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UNIVERSITY OF LONDON  
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No. 16 of 1959 - 7 FEB 1961  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

IN THE PRIVY COUNCIL

No. 16 of 1959 - 7 FEB 1961

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

50373

B E T W E E N :

CLIFFORD W.L. CALLWOOD

Appellant

- and -

ELSE E. CALLWOOD

Respondent

CASE FOR THE RESPONDENT

RECORD

10 1. This is an appeal from an order, dated the 22nd July, 1958, of the Federal Supreme Court of the West Indies (Hallinan, C.J., Rennie and Archer, JJ.), dismissing (save as to damages) an appeal from an order, dated the 14th June, 1957, of the Supreme Court of the Windward Islands and Leeward Islands (Lewis, J.), whereby the Appellant was ordered to give possession of Great Thatch Island, in the British Virgin Islands, to the Respondent on or before the 30th September, 1957, and to pay damages of \$2880 B.W.I. for use and occupation of Great Thatch Island. The Federal Supreme Court reduced the damages to \$840.

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pp.34-35

pp.27-28

30 2. This appeal concerns the title to Great Thatch Island. It turns upon the interpretation of a joint will made on the 25th April, 1911 by the Respondent and her husband, who were then resident and domiciled in the island of St. Thomas. St. Thomas was in 1911 part of the Danish Virgin Islands, and the joint will of the 25th April, 1911 was made according to the Danish law prevailing there. The Danish Virgin Islands were ceded to the United States on the 31st March, 1917, but Danish law remained in force there until the 1st July, 1921.

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3. The British Virgin Islands are now part of the Colony of the Leeward Islands. The following Section of the Wills Act (Federal Acts of the Leeward Islands, 1927, Chapter 26) is relevant to this appeal :

"8. No will shall be valid unless it shall be in writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the foot, or end, thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made, or acknowledged, by the testator in the presence of two, or more, witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary".

pp. 1-2

4. The Writ in these proceedings was issued by the Respondent in the Supreme Court of the Windward Islands and Leeward Islands on the 15th April, 1955. The claim indorsed on the Writ was for :

- (1) A declaration that Great Thatch Island is by virtue of the joint will of the Respondent and her husband the property of the Respondent;
- (2) Possession of Great Thatch Island; and
- (3) Damages for the use and occupation of Great Thatch Island by the Appellant from the 14th August, 1948.

pp. 2-4

5. By her Statement of Claim, delivered on the 16th March, 1956, the Respondent pleaded that she was the widow of Richard Edgar Clifford Callwood, deceased, formerly of the Island of St. Thomas in the Virgin Islands of the U.S.A.. R.E.C. Callwood had become the owner of Great Thatch Island, in the British Virgin Islands, on the death of his father intestate in 1902, and had continued to own it until his own death in 1917. The Respondent and R.E.C. Callwood had made a joint will on the 25th April, 1911, under which the Respondent, should she survive her husband, was to have the right to retain their joint estate in accordance with a Danish Ordinance of 1845 then in force in the Island of St. Thomas. The Respondent, in accordance with that law, had elected to retain Great Thatch Island and not to divide it with her

son, the Appellant. On or about the 14th August, 1948, the Appellant had purported to take from the Respondent's Attorney a lease of Great Thatch Island, but this lease had not been properly executed in accordance with the law of the British Virgin Islands. The Appellant had entered into possession of Great Thatch Island in purported reliance upon this lease, and the Respondent claimed damages for his use and occupation of the island.

10 6. By his Defence, delivered on the 2nd October, 1956, the Appellant alleged that the will of R.E.C. Callwood was ineffective in so far as it related to real property in the British Virgin Islands, and consequently R.E.C. Callwood had died intestate as regards Great Thatch Island and the island had devolved upon the Appellant, the only child of R.E.C. Callwood. He did not admit that the Respondent had any right to Great Thatch Island. He had purported to enter into the lease of the  
20 14th August, 1948 under a mistaken understanding that the Respondent was entitled to possession of Great Thatch Island for her life. He alleged that he had entered into possession of the island as owner, and denied that he was liable for any damages for use or occupation.

