 59 years b) 35 years.
Place of birth:	Valletta	Valletta		a) Valletta b) Zebbug.
Place of residence:	Valletta	Valletta		a) Valletta b) Hamrun.
Name and Surname of the father, and whether living or dead:	Marquis Lawrence Anthony (dead)	James Turnbull (dead)		a) Paul, dead b) Michael dead.

Signature of the person making the declaration: R. CASSAR DESAIN.

Signature of the witnesses: A. FARRUGIA.
ALB. ZAMMIT.

Signature of the Officer in Charge: W. J. MONTANARO.

PUBLIC REGISTRY OFFICE — Valletta,
8th December, 1941.

(signed) G. SCICLUNA, Asst. Director.

Exhibit "G"

Public Registry

No. 5382.

I, the undersigned, do hereby certify that the following is a true translation of an Act of Birth registered in the Public Registry Office, Valletta, Malta.

ACT OF BIRTH — Date of the Act: Valletta 8th June 1907.

Particulars respecting the child

Place: Birth:	Valletta.
Hour, day, month and year:	7.30 p.m. 29th May, 1907.
Sex:	Male.
Names given:	James, George, Lawrence, Philip, Carmel, Vincent, Calcedonio, Gerald, Lewis.
Name by which the child is to be called:	James.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION	WITNESSES
Name and Surname:	George Richard Cassar Desain	Mary wife of the said Richard Cassar Desain	The Father	a) Achilles Farrugia b) Joseph Burke.
Profession, trade or other status:	Of independent means	Housewife		a) Writer b) Police Constable.
Age:	27 years	26 years		a) 51 years b) 23 years.
Place of birth:	Valletta	Valletta		a) Valletta b) Floriana.
Place of residence:	Valletta	Valletta		a) Valletta b) Floriana.
Name and Surname of the father, and whether living or dead:	Marquis Lawrence Anthony (dead)	James Turnbull alive.		a) Paul, dead b) Thomas, alive.

Signature of the person making the declaration: R. CASSAR DESAIN.

Signature of the witnesses: A. FARRUGIA.
G. BURKE.

Signature if the Officer in Charge: ROS. LEONARDINI.

Date of Reception of the Act: 11th June, 1907.
Progressive Number of the Inscription: No. 3515.
Signature of the Director: A. MICALLEF, Director.

PUBLIC REGISTRY OFFICE — Valletta,

8th December, 1941.

(signed) G. SCICLUNA, Asst. Director.

Exhibit "H"

Public Registry

No. 5381.

I, the undersigned, do hereby certify that the following is a true translation of an Act of Birth registered in the Public Registry Office, Valletta, Malta.

ACT OF BIRTH — Date of the Act: Valletta 14th December 1908.

Particulars respecting the child

Birth: Place:	Valletta.
Hour, day, month and year:	1.30 a.m. 27th November, 1908.
Sex:	Male.
Names given:	Philip, John, Gerald, Lawrence, Anthony, James, Calcedonio, Vincent, Rosario, Carmel, Joseph, Dominic.
Name by which the child is to be called:	Philip.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION	WITNESSES
Name and Surname:	Richard Cassar Desain	Mary wife of Richard Cassar Desain	The father	a) Achilles Farrugia b) Joseph Burke.
Profession, trade or other status:	Marquis	Housewife		a) Writer b) Police Constable.
Age:	28 years	27 years		a) 53 years b) 25 years.
Place of birth:	Valletta	Valletta		a) Valletta b) Floriana.
Place of residence:	Valletta	Valletta		a) Valletta b) Floriana.
Name and Surname of the father and whether living or dead:	Lawrence Anthony (dead)	James Turnbull (dead)		a) Paul, dead b) Thomas, (alive)

Signature of the person making the declaration: R. CASSAR DESAIN.

Signature of the witnesses: A. FARRUGIA.
G. BURKE.

Signature of the Officer in Charge: A. G. BUSUTTIL, Asst. Superintendent.

Date of the Reception of the Act: 16th December, 1908.
Progressive Number of the Inscription: No. 7145.
Signature of the Director: (sd.) G. ZAMMIT, Director.

PUBLIC REGISTRY OFFICE — Valletta,

8th December, 1941.

(signed) G. SCICLUNA, Asst. Director.

Exhibit "I". Testament: Marchese Riccardo Cassar Desain.

Exhibit "I"

Testament: Marchese Riccardo Cassar Desain

The twenty-first February, one thousand nine hundred and twenty seven (21.2.1927).

Before me Notary, and in the presence of the undersigned competent witnesses, personally came and appeared the Illustrissimo e Nobile Marchese Riccardo Cassar Desain, son of the late Marchese Lorenzo Antonio, born and residing in Valletta.

Appearer is known to me Notary.

Said Appearer bequeaths to his wife, the Marchesa Maria Cassar Desain, the usufruct during her lifetime of all his property, exempting her from the obligation of tendering security, and he appoints as his heirs all his children in equal quotas between them.

He appoints his son Filippo to the Viani primogeniture, founded in the Records of Notary Paolo Vittorio Giammalva on the 28th May, 1775 (one thousand Seven hundred and Seventy-five), and he declares that he has not hereto-before made any last will and testament. He declares that he has appointed his said son to the succession of the said primogeniture, because his first-born son is called to the Cassar Desain primogeniture, and for no other reason whatsoever; and that he has so disposed, availing himself of the powers accorded to him by the founders.

He bequeaths to his Medical Adviser, Doctor Federico Maempel, a legacy of one hundred pounds sterling.

Done and published — the Appearer having been duly informed of the import hereof — in Malta, at the Testator's residence at Tarxien, in the presence of Professor Enrico Carlo Vassallo, Advocate, son of the late Enrico, residing at Sliema, and Eduardo Calleja, clerk, son of the late Vincenzo, residing at Hamrun, competent witnesses. The aforesaid residence of the Appearer is situate at Number Seven, Strada Reale.

