Privy Council Appeal No. 76 of 1946

George Cassar Desain – – – – – – – *Appellant*

v.

James Cassar Desain Viani and others – – – *Respondents*

FROM

THE SUPREME COURT OF MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH OCTOBER, 1947.

Present at the Hearing:

LORD DU PARCQ
LORD MORTON OF HENRYTON
LORD MACDERMOTT

[*Delivered by* LORD DU PARCQ]

The appellant and the first-named respondent (hereinafter referred to as "the respondent") are brothers. They are now the only surviving sons of the Marchese Giorgio Riccardo Cassar Desain, who died on the 21st July, 1927. A third son, Filippo, survived his father by one day. Of the three sons the respondent was the eldest and the appellant the youngest. Their father, the late Marchese, had succeeded to a primogenitura which was founded in 1781 by the will of the Noble Dr. Gio Batta Cassar in favour of the lawful male line descending from the Noble Salvatore Testaferrata, who was designated as universal heir to the whole of the testator's hereditary immovable property. The will made provision for the succession in the event of the failure of male issue of the heir or of his male descendants. The property was to descend in accordance with the rules laid down by the will "in perpetuity"—a direction which was valid in 1781, though after 1784, the date of the Code of Rohan, no primogenitura could be instituted so as to extend beyond the fourth degree or "grado".

The Noble Salvatore Testaferrata died without issue. The question of the succession then came before the Civil Court, and on the 25th February, 1848, it was adjudged that Filippo Giacomo Testaferrata should succeed him. From then onwards the successors to the primogenitura have borne the surname of Cassar Desain in accordance with a clause in the will the construction and effect of which form the subject of the present dispute. The agreed translation of this clause is as follows:—

> "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 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 primogenitura; and not otherwise."

The respondent, having succeeded to the primogenitura on his father's death in 1927, has borne the surname Cassar Desain, but at least from the year 1931 he also used the surname Viani, styling himself on occasion Cassar Desain Viani. The temptation to do so was no doubt strong, since he claimed to be entitled, owing to the untimely death of his brother

Filippo, to a second primogenitura, the holder of which was required to bear the surname Viani in addition to his own. It may here be mentioned that a question has been raised by the appellant as to the respondent's alleged right to yet a third primogenitura, that associated with the name Testaferrata, but this is a matter which has no direct relevance to the present appeal.

On the 13th August, 1934, the appellant filed a Protest in His Majesty's Civil Court (First Hall), alleging that the respondent had " for a period of over six years . . . added the name Viani to that of Cassar Desain." The appellant then claimed to be entitled to the primogenitura, on the ground that the respondent had " incurred forfeiture six years ago " and that at the moment when forfeiture was thus incurred the appellant was the person nearest in the vocation.

No further step was taken until the action which has culminated in the present appeal was begun by the appellant's Libel dated the 4th September, 1942. It would be idle to speculate as to the reason of this long delay. The Libel repeated the allegation and the claim contained in the Protest. The respondent, by his Answer, denied the appellant's right to bring the action, and pleaded that " forfeiture of the primogenitura 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 '." The respondent was entitled (he said) " 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."

Before the action came to trial it was ordered, at the instance of the appellant, that the two minor children of the respondent, as well as any male children who might yet be born to the respondent, should be called as parties to the suit, and the mother of the minors, the Marchesa Evelyn Cassar Desain, was duly appointed to represent them as Curatrix. The Marchesa and the two minor children are also respondents in this appeal.

In the First Hall of His Majesty's Civil Court, the learned Judge, Mr. Justice Montanaro Gauci, after hearing the evidence of the respondent, held that the appellant, being " within the vocation ", was entitled to bring the respondent's failure to observe the terms of the founder's disposition to the notice of the Court. He further held that the respondent had acted in error, that he was not guilty of culpa gravis, and that his error was excusable. He had therefore not forfeited the primogenitura, but it was adjudged that he should incur forfeiture thereof if, within one month after the judgment became res judicata, he failed " to declare and formally to undertake, by Note filed in the Record, never more to bear the name Viani together with the name Cassar Desain, whether in public or in private." The Court went on to order that in the event of such forfeiture the primogenitura was to devolve on the respondent's eldest son. The Court of Appeal (Sir George Borg, C.J., Mr. Justice Ganado and Mr. Justice Camilleri) dismissed the appeal which was brought against this judgment by the present appellant, and affirmed the judgment of the First Hall. Thereafter, on the 23rd July, 1945, the respondent made the declaration and gave the undertaking required to avoid forfeiture. The judgment of the First Hall appears to have been regarded as having " become res judicata " upon its affirmation by the Court of Appeal, and it has not been suggested that the declaration was made out of time. The appellant has now brought a further appeal to His Majesty in Council.

