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IN THE PRIVY COUNCIL No. 16 of 1959

F0372

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

(APPELLATE JURISDICTION)

ON TRANSFER FROM THE WEST INDIAN COURT OF APPEAL

BETWEEN

CLIFFORD W. L. CALLWOOD

... ... (Defendant) Appellant

and

ELSE E. CALLWOOD

... (Plaintiff) Respondent

CASE FOR THE APPELLANT

1. This is an Appeal by special leave from a judgement of the Federal Supreme Court of the West Indies (Appellate Jurisdiction) (Hallinan C.J., Rennie and Archer J.J.) dated the 22nd July 1958, dismissing save as to the quantum of damages an appeal from a judgment of the Supreme Court of the Windward Islands and Leeward Islands (Presidency of the Virgin Islands Circuit) (P. Cecil Lewis Puisne Judge) dated the 14th June 1957. pp.34-35 p.27

2. The main questions which arise for consideration in this appeal are:-

(i) Whether it was proved at the trial of the action that by Danish Law Great Thatch Island in the British Virgin Islands became the joint property of the Respondent and her husband upon their marriage and

subsequently passed to the Respondent on her husband's death under a Joint Will dated the 25th April 1911.

(ii) Whether a foreign statute providing that real property held by either of the spouses abroad should be held by them henceforth in community could affect the title to land situate in British Territory.

3. That the facts admitted or proved at the trial of this action included the following:-

(1) The husband of the Respondent (hereinafter called "the Testator") was a British subject by birth and remained so until his death in Germany on the 17th January 1917. He was born in Tortola one of the British Virgin Islands but at the age of fourteen he went to live in St. Thomas, then a Danish colony under Danish Law. He continued to live in St. Thomas until 1913 when he went to live in Germany. At the date of the testator's marriage in 1905 until his death in 1917 he was domisiled in St. Thomas.

(2) In the year 1902 the testator became the owner of Great Thatch Island in the British Virgin Islands on the death intestate of his father. He subsequently acquired land in St. Thomas. He married the Respondent in London the 31st August 1905 and there was no marriage settlement. On the 25th April 1911 the Testator and the Respondent made a Joint Will which provided (inter alia) as follows:-

pp. 40-44

Paragraph 1

"I, Richard Edgar Clifford Callwood, reserve the right accruing to me as husband in accordance with Royal Ordinance of 21st May, 1845, Para. 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.

Paragraph 2

I, Richard Edgar Clifford Callwood, do hereby give and grant to my said wife, Mrs. Else M. 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.

As, however, both of us consider it to be the benefit and welfare of all concerned, that the said right of retaining our joint estate undivided should be given me, Mrs. Else E. Callwood, under certain restrictions, I, Richard Edgar Clifford Callwood and I, Mrs. Else E. Callwood do hereby decide, that the said right is given with the following restrictions."

There was no specific mention of Great Thatch Island in the said Will.

(3) That if Great Thatch Island did not upon the death of the testator on the 17th January 1917 pass to the Respondent under the Joint Will the testator died intestate as regards Great Thatch Island and it devolved upon the Appellant as the only child of the testator.

(4) The Respondent claimed to elect to retain Great Thatch Island as her property and not to divide the same with your Appellant.

(5) That in 1948 the Appellant took a lease of Great Thatch Island and entered into possession thereof but such lease was invalid for want of a seal and want of registration. The Appellant nevertheless remained in possession of the said Island.

4. That on the 5th April 1955 the Respondent instituted proceedings in the Supreme Court of the Windward Islands and Leeward Islands (presidency of the Virgin Islands Circuit) claiming p.1.

(i) A declaration that Great Thatch Island is, by virtue of the said joint Will, the property of the Respondent.

(ii) Possession of the said Island.

(iii) Damages for use and occupation.

5. By her Statement of Claim the Respondent p.2.

pleaded as follows:-

"1. The Plaintiff is the widow of Richard Edgar Clifford Callwood deceased formerly of the Island of St. Thomas in the Virgin Islands of the U.S.A.

