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(12), 1960

IN THE PRIVY COUNCIL

No.16 of 1959

ON APPEAL

FROM THE FEDERAL SUPREME COURT

OF THE WEST INDIES

(Appellate Jurisdiction)

B E T W E E N :-

CLIFFORD W. L. CALLWOOD Appellant
(Defendant)

- and -

ELSE E. CALLWOOD Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

Herbert Smith & Co.,
62 London Wall,
London, E.C.2.
Solicitors for the Appellant

Zeffertt, Heard & Morley Lawson,
7, Devonshire Square,
Bishopsgate,
London, E.C.2.
Solicitors for the Respondent.

IN THE PRIVY COUNCILNo.16 of 1959ON APPEALFROM THE FEDERAL SUPREME COURT OFTHE WEST INDIESAPPELLATE JURISDICTION

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

B E T W E E N :-

EC371

CLIFFORD W.L. CALLWOOD (Defendant)

Appellant

- and -

ELSE E. CALLWOOD (Plaintiff)

RespondentRECORD OF PROCEEDINGSINDEX OF REFERENCE

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5th November
1958.

1.

No.1

WRIT OF SUMMONS

1955

"C"

No.2

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

IN THE SUPREME COURT OF THE WINDWARD ISLANDS
AND LEEWARD ISLANDS
PRESIDENCY OF THE VIRGIN ISLANDS.

No.1
Writ of Summons
15th April, 1955.

BETWEEN :

ELSE E. CALLWOOD, Widow, Plaintiff

and

CLIFFORD W. L. CALLWOOD Defendant.

10

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland, and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith.

To Clifford W. L. Callwood, of Estate Thomas, St. Thomas, Virgin Islands of U.S.A. WE COMMAND YOU, that within eight days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Else E. Callwood, Widow, of Charlotte Amalie, St. Thomas, Virgin Islands of U.S.A. AND TAKE NOTICE, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

20

WITNESS, The Honourable Adrian Date, Chief Justice of the Windward Islands and Leeward Islands, the fifth day of April in the year of Our Lord One thousand nine hundred and fifty-five.

30

N.B. - This Writ is to be served within Twelve Calendar Months from the date thereof, or if renewed, within Six Calendar Months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance either personally or by his Solicitor at the Registrar's Office, The Court House, Roadtown.

INDORSEMENT OF CLAIM

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

The Plaintiff's claim is

No.1
Writ of Summons
15th April, 1955
continued.

1. A declaration that Great Thatch Island in the Presidency of the British Virgin Islands is by virtue of the joint will of the Plaintiff and her late husband Richard Edgar Clifford Callwood the property of the Plaintiff.
2. Possession of the said Great Thatch Island.
3. Damages for the use and occupation of the said Great Thatch Island by the Defendant from the 14th day of August, 1948, to the date of delivery of possession of the same to the plaintiff.

10

(Sd) Sydney T. Christian
Solicitor for the Plaintiff.

THIS Writ was issued by Mr. Sydney T. Christian in the Colony of the Leeward Islands. whose address for service in Tortola is c/o Jose O'Neal, Roadtown, Tortola, British Virgin Islands, Solicitor for the said Plaintiff who resides at Antigua, B.W.I.

20

No.2
Statement of
Claim
16th March, 1956

No.2
STATEMENT OF CLAIM

IN THE SUPREME COURT OF THE WINDWARD ISLANDS
AND LEEWARD ISLANDS PRESIDENCY OF THE VIRGIN
ISLANDS.

BETWEEN :

ELSE E. CALLWOOD, Widow	Plaintiff	30
and		
CLIFFORD W. L. CALLWOOD	Defendant	

STATEMENT OF CLAIM

The Plaintiff for his Statement of Claim

herein alleges:

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 said law to retain the said Great Thatch Island as her property and not to divide the same with the Defendant her son.

5. On or about the 14th day of August, 1948 the Defendant purported to enter into a lease with the Plaintiff of Great Thatch Island in the said British Virgin Islands for a term of 25 years to date from the said 14th day of August 1948 at an annual rental of \$50.00 per annum in currency of the United States of America the first of said annual payments to be made on the 14th day of August, 1949.

6. The said lease was signed by the Defendant as lessee but the Plaintiff was alleged to have signed said lease by her attorney Osmond Kean.

7. Said lease was not properly executed as the same was not under seal nor was it recorded in the Register of Titles of the Presidency of the British Virgin Islands as required by law.

8. The defendant as said lessee has purported

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.2

Statement of
Claim

16th March,
1956
continued

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.2
Statement of
Claim

16th March,
1956
continued

to enter into possession of said Great Thatch Island but has failed to pay to the Plaintiff or anyone on her behalf any part of the said annual rental for the past 8 years and there is due for use and occupation of the said Great Thatch Island by the Defendant to the Plaintiff a total sum of \$400.00 in currency of the United States of America being 8 years reasonable value for said use and occupation at \$50.00 per annum.

Wherefore the Plaintiff claims:

10

1. A declaration that Great Thatch Island in the Presidency of the British Virgin Islands is by Virtue of the joint Will of the Plaintiff and her late husband Richard Edgar Clifford Callwood, the property of the Plaintiff.
2. Possession of the said Great Thatch Island.
3. Damages for the use and occupation of the said Great Thatch Island by the Defendant from the 14th day of August, 1948 to the date of delivery of possession of the same to the Plaintiff.

20

(Sd.) Sydney T. Christian

Delivered the 16th day of March, 1956.

No.3

Defence
2nd October,
1956.

No.3

D E F E N C E

IN THE SUPREME COURT OF THE WINDWARD ISLANDS
AND LEEWARD ISLANDS
PRESIDENCY OF THE VIRGIN ISLANDS

BETWEEN :

ELSE E. CALLWOOD,
Widow,

Plaintiff

30

and

CLIFFORD W. L.
CALLWOOD

Defendant

DEFENCE

1. The defendant admits paragraphs 1, 2, 3,

6 and 7 of the Statement of Claim herein.

2. As to paragraph 4 of the Statement of Claim the defendant does not admit any right in the plaintiff to Great Thatch Island as her property. The defendant says as follows :-

10 (i) that the Will of his father Richard Edgar Clifford Callwood, deceased, is ineffective in so far as it relates to real property situate in the British Virgin Islands and consequently the said Richard Edgar Clifford Callwood died intestate as regards Great Thatch Island.

(ii) that on the death of the said Richard Edgar Clifford Callwood Great Thatch Island devolved to the defendant who was the only child of the deceased.

20 3. The defendant admits paragraph 5 of the Statement of Claim but says that when he purported to enter into the lease he did so in the mistaken understanding that the plaintiff was entitled to possession of Great Thatch Island for life.

4. As to paragraph 8 of the Statement of Claim the defendant says that he entered into possession of Great Thatch Island as owner and denies that he is indebted to the plaintiff in the sum of \$400.00 in the currency of the United States of America or in any other sum.

30 5. Save and except those matters expressly admitted herein, the defendant denies each and every allegation contained in the Statement of Claim.

(sd.) E. Ewart Harney
Solicitor for the Defendant.

Delivered the 2nd day of October, 1956.