It was strongly urged on behalf of the appellant at their Lordships' Bar that the intention of the testator was plain and that the words of the material clause were free from ambiguity. The respondent, it was said, held the primogenitura subject to a condition, a breach of which must bring about immediate forfeiture. It was further contended that, as the appellant was nearest in the vocation at the date of the contravention and the forfeiture which immediately followed it, he was entitled to succeed. The Courts of Malta had rejected these contentions.

There is no doubt that the clause in question must be read and construed in the light of the common law of Malta, which is 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. It must be borne in mind that the tradition of the Roman law has 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 re-fashioned, 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. IV, p. 220.) It was the communis opinio which made the common law.

Their Lordships have considered the authorities on which the Courts of Malta relied, and others to which their attention has been directed by counsel, and they are of opinion that the case has been decided on a correct view of the law. In Justinian's day the distinction between a condition and a modus was clearly defined. " Modus " meant " a qualification added to a gift or testamentary disposition, whereby the person benefited is required and bound to devote the property he receives, or the value thereof, to a specified purpose." (Sohm's Institutes, translated by J. C. Ledlie, 3rd ed., at p. 215.) " The modus " says Professor Sohm, " has no ' real ' effect on the right conveyed; that is to say, it does not impress the right with a particular character as against anyone that acquires it; it does not encumber the right in the sense of making it ' defeasible '." Failure to perform the obligation imposed by a modus rendered the person in default liable to an action in personam: unlike the breach of a condition, it did not affect his title.

Founding themselves on this distinction, the jurists of later days found a way of escape from the rigour of testamentary provisions which might press hardly on one who, through excusable error or perhaps mere inadvertence, had imperfectly performed, or had contravened, an obligation. On a strict reading of the testator's language it might appear that the heres had irremediably forfeited his inheritance. This might well be an injustice to him, and would often, moreover, in fact defeat the true intention of the testator, whose paramount object might be (as in the present case) that his property should remain in the hands of those descendants of the first heir whom he had designated. That object would be frustrated if the property were taken away (as it might be) from that branch of the family which he especially favoured by reason of some trivial, or at least excusable, lapse.

The doctrine which enabled the Courts to avoid so harsh and unsatisfactory a result from necessarily following the use of such language as that employed by the testator in this case is commonly known as the doctrine of Aretinus, and owes its origin to Angelus Aretinus (or Angelo Aretino) who taught law at Bologna and Ferrara in the 15th century, and is described as " eximius juris consultus saeculi XV " in Fierli's " Celebriores Doctorum Theoricae," published in Rome in the year 1840, (at page 18). The doctrine was generally accepted, and was expounded and developed by later commentators and in decisions of the Rota Romana and other courts. It was well established as a guiding principle of construction at the date of the foundation of the Cassar Desain primogenitura, and, in the form which it had then assumed, it may be stated as follows:

The distinction between a modus and a conditio suspensiva is plain. If it be laid down in a will or other disposition that the heres or other successor to property is to enter upon the enjoyment of it only after he has fulfilled some obligation, then he can never acquire the property until he has fulfilled that obligation. The term cannot be construed as a modus, and there is no question of a penalty. The heres is not subject to the penalty of forfeiture because he cannot forfeit that which has never been his. Where however the obligation is to be performed after the acquisition of the property, the case is less simple. On a strictly literal construction the words of the instrument may provide for immediate forfeiture on failure to fulfil a resolutive condition (conditio resolutiva). But the law

leans against such forfeitures, regarding them as odious and likely to produce a result contrary to the true intention of the testator. It will therefore be presumed, whenever an obligation is imposed to be performed after, and not before, the acquisition of the property, that the provision is to be read as a modus. This presumption (praesumptio juris) holds even if it be expressly laid down that on a breach by non-fulfilment there is to be a forfeiture. The clause will then be read as a modus with a penalty (poena) annexed. Now a poena can only be enforced after an application to the Court and a formal judgment, and the Court, when once the matter is before it, must decide first whether there has been a contravention, and next, if a contravention is proved, whether the circumstances are such that the defaulter, instead of being immediately dispossessed, should be permitted to retain the property if he gives an undertaking strictly to observe the obligation in future, the Court ordering that he shall suffer the penalty of forfeiture if he fails to give the required undertaking within a prescribed time. Such an order will always be made when the contravention is excusable. It will be excusable if there has not been culpa gravis on the part of the defaulter, and should certainly be excused when it is the result of error, when, for instance, there has been a mistake as to the meaning of the clause or the extent of the obligation.