(signed) R. CASSAR DESAIN.
„ E. C. VASSALLO.
„ EDUARDO CALLEJA.
„ C. FARRUGIA, LL.D.,
Notary Public, Malta.

Registered on the 8th March, 1927.

True copy from the Registers of Notary Dr. C. Farrugia, issued this 10th day of August, 1942.

Exhibit "I". Testament: Marchese Riccardo Cassar Desain. —*Continued.*

Quod Attestor

(signed) JOSEPH GATT,
Notary Public, Malta.
Keeper.

Notarial Deeds: Extracts

Notarial Deeds: Extracts.

Exhibit "J"

The ninth day of March, one thousand nine hundred and thirty-one.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part: the Illustrissimo e Nobile Marchese Giacomo Cassar Desain, son of the late Illustrissimo e Nobile Marchese Riccardo, born in Valletta, residing at Floriana, of independent means.

And, of the other part, Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

Appearers are known to me Notary.

omissis

Done, read and published, the parties having been duly informed of the import hereof, in Malta, at the chambers of Professor Enrico Carlo Vassallo, LL.D., at number Twenty-seven, Strada Zaccaria, Valletta, in the presence of the said Professor Enrico Vassallo, LL.D., son of the late Enrico, residing at Sliema, and Antonio Azzopardi, messenger, son of the late Spiridione, residing at Casal Curmi, witnesses.

(signed) Marchese JAMES CASSAR DESAIN VIANI.
„ G. PACE, Avv.
„ E. C. VASSALLO.
„ ANTONIO AZZOPARDI.
„ GIOVANNI AZZOPARDI, Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi.
This 13th August, 1942.

(signed) Not. V. BISAZZA, Keeper.

Notarial Deeds: Extracts.

Exhibit "K"

The Twentieth day of April, one thousand nine hundred and thirty nine.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — Giuseppe Attard, a trader, son of the late Carmelo, born and residing in Valletta; Giovanna Attard, spinster, daughter of the late Carmelo, of independent means, born and residing in Valletta; Paolina, the widow of Angelo Magro, daughter of the said Carmelo Attard, born and residing in Valletta.

And — of the other part — the Illustrissimo e Nobile Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, born in Valletta, residing at St. Julian's, of independent means.

Appearers are known to me Notary.

omissis

Done, read and published, the parties having been duly informed of the import hereof, in Malta, at Number Seventeen, Milner Street, Sliema, in the presence of Giuseppe Cassar, son of the late Angelo, residing at Birkirkara, a mason by trade, and Sebastiano Grixti, mechanic, son of Mario, residing at Gzira, witnesses.

(signed) Marchese Cassar Desain Viani — Joseph Attard — Paolina Magro — Giovanna Attard — G. Pace, Avv. — G. Cassar — S. Grixti — Giovanni Azzopardi, Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi.
This 13th August, 1942.

(signed) Not. V. BISAZZA, Keeper.

Exhibit "L"

Notarial Deeds: Extracts.

This Eighteenth day of September, one thousand nine hundred and thirty-one.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — the Illustrissimo e Nobile Marchese Giacomo Cassar Desain, son of the late Illustrissimo e Nobile Marchese Riccardo, born in Valletta, residing at St. Julian's, and Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

And — of the other part — Antonio Galea, son of the late Spiridione, born at Casal Curmi, residing at Sliema.

Appearers are known to me Notary.

omissis

Done, read and published — the parties having been duly informed of the import hereof, — in Malta, at Number Forty, Graham Street, Sliema, in the presence of Iro Vella, Court Messenger, son of Carmelo, residing in Valletta, and Carmelo Pace, clerk, son of Remigio, residing in Valletta, witnesses.

(signed) Marchese CASSAR DESAIN VIANI.
„ G. PACE, AVV.
„ IRO VELLA, witness.
„ CARMELO PACE, witness.
„ GIOVANNI AZZOPARDI,
Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. BISAZZA, Keeper.

Notarial Deeds: Extracts.

Exhibit "M"

The Twenty-first December, one thousand nine hundred and thirty-one.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

And the Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, born in Valletta, residing at St. Julian's.

And — of the other part — Felice Gerada, a trader, son of the late Salvatore, born at Msida, residing at Sliema (Gzira).

Appearers are known to me Notary.

omissis

Done, read and published — the parties having been duly informed of the import hereof — in Malta, at Number twenty-five, Strada Tesoreria, Valletta, in the presence of Carmelo Pace, clerk, son of Remigio, residing in Valletta, and the Nobile Nazzareno Zimmermann Barbaro, son of the late Nobile Carlo Ermolao, residing at Zurrieq, of independent means, witnesses.

(signed) G. PACE, Avv.
„ Marchese CASSAR DESAIN VIANI.
„ FELICE GERADA.
„ N. ZIMMERMANN BARBARO.
„ GIOVANNI AZZOPARDI,
Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. BISAZZA, Keeper.

Exhibit "N"

Notarial Deeds: Extracts.

This twenty-sixth June, one thousand nine hundred and thirty-one.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — the Illustrissimo e Nobile Marchese Giacomo Cassar Desain, son of the Illustrissimo e Nobile Marchese Riccardo, born in Valletta, residing at St. Julian's, and Giuseppe Pace, Advocate, son of Giovanni Pace, Legal Procurator, born and residing at Sliema.

And — of the other part — Giuseppe Cassar, son of the late Angelo, born and residing at Birkirkara.

Appearers are known to me Notary.

omissis

Done, read and published — the parties having been duly informed of the import hereof — in Malta, at Number Forty, Graham Street, Sliema, in the presence of Victor Pace, clerk, son of Remigio, residing in Valletta, and Giuseppe Pace Asciak, clerk, son of Giuseppe, residing at Sliema.

(signed) Marchese Cassar Desain Viani.
„ G. Pace, Avv.
„ G. Cassar.
„ Jos. Pace Asciak.
„ Victor Pace.
„ Giovanni Azzopardi,
Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. Bisazza, Keeper.

Notarial Deeds: Extracts.