7. The action was tried by Lewis, J., on the 8th April and the 15th May, 1957. The Respondent gave evidence. She said that she had been born in Germany, and had married R.E.C. Callwood in London  
30 in 1905. He had been born in the Island of Tortola (in the British Virgin Islands), and had been a British subject by birth and had remained a British subject all his life. He had lived in the Island of St. Thomas from the age of 14, and she and her husband had gone to St. Thomas after their marriage. Her husband had often returned to Tortola on visits. She and her husband had not entered into any marriage settlement, but in April, 1911, in St. Thomas, they had made a joint will before a Danish  
40 Notary Public and two witnesses. In 1913, her husband having retired, she and her husband had gone from St. Thomas to Germany. Her husband had made no definite plans as to where they would settle. The Respondent had been getting medical attention in Germany, and the outbreak of war in 1914 had kept them there. R.E.C. Callwood had died in Germany on the 17th January, 1917. He had owned Great Thatch Island, in the British Virgin Islands. The Respondent had never remarried, and was still a widow.

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pp.40-44;  
p. 7,11 1-12

8. A copy of the joint will of R.E.C. Callwood and the Respondent, dated the 25th April, 1911, was put in evidence by agreement of the parties. The first two clauses of this will read as follows :

"1. I, Richard Edgar Clifford Callwood, reserve the right accruing to me as husband in accordance with Royal Ordinance of 21st May, 1845, paragraph 18, Section 1, say to retain, if I am the survivor, our whole joint estate undivided with our joint children, as long as I do not marry again.

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2. I, Richard Edgar Clifford Callwood, do hereby give and grant to my said wife, Mrs. Elsa E. Callwood, if she is the survivor, the same right as mentioned sub-Para. 1 of retaining our joint estate undivided with our joint children as long as she does not marry again".

The will also contained other provisions not relevant to this appeal. This will was executed at St. Thomas before a Notary Public and two witnesses.

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p.39; p.7,  
11.1-5

9. An affidavit of James August Bough was also put in evidence by agreement of the parties. Mr. Bough said that he was an Attorney and Counsellor at Law, and had practised as such in the American Virgin Islands since 1934, except between the years 1946 and 1954. The American Virgin Islands had been a Danish colony until the 31st March, 1917, and it had been common practice for persons to be married there under the Danish Law of community property. The question of what the Danish Law as to community property was had often arisen in the deponent's practice. He stated categorically that the law on this question was correctly stated in the Judgment of Maris, J. in the United States Court of Appeals for the Third Circuit in Callwood v. Kean (1951), 189 F.2d. 565.

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p.7, 11.1-8

10. A copy of the Judgment of the United States Court of Appeals in Callwood v. Kean was also put in evidence by consent. This was an action brought by the Respondent against one Kean, who had for many years been her agent for the management of properties in St. Thomas, for an account and for recovery of certain monies derived from real property in the town of Charlotte Amalie, in St. Thomas. These properties had been the subject of a provision of the joint will of the 25th April, 1911 (a provision not relevant to this appeal), and

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it was therefore necessary for the Court of Appeals to consider that will and the law under which it was made. The Judgment of Maris, J. contained the following passages :

10 "Since the will involves the title to real estate in St. Thomas it is to be construed in accordance with the rules of law in force in that island when the will went into effect on January 17, 1917, the date of the testator's death. At that time the law in force in St. Thomas was that of Denmark. The Danish law in force when the island was one of the Danish West Indies remained in force, after the change of sovereignty, until July 1, 1921, when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the Danish law rules of law based upon the common law of England as understood in the United States.

20 Under the Danish law from very early times husband and wife held their property in community, unless otherwise provided by marriage settlement. Moreover one of the provisions of the Danish law was that upon the death of a spouse the surviving spouse could, under certain circumstances, continue to hold their entire joint estate in community until his or her death or remarriage, thereby postponing the rights of children or other heirs in the community property. This right appears to have been established by, and certainly was recognized by, the Ordinance of May 21, 1845, which was in force in the Danish West Indies. Section 18 of that Ordinance, referred to in the will here in question, provides that a husband after the death of his wife is not obligated to divide the property with their common children, whether they have attained their majority or not, so long as he does not remarry unless marriage contracts or other binding determinants create the necessity for such a division. The section further authorizes the husband by testamentary disposition to confer on his wife the same right to retain the whole property undivided."

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"It appears that under the Danish law a surviving spouse who thus retained possession of the community property was entitled to sell or mortgage it or otherwise to deal with and dispose of it as absolute owner, although perhaps under a duty to compensate their children as heirs for any undue diminution in the aggregate value of their inheritance."