2. The said Richard Edgar Clifford Callwood was the owner (on the death of Richard Louis Callwood, his father intestate in the year 1902) of Great Thatch Island in the British Virgin Islands and continued as such owner until the date of his death in the year 1917.

3. By joint Will made by the Plaintiff and her husband the said Richard Edgar Clifford Callwood on the 25th day of April, 1911, it was agreed by the Plaintiff and her said husband that, should she survive him, that she should have the right to retain their joint estate in accordance with the provisions of the Royal Danish Ordinance of 21st May 1845, Chapter 18, Section 1, under the Danish Laws then in force in the said Island of St. Thomas then a Colony of the Kingdom of Denmark.

4. The Plaintiff has elected in accordance with the said law to retain the said Great Thatch Island as her property and not to divide the same with the Defendant her son."

It was nowhere in the said pleading alleged that the Respondent had any interest in Great Thatch Island prior to the death of the testator. By his defence the Appellant admitted Paragraph 1, 2 and 3 of the Statement of Claim but contended that the testator had died intestate as regards Great Thatch Island.

p.39

6. The only evidence on Danish Law given at the trial of the action was contained in an affidavit by James August Bough, an Attorney and Counsellor at Law, of St. Thomas in the Virgin Island of the United States of America. The material passage in in the said affidavit was as follows:-

"1. I am an Attorney and Counsellor at Law and have practised as such in the Virgin Islands of the United States of America from the year 1934, except between 1946 and 1954 when I served with the Departments of Trusteeship of the United Nations, at New York City. The Virgin Islands of the United States of America

were up to March 31st, 1917 a Colony of Denmark, and it was common practice for persons to be married there under the Danish Law of community property. In my practice the question as to what is the Danish Law as to community property has often arisen.

2. I have read carefully the Opinion of the Court delivered by MARIS J. in the United States Court of Appeals for the Third Circuit in the case of Callwood v. Kean No.10310, of January 29th 1951. I can state categorically that the law on this question is as stated in that Opinion."

In Pocket

7. The said Opinion related to certain particular matters arising out of the said Joint Will. It is submitted for the Appellant that the said Opinion in so far as it was relevant was concerned with real property in St. Thomas admittedly belonging to the joint estate of the Respondent and the testator, and with restrictions placed by the said Joint Will on the powers of the Respondent to deal with such property after the testator's death. It did not lay down, nor was it concerned to lay down, any statement of principle as to what property of the respective spouses becomes joint property under Danish Law, or passes under a Joint Will.

8. At the trial it was contended on behalf of the Respondent that Great Thatch Island was devised to the Respondent under the joint Will as being comprised within the words "whole joint estate." The Respondent contended that under Danish law the joint estate comprised all property moveable or immoveable, wherever situate, owned by the Respondent and the testator either before or after marriage.

9. It was contended on behalf of the Appellant (inter alia):-

(a) that it had not been proved or established by the Respondent whether as a matter of Danish or the law prevailing in the British Virgin Islands that Great Thatch Island was comprised within the words "joint estate" so as to pass to the Respondent under the said joint Will; and that the evidence of the said Bough was incompetent or insufficient for the purpose.

(b) That even if Great Thatch Island was joint property under Danish law the Will was ineffective to pass the ownership of the said island to the Respondent as the said island was situate in British territory.

p.12 10. That on the 14th June 1957 the Supreme Court (P. Cecil Lewis Puisne Judge) adjudged that the Respondent was the owner and entitled to possession of the said island and awarded a sum of $40. per month as damages for use and occupation for a period of six years.