Exhibit "O"

The fifth March, one thousand nine hundred and thirty-one.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — the Illustrissimo e Nobile Marchese Giacomo Cassar Desain, son of the late Marchese Riccardo, of independent means, born in Valletta, residing at Floriana.

And — of the other part — Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

Appearers are known to me Notary.

omissis

Done and published — the parties having been duly informed of the import hereof — in Malta, at the Chambers of Professor Enrico Carlo Vassallo, LL.D., Number twenty-seven, Strada Zaccaria, Valletta, in the presence of the said Professor Enrico Carlo Vassallo, LL.D., son of the late Enrico, residing at Sliema, and Antonio Azzopardi, messenger, residing at Casal Curmi, son of the late Spiridione —

(Signed) Marchese James Cassar Desain Viani — G. Pace, Avv. — E. C. Vassallo — Antonio Azzopardi — Giovanni Azzopardi, Notary Public, Malta.

omissis

True copy

issued from the records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. Bisazza, Notary Public, Malta.

Exhibit "P"

The eighth day of January, one thousand nine hundred and thirty-five.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

And — of the other part — Spiridione Lorenzo Mizzi, merchant, son of the late GioMaria, born at Vittoriosa, residing in Valletta.

Appearers are known to me Notary.

omissis

There also appears the Illustrissimo Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, of independent means, born in Valletta, residing at St. Julian's, who is also known to me Notary, and who .....

omissis

Done and published — the parties having been duly informed of the import hereof — in Malta, at number one hundred and thirty "A", Strada Britannica, Valletta, in the presence of Sebastiano Grixti, mechanic, son of Mario, residing at Sliema, Gzira, and Elia Borg, messenger, son of Paolo, residing in Valletta, witnesses.

(signed) S. L. Mizzi.
„ Marquis Cassar Desain Viani.
„ Eduard Degiorgio.
„ Elia Borg.
„ S. Grixti.
„ Giovanni Azzopardi,
Notary Public, Malta.

omissis

True copy

issued from the Records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. Bisazza, Keeper.

Notarial Deeds: Extracts.

Exhibit "Q"

The twenty-second July, one thousand nine hundred and thirty-three.

Before me, Notary Giovanni Azzopardi, and in the presence of the undersigned competent witnesses, have personally appeared:—

Of the one part — the Illustrissimo e Nobile Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, born in Valletta, residing at St. Julian's, of independent means.

And — of the other part — Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

Appearers are known to me Notary.

omissis

Done and published — the parties having been duly informed of the import hereof — in Malta, at number twenty-five, Strada Tesoreria, Valletta, in the presence of Gaetano Ciancio, clerk, son of the late Andrea, residing at Hamrun, and Pietro Guglielmo Camilleri, merchant, son of the late Pietro Paolo, residing at Sliema, witnesses.

(signed) Marchese CASSAR DESAIN VIANI.
„ G. PACE, AVV.
„ PETER CAMILLERI.
„ GAET. CIANCIO.
„ GIOVANNI AZZOPARDI,
Notary Public, Malta.

True copy

issued from the Records of Notary Giovanni Azzopardi, this 13th August, 1942.

(signed) Not. V. BISAZZA, Keeper.

Exhibit "R"

Notarial Deeds: Extracts.

The Fourteenth March, 1932.

By these presents, the Illustrissimo Marchese Giacomo Cassar Desain Viani, appoints Giuseppe Pace, Advocate, his special Attorney **omissis**

(signed) Marchese CASSAR DESAIN VIANI.
„ Not. GIOVANNI AZZOPARDI,
Witness to signature.

True copy of document annexed to Deed enrolled in my Records on the Second March, one thousand nine hundred and thirty-two.

Issued from my Records, this First day of March, 1934.

(signed) GIOVANNI AZZOPARDI,
Notary Public, Malta.

Exhibits "S"

Notarial Deeds: Extracts.

Public Registry — Malta.

No. 75. **Year** 1941.

I, the undersigned, do hereby certify that the following is a true copy of a Note of Cause of Preference registered in this Office in Volume "I".

(Debtor
(
(Creditor Marquis Giacomo Cassar Desain Viani, of independent means, son of the late Marquis Richard, born in Valletta, residing in St. Julian's

omissis

(signed) CALCEDONIO GATT,
Notary Public, Malta.

At the request of Not. C. Gatt for the parties.
Date of receipt of Nota — 27th February, 1935.
Progressive Number — 284 Vol.I
Signature of Director: V. GATT, Director.

This the Fifth day of December, one thousand nine hundred and forty-one.

(signed) G. SCICLUNA,
Assistant Director.

Notarial Deeds: Extracts.

Exhibit "T"

Public Registry — Valletta.

No. 74 **Year** 1941.

I, the undersigned, do hereby certify that the following is a true copy of a Note of Cause of Preference registered in this Office in Volume I.

Creditor: Vincenzo Spiteri, merchant, son of the late Vittorio, born and residing in Valletta.

Debtor: Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, born in Valletta, residing at St. Julian's.

omissis

(signed) ANGELO CACHIA, Notary Public, Malta.

At the request of Notary Angelo Cachia for the creditor.

Date of receipt of Nota — 7th September, 1933.

Progressive Number: 3233 Vol. I.

Signature of Director: V. GATT, Acting Director.

This the Fifth day of December, one thousand nine hundred and forty-one.

(signed) G. SCICLUNA, Assistant Director.

Exhibit "U"

The Eighteenth September, one thousand nine hundred and thirty-one.

Before me, Dr. Ettore Francesco Vassallo, Notary Public, Malta, and in the presence of the undersigned competent witnesses, have personally appeared:—

The Illustrissimo e Nobile Marchese Giacomo Cassar Desain Viani, son of the late Nobile Marchese Riccardo, born in Valletta, residing at St. Julian's, and Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema.

And — of the other part — Carmelo Sultana, merchant, son of the late Annetto, born and residing in Valletta, and, with his consent and concurrence, Paolina Sultana, his wife, daughter of the late GioBatta Micallef, born at St. Julian's, residing in Valletta.