In so stating the doctrine, their Lordships accept as correct its exposition by De Valentibus in the 2nd volume, Part I, votum XXVIII, of his work " De ultimis voluntatibus," published in 1744. This is a book of authority, and was so regarded by this Board in an appeal in which the title to the Viani primogenitura was in question: *Desain* (*Marquis*) v. *Viani* [1925] A.C. 416, at p. 435. In the passage to which their Lordships now refer the learned author was stating his opinion on a case in which a testator had instituted a fideicommissum in favour of one F. B. and his sons, grandsons and great-grandsons in the male line, with a provision that on failure of the male line the female line should be substituted. The founder had expressly directed that within a month after taking his inheritance any " heres substitutus " was to assume the name and arms of the testator's family " absque alia mixtione," and that, should any such heres fail to comply with this direction, there should be substituted for him the person who would succeed him on an intestacy. There was alleged to have been such a failure. De Valentibus advised upon all the aspects of the question which then arose, and thus part of his opinion is directly relevant to the present case.

De Valentibus was of opinion that the testator's direction must be construed as a modus even though a time had been fixed within which the obligation must be performed. He quotes Aretinus to show that the forfeiture imposed is to be regarded as a penalty:—" Si institutio est pura, et postea injungitur aliquod onus heredi, si illud non impleat, privetur relicto, tunc ademptio dicitur in poenam contraventionis, et legatum est poenale."

In the case of a modus as opposed to a conditio suspensiva (says De Valentibus), if the hereditas is to be forfeited for its non-fulfilment (" ob non implementum adimatur ") then " ademptio per viam poenae fieri dicitur," with the result that before effect can be given to the declaration of forfeiture the Court must be moved—" ideoque, ut illi locus esse queat, semper requiritur interpellatio, juxta in subjecta materia nota juris principia." The penalty of forfeiture will not be imposed in a case such as he is considering unless the offence is grave and no reasonable excuse can be advanced:—" Contraventio in armorum assumptione tunc demum praejudicat, quum speciem habet delicti, nullaque justa ratione excusari potest, ita quidem, ut nec etiam excusari possit sub obtentu erroris, qui semper adesse praesumitur, quando persona ad onus obligata contrarium juste credere potuit; error, inquam, excusat a caducitate." The offender, according to well-known and elementary principles (" familiares regulae, quibus edocemur "), ought to be warned by the Court and required in future to observe the provisions of the will strictly—" ita quidem, ut caducitatem omnem effugiat declarando se paratum esse obsequi voluntati testatoris."

It will be seen that De Valentibus professed to be stating familiar rules, and authorities to which their Lordships were referred bear 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 must be construed as a modus. This is illustrated by a judgment of the Rota Romana in 1667 (S.R.R., Decis. *CII*, at p. 132, coram R.P.D. Ottalora), in which it is said " Onus a testatore post heredis institutionem injunctum semper per viam modi, non autem conditionem, adjectum fuisse censetur." Thus what might be regarded as a conditio resolutiva is effective only as a modus—a conclusion tersely expressed by the Rota in the words " Conditio resolutiva et modus idem sunt."

The view of the law which their Lordships have now stated has been previously adopted in Malta. In the case of *Caruana* v. *Strickland*, which was decided in 1902, it was held in the Civil Court (First Hall) " that according to the doctrine of the best authorities when the disposition imposes on the devisee a burden which, according to the mind of the devisor, is to be fulfilled after the devisee has accepted the disposition and received the emolument, then such disposition is held as made sub modo and not sub conditione, although the words used point to a condition." Their Lordships were furnished with a transcript of this judgment, which, they were informed, was affirmed by the Court of Appeal. It has been followed in the present case, and both it and the judgment now under review, in their Lordships' opinion, expound the law with substantial accuracy. Their Lordships think it well to state, however, for the guidance of the Courts of Malta, that those Courts are unlikely to derive assistance from English decisions as to " names and arms clauses " in wills or other dispositions. They observe that in *Caruana* v. *Strickland* certain decisions of the English Courts were cited, and were distinguished on the ground that they were given in cases in which the testator had fixed a time within which the duty imposed by him was to be fulfilled, and " had directed that on the lapse of such time the party benefited should incur the loss of the property." " It is evident," said the learned Judge, " that in such cases the possessor forfeits his right by the effluxion of the time itself, and hence there was no need that a time be fixed by the Court for such forfeiture." It is impossible to regard this distinction as satisfactory from the standpoint of English law, and it is questionable whether it ought to be regarded with any more favour according to the law of Malta. It was certainly the opinion of De Valentibus (as has been said above) that the fact that the testator has fixed a time within which the onus is to be fulfilled does not affect the general principle of construction. Their Lordships must add that they are not prepared, as at present advised, to approve the dictum of the Court of Appeal in the present case that " there can be no contravention without dolus or at least culpa gravis." It is enough for the decision of this case and, in their Lordships' opinion, more accurate, to say that, even though a contravention is in fact proved, the Court has a discretion, if the contravention does not involve culpa gravis, to give the offender an opportunity of undertaking to comply strictly in future with the terms of the modus, and thus to avoid forfeiture.