- p.25, 11.6-7      11. It was admitted that the lease of the 14th August, 1948 was of no effect. The Appellant claimed to justify his possession of Great Thatch Island solely on the ground that he was the heir of R.E.C. Callwood. 10
- pp.12-15  
p.15, 1.42 -  
p.16, 1.26      12. Lewis, J. delivered judgment on the 14th June, 1957. He first summarised the facts and the pleadings. He went on to say that the Respondent, since she was relying on foreign law for the establishment of her claim, had to prove that law to the satisfaction of the Court. 20  
This law had to be proved by a properly qualified witness, and could not be established merely by reference to a decision of the Court of the foreign country. A competent witness was either a practising lawyer under the legal system in question, or someone following a calling in which he must necessarily acquire a practical working knowledge of the foreign law. The learned Judge read the affidavit of Mr. Bough. He said that Mr. Bough's reference to the American judgment was not a breach of the rule that foreign law could not be proved by citing a decision of the foreign country. The effect of that rule was to prevent counsel from quoting at the Bar decisions of foreign Courts. What had happened in the present case was that Mr. Bough had stated that his opinion on the foreign law was the same as that expressed in the American judgment, and had adopted as his own the opinion there set out. The learned Judge was satisfied that Mr. Bough was competent to express an opinion on the subject, and held that the method of proof of the foreign law did not violate the rules. The Appellant had not offered any evidence to contradict that of Mr. Bough, so the learned Judge was compelled to hold that the only evidence of foreign law before him was Mr. Bough's. Lewis, J. then went on to consider the Danish law as 40
- p.16, 11.27-42
- p.18, 11.5-40      30
- p.18, 1.42 -  
p.19, 1.8
- pp. 19-24



set out in Mr. Bough's affidavit and the American judgment. He reached the following conclusion:

10 "....all property owned by (the Respondent and her husband) at the date of their marriage would constitute part of the joint estate property unless a marriage settlement provided otherwise. It is admitted that there was no marriage settlement and as Great Thatch Island was owned by the testator at the date of his marriage it would, in the absence of any evidence to the contrary form part of the joint estate, and I accordingly hold that it does form part of the joint estate".

p.24, 11.14-23

20 The learned Judge held that the words "our whole joint estate" in Clause 1 of the will were sufficient to comprehend all joint property of the Respondent and her husband wherever situate. He found as a fact that the expression did include Great Thatch Island, although it was not specifically mentioned in the will. Counsel for the Appellant had submitted, the learned Judge said, that even if Great Thatch Island was joint property, the will was ineffective to pass the property in the island, because the island was situate in British territory, so that R.E.C. Callwood had died intestate as to at least half of the island. Counsel had not developed this point or quoted any authority for his submission, and Lewis, J. held that the submission was clearly wrong. In order to pass property in the British Virgin Islands, a will had to be executed in accordance with the Wills Act of the Leeward Islands. The certificate attached to the will showed clearly that the Respondent and her husband had signed it in the presence of a Notary and the Notary's two witnesses, and the two witnesses had been present and had signed the will at the same time. The will was therefore executed in accordance with the Wills Act, and R.E.C. Callwood had not died intestate as to Great Thatch Island. Since both parties admitted that the purported lease of the 14th August, 1948 was void, the Appellant was not entitled to continue in possession, and the Respondent was entitled to possession of Great Thatch Island. The learned Judge finally considered the question of damages for the use and occupation of the island, and assessed the damages at \$40 per month over the six years ending on the 30th September, 1957, by which date he ordered the Appellant to give up possession.

p.24, 11.24-34

p.24, 1.35-  
p.25, 1.22

p.25, 1.22 -  
p.26, 1.9

p.26, 11.10-36

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pp.28-30

13. The Appellant appealed against this judgment. By his Notice of Appeal, dated the 24th September, 1957, he relied on the following grounds :

- (1) That the Danish Law of community property had not been proved.
- (2) That Mr. Bough was not qualified to give expert evidence of Danish Law.
- (3) That the attempt to prove Danish Law had infringed the rule that foreign law cannot be proved by reference to a decision of a foreign Court. 10
- (4) That there was no evidence to support the finding that Great Thatch Island was part of the joint estate.
- (5) That, if the island had in fact been part of the joint estate, R.E.C. Callwood had died intestate as to his share of it.
- (6) That the damages were excessive.