Appearers are known to me Notary.

omissis

Done, read and published — the parties having been duly informed of the import hereof — in Malta, at Number Forty, Graham Street, Sliema, in the presence of Francesco Pace, clerk, son of the late GioBatta, residing at Sliema, and Carmelo Pace, clerk, son of Remigio, residing in Valletta, witnesses, signed hereunder.

(signed) Marchese Cassar Desain Viani.
„ G. Pace, Avv.
„ Carmelo Sultana.
„ Paolina Sultana.
„ Francis Pace.
„ Carmelo Pace.
„ Dr. Ettore Francesco Vassallo, Notary Public, Malta.

Notarial Deeds : Extracts.

Exhibit "V"

This Fourth October, one thousand nine hundred and thirty-two.

Before me, Giovanni Chapelle, Notary Public, Malta, and in the presence of the undersigned competent witnesses, have personally appeared:—

Giuseppe Pace, Advocate, son of the late Giovanni Pace, Legal Procurator, born and residing at Sliema, and the Marchese Giacomo Cassar Desain Viani, son of the late Marchese Riccardo, of independent means, born in Valletta, residing at St. Julian's.

Pasquale Attard, Merchant, son of the late Carmelo. born and residing in Valletta.

Appearers are known to me Notary.

omissis

Done, read and published — the parties having been duly informed of the import hereof — in Malta, at number one hundred and eighty-five A, Strada Forni, Valletta, in the presence of Giovanni Darmanin, clerk, son of the late Saverio, residing at Hamrun, and Gaetano Ciancio, clerk, son of the late Andrea, residing at Hamrun.

(signed) G. Pace, Avv. — Marchese Cassar Desain Viani — Pasquale Attard — Gaetano Ciancio — G. Darmanin — Gio. Chapelle, Notary Public, Malta.

True Copy

issued from my Records, this sixth October, one thousand nine hundred and thirty-two.

(signed) GIO. CHAPELLE,
Notary Public, Malta.

Exhibits A, B, C and D produced together with Plaintiff's Petition (1)

Exhibits A, B, C and D produced together with Plaintiff's Petition.

"A"

On this twenty-first day of April, one thousand nine hundred and forty-one — 1941.

Before me, Edward Calleja Schembri, Notary Public in Malta, and in the presence of the undersigned competent witnesses, well known to me and having all the qualifications required by Law, have personally appeared:—

Of the one part Colonel Gordon Joseph Eaton Matthews, son of the late Herbert, born in Croydon, Surrey, England, and residing in Valletta, Malta, Chief Engineer, Malta Command, appearing on this deed for and on behalf of the Secretary of State for War, in the name of the Crown, hereinafter also termed the War Department.

And of the other part the Most Noble Marquis James Cassar Desain Viani, of independent means, son of the late Marquis Richard and of Marchioness Mary née Turnbull, born in Valletta, residing in Ta Xbiex, limits of Msida.

Well known to me the said Notary.

omissis

This deed was done, read and executed in Malta, after explanation having duly been made by me the said Notary to the appearers of the import hereof — in Valletta at the Auberge de Castille, Castille Place, in the presence of Lieutenant Benjamin Walter Cordwell, Assistant Command Lands Agent, son of the late Fredrick William, residing in Sliema, and of Emmanuele Calleja, clerk, son of Carmelo, residing in Valletta, witnesses having all the qualifications required by Law.

(Signed) G. J. Eaton-Matthews — Marquis Cassar Desain Viani — B. W. Cordwell — E. Calleja — Ed. Calleja Schembri, Notary Public, Malta.

For the full enjoyment at Vol. I No. 512.

A true Extract
issued from my Acts on this 11th May, 1944.
Quod Attestor

(signed) E. Calleja Schembri,
Notary Public, Malta.

Exhibits A, B and C — Originals in English.

Exhibits A, B, C and D produced together with Plaintiff's Petition.

"B"

On this ninth day of June, one thousand nine hundred and forty-two — 1942.

Before me Edward Calleja Schembri, Notary Public in Malta, and in the presence of the undersigned competent witnesses well known to me and having all the qualifications required by law, personally came and appeared:—

Of the one part Colonel Gordon Joseph Eaton-Matthews, son of the late Herbert, born at Croydon, Surrey, England, and residing in Valletta, Chief Engineer, Malta Command, appearing on this deed for and on behalf of the Secretary of State for Air, in the name of the Crown, hereinafter also termed the Air Ministry.

And of the other part Marquis James Cassar Desain Viani, son of the late Marquis Richard and of the living Mary née Turnbull, born in Valletta and residing in Ta Xbiex.

Well known to me the said Notary.

omissis

This deed was done, read and executed in Malta, after explanation having been duly made by me the said Notary to the appearers of the import hereof in Valletta, at the Auberge de Castille, Castille Place, in the presence of Lieutenant Benjamin Walter Cordwell, Assistant Command Lands Agent, son of the late Fredrick William, residing in Sliema, and of Emmanuele Calleja, clerk, son of Carmelo, residing in Valletta, witnesses having all the qualifications required by Law.

(signed) G. J. Eaton-Matthews — Marquis Cassar Desain Viani — B. W. Cordwell — E. Calleja — Ed. Calleja Schembri, Notary Public, Malta.

For the full enjoyment at Vol. I No. 427.

A true Extract

issued from my Acts on this 11th May, 1944.

Quod Attestor

(signed) E. CALLEJA SCHEMBRI,
Notary Public, Malta.

"C"

Exhibits A, B, C and D produced together with Plaintiff's Petition.

On this twenty-third day of August, one thousand nine hundred and forty-one—1941.