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.3
Defence
2nd October,
1956.
continued

By agreement the following documents were put in evidence by the plaintiff:-

(1) Copy of Affidavit of James August Bough, Attorney and Counsellor at law practising in St. Thomas in the U.S.A. Virgin Islands:

(11) Copy of Judgment of U.S. Court of Appeal for the third Circuit in Case No.10310 Else E. Callwood, Appellant vs Osmand Kean.

10 (111) Copy of joint Will of Richard Edgar Clifford Callwood deceased and of the plaintiff including a translation of the Notary's Certificate at the end of the said Will.

Christian reads joint Will.

Harney agree that there was no marriage settlement between plaintiff and her late husband on marriage.

Christian. Plaintiff will give evidence.

(a) EVIDENCE OF ELSA EMMA CALLWOOD

20 Elsa Emma Callwood S/S: I live in St. Thomas U.S.V.I. I am the widow of Richard Edgar Clifford Callwood who was born in the Island of Tortola. I was born in Germany. I married my husband in London on 31st August, 1905. My husband was a British Subject by birth and remained a British Subject up to the time of his death. I became a British Subject by marriage. After marriage my husband and I came to St. Thomas. My husband was living in St. Thomas from the age of 14 years and went to school there for a time. My husband often returned to Tortola on visits. He never lived in Tortola after he left that Island as a boy. My husband and I lived in Charlotte Amalie, St. Thomas. My husband bought a lot of property in St. Thomas. My husband and I made a joint Will in April, 1911 in St. Thomas. When my husband and I married we did not enter into any marriage settlement.

30

40 My husband and I made joint Will before one Mr. Jacobson, a Danish Notary Public and two witnesses.

My husband died in Germany on 17th January,

In the
Supreme Court
of the Windward
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Leeward Islands

No.4

Notes of
Lewis J.
on Evidence.
continued

Plaintiff's
Evidence.
(a) Elsa
Emma
Callwood
Examination.

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.4

Plaintiff's
Evidence

(a) Else Emma
Callwood
Examination
continued

1917. I was with my husband at the time in Germany. After the end of the first World War I remained in Germany until the second World War.

I did not re-marry at the death of my husband. I am still a widow. My husband owned property in the British Virgin Islands named Great Thatch Island.

My agent Osman Kean in St. Thomas in the U.S. Virgin Islands purported to lease Great Thatch Island to my son the defendant for \$50.00 U.S. per annum. I produce copy of purported lease, (exhibit E.E.C. 1.). The defendant has never paid me any money under the purported lease.

10

Cross-Examination

Cross-
Examination

My husband and I left St. Thomas via the West Indies for Germany in 1913. My husband had then retired from his work. My husband had made no definite plans as to where we would settle. I was in Germany getting medical attention and war broke out and kept us there.

20

Case for Plaintiff.

Harney I have no witnesses to call.

It was agreed between the parties that it would be more convenient to argue the legal issues arising in this case in Antigua. Court agrees and it is ordered that the case be transmitted to Antigua for legal argument.

Case adjourned sine die.

Wednesday 15th May, 1957.

Resumed from Monday 8th April, 1957.

30

S.T.Christian Q.C. for plaintiff

E.E. Harney for defendant.

Christian In the absence of any evidence by the defence it is presumably correct for me to begin. Counsel for the defence and I have agreed upon this procedure subject to any ruling of the Court to the contrary.

Court rules that the plaintiff should begin.

40

Christian Plaintiff's case briefly is that her rights arise under the joint Will and that under that joint will Great Thatch Island was devised to her notwithstanding it was not specifically mentioned therein. Paragraph 1 of joint Will refers to "whole joint estate".

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.4

Notes of
Lewis J.
on Evidence
continued

10 Under joint Will the rights of the plaintiff are set out. Plaintiff has not married again and has elected in accordance with paragraph 2 of joint Will to keep the joint estate undivided.

Defendant says on the other hand that he is the eldest son and heir of Richard Edgar Clifford Callwood and that his father died intestate as regards Thatch Island and so he is entitled to the said Island subject to whatever rights the plaintiff may have therein according to the rules of law governing intestates successions.

20 Defendant admits he is in possession as heir and not under any other claim.

There was an abortive attempt at drawing up a lease which both sides accept as being null and void. Upon pleadings and on the evidence plaintiff asks for (a) declaration (b) possession (c) damages.

30 First question which arises is "Was the joint Will executed in accordance with the Wills Act (Cap.26) of the Revised Acts of the Leeward Islands". There is a translation before the Court showing the circumstances in which the Will was signed. This was originally in Danish but a translation is before the Court. I submit that this translation shows that the joint Will was executed in accordance with the provisions of the Wills Act Cap. 26. It is therefore a valid Will and can pass any property included in the words "our whole joint estate."

40 What constitutes a joint estate would be all the property owned by the plaintiff and the testator either before or after marriage. Refers to judgment of United States Court of Appeals (for the third Circuit) Appeal No.10310 Else E. Callwood vs. Osman Kean.

See in re De Nichols (De Nichols v Curlier)
1900 2 Ch 410.

In the Supreme Court of the Windward Islands and Leeward Islands

No.4

Notes of Lewis J. on Evidence continued

Harney Refers to paragraph 1 of the joint Will which he reads. Marriage took place in St. Thomas when it was a Danish Colony. Plaintiff must satisfy Court as to the meaning of the words "joint estate" in Danish Law, and secondly show that Thatch Island fell within this expression. Evidence as to what Danish Law was at the relevant date in regard to community of property is insufficient. The affidavit of James August Bough is inadequate in this point.

10

Refers to page 16 of judgment of U.S.A. Court of Appeal in Callwood v Kean Appeal No.10310 last paragraph of notes at foot of page 16..... formerly a husband was entitled

Submits that it was possible for either spouse to have separate property despite a marriage in community. Separate property could consist of gifts, inheritance etc.

Despite a marriage in community the spouses were entitled to retain any separate property which they might have had. In support refers to page 18 of the judgment of the U.S.A. Court of Appeal Callwood v Kean Appeal No. 10310 and the notes on this page.

20

Submits that Thatch Island which descended to the testator from his father was testator's separate property and did not fall within the community of property and was not part of the whole joint estate referred to in joint Will. Refers to De Nichols v Curlier 1900 A.C. para.21 at page 24 "Subject to the exceptions specified" In that case the Court had all the evidence before it as to what constituted the joint estate. In the instant case this Court has no such evidence but it is submitted that both parties were entitled to have separate property.

30

Paragraph 2 of the joint Will refers to and sets out personal property. Paragraph 3 of joint Will enumerates the real property referred to therein. No mention of Thatch Island. All property referred to in this paragraph is property in St. Thomas. Not known if Thatch Island is part of joint estate. Testator must therefore be presumed to have died intestate as regards Thatch Island unless plaintiff can prove that it formed part of Joint estate. Submit it

40

has not been proved that the Island formed part of joint estate and consequently it devolved to defendant as on an intestacy.

If it is held that Thatch Island formed part of joint estate then it is submitted that the testator died intestate as to one half thereof.

All that was devised to plaintiff by her husband was a right which right was given to him by a foreign statute. If the testator failed to devise any part of his property outside of the jurisdiction of the St. Thomas Court the rules of succession in regard to the property not devised will be the rules applying on intestacy in the British Virgin Islands, and if this is so the most the plaintiff can be entitled to is one half of Thatch Island and not to ownership of the whole Island. See Nelson v Bridport 1846, 8 Bevan p.547.

