Law Reports

H.M. COURT OF APPEAL

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

Judgment delivered on 25. 6. 45

CONFIRMED BY JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—14. 10. 47.

Defendant who was the actual holder of a primogenitura founded by the Noble Cleric Dr. Gio Batta Cassar, had since 1931 added the surname Viani to that of Cassar Desain, thereby contravening the order of the founder. Plaintiff claimed that his brother, the defendant, had forfeited the entail and that the primogenitura should be given over to him, being in 1931, the legitimate successor. Marquis James Cassar Desain Viani pleaded that he had not yet forfeited the entail as the Court could grant him a period of time in which to conform with the testator's orders.

Held: that the order did not imply a dissolving condition but only a 'modus' and that defendant should incur forfeiture of the primogenitura if, within one month he failed to undertake, by a note to be filed in the Registry of the Court, never more to bear the name Viani together with the name Cassar Desain.

Plaintiff and defendant were the surviving sons of the Marchese Giorgio Riccardo Cassar Desain who had succeeded to a primogenitura which was founded in 1781 by the will of the Noble Dr. Gio Batta Cassar in the records of Notary Paolo Vittorio Giammalva in favour of the lawful male line descending from the Noble Salvatore Testaferrata and the property was to descend in accordance with the rules laid down in the will "in perpetuity" — a direction which was valid in 1781, though after 1784, the date of the Code de Rohan, no primogenitura could be instituted so as to extend beyond the fourth degree.

The successors to this primogenitura have borne the surname of Cassar Desain in accordance with the provisions of the will, wherein it was stipulated that if the holder of the entail were to add other surnames then from that moment of con-

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* *Reported by J. A. Micallef, LL.D.*

travention he who should succeed in accordance with the provisions of the will, should succeed to the said primogenitura. Defendant had at least from 1931 borne the surname Cassar Desain using also the surname Viani. Plaintiff claimed that his brother had forfeited the entail and that being in 1931 the lawful successor he should take over the property forming the entail in question. Defendant pleaded that plaintiff had no interest to promote the suit for even if defendant had forfeited the lands these would pass to his son born after 1931, in accordance with the provisions of the said will, and further pleaded that he had not yet incurred forfeiture as the order did not imply a dissolving condition but only a 'modus'.

In H.M. Civil Court, First Hall, Mr. Justice Montanaro Gauci pointed out that plaintiff being "within the vocation" was entitled to bring the defendant's failure to observe the terms of the founder's disposition to the notice of the Court. He further held that defendant had acted in error and that his error was excusable. Defendant had not forfeited his primogenitura but was to file a note undertaking not to add any surname to that of Cassar Desain. The entail was to pass to the first born child of defendant in case of non-compliance with the undertaking.

Plaintiff's appeal was dismissed by H.M. Court of Appeal and upheld defendant's plea. It was argued that in order to decide whether in the case of forfeiture the lands should pass to plaintiff or to defendant's son, it was essential to interpret the provision in question in the light of the other provisions of the will, in terms of the rules which govern the interpretation of wills and laws. The provision which set down the penalty, by its diction implied a reference to the other rules of the will. In fact it emerged that the founder's will was that the entail should always be held by the direct male line of descendants of his heir and had laid down various rules in order to safeguard this succession. Furthermore the testator had nowhere shown in his will that the line of descendants of the person who failed to comply with his orders should be penalized.

In order to decide whether the order in question implied a resolutive condition or a 'modus' it was essential to examine the law prevailing at the time of the foundation as was held in re "Caruana vs. Sir Gerald Strickland" (Vol. XVIII P. II. Pg. 106). The doctrine of Aretinus which owes its origin to

Angelus Aretinus who taught at Bologna and Ferrara in the 15th century and is described as 'eximius juris consultus saeculi XV' in Fierli's "Celebriorum Doctorum Theoricae", was well established as a guiding principle of construction at the date of the foundation of the Cassar Desain primogenitura. The distinction between a 'modus' and a 'conditio' was plain. If it was laid down in the will that the successor to the property should enter upon the enjoyment of it only after he had fulfilled some obligation, then he could never acquire the property until he had fulfilled that obligation. The term was not construed as a 'modus' and the heir was not subject to the penalty of forfeiture because he could not forfeit that which never had been his. Where however the obligation was to be performed after the acquisition of the property the case was not simple. On a strictly literal construction the wording of the will might appear to provide for an immdiate forfeiture. The law however, was against such forfeitures, regarding them as odious and as generally producing a result contrary to the true intention of the testator. It was therefore presumed that, whenever an obligation was imposed on the heir after, and not before, the acquisition of the property, the provision was to be read as a 'modus'. The Court when the matter came before it had to decide first whether a contravention had been committed and next, if a contravention was proved, whether the circumstances were such that the defaulter instead of being immediately dispossessed should be permitted to retain the property if he gave an undertaking to observe the obligation in future. The permission was always granted when the contravention was excusable. Where there had been no culpa gravis on the part of the defaulter, the contravention was excusable.

The terms of the testamentary provision further suggested that the founder had only a 'modus' in his mind. He laid down, in fact, that in case of contravention of his order the holder would forfeit the entail "ex nunc", and had he willed a resolutive condition he could have laid down that the forfeiture should occur "ex tunc".

The case was brought before the Judicial Committee of the Privy Council and their Lordships, Lord du Parqq, Lord Morton of Hennyton and Lord Macdremont in dismissing the appeal pointed out that there was no doubt that the clause of the

will under consideration should be read and construed in the light of the common law of Malta, which was Roman Law based primarily on the laws of Justinian, but developed by the interpretation of civilian jurists into a system — the usus modernus juris Romani — which perhaps would have seemed strange in some of its aspects to the lawyers of Justinian's day. The tradition of the Roman Law had been to give great weight to the opinions of the learned. This tradition was followed in the 14th and 15th centuries when the Roman law was being refashioned or at any rate adjusted to meet new conditions and problems: continental lawyers of that period, in the words of Sir William Holdsworth, "made their law depend upon the common opinion of the legal profession to be gathered principally from legal treatises" (Holdsworth's "History of English Law" Vol. I p. 220).

Their Lordships considered the authorities on which the Courts of Malta relied and were of opinion that the case had been decided on a correct view of the law. Their Lordships accepted the doctrine exposed by De Valentibus in his work "De Ultimis Voluntatibus" (Vol. 2 P. 1 Votum XXVIII) published in 1744. This book of authority was also referred to by the Privy Council in an appeal in which the title to the Viani primogenitura was in question: Desain (Marquis) v. Viani (1925). De Valentibus professed to be stating familiar rules, and authorities to which their Lordships were referred, bore him out. It had come to be regarded as a general rule, hardly (if at all) subject to exception, that where an obligation was imposed which was to be fulfilled, on pain of forfeiture, after acquisition of the property, it had to be construed as a 'modus'. This was illustrated by a judgment of the Rota Romana in 1667, (S.R.R. Decis CII at p. 132, coram R.P.D. ottalora).