Before me Edward Calleja Schembri, Notary Public in Malta, and in the presence of the undersigned competent witnesses, well known to me and having all the qualifications required by Law, have personally appeared:—

Of the one part Colonel Gordon Joseph Eaton-Matthews, son of the late Herbert, born in Croydon, Surrey, England, and residing in Valletta, Malta, Chief Engineer, Malta Command, appearing on this deed for and on behalf of the Secretary of State for Air, in the name of the Crown, hereinafter also termed the Air Ministry.

And of the other part the Most Noble Marquis James Cassar Desain Viani, son of the late Marquis Richard and of Marchioness Mary née Turnbull, born in Valletta and residing at Ta Xbiex, limits of Msida.

Well known to me the said Notary.

omissis

This deed was done, read and executed in Malta, after explanation having duly been made by me the said Notary to the appearers of the import hereof in Valletta, at the Auberge de Castille, Castille Place, in the presence of Lieutenant Benjamin Walter Cordwell, Assistant Command Lands Agent, son of the late Fredrick William, residing in Sliema, and of Emmanuele Calleja, clerk, son of the living Carmelo, residing in Valletta, witnesses having all the qualifications required by Law.

(signed) G. J. Eaton-Matthews — Marquis Cassar Desain Viani — B. W. Cordwell — E. Calleja — Ed. Calleja Schembri, Notary Public, Malta.

For the full enjoyment at Vol. I No. 1033.
For relief at Vol. I No. 1039.

A true copy

Quod Attestor

(signed) E. Calleja Schembri,
Notary Public Malta.

"D"

Public Registry

No. 4312.

I, the undersigned, do hereby certify that the following is a true copy of an Act of Marriage registered in the Public Registry Office of Valletta, Malta.

ACT OF MARRIAGE — Date of the Act: Valletta 7th May 1928.

Particulars respecting the:

	HUSBAND	WIFE
Name & Surname:	Marchese Giacomo Cassar Desain.	Evellina Cassar Torreggiani
Profession, trade or other status:	Of independent means.	Nil.
Age:	21 years	22 years.
Place of birth:	Valletta	Zebbug
Place of Residence:	Floriana	Floriana.
Parents: Name & Surname: whether living or dead:	Marchese Giorgio Riccardo Cassar Desain (deceased) and Maria Turnbull (living)	Paolo Cassar Torreggiani (deceased) and Emilia Despott (living)
Profession, trade or other status of Parents:	FATHER: Of independent means. MOTHER: Marchesa	FATHER: Merchant MOTHER: Nil.

PARTICULARS RESPECTING THE WITNESSES WHO ATTENDED AT THE SOLEMNIZATION OF THE MARRIAGE

Name & Surname,	Giuseppe Slythe	Filippo Despott
	Of independent means.	Merchant
Age:	60 years	46 years.
Place of Birth:	Valletta	Valletta
Place of Residence:	Valletta	Valletta
Name & Surname of the father, and whether living or dead.	Riccardo Slythe (deceased)	Antonio Despott (living).

Declaration of the husband and wife or of the Parish Priest, or other Ecclesiastic, or of the Notary.

I, the undersigned, do hereby declare that the said Marchese Giacomo Cassar Desain and Evellina Cassar Torreggiani were united in wedlock, in the presence of the Very Reverend Canon Archpriest Don Salvatore Dei Conti Manduca — delegated by me — and of the abovementioned witnesses, in the Oratory of the Sacred Rosary annexed to the Parish Church of "Santa Maria di Porto Salvo" (St. Dominic), Valletta, on the 26th April, 1928.

(signed) Padre Fra LUIGI GATT, O.P.
Parish Priest of
"Santa Maria di Porto Salvo"
Valletta.

Date of the reception of the Act: 7th May, 1928.

Progressive Number of the Inscription: No. 344.

Signature of the Director: S. CREMONA, Director.

PUBLIC REGISTRY OFFICE — Valletta,
9th May, 1944.

(signed) G. SCICLUNA,
Asst. Director.

DEFENDANT'S EXHIBITS

Exhibit "A" — filed by the Defendant together with his Answer of the 14th September, 1942.

Exhibit "A" — filed by the Defendant together with his Answer of the 14th September, 1942

Copy.

In His Majesty's Civil Court,

First Hall.

The Noble Giorgio Cassar Desain
vs.
The Marchese Giacomo Cassar Desain Viani.

The Protest of the Noble Giorgio Cassar Desain.
Respectfully sheweth:—

In terms of the instrument of foundation of the Cassar Desain primogeniture, the said Marchese Giacomo Cassar Desain Viani, as the holder of that primogeniture, is bound to bear the name Cassar Desain (and to make use of the family coat-of-arms) without the admixture of any other surname, on pain of forfeiture.

Further, according to the foundation, the holder who contravenes that precise order immediately forfeits the right to hold the primogeniture, and is succeeded by the person who, at that moment, is nearest in the vocation.

For a period of over six years, the Marchese Giacomo Cassar Desain Viani, who is also the holder of the Viani primogeniture, and who is bound by the terms thereof to bear the name Viani, has added the name Viani to that of Cassar Desain.

The complainant was the nearest in the vocation at the moment the Marchese Giacomo Cassar Desain Viani incurred forfeiture six years ago, and therefore the Marchese has no right to the tenure of the Cassar Desain primogeniture, which should devolve upon the complainant.

According to the Cassar Desain foundation, only males can hold the Cassar Desain primogeniture. The Marchese Giacomo Cassar Desain Viani has no male children, but only a daughter, who was born after he incurred forfeiture. Therefore, even if the complainant has 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. Since it is possible that a male may later on be born of the said female, the income deriving from the primogeniture must, according to that instrument,

Exhibit "A" — filed by the Defendant together with his Answer of the 14th September, 1942. —*Continued.*

be collected and administered by the female and left to accrue to the benefit of the primogeniture, less a small deduction therefrom as provided for in the instrument. Therefore, whether that income is due to the complainant or to the male child that may yet be born of the said female, the Marchese Giacomo aforesaid has no right further to hold the property of the Cassar Desain primogeniture.