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40

Christian in reply: Refers to page 14 of judgment of U.S.A. Court of Appeal in Callwood v. Kean and quotes "under the Danish Law..... remarries" and submits that this passage sets out authoritatively what was the law with respect to property held in community in St. Thomas at the time the joint Will was made. Passage that defendant's Counsel read occurs in a footnote on page 16 of the said judgment. All that this note does is to attempt to set forth what the law was on some prior date but the real position is as stated on pages 14 & 15 of the judgment itself. Footnotes are no part of the judgment. Refers to defendant's Counsel's mention of case of De Nichols v Curlier. The foreign law referred to in this case is the law of France not Denmark. Submit that all property owned by the spouses when they made joint Wills formed part of the community of property. In 1902 testator was owner of Thatch Island and if he did not wish to make it subject to community of property when he married in 1905 he should have expressly excluded it when making the joint Will. Thatch Island was not so expressly excluded and therefore forms part of the joint estate.

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Supreme Court
of the Windward
Islands and
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No. 4

Notes of
Lewis J.
on Evidence
continued

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No.5

J U D G M E N T

IN THE SUPREME COURT OF THE WINDWARD ISLANDS
AND LEEWARD ISLANDS
(VIRGIN ISLANDS CIRCUIT)

No.5
Judgment
14th June, 1957.

SUIT NO.2 of 1955.

ELSE E. CALLWOOD PLAINIFF

and

CLIFFORD W. L.
CALLWOOD DEFENDANT

10

BEFORE LEWIS J.

S.T. CHRISTIAN Q.C. FOR PLAINTIFF

E.E.HARNEY FOR DEFENDANT

JUDGMENT

THE plaintiff in this action is the widow of Richard Edgar Clifford Callwood deceased and the mother of the defendant.

The said Richard Edgar Clifford Callwood (hereinafter referred to as "the testator") became the owner of Great Thatch Island in the Colony of the British Virgin Islands on the death intestate of his father Richard Louis Callwood in the year 1902. The testator remained the owner of the said island until his death in Germany on January 17, 1917.

20

The plaintiff in her evidence said that the testator was born in Tortola, one of the British Virgin Islands, that he was a British Subject by birth and remained a British subject until his death that the testator and herself were married in London on 31st August, 1905 and after their marriage lived in St. Thomas in the American Virgin Islands until 1913 when they left and went to live in Germany on the testator's retirement.

30

The plaintiff and the testator made a joint Will in St. Thomas in 1911 before a Danish Notary Public Mr. Jacobson and the Notary's two witnesses. It is alleged by the plaintiff and indeed admitted by the defence that the plaintiff and the testator did not enter into a marriage settlement before they were married.

In the
Supreme Court
of the Windward
Islands and
Leeward Islands

No. 5

Judgment

14th June, 1957.
continued

10

The plaintiff is seeking a declaration from this Court that Great Thatch Island is her property together with an order for possession of the same and an award of damages for the use and occupation of the said Island by the defendant. Her claim for relief is set out in the following paragraphs of the statement of claim:

20

"3. By a 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 said law to retain the said Great Thatch Island as her property and not to divide the same with the Defendant her son.

30

5. On or about the 14th day of August, 1948 the Defendant purported to enter into a lease with the Plaintiff of Great Thatch Island in the said British Virgin Islands for a term of 25 years to date from the said 14th day of August 1948 at an annual rental of \$50,000 per annum in currency of the United States of America the first of said annual payments to be made on the 14th day of August, 1949.

40

6. The said lease was signed by the Defendant as lessee but the Plaintiff was alleged to have signed said lease by her attorney Osmond Kean.

7. Said lease was not properly executed as the same was not under seal nor was it recorded in the Register of Titles of the Presidency of the British Virgin Islands as required by law.

In the
Supreme Court
of the Windward
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Judgment

14th June, 1957.
continued

8. The defendant as said lessee has purported to enter into possession of said Great Thatch Island but has failed to pay to the Plaintiff or anyone on her behalf any part of the said annual rental for the past 8 years and there is due for use and occupation of the said Great Thatch Island by the Defendant to the Plaintiff a total sum of \$400.00 in currency of the United States of America being 8 years reasonable value for said use and occupation at \$50.00 per annum.

10

Wherefore the Plaintiff claims:

1. a declaration that Great Thatch Island in the Presidency of the British Virgin Islands is by virtue of the joint Will of the Plaintiff and her late husband Richard Edgar Clifford Callwood, the property of the Plaintiff.

2. Possession of the said Great Thatch Island.

3. Damages for the use and occupation of the said Great Thatch Island by the Defendant from the 14th day of August, 1948, to the date of delivery of possession of the same to the plaintiff."

20

By agreement the following documents were put in evidence by the Plaintiff :-

(i) Copy of Affidavit of James August Bough Attorney and Counsellor at law practising in St. Thomas in the U.S.A. Virgin Islands;

(ii) Copy of a Judgment of the United States Courts of Appeal for the third vs. Osman Case No.10310 Else E. Callwood, Appellant vs. Osman Kean (hereinafter referred to as "the American judgment"):

30

(iii) Copy of joint Will of Richard Edgar Clifford Callwood deceased, and of the Plaintiff including a translation of the Notary's Certificate at the end of the said Will.

Paragraph No.1 of the joint Will reads as follows :-

40

"I Richard Edgar Clifford Callwood, reserve

the right accruing to me as husband in accordance with Royal Ordinance of 21st May 1845, Chapter 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 No.2 of the said Will in so far as it is relevant reads as follows :-

10 "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 in sub. No.1 of retaining our joint estate undivided with our joint-children as long as she does not marry again.

20 "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 to me, Mrs. Elsa E. Callwood, under certain restrictions, I Richard Edgar Clifford Callwood and I, Mrs. Elsa E. Callwood, do hereby decide, that the said right is given with the following restrictions:

30 An examination of paragraph 1 of the said Will shows that the testator relying on a Danish Ordinance of May 21, 1845 reserved the right accruing to him as the husband of the plaintiff, if he survived the plaintiff, to retain their whole joint estate without dividing it with their children as long as he did not marry again. By paragraph 2 of the Will the same right was conferred on the plaintiff by the testator, should she survive the testator, subject, however, to certain restrictions contained in the said paragraph which are not material for the purposes of this action.

40 The plaintiff did not re-marry after the testator's death and she has elected in accordance with the terms of the said Will to retain Great Thatch Island as her property solely and not to divide it with the defendant who is the eldest son of herself and the testator.

Since the plaintiff is relying on foreign law to establish her claim she is under a duty to prove the same as a fact to the satisfaction of the Court. (Earl Nelson v Lord Bridport. 8 Beavan 527). The law with regard to the proof of foreign law has been stated as follows :-

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continued.

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continued

"The established rule is that knowledge of foreign law, even of the law obtaining in some other part of the British possessions, is not to be imputed to an English judge. Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, the presumption is that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference. If there is no such plea, the court must give a decision according to English law, even though the case may be connected solely with some foreign country.