It is perhaps desirable, in order to avoid any misunderstanding, to emphasize the fact that it is only when there is added to an " institutio pura " an onus to be subsequently fulfilled that the praesumptio juris is operative. Another clause in the will now under consideration was referred to in the course of argument whereby the testator provided that if any holder of the primogenitura should commit any crime in respect of which he incurred the penalty of confiscation, he should, " ipso jure and ipso facto . . . be and be deemed to be, eight days before the commisssion of the crime, deprived and excluded from the possession and enjoyment of the said primogenitura." The only significance of this provision for the present purpose is that it is in striking contrast with the material clause. It imposes no onus, for even if the duty to abstain from crime could properly be described as an onus, it is not one which the testator imposes. There would be no ground for construing such a provision as a modus, nor could any contravention of it be considered excusable.

It remains to consider whether the appellant was right in contending that the judgment could not be supported on the particular facts of this case. It is manifest that what the law requires from the Court is, first, a decision on the facts, and, secondly, the exercise of a discretion. The Courts in Malta are in agreement both as to the facts and as to the way in which it was proper to exercise their discretion, and it would be contrary to their Lordships' practice to disturb a decision so arrived at if there is evidence to support the finding of fact and reasonable ground for the exercise of the discretion in the manner in which the Court has thought fit to exercise it. It was forcibly contended by counsel for the appellant that there was no justification for the Court's finding of excusable error. The only evidence before the Court was that of the respondent, and the note of it in the Record is regrettably meagre. The respondent seems to have been frank in his admissions. He had been warned by his mother not to use the name of Viani, but he had done so. He had however consulted Professor Vassallo, who is described by the Court of Appeal as " one of the leading Advocates we have in Malta, who has done honour to the profession to which he belongs " and (said the respondent) " Professor Vassallo told me ' you may use it. ' " No attempt was made at the Bar to justify this advice. There is nothing in the notes of evidence to indicate that the respondent was cross-examined either as to the circumstances in which the advice was given, or the reasons, if any, by which Professor Vassallo supported his alleged opinion. The advice appears to have been given orally, and may not have been correctly understood, or repeated, by the respondent. Their Lordships are bound to assume, however, that the learned judge sitting in the First Hall was satisfied that the respondent had believed that he was acting in conformity with Professor Vassallo's opinion.

The respondent further confessed that he had continued to bear the name Viani even after the serving of the Protest upon him in August, 1934, but he appears to have done so on the strength of Professor Vassallo's advice. At a later stage—apparently after proceedings were begun in earnest in 1942—the respondent, on the advice of the lawyers who were then acting for him, ceased to use the name Viani except, he said, when he was required to do so in certain transactions with the military authorities. Much stress was laid by the appellant's counsel on the expression used by the respondent when he said, according to the note, " after I was served with the Protest, not knowing whether I was doing right or not, I retained the name." These words, taken by themselves, might be read as negativing innocent error. Their Lordships are, however, of opinion that, taking the very briefly recorded evidence as a whole, and remembering, as it is essential to remember, that the judge who tried the case was in the best position to assess the meaning and value of that evidence, there is sufficient ground for the finding that the respondent's fault may fairly be described as excusable error, so that culpa gravis ought not to be attributed to him. The appeal therefore fails.

As the respondent has now avoided a forfeiture by making the prescribed declaration, it is unnecessary to decide whether the Courts in Malta were right in holding that the respondent's eldest son ought to succeed him if he incurred a forfeiture in pursuance of the judgment. Their Lordships therefore refrain from expressing a concluded opinion on that question, but they are certainly not disposed, as at present advised, to disapprove the view taken by the Courts in Malta on this part of the case.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs of the appeal.

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Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

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