11. The learned trial judge held:-

(1) that the evidence of the said Bough was competent to prove the relevant Danish law;

(2) that as it was uncontradicted such evidence should be accepted and that so accepted it was sufficient to prove that under Danish law all property of either spouse at the date of the marriage became joint property on marriage;

(3) that accordingly Great Thatch Island was joint estate and the Respondent was entitled under the provisions of the Will to retain it as owner to the exclusion of the Appellant.

p.28 12. That the Appellant appealed to the West Indian Court of Appeal before whom he further contended that the intrinsic validity of the Will in so far as it related to the title to land in British territory was exclusively governed by the law of that territory and that the law prevailing at all material times in Great Thatch Island did not provide for land to be held in community as permitted by Danish Law.

pp.30-33 13. That on the 22nd July 1958 the Federal Supreme Court (Sir Eric Hallinan Chief Justice, Mr. Justice Rennie and Mr. Justice Archer) on transfer from the West Indian Court of Appeal dismissed the Appellant's Appeal (save in respect of the quantum of damages) and upheld the decision of the Supreme Court. The Federal Supreme Court held that the American lawyer was competent to give evidence of the Danish law applicable to this case and that this evidence sufficiently established that by Danish law Great Thatch Island became upon the marriage of the

testator the joint property of the testator and the Respondent and that by the Joint Will the testator had disposed of this joint estate in accordance with Danish law. They further held that the disposition was valid and effective by the law of the British Virgin Islands.

14. On the competence of the said Bough to give evidence of the Danish law applicable to this case and on the sufficiency of such evidence, the material passages of the judgment of Sir Eric Hallinan, Chief Justice, (in the whole of which judgment Mr. Justice Archer and Mr. Justice Rennie concurred) were as follows:-

"At the trial, Mr. Bough, an American lawyer, gave evidence by affidavit. He has practised in St. Thomas and is familiar with Danish law which was then in force in St. Thomas until 1921. He referred to a judgment in the United States Court of Appeal for the Third Circuit given on the 25th April, 1951, in which the interest of the respondent under the joint Will was fully considered and discussed in relation to the Danish law in force prior to 1921 and which was part of the domestic law of the United States in that territory when it was acquired from Denmark in 1917. Mr. Bough stated that the judgment of 1951 is a correct statement of the law on this question."

and the learned Chief Justice stated his conclusions on this question thus:-

"I am unable to accept the submission made on behalf of the appellant that Mr. Bough was not qualified to give evidence on the Danish law applicable to this case or that this law was not sufficiently established by the evidence. The joint Will itself clearly showed that the respondent's husband regarded himself as subject to Danish law and, therefore, that his property would upon marriage be held jointly by his wife and himself, and he proceeded to dispose of this joint estate in terms of Danish law. The implications of such dispositions according to Danish law are explained in the judgment of 1951. I consider that the Trial Judge had sufficient evidence before him to hold that the joint Will comprised and destined the lands in question."

15. It is submitted on behalf of the Appellant that the Federal Supreme Court failed to give due

weight to the fact that the said Bough did not commence to practice in the Virgin Islands of the United States of America until 1934. They ceased to be a colony of Denmark in 1917. From 1917 to 1921 the Danish laws existing locally in 1917 were continued in force by virtue of an American statute. Since 1921 there has been in force in the Virgin Islands of the United States of America a code based on common law principles. It is submitted on behalf of the Appellant that the said Bough has never practiced in a country where the Danish law of community property was in force, and that he cannot have a practical knowledge of the said law, but only either a knowledge gained by study, or a knowledge of the view taken of the relevant Danish law by American law.

16. It is further submitted on behalf of the Appellant

(a) The Federal Supreme Court failed to appreciate that if Great Thatch Island did not become part of the community property or joint estate of the Respondent and the testator upon their marriage it would not pass under the joint Will nor would the joint Will affect any rights thereto since Great Thatch Island was not expressly mentioned in the said Will.

(b) The Opinion referred to in the affidavit of the said Bough did not contain any statement as to what property of the spouses became part of the community property or joint estate, and in particular did not contain any statement as to whether foreign land held by one of the spouses before marriage became part of the community property or joint estate.

(c) In the absence of such evidence the Federal Supreme Court erred in holding that the Joint Will comprised and destined Great Thatch Island.