10

The question as to what is the foreign law upon some particular matter, like other matters of which no knowledge is imputed to the judge, 'must be proved, as facts are proved, by appropriate evidence, i.e. by properly qualified witnesses'.

It cannot be proved, for instance, by citing a previous decision of an English court in which the same foreign rule was in issue, or by referring to a decision in which a court of the foreign country has stated the meaning and effect of the law in question." (Cheshire, Private International Law, Fourth Edition, p.127).

20

As to the competency of a witness to prove foreign law the following opinion is expressed by Dr. Cheshire in his work mentioned above : "It is obvious that no witness can speak to a question of law as a fact and that all he can do is to express his opinion. The rule is, therefore, that he must be an expert. The question as to who is a sufficient expert in this matter has not been satisfactorily resolved by the English decisions. The general principle would appear to be that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position or follows a calling in which he must necessarily acquire a practical working knowledge of the foreign law". (Cheshire, *ibid*, p.128).

30

40

As to the manner in which evidence of an expert on this question may be given, Dr. Cheshire has this to say :

"The evidence of the expert may exceptionally be given by affidavit, but it is usually

given orally, and if so he is of course open to cross-examination. Although he must state his opinion as based upon his knowledge or practical experience of the foreign law, he may refer to codes, decisions, or treaties for the purpose of refreshing his memory, but in such an event the court is at liberty to examine the law or passage in question in order to arrive at its correct meaning. Again, if there is a conflict of testimony between the expert witnesses on either side, the court must place its own interpretation upon the foreign law in the light of the evidence given. In all cases, in fact, it is the right and the duty of the court to criticise the evidence." (Cheshire *ibid* p.130).

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No. 5

Judgment

14th June, 1957.

continued

The plaintiff has sought to prove the foreign law applicable to her case by putting in evidence with the consent of the defence an affidavit sworn by James August Bough, an Attorney and Counsellor at law practising in the Virgin Islands of the United States of America. In his affidavit which is set out below Mr. Bough says that he can "state categorically that the law" on the questions raised in this action is as stated in the American judgment. The affidavit of James August Bough reads as follows :

I, JAMES AUGUST BOUGH, of Charlotte Amalie, in the Island of St. Thomas, Virgin Islands of the United States of America, make oath and say 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 Department of Trusteeship of the United Nations, at New York City. The Virgin Islands of the United States of America were up to March 31, 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 29, 1951. I can state categorically

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that the law on this question is as stated in that Opinion. The copy of the Joint Will of Richard Edgar Clifford Callwood and Else E. Callwood, printed in said Judgment is a true and correct copy of the Joint Will under which the Plaintiff Else E. Callwood claims in this action.

No.5
Judgment
14th June, 1957.
continued

Sworn to at the British Consulate.

....."

In the instant case Mr. Bough has referred in his affidavit to the opinion expressed in the American judgment, and at the first sight it would appear that there has been a breach of the rule that foreign law cannot be proved by citing a decision in which a court of the foreign country has stated the meaning and effect of the law in question. I do not think however that this has happened in this case. The rule, I think, is intended to prevent counsel from quoting at the Bar decisions of courts of foreign countries on matters of foreign law for the purpose of proving such law, that is to say the rule would prevent counsel for either party from quoting the decision embodied in the American judgment and asking me to accept the same as a matter of law. What has in fact been done is that Mr. Bough an Attorney and Counsellor at law who is practising in the Virgin Islands of the United States of America has stated in his affidavit that his opinion on the foreign law involved in this case is the same as that expressed in the American judgment and has expressly adopted as his own opinion the opinion set out in the said judgment. I am satisfied from the affidavit filed by Mr. Bough that he is competent to express an opinion on this question and I hold that the method of proof employed by the plaintiff in regard to the foreign law applicable to this case is not a violation of the rule regarding the proof of foreign law mentioned earlier in this judgment.

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The defendant has not offered any evidence to contradict the opinion expressed in Mr. Bough's affidavit, but has sought to detract therefrom by quoting certain footnotes to the American judgment. I do not think it is open to the Defendant to put the question of foreign law in

issue in this manner. If the defendant wished to challenge Mr. Bough's affidavit it was his duty either to file a counter affidavit or to give evidence in disproof of the opinion expressed by Mr. Bough. He has done neither and consequently I am compelled to hold that the only evidence of foreign law before me is that expressed in the opinion of James August Bough.

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No. 5

Judgment
14th June, 1957.
continued

10 A translation of section 18 of the Danish Ordinance of May 21, 1845 referred to in the Will appears in footnote No.10 of the American judgment and reads inter alia as follows:

20 " A husband is, after his wife's death, not bound to divide with their children, whether they are adult or minor, as long as he does not remarry, or by marriage-contracts or other binding determinants create the necessity for such a division. The husband also has the power by a testamentary disposition to confer on his wife the same right to retain the whole property undivided

30 Section 19 of the said Ordinance as translated appears in the same footnote at page 16 of the American judgment and reads as follows :
"The right of the surviving spouse, mentioned in the previous section, to remain in community property ceases when the spouse remarries."
The above-mentioned sections of the Danish Ordinance of 1845 are the sections on which the plaintiff bases her claim and it is necessary to inquire if these sections were in force in St. Thomas on January 17, 1917, the date of the testator's death.

This question appears to be answered by the following quotation beginning at page 13 of the American judgment :-

40 "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

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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.

No. 5
Judgment
14th June, 1957
continued

"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. Section 19 of the Ordinance stipulates that the right of the surviving spouse to remain in community property as authorized by Section 18 ceases when the spouse remarries.

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"It will be observed that the right thus given by the Danish law to a husband by his Will to authorise his widow to remain in possession of their community property or joint estate was exercised by the testator here who, by paragraphs 2 and 3 of the Will, expressly authorised his wife, the plaintiff, to retain the whole of their joint estate undivided and to the exclusion of their children until her remarriage. 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."

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10 This quotation from the American judgment shows that the Danish Ordinance of May 21, 1845 was in force in St. Thomas on January 17, 1917 and that by this Ordinance a husband and wife subject to such law held their property in community unless otherwise provided by a marriage settlement. The quotation also shows that by Section 18 of said Ordinance a husband after his wife's death was under no obligation to divide their property with their children so long as he did not remarry unless there was some binding contract calling for such division. It is also clear that a husband could by Will confer on his wife the same right as he had, by law, to retain their whole property without dividing it with the children of the marriage, but in the case of a wife or husband who survived this right to remain in community property ceased on remarriage. This opinion as stated in the American judgment has been adopted by the American expert called by the plaintiff, and in the absence of any evidence by the defendant to contradict or put in issue Mr. Bough's opinion I find as a fact that the plaintiff and the testator held their property in community when they were married as it has been admitted by both sides that there was no marriage settlement which provided otherwise.