p.31

p.31, 11.9-14

p.32, 11.2-15

p.32, 11.34-39

p.32, 1.40 -  
p.33, 1.22

p.33, 11.23-26

14. The appeal was heard in the Federal Supreme Court of the West Indies on the 21st and 22nd July, 1958. Judgment was given on the latter day. Hallinan, C.J. summarised the facts and said it was quite clear from the form and contents of the will that the Respondent and her husband regarded themselves as holding property under Danish Law, whereby husband and wife held their property in community unless otherwise provided by marriage settlement. He said that Lewis, J. had accepted a statement in the American judgment as defining the right of the Respondent in the joint estate, and had found that the joint will satisfied the requirements of the Wills Act in point of form. The latter finding had not been challenged on appeal nor had any matter been indicated which would make the disposition in the will invalid by the law of the British Virgin Islands. The learned Chief Justice was unable to accept the submission that Mr. Bough was not qualified to give evidence on the Danish Law applicable to the case. He also held that the Danish Law was sufficiently established, and Lewis, J. had had evidence before him to justify him in holding that the joint will comprised and destined Great Thatch Island. The Respondent, therefore, had 20 30 40



had the right to the possession of the island since her husband's death. She was entitled to damages for its use and occupation by the Appellant during the last 10 years. The learned Chief Justice held, however, that the damages awarded at the trial could not be supported on the evidence and ought to be reduced to \$840. Rennie and Archer, JJ. concurred in this judgment. p.33

10 15. The Respondent respectfully submits that Mr. Bough was competent to give expert evidence of the Danish Law of community property which prevailed in St. Thomas until 1921. It appeared from Mr. Bough's affidavit that questions on this law had often arisen in the course of Mr. Bough's professional practice. In the Respondent's submission, a person following a calling in which he must necessarily acquire a practical working knowledge of a certain foreign law is competent to give expert evidence of that law, and Mr. Bough was accordingly a competent witness of the Danish law relevant to this case.

20 16. The Respondent respectfully submits that the manner in which Mr. Bough gave his evidence was perfectly regular and did not violate any rule. While counsel in a British Court is not permitted to refer to a decision of a foreign Court in order to show what is the foreign law, an expert witness may, in the Respondent's submission, refer to such a judgment as a correct statement of the law. In 30 other words, he may adopt what is said in such a judgment as his own opinion, and is not obliged to copy it all into his affidavit or to read it all out in oral testimony.

40 17. The Respondent respectfully submits that the evidence of Danish law given by Mr. Bough was sufficient to show that Great Thatch Island was part of the joint estate of the Respondent and R.E.C. Callwood. This evidence also showed that the Respondent, as the surviving spouse retaining possession of the joint property, was entitled to deal with it as an absolute owner. Furthermore, these questions were questions of fact in the present proceedings, and concurrent findings have been made upon them in the Respondent's favour by the Supreme Court of the Windward Islands and Leeward Islands and the Federal Supreme Court. This being so, Clause 2 of the joint will by its terms disposed of Great Thatch Island in favour of the Respondent. This will complied in point of

form with the requirements of the Wills Act of the Leeward Islands, and there is, in the Respondent's respectful submission, no justification for the suggestion that R.E.C. Callwood died intestate as to his interest in Great Thatch Island.

10 18. The Respondent respectfully submits that the order of the Federal Supreme Court of the West Indies was right and ought to be affirmed, and this appeal ought to be dismissed for the following (amongst other)

R E A S O N S

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- (1) BECAUSE James August Bough was a competent witness of the Danish law relevant to this case:
- (2) BECAUSE his evidence was duly and properly given:
- (3) BECAUSE upon the questions of Danish law the two Courts below have made concurrent findings in the Respondent's favour:
- (4) BECAUSE the evidence showed that Great Thatch Island was part of the joint estate of the Respondent and R.E.C. Callwood:
- (5) BECAUSE the Respondent is entitled to retain that joint estate so long as she does not remarry:
- 30 (6) BECAUSE the joint will of the 25th April, 1911 was a valid disposition of real property in the British Virgin Islands:
- (7) BECAUSE of the other reasons contained in the judgments delivered in the Courts below.

J.G. Le QUESNE.