17. In regard to the further contentions of the Appellant before the Federal Supreme Court, the material passage of the judgment of the learned Chief Justice was as follows:-

"Our law relating to foreign will of land situated in British territory is stated in JARMAN on Wills 8th Edition Vol. 1 page 1

thus:-

> 'Thus, a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which being translated into our language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England'.

At note (c) on the same page, it is said:-

> 'To arrive at the intention of such a will, the technical terms of foreign law will be read in the sense which that law gives them, and will operate accordingly so far as the lex loci permits'.

The finding of the learned Trial Judge that the joint will conforms with the Wills Act 1837 has not been challenged on appeal. Our attention has not been directed to any matter that would make the disposition invalid by the law of the British Virgin Islands".

18. It was and is submitted on behalf of the Appellant

(i) The Respondent can claim no rights in land in The British Virgin Islands other than those given by the law of that place.

(ii) The marriage of the Respondent and the testator could not under the law of the British Virgin Islands affect the title to Great Thatch Island, especially in the absence of proof of any contract between them relating thereto, since it is the lex situs of land which determines all questions of title thereto. There was at all material times no rule of law in the British Virgin Islands which provided for passing of property of the husband on marriage.

(iii) If (as was in fact common ground on the pleadings) Great Thatch Island was not at the date of death of the testator part of the joint estate or community property, the Joint Will could not under the law of the British Virgin Islands affect the title thereto.

(iv) The said Joint Will was not, and did not purport to be a testamentary disposition, but an exercise of a Danish statutory power applicable to joint property, and could not therefore pass a title to land in the British Virgin Islands.

(v) The right to the joint state or community property thereby created in Danish law was not such as the law of the British Virgin Islands should or could recognise as an estate or interest in land.

19. The Appellant humbly submits that this Appeal Appeal ought to be allowed for the following among other

REASONS

(1) Because it was for the Respondent to prove her title to the land and the facts and the foreign law supporting it and she failed to do so

(2) Because the said Bough was not a competent witness as to the Danish law of community property.

(3) Because there was no sufficient evidence before the court that in Danish law Great Thatch Island became joint estate on marriage.

(4) Because a rule of Danish law providing that upon marriage real property owned by either of the spouses abroad should be held by them henceforth in community could not affect the title to land situate in British territory, especially in the absence of proof of any contract between the parties relating thereto.

(5) Because "joint property" as defined in Danish law is not an estate or interest in land under the law of the British Virgin Islands.

(6) Because the learned trial judge and the Federal Supreme Court failed adequately to distinguish between the question as to what property became joint property on or during marriage from the question as to what

property passed under a Joint Will.

(7) Because the Federal Supreme Court erred in treating the Joint Will as a testamentary disposition or as a devise rather than as the exercise of a statutory power.

(8) Because the "right to retain the joint estate undivided with the children of the marriage" as defined by Danish law is not an estate or interest in land known to the Law of the British Virgin Islands.

(9) Because the Appellant's father, who was the Respondent's husband, died intestate as to Great Thatch Island and Great Thatch Island passed on such intestacy to the Appellant as heir-at-law.

(10) Because if as the respondent alleged and the Appellant admitted Great Thatch Island was not joint property of the testator and the respondent during the testator's life-time it could not be included in the words "our joint estate"

(11) Because the Respondent, not having proved the joint will in a British Court, could not in these proceedings establish title to British land belonging to the deceased.

(12) Because a Will not proved to have been executed in accordance with the form provided for by the law of the British Virgin Islandsis incapable of passing immovables therein situate.

(13) Because, in the absence of a contract, the title to immovables situate in the British Virgin Island cannot pass otherwise than by virtue of the Law of the British Virgin Islands.

(14) Because the decision of the Federal Supreme Court was wrong and should be reversed.

MARK LITTMAN.

No. 16 of 1959

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(Defendant)

- and -

ELSE E. CALLWOOD
Respondent
(Plaintiff)

CASE FOR THE APPELLANT

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