30 As I said before I do not think it is open to Counsel for the defendant to question the opinion of Mr. Bough on the foreign law applicable to this case merely by referring to footnotes in the American judgment. He nevertheless did refer to certain footnotes in the said judgment and I will examine them merely as a matter of interest. The first footnote to which counsel for the defendant referred was footnote No. 11 on pages 16 and 17 of the American judgment:

40 "Formerly the husband was entitled on the death of his wife, on condition that her other heirs were the issue of the marriage with him, to take over their former joint estate being then invested with the right of an owner till his own death or remarriage. The estate was then to be partitioned, one half being distributed according to the order of succession at the time of the wife's death, the other half as it was on the husband's death. Separate estate, however, always had to be distributed at once. The husband could by Will confer the same right on his wife,

In the
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of the Windward
Islands and
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No. 5

Judgment

14th June, 1957
continued

In the
Supreme Court
of the Windward
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No. 5

Judgment

14th June, 1957
continued

but had he omitted to do so, she could only with the consent of the authorities remain in possession of the joint estate, and each child (resp, grand-child etc.) could claim liquidation of its portion on coming of age

(Faurholt and Federspiel, Recent Danish Legislation on the Relation of Husband and Wife)

This statement of the Danish law does not seem to differ materially from the law applicable to this case but Counsel for the defendant stressed in particular the words "separate estate, however, always had to be distributed at once" and submitted that despite the fact the testator and the plaintiff held their property in community nevertheless they could each hold separate property.

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The defendant contended that Great Thatch Island was a separate property of the testator and in support of this contention he referred to footnote No.12 on page 18 of the American judgment. This footnote contains a translation of Section 5 of the Danish law of April 20, 1926 and reads as follows :

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5. Into the community property goes besides the joint estate all that the surviving spouse later acquires to the extent that it would have been community property if it had been acquired during the marriage.

"Inheritance or gifts, which accrue to the survivor, however, do not go into the community property, if the spouse demands a partition within three months of the acquisition coming to his knowledge".

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On the basis of this quotation Counsel for the defendant submitted that gifts, or property acquired by inheritance are separate property and that Great Thatch Island which the testator inherited from his father was the testator's separate property and not part of the joint property mentioned in the Will. Apart from the fact that the law on which Counsel relies i.e. the Danish law of April 20, 1926 never applied in St. Thomas, it is clear that the section contemplates circumstances radically different from those in this case. The section speaks of inheritance, or gifts accruing to a surviving

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spouse. This is not the position in this case, for although the plaintiff is the surviving spouse, Great Thatch Island did not accrue to her in that capacity, it is property which accrued to the testator before his marriage to the plaintiff and would form part of the community property unless specifically excluded therefrom by a marriage settlement.

In the
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of the Windward
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No. 5

Judgment

14th June, 1957
continued

10 I am of the opinion therefore that neither footnote No. 11 nor No. 12 of the American judgment is applicable to this case.

20 In further support of his contention that Great Thatch Island was the testator's separate property Counsel for the defendant referred to De Nicols v Curlier 1900 A.C. 21 at pages 24 and 25 and quoted the following "subject to the exceptions specified in the next following paragraph the community of goods includes (1) all personal property belonging to the husband and wife at the date of the marriage or having devolved upon either of them during coverture (2) all interest or income of whatever nature and source accrued or received during coverture; (3) all real estate acquired during coverture (Art 1402 Code Civil)". The exceptions referred to in the immediately preceding quotation are contained in a paragraph which reads :

30 "5. Real estate possessed by either spouse at the time of their marriage or that may during coverture devolve upon him or her by way of inheritance, gift inter vivos or Will exclusive of real property acquired during coverture by any other means whatever does not become common property but remains a separate property of the spouse so possessing the same or upon whom the same has so devolved and any real estate is deemed to be common property unless it is clearly proved that either husband or wife possess the same previous to the marriage or become entitled to it during coverture by way of inheritance, gift inter vivos, or Will as aforesaid (Arts 1402 and 1404 Code Civil)".

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I need say nothing more about Counsel's reference to De Nicols v Curlier other than to observe that this case dealt with the rights of a French woman who had married in France without contract and who had set up a claim to

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the movable goods which formed part of the community property. It is manifest therefore that any reference to the French Civil Code for the purpose of supporting a submission in this case is entirely irrelevant.

No. 5
Judgment
14th June, 1957.
continued

The defendant argued further that Great Thatch Island did not form part of the joint estate of the Testator and the Plaintiff because it was not mentioned in the Will, and he submitted that the testator must be presumed to have died intestate as regards this Island. I have already held that the Plaintiff and the Testator held their property in community, and it follows that all property owned by them 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.

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Counsel for the defendant has argued that it is for the plaintiff to show that the words "our whole joint estate" in paragraph 1 of the Will included joint estate elsewhere than in St. Thomas. These words are in my opinion sufficiently comprehensive to include all property held by the testator and the plaintiff at the time of their marriage wherever it may be situate and I find as a fact that the expression "our whole joint estate" included Great Thatch Island although it is not specifically mentioned in the Will.

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Finally, it was submitted on behalf of the defendant that even if Great Thatch Island was joint property, the Will is ineffective to pass the ownership of the said Island to the plaintiff as the said Island is situate in British territory. Counsel thereupon submitted that the testator died intestate as to at least one half of this Island. Counsel did not develop this point nor did he quote any authority for his submission. I am however of opinion that his submission on this point is clearly contrary to authority. On page 76 of Tristram and Coote's Probate Practice 19th Edition, it is stated that "no matter where a Will was made or what the domicile of the testator, the Will must be executed in accordance with the Wills Act 1837 in

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order to pass real estate in England" (See Freke v Carbery L.R. 16 Eq. 466; 11 Digest 359, 412). This statement is equally true for the colony of the Virgin Islands and it is necessary to inquire whether the joint Will of the plaintiff and testator made in St. Thomas satisfied the conditions of the Will Act Cap.26 which is in force in the colony of the Virgin Islands.

In the
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of the Windward
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No.5

Judgment

14th June, 1957.
continued

10 An examination of the translation of the certificate attached to the Will makes it abundantly clear that the testator and the plaintiff signed their Will in the presence of the Notary and the Notary's two witnesses and that the Notary's witnesses were present also and signed the Will at the same time. I therefore hold that the joint Will was executed in accordance with the provisions of the Wills Act Cap.26 and in consequence can validly pass real estate in the Colony of the Virgin Islands. I therefore hold
20 that the testator did not die intestate as regards Great Thatch Island.

In the result I am of the opinion that the plaintiff is entitled under the provisions of the Will to retain Great Thatch Island as owner to the exclusion of the defendant and I accordingly declare that she is the owner thereof.

I now turn to the plaintiff's claim for possession. The defendant is admittedly in
30 possession of Great Thatch Island. He says in paragraph 4 of his defence that he entered into possession of the Island as owner and denies that he is indebted to the plaintiff in the sum of \$400.00 in currency of the United States of America or in any other sum claimed by the plaintiff as reasonable value for the use and occupation of the said Island. It appears that the plaintiff by her attorney purported to enter into a lease of the said Island to the defendant on or
40 about the 14th day of August, 1948, for a term of 25 years from the said date at an annual rental of \$50 in currency of the United States of America. The defendant says in his defence that when he purported to enter into the lease he was under the mistaken impression that the plaintiff was entitled to possession of Great Thatch Island for life. It is admitted by both parties that the purported lease is void and was not properly executed in that it was not under seal nor was it recorded in the Register of Titles of
50 the Colony of the Virgin Islands as required by law.