Wherefore, in bringing the foregoing formally to his notice, the complainant hereby solemnly enters Protest against the Marchese Giacomo Cassar Desain Viani in that he has acted unlawfully and otherwise than in accordance with the dispositions of the Cassar Desain foundation; and he calls upon him to relinquish to him, within thirty days, possession of the property belonging to that primogeniture, and to desist, from this day, drawing the income deriving from that property in his own behalf; and, in case it should be decided that the male child that may yet be born of his daughter aforesaid is entitled to that primogeniture, he calls upon him to relinquish the property, within the period aforesaid, in favour of that child, and to desist drawing the income deriving therefrom in his own behalf and to preserve and safeguard that income in accordance with the terms of the foundation.

And the Complainant thus holds the said Marchese Giacomo Cassar Desain Viani answerable for *dolus*, delay and negligence.

(signed) UGO P. MIFSUD, Advocate.
„ EDGAR BUHAGIAR, Advocate.
„ A. BENJACAR, Legal Procurator.

This thirteenth August, 1934.

Filed by A. Benjacar, L.P. without Exhibits.

(signed) J. N. CAMILLERI,
Deputy Registrar.

I hereby certify that, on the 13th August, 1934, through Usher Giorgio Bellizzi, I effected service of the present act upon the Marchese Giacomo Cassar Desain Viani, leaving a copy thereof with his servant, Carmela Cammilleri, at his residence, Casa Leone, Strada Reale, St. Julian's.

This 13th August, 1934.

(signed) C. VELLA, Marshal.

True copy

(signed) A. GHIRLANDO,
Deputy Registrar.

Exhibits "A", "B" and "C" produced together with Defendant's Minute of the 18th June, 1943.

Exhibits "A", "B" and "C" produced together with Defendant's Minute of the 18th June, 1943.

"A"

Official Copy of Protest to be served upon:—

Marchese Giacomo Cassar Desain Viani

In His Majesty's Civil Court,
First Hall.

The Noble Giorgio Cassar Desain
dei Marchesi Testaferrata.

vs.

The Marchese Giacomo Cassar Desain Viani, and, in so far as he may be concerned, Alfredo Cachia Zammit, in his capacity as Testamentary Executor of the late Noble Lorenzo Antonio dei Marchesi Testaferrata.

The Protest of the Noble Giorgio Cassar Desain Testaferrata.

Respectfully sheweth:—

The primogeniture Testaferrata, founded by the Reverend Canon Giuseppe Giacomo Testaferrata by Testament opened and published by Notary Dr. Cristoforo Frendo on the 14th October, 1804, became vacant with the death on the 3rd June, 1939, of the Noble Lorenzo Antonio Testaferrata.

In terms of the instrument of foundation, the primogeniture, once the holder died without male issue, enters into the line of Filippo Testaferrata, third-born son of the Marchese Mario Testaferrata, and consequently devolves upon the complainant, who was the second-born son of the Marchese Riccardo Cassar Desain Viani living on the day of the death of the said Lorenzo Antonio Testaferrata; and it devolves upon him because the Marchese Giacomo Cassar Desain Viani is the holder of other primogenitures which, according to their respective terms of foundation, he cannot hold together with the Testaferrata primogeniture.

Exhibits "A", "B" and "C" produced together with Defendant's Minute of the 18th June, 1943. —*Continued.*

The endowment of the aforesaid primogeniture includes, besides immovable property, a quantity of furniture and all books, manuscripts and papers relating to family interests, which are in possession of the said Cachia Zammit, in his capacity as Testamentary Executor of the said Nobile Lorenzo Antonio Testaferrata.

Wherefore, in bringing the foregoing formally to their notice, the complainant hereby solemnly informs the said Marchese Cassar Desain Viani and the said Cachia Zammit that he is the lawful holder of the aforesaid primogeniture and of all the property, furniture and documents appertaining thereto; and he calls upon them to desist interfering with the possession of the property, furniture and documents aforesaid, and requests the said Cachia Zammit to make available to him, within eight days, a detailed list of the tenants and the farmers of the primogenial property; and, for all the ends and purposes of the law, he holds the said Marchese Cassar Desain Viani and the said Cachia Zammit answerable for *dolus*, delay and negligence according to law.

(signed) G. PACE, Advocate.
„ ROB. DINGLI, Legal Procurator.

This seventh June, 1939.

Filed by R. Dingli, L.P. without Exhibits.

(signed) A. GHIRLANDO, Dep. Registrar.

True Copy,

(signed) CARM. VELLA. Dep. Registrar.

Exhibits "A" "B" and "C" produced together with Defendant's Minute of the 18th June, 1943.

"B"

In His Majesty's Civil Court,
First Hall.

19th August, 1940.

To:—

1. The Noble Giorgio Testaferrata, known also as Cassar Desain;

2. The Noble Marchese Giacomo Cassar Desain Viani in his own name and in his capacity as lawful representative of his minor son, Anthony;

3. The Noble Filippo Testaferrata Bonici.

Nazzareno Ciantar and Paolo Gatt — referring to the three Schedules of Pre-emption filed by you respectively on the 6th August and the 9th August, 1940, wherein each one of you claims to be next in the vocation to the Testaferrata primogenture — hereby inform you:—

1. That they are not competent to decide who between you is entitled to that primogeniture, and that, therefore, they find themselves in the impossibility of effecting the re-sale before the competent Court decides, or you yourselves decide out of Court, who between you is next in the vocation.

2. That, independently of the foregoing, they would request you to acquaint their Legal Adviser, Dr. Gius. E. Degiorgio, with the vaunted titles of preference and rights of servitude in respect of the property.

3. They warn you of the suit pending before this Court between Nazareno Ciantar and Pietro Vassallo, relating to the improvements in the property in respect of which you have exercised the right of pre-emption, which stands adjourned to the 11th October, 1940.

Saving the above, and saving the proofs in respect of servitude and other titles, the payment of all lawful expenses, of the costs incurred in that suit, of the present judicial letter and Legal Advice, they are prepared to effect the re-sale to the one between you who may and shall prove his title to the property.