In the
Supreme Court
of the Windward
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Leeward Islands

No. 5

Judgment

14th June, 1957
continued

I have already held that the defendant's claim to ownership of Great Thatch Island cannot be maintained. His possession thereof under the void lease is of no effect, and it follows that the defendant is not entitled to continue in possession of the said Island against the Will of the Plaintiff. I accordingly declare that the plaintiff is entitled to possession of the Island.

As regards the plaintiff's claim for damages for the use and occupation of the said Island by the defendant, the plaintiff argues that the sum to be awarded should be based on the annual rental figure which the defendant was willing to pay for the use and occupation of the land had the purported lease been valid. The defendant has apparently been in possession of the said Island since August 14, 1948 as alleged in statement of claim. At least I assume this to be the date on which the defendant entered into possession because he has given no evidence to contradict this date. A copy of the purported lease was put in evidence by the plaintiff as Ex.E.E.C.1. and the plaintiff said the defendant has never paid her any money during the time he has been in occupation of the Island. This has not been denied by the defendant. In my view the plaintiff is clearly entitled to some compensation for the defendant's use and occupation of the Island and I assess this amount at \$40.00 per month in British West Indian Currency to be calculated over a period of six years ending on the 30th day of September, 1957, the date by which I order the defendant to give up possession of Great Thatch Island to the plaintiff.

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The costs of this action must be taxed and paid by the defendant.

(sgd) P.Cecil Lewis

Puisne Judge.

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14th June, 1957.

owner of Great Thatch Island in the British Virgin Island and is entitled to possession of the said Island and whereby it was ordered that the defendant give up possession of the said Great Thatch Island to the plaintiff on or before the 30th day of September, 1957, and pay to the plaintiff the sum of \$2,880.00 by way of damages and her costs of the action be reversed and that judgment may be entered for the defendant with costs here and in the Court below.

In the Federal Supreme Court of The West Indies Appellate Jurisdiction.

No.7

Notice of Appeal
24th September
1957
continued

AND FURTHER TAKE NOTICE that the defendant appeals against the whole of the said judgment.

The grounds of this appeal are :-

- (1) That the Danish Law with regard to community property has not been proved.
- (2) That James August Bough was not qualified to give evidence as an expert for the purpose of proving Danish Law.
- (3) That the attempt to prove Danish Law with respect to community property in the manner adopted in this case is an infringement of the rule of evidence that foreign law cannot be proved by referring to a decision in which a court of a foreign country has stated the meaning and effect of the law in question.
- (4) That there was no evidence to prove that Sections 18 and 19 of the Danish Ordinance of 1845 were in force in St. Thomas on the 17th day of January, 1917, the date of the testator's death or at all.
- (5) That there was no evidence upon which the learned judge could base his finding that Great Thatch Island formed a part of the joint estate of the testator and, consequently, the testator must be presumed to have died intestate as to the same.
- (6) That, if it is found that Great Thatch Island was in fact a part of the joint estate, the testator died intestate as to his share of the said Island.
- (7) That the learned judge was wrong in holding that the testator by his Will devised

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In the Federal
Supreme Court of
The West Indies
Appellate
Jurisdiction.

Great Thatch Island to the Plaintiff and in
declaring that the plaintiff is the sole owner
thereof and entitled to possession.

(8) That the damages awarded by the learned
judge are excessive and cannot be supported by
evidence.

No.7

Notice of Appeal
24th September,
1957.
continued

Dated this 24th day of September, 1957.

(sgd) H.L.Harney
Solicitor for the Defendant.

To Sydney T.Christian, Esq., C.B.E., Q.C.
For the Plaintiff

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and
The Registrar of the Supreme Court
The Virgin Islands Circuit.

No.8

Judgment
Hallinan C.J.
21st & 22nd
July 1958

No.8

JUDGMENT OF HALLINAN C.J.
IN THE FEDERAL SUPREME COURT
APPELLATE JURISDICTION

Sub-Registry - VIRGIN ISLANDS
ON TRANSFER FROM THE WEST INDIA COURT OF
APPEAL

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1957 No.1 - VIRGIN ISLANDS
BETWEEN ELSE E. CALLWOOD PLAINTIFF-RESPONDENT
AND CLIFFORD W.L.
CALLWOOD DEFENDANT-APPELLANT

Before the Honourable Sir Eric Hallinan,
Chief Justice
" " Mr. Justice Rennie
" " Mr. Justice Archer.

1958 : July 21st & 22nd.

E.E.Harney and H.L.Harney for the Defendant-
Appellant.
S.T.Christian, Q.C.
and C.A.Harney for the Plaintiff-
Respondent

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JUDGMENT

The Chief Justice :

The husband of the plaintiff-respondent

10 inherited Great Thatch Island in the British Virgin Islands from his father in 1902. He had lived and worked in St. Thomas since he was a boy of 15 years and was at all material times domiciled there. He married the respondent in 1905 and died on the 17th January, 1917. He and his wife made a joint Will in St. Thomas on the 25th April, 1911. At that time St. Thomas was Danish and it was quite clear from the form and contents of this Will that Mr. and Mrs. Callwood regarded themselves as holding the property according to Danish law whereby husband and wife held their property in community unless otherwise provided by marriage settlement. Under the joint Will the whole joint estate was in the event of his death to be retained by the respondent at her election undivided with the children as long as she did not remarry and on certain other circumstances. The respondent exercised her right and retained the joint estate undivided.

20 In 1948 the defendant-appellant went into possession of Great Thatch Island probably pursuant to a lease of this Island to him by the agent of his mother, the respondent, and he has remained in possession since then. This lease was invalid since it was not under seal and not registered.

30 The respondent instituted this suit claiming possession and damages for use and occupation. The appellant contends that the joint Will was ineffective so far as relates to real property in the British Virgin Islands and claimed to be in possession of Great Thatch Island on an intestacy as his father's heir.

40 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. The judgment summarised the position of the surviving spouse under this

In the Federal Supreme Court of The West Indies Appellate Jurisdiction.

No. 8

Judgment
Hallinan C J.
21st & 22nd
July 1958.
continued

In the Federal
Supreme Court of
The West Indies
Appellate
Jurisdiction.

No. 8
Judgment
Hallinan C.J.
21st & 22nd
July 1958.
continued

joint Will thus :-

" 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".

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The trial Judge accepted this statement as defining the rights of the respondent in the joint estate; and he found that the joint will satisfies in form the provisions of the Wills Act 1837.

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".

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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."

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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.

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

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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 disposition 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.

In my view the respondent has had the right to the possession of the Great Thatch Island since the death of her husband. She is, therefore, entitled to damages for its use and occupation by the appellant during the last 10 years. I think the damages awarded by the Trial Judge are not supported by evidence. The rent mentioned in the invalid lease was \$50 U.S. per annum that is \$84 B.W.I. and since the Leeward Islands Limitation Act (Chapter 18 of the Leeward Islands Statutes) permits arrears of rent to be collected for a period of 12 years, I would award the respondent \$84 per annum for 10 years that is \$840. B.W.I.

I would, therefore, dismiss this appeal except in so far as it relates to the quantum of damages which I would vary by reducing them to \$840. The order as to costs in the court below is to stand. There will be no order as to costs of this appeal.

22. 7.58.

(Sgd) Eric Hallinan
Chief Justice.

No.9

JUDGMENT OF RENNIE J.

Mr. Justice Rennie I concur.

Sgd. A.B.Rennie
Federal Justice

No.10

JUDGMENT OF ARCHER J.

Mr. Justice Archer I concur

Sgd. C.V.H.Archer
Federal Justice.

In the Federal
Supreme Court of
The West Indies
Appellate
Jurisdiction

No.8

Judgment

Hallinan C.J.

21st & 22nd

July 1958.

continued

No.9

Judgment of
Rennie J.

21st and 22nd
July, 1958.

No.10

Judgment of
Archer J.

21st and 22nd
July 1958

In the Federal
Supreme Court of
The West Indies
Appellate
Jurisdiction

No.11

O R D E R

IN THE FEDERAL SUPREME COURT

APPELLATE JURISDICTION

No.11

Order

22nd July, 1958

Sub-Registry = VIRGIN ISLANDS

ON TRANSFER FROM THE WEST INDIAN COURT OF
APPEAL

ON APPEAL FROM THE SUPREME COURT OF THE WINDWARD
ISLANDS AND LEEWARD ISLANDS
THE VIRGIN ISLANDS CIRCUIT

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No.1 of 1957

VIRGIN ISLANDS

BETWEEN:

ELSE E. CALLWOOD

PLAINTIFF-RESPONDENT

and

CLIFFORD W. L.
CALLWOOD

DEFENDANT-APPELLANT

On the 22nd day of July, 1958

Entered the 25th day of July, 1958

Before:

The Honourable Sir Eric Hallinan, Chief
Justice,

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" " Mr. Justice Rennie,

" " Mr. Justice Archer.

UPON READING the Notice of Motion on behalf
of the above-named defendant-appellant dated the
14th day of September, 1957, and the Judgment
hereinafter mentioned

AND UPON READING the record of appeal filed
herein

AND UPON HEARING Mr.E.E.Harney of Counsel
for the Appellant and Mr.S.T.Christian, Q.C. of
Counsel for the Respondent AND MATURE DELIBERATION
thereupon had

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IT IS ORDERED that the Judgment of the Honourable Mr. Justice P. Cecil Lewis dated the 14th day of June, 1957, in favour of the plaintiff - respondent be affirmed in all respects except that the amount of damages awarded the plaintiff-respondent be reduced from \$2,880.00 to the sum of \$840.00.

In the Federal Supreme Court of The West Indies Appellate Jurisdiction

AND IT IS FURTHER ORDERED that there be no order as to costs of this Appeal.

No.11
Order
22nd July, 1958
continued

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BY THE COURT
Sgd. R.V.McIntosh Clarke
Registrar.

No.12

ORDER REFUSING LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL 10TH
NOVEMBER 1958.

No.12
Order Refusing
leave to Appeal
to Her Majesty
in Council 10th
November 1958.

IN THE FEDERAL SUPREME COURT
APPELLATE JURISDICTION

Sub-Registry - VIRGIN ISLANDS

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ON TRANSFER FROM THE WEST INDIAN COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT OF THE WINDWARD
ISLANDS AND LEEWARD ISLANDS.

THE VIRGIN ISLANDS CIRCUIT

No.1 of 1957 "C" VIRGIN ISLANDS

BETWEEN ELSE E. CALLWOOD Plaintiff-Respondent

AND

CLIFFORD W. L.
CALLWOOD Defendant-Appellant

On the 10th day of November, 1958.

Entered on the 18th day of November, 1958.

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Before :

The Honourable Sir Eric Hallinan, Chief
Justice.

" " Mr. Justice Rennie

" " Mr. Justice Archer

Upon reading the petition of the defendant-appellant, dated the 5th day of November, 1958, and the affidavit of Harold Lyril Harney, sworn to on the 5th day of November, 1958, both filed herein

In the Federal
Supreme Court of
The West Indies
Appellate
Jurisdiction

No.12

Order Refusing
leave to Appeal
to Her Majesty
in Council 10th
November 1958
continued

And Upon hearing Harold Lyril Harney, of
Counsel for the said defendant-appellant, and
Sydney T. Christian, Q.C., of Counsel for the
plaintiff-respondent,

IT IS ORDERED that the application for an
extension of time for applying for leave to ap-
peal to Her Majesty in Her Privy Council be and
the same is hereby refused.

(Signed) Evan Creque
Ag. Deputy Registrar.

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Certified a true and correct copy.

(Sgd) O.M. Browne
Deputy Registrar
Federal Supreme Court.

In the
Privy Council.

No.13

Order granting
special Leave
to Appeal to
Her Majesty in
Council
19th December
1958.

No.13

ORDER GRANTING SPECIAL LEAVE TO
APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 19th day of December, 1958

PRESENT

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THE QUEEN'S MOST EXCELLENT MAJESTY
LORD PRESIDENT CHANCELLOR OF THE DUCHY
MR. BOYD-CARPENTER OF LANCASTER
SIR HARRY HYLTON-FOSTER

WHEREAS there was this day read at the
Board a Report from the Judicial Committee of
the Privy Council dated the 15th day of December
1958 in the words following viz. :-

"WHEREAS by virtue of His Late Majesty
King Edward the Seventh's Order in Council of
the 18th day of October 1909 there was refer-
ed unto this Committee a humble Petition of
Clifford W.L. Callwood in the matter of an

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Appeal from the Federal Supreme Court of the West Indies (Appellate Jurisdiction) on transfer from the West Indian Court of Appeal between the Petitioner Appellant (Defendant) and Else E. Callwood Respondent (Plaintiff) setting forth (amongst other matters) 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 (i) A declaration that Great Thatch Island is by virtue of a joint will of herself and her deceased husband the property of the Respondent (ii) Possession of the said Island and (iii) Damages for use and occupation: that on the 14th June 1957 the Court 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: that the Petitioner appealed to the West Indian Court of Appeal and on the 22nd July 1958 the Federal Supreme Court on transfer from the West Indian Court of Appeal dismissed the Appeal (save in respect of the quantum of damages): that although the Petitioner was entitled as of right to be granted leave to appeal to Your Majesty in Council by the said Federal Supreme Court no application was made therefor within the time permitted and the said Court have no jurisdiction to extend the period for making such an application: And humbly praying that the Petitioner may be granted special leave to appeal from the Judgment of the Federal Supreme Court of the West Indies dated the 22nd July 1958 and that execution of the said Judgment be stayed pending the hearing of such Appeal and for such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Federal Supreme Court of the West Indies (Appellate Jurisdiction) dated the 22nd day of July 1958 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

In the
Privy Council.

No.13

Order granting
Special Leave
to Appeal to
Her Majesty in
Council

19th December
1958

continued

In the
Privy Council.

No.13

Order granting
Special Leave
to Appeal to
Her Majesty in
Council.

19th December,
1958
continued

"And Their Lordships do further report to Your Majesty that the proper officer of the said Federal Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

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HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of the Leeward Islands for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

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(Signed) W. G. Agnew.

Exhibits3 - JOINT WILL OF RICHARD EDGAR CLIFFORD
CALLWOOD AND ELSE CALLWOOD

3-Joint Will of
Richard Edgar
Clifford
Callwood.

25th April,
1911.