(signed) G. E. DEGIORGIO, Advocate.
„ R. DINGLI, Legal Procurator.

"C"

Exhibits "A" "B" and "C" produced together with Defendant's Minute of the 18th June, 1943.

Official Copy of Schedule to be served upon:

Marchese James Cassar Desain.

In His Majesty's Civil Court,
First Hall.

No. 714/1940.

The Honourable John Pace, in his capacity as Treasurer to Government and Director of Contracts.

vs.

Marchese James Cassar Desain and the Noble George Testaferrata (known as Cassar Desain) jointly as Curators on behalf of the uncertain landlord of the three plots of land mentioned hereunder.

Schedule of Deposit of the Honourable John Pace in his aforesaid capacity.

Respectfully sheweth:—

That the Land Arbitration Board, by an order given on the 30th March, 1940, in re "The Hon. John Pace **nomine** vs. Dr. Joseph Salomone Reynaud", ordered the transfer to the Competent Authorities of the absolute ownership of the three plots of land adjoining the road leading from the Cavallerizza to St. Lucian's Tower which are fully described in the Governor's Declaration annexed to the Record of the proceedings aforesaid; — assessed the total amount of compensation payable therefor by the Competent Authorities at Fifty-eight Pounds Fifteen Shillings; — and ordered that the Deed of Conveyance be drawn up on the 16th April, 1940, by the Notary to Government, and that the amount of compensation as above assessed, together with the sum of three per cent thereon, be lodged in this Court and withdrawn only under the authorization of this Court.

That the Deed of Conveyance was published on the date aforesaid as ordered by the Board.

Exhibits "A" "B" and "C" produced together with Defendant's Minute of the 18th June, 1943. —*Continued.*

Wherefore the Honourable John Pace **nomine** hereby deposits in this Court the sum of Sixty pounds Ten shillings and Three pence, being: £58. 15., amount of compensation in respect of the three plots of land aforesaid, as assessed by the Land Arbitration Board, and £1. 15. 3, amount of interest thereon at three per cent; and this in compliance with the order aforesaid and in accordance with Article 10 of Ordinance XI of 1935.

(signed) T. GOUDER, Crown Counsel.
„ J. P. BUSUTTIL, Legal Procurator.

The nineteenth April, 1940.

Filed by J. P. Busuttil, L.P. without exhibits and with the sum of £60.10.3.

(signed) G. VELLA, Asst. Registrar.

True copy

(signed) V. GRECH,
Dep. Registrar.

Immovable Property — Cassar Desain Primogeniture

(Exhibit "A" and "B" filed by Defendant on 11th October, 1943.)

(Abstract)

Property in Malta	£107. 6. 3
Property in Gozo (approximately)	400. —. —
Total	£507. 6. 3

Exhibits B—J

Birth Certificates: Defendant's children.

"B"

Public Registry

No. 9513.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act, Sliema 28th November, 1932.

Particulars respecting the Child

Birth: Place:	Saint Julian's.
Hour, day, month and year:	7 a.m. 9th November, 1932.
Sex:	Female.
Names given:	Unnamed, child still-born.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD DECLARATION	PERSON MAKING THE	WITNESSES
Name and Surname:	Giacomo Cassar Desain Viani.	Evellina wife of the said Giacomo Cassar Desain Viani.	Father	a) Giuseppe Bartolo; b) Carmelo Galea.
Profession, trade or other status:	Marchese	Marchesa		a) & b) Police Constables.
Age:	25 years	25 years		a) 26 years b) 23 years
Place of birth:	Valletta	Zebbug		a) Floriana b) Ghain-sielem Gozo
Place of residence:	St. Julian's	St. Julian's		a) Sliema b) Vitto-riosa
Name and Surname of the father and whether living or dead:	Riccardo (deceased)	Paolo Cassar Torreggiani (deceased)		a) Michele, living. b) Vincen-zo, living.

Signatures { of the person making the Declaration: GIACOMO CASSAR DESAIN VIANI. of the Witnesses: G. BARTOLO, C. GALEA. of the Officer in Charge: R. FENECH, Police Sergeant.

Date of the Reception of the Act: 7th December, 1932.
Progressive Number of the Inscription: No. 7610.
Signature of the Director: S. CREMONA, Director.

PUBLIC REGISTRY OFFICE — Valletta, 22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"C"

Public Registry

No. 5515.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Sliema, 18th May, 1934.

Particulars respecting the Child

Birth place:	43, Strada Reale, Villa Leone, St. Julian's.
Hour, day, month and year:	9 a.m. 25th April, 1943.
Sex:	Female.
Names given:	Mary Rose, Giorgia, Camilla, Elena, Giovanna, Filippa, Giuseppa, Paolina, Caterina, Carmela.
Name by which child is called:	Mary Rose.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	Marquis James Cassar Desain Viani	Evelyn, wife of the said Marquis James Cassar Desain Viani.	The father
Profession, trade or other status:	Of independent means		
Age:	26 years	26 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	Saint Julian's	Saint Julian's	
Name and Surname of the father and whether living or dead:	Marquis Richard — dead.	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis CASSAR DESAIN VIANI.

(sd.) R. FENECH, Police Sgt.
Officer i/Charge.

Date of the reception of the Act: 26th July 1934.
Progressive number of the Inscription: No. 5163.
Signature of the Director: (sd.) GIOV. SCICLUNA,
Act. Ass. Dir.

"D"

Public Registry

No. 5519.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Sliema 29th August, 1935.

Particulars respecting the Child

Birth place:	Saint Julian's, Villa Leone, Strada Reale.
Hour, day, month and year:	3 a.m. 16th August, 1935.
Sex:	Male.
Names given:	No names given — child still-born.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	Marquis James Cassar Desain Viani.	Evelyn, wife of the said Marquis James Cassar Desain Viani.	The father
Profession, trade or other status:	Nil	Nil	
Age:	28 years	29 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	St. Julian's	St. Julian's	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis CASSAR DESAIN VIANI.

(signed) J. E. BUSUTTIL, Insp. of Police
Officer in Charge.

Date of the reception of the Act: 3rd September, 1935.
Progressive Number of the Inscription: No. 5876.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,
22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"E"

Public Registry

No. 5518.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Sliema, 30th October, 1936.

Particulars respecting the Child

Birth place:	St. Julian's, 43 Strada Reale.
Hour, day, month and year:	7 a.m. 20th October, 1936.
Sex:	Female.
Names given:	Anna.
Name by which the child is to be called:	Anna.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	THE DECLARATION PERSON MAKING
Name and Surname:	James Cassar Desain.	Evelyn, wife of the said James Cassar Desain Viani.	The father.
Profession, trade or other status:	Marquis (of independent means)	—	
Age:	29 years	29 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	St. Julian's	St. Julian's	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis CASSAR DESAIN.

(signed) J. E. BUSUTTIL, Insp. of Police
Officer in Charge.

Date of the reception of the Act: 10th November, 1936.
Progressive Number of the Inscription: No. 7473.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,
22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"F"

Public Registry

No. 5517.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Sliema, 7th November, 1938.

Particulars respecting the Child

Birth place:	Saint Julian's, Villa Leone, Strada Reale.
Hour, day, month and year:	7 a.m. 23rd September, 1938.
Sex:	Male.
Names given:	Anthony Richard.
Name by which the child is to be called:	Anthony.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	Marquis James Cassar Desain	Evelyn, wife of the said Marquis James Cassar Desain	The father.
Profession, trade or other status:	Of independent means		
Age:	30 years	30 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	St. Julian's	St. Julian's	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis J. CASSAR DESAIN.

(signed) O. VELLA, Police Sergeant,
Officer in Charge.

Date of the reception of the Act: 10th November, 1938.
Progressive number of the Inscription: No. 7546.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,
22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"G"

Public Registry

No. 5520.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Msida, 4th May, 1940.

Particulars respecting the Child

Birth place:	Ta' Xbiex, Msida, Villa Sunshine.
Hour, day, month and year:	5.45 a.m. 24th April, 1940.
Sex:	Male.
Names given:	Lawrence, Gerald, James, Richard, Philip.
Name by which the child is to be called:	Lawrence.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	James Cassar Desain. Viani.	Evelyn, wife of the said Cassar Desain Viani.	The father.
Profession, trade or other status:	Marquis		
Age:	32 years	33 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	Ta Xbiex	Ta Xbiex	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis CASSAR DESAIN VIANI.

(signed) L. BORG, Acting Police Sergeant
Officer in Charge.

Date of the reception of the Act: 20th May, 1940.
Progressive number of the Inscription: No. 3765.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,

22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"H"

Public Registry

No. 5521.

ACT OF BIRTH — Date of the Act: Floriana, 17th September, 1941.

Particulars respecting the Child

Birth place:	King George V Merchant Seamen's Memorial Hospital, Floriana.
Hour, day, month and year:	9 a.m. 15th June, 1941.
Sex:	Female.
Name given:	Veronica, Elizabeth, Mary, Evelyn.
Name by which the child is to be called:	Veronica.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	Marquis James Cassar Desain	Evelyn, wife of the said Marquis James Cassar Desain	The father.
Profession, trade or other status:	Of independent means		
Age:	34 years	35 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	Rabat	Rabat	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } JAMES CASSAR DESAIN VIANI.

(signed) JOSEPH POCOCK, Police Sergeant
Officer in Charge.

Date of the reception of the Act: 7th October, 1941.
Progressive number of the Inscription: No. 5719.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,

22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"I"

Public Registry

No. 5516.

ACT OF BIRTH — Date of the Act: Rabat, 25th August, 1942.

Particulars respecting the:

Birth place:	No. 26, Buskett Road, Rabat.
Hour, day, month & year:	10 p.m. 21st July, 1942.
Sex:	Female.
Names given:	Christine, Pauline, Victoria.
Name by which the child is to be called:	Christine.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	Marquis James Cassar Desain	Evelyn, wife of the said Marquis James Cassar Desain	The father.
Profession, trade or other status:	Landowner		
Age:	34 years	35 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	Rabat	Rabat	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } Marquis JAMES CASSAR DESAIN.

(signed) V. MUSCAT, Police Sergeant
Officer in Charge.

Date of the reception of the Act: 1st September, 1942.
Progressive number of the Inscription: No. 4872.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,

22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.

"J"

Public Registry

No. 5514.

I, the undersigned, do hereby certify that the following is a true Copy of an Act of Birth registered in the Public Registry Office of Valletta, Malta.

ACT OF BIRTH — Date of the Act: Sliema, 31st March, 1944.

Particulars respecting the Child

Birth place:	Saint Julian's, "Casa Pinto", Sacred Heart Avenue.
Hour, day, month & year:	0.30 a.m. 1st March, 1944.
Sex:	Female.
Names given:	Without name — child died few seconds after birth.

PARTICULARS RESPECTING THE:

	FATHER OF THE CHILD	MOTHER OF THE CHILD	PERSON MAKING THE DECLARATION
Name and Surname:	James Cassar Desain	Evelyn, wife of the said James Cassar Desain	The father.
Profession, trade or other status:	Of independent means		
Age:	36 years	36 years	
Place of birth:	Valletta	Zebbug	
Place of residence:	St. Julian's	St. Julian's	
Name and Surname of the father and whether living or dead:	Richard — dead	Paul Cassar Torreggiani — dead.	

Signature of the person making the declaration } J. CASSAR DESAIN.

(signed) O. VELLA, Police Sergeant,
Officer in Charge.

Date of the reception of the Act: 4th April, 1944.
Progressive number of the Inscription: No. 2940.
Signature of the Director: V. GATT, Director.

PUBLIC REGISTRY OFFICE — Valletta,

22nd May, 1945.

(signed) G. SCICLUNA, Ass. Director.