JOINT - WILL

We the undersigned I, Richard Edgar Clifford Callwood and I, Mrs. Elsa E. Callwood, born Georg, his wife, do hereby declare and devise the following to be our last Joint-Will and Testament, hereby revoking and Will and Testament we may formerly have made.

Para. 1.

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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.

Para.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.

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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. Elsa E. Callwood, under certain restrictions, I Richard Edgar Clifford Callwood and I, Mrs. Elsa E. Callwood do hereby decide, that the said right is given with the following restrictions.

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It shall be obligatory for me, Mrs. Elsa E. Callwood, immediately at the death of my husband to deposit all Cash Money, Bonds, Shares and securities, belonging to the Joint-Estate and only to draw the interest of same. In case of unforeseen events, which will make it necessary to withdraw the money or to make a change of the securities, this can only be done with the consent of Mr. Jakob Peiffer, living at Biebrich of Rhein,

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or in the case of his death with the consent of Mr. Otto Zwanziger of Biebrich of Rhein or the person to whom the surviving of these gentlemen may transfer the said authority. It shall furthermore be obligatory for me, Mrs. Elsa E. Callwood, to pay every month the revenues, which I receive to Mr. Richard Edgar Clifford Callwood's mother, Mrs. Caroline A. Callwood, as long as she lives, the amount of Thirty (Thirty) Dollars and to Mrs. Josephine W. Branson of New York as long as she lives the sum of Fifteen Dollars, these amounts to be paid the first time of the last day of the month after that in which Mr. Callwood's death has taken place and afterwards the last day in each month. If the amounts are not paid in due time the legatees are entitled to claim instead of the monthly amounts annuities from a reliable life-insurance-company of respectively 360 Dollars and 180 Dollars a year. Finally, if Mrs. Elsa E. Callwood's retaining of our joint estate should cease only $\frac{1}{3}$ say One Third Part of our whole joint estate $\frac{2}{3}$ should accrue to me, Mrs. Elsa E. Callwood, while the balance of $\frac{2}{3}$ say Two Third Parts shall accrue to our joint children share and share alike, as their paternal inheritance.

Exhibits

3-Joint Will of
Richard Edgar
Clifford
Callwood.

25th April,
1911
continued

Para. 3.

The properties situated in the town of Charlotte Amalie, St. Thomas D.W.I. and which are recorded in Mrs. Peiffer's name, but of which the greater part belongs to us viz:

Property No.38 Dronningensgade & Qvtr. Half to Mrs. Anna R. Peiffer & half to C. Callwood.

Property No.25 Noiregade Kgs. Qvtr. One Third to Do. and Two Thirds to Do.

Property No.36 Vestergade Drgs. Qvtr. One Third to Do. & Two Thirds to Do.

Property No.27D Noiregade Kgs. Qvtr. Belonging to C. Callwood.

Property No.40A. Taarnebjerg sub N.11 Ny Qvtr. to C. Callwood.

Lot No.40 AA Taarnebjerg sub N.11 Ny Qvtr. to C. Callwood.

<u>Exhibits</u> 3-Joint Will of Richard Edgar Clifford Callwood. 25th April, 1911 continued	Property No.19 Noiregade Kgs.Qvtr.Ny to C.Callwood. Property No.17 Hospitallinien Kgs.Qvtr. " Do. Property No.16 Do. " " Do. " No.11D Generalgade Krps." " Do. " No.11B Do. " " " Do. " No.58 Prindsensgade " " " Do. " No.59 Do. " " " Do.
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concerning those properties it is decided, that if Mrs. Elsa E. Callwood be the survivor, Mr. Richard Edgar Clifford Callwood's sister Mrs. Anna R. Peiffer, shall after the death of Mr. Richard Edgar Clifford Callwood have the full use and benefit of these, including the right to rent them out, with the conditions, that she pays all taxes and fulfill all duties incumbent upon the owner against the Public, that she keeps the properties in proper repair, and insured against fire in a reliable fire-insurance-company the policies to be deposited as the Cash Money etc. mentioned in Para. 2. and further that she pays a monthly amount of Dollars 15 unto Miss Iza Callwood, at present at school at New-chatel, Switzerland, as long as both of them are alive, Finally, it is a condition that Mrs. Peiffer as soon as possible after my death has the properties recorded in the name of Mrs. Elsa E. Callwood or if she is not taking possession of our joint estate, as belonging to this, and that she has recorded as a servitude, that they may only be sold or mortgaged with the consent of the gentlemen, keeping the power mentioned in Para.2 If any of these conditions are not fulfilled for any of the properties, the expenses for the recording to be paid for the joint estate, she is no more to have the use and benefit of that on these properties, and the gentlemen keeping the above mentioned power are to decide these questions, but if the monthly amounts for Miss Iza Callwood are not paid in due time she may claim an annuity of Dollars 180 a year from a reliable life-insurance-company. If these properties should be sold or mortgaged or the fire insurance policies become due the cash proceeds are to be administered as the cash money etc. mentioned in

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Para.2. and the payments to Miss Iza Callwood to be continued for her lifetime from our joint estate.

Exhibits

3-Joint Will of
Richard Edgar
Clifford
Callwood.

25th April,
1911
continued

Para.4.

In case a division of our joint estate should become necessary the legacies are to be paid to Mrs.Elsa E. Callwood and our joint children proportionally to the shares each of them should take; but if one of them should not wish to submit himself to this he shall be free to pay once for all the legatees 25 times the yearly amount, which else he should have paid, or to buy for them annuities, in a reliable life-insurance-company to the same amount as else he should have paid. The cash Money paid in this way to Miss Iza Callwood or the policy bought for her to be administered as the Cash Money etc. mentioned in Para.2.

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Para.5.

Bank or Banks for depositing Cash, Money, Bonds, Shares, Securities and Policies are to be determined on the gentlemen keeping the power mentioned in Para.2.

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Para.6.

This our Joint-Will and Testament is to be recorded in the Notary Public's Protocol and a copy of this is in all cases to be of same value and consequences as this original document. Signed before the Notary Public at this 25th day of April in the year 1911.

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/s/ Elsa Callwood.

/s/ R.E.C.Callwood.

(Stempelmaerke 10 francs).

Paa Notaril publici Vegne havidner i hans Embedsforfaid undertegnede hans est. Fulmagtis Cand. jur. Will Jacobsen, at Hr. Vorftsbertyrer Richard Edgar Clifford Callwood of Hustru Elsa E. Callwood, fodt Georg, begge mig personlig bekendte, Dags Dato oed Harvarelse pan Notarialkintoret egenhandig of oed deres For-nafts fulde Brug have imin og Notarialvidnernes

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Exhibits

3-Joint Will of
Richard Edgar
Clifford
Callwood.
25th April,
1911
continued

Overvalrelse underskrust foranstående Dokument, som de orklarede indeholdt deres Testament og sidste Vilje, og med hois Jndhold de ligeledes erklarede et vare bekendt. Son Notarialvidner vare tilstede de Horrere T Thomsen og W.W.Jensen.

Efter Bezaring indiortes Testamentet i Notarial protokollen. Notarialkontoret, St. Thomas, den 25. April 1911.

Notarialvidner:

gez Wilh.Jensen
Th. Thomsen

ges. Will. Jacobsen

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Sytton Francs, 67½ Bit
(Siegel) Notarius Publicus
paa
St.Thomas.