Privy Council Appeal No. 16 *of* 1959

Clifford W. L. Callwood – – – – – – – *Appellant*

v.

Else E. Callwood – – – – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST March, 1960

Present at the Hearing
LORD TUCKER
LORD JENKINS
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD JENKINS]

This appeal arises out of a dispute concerning the ownership of Great Thatch Island in the British Virgin Islands.

The rival claimants are the plaintiff (now respondent) Else E. Callwood, the widow of Richard Edward Clifford Callwood (hereinafter called the testator) and the defendant (now appellant) Clifford W. L. Callwood, the only son of the plaintiff and the testator.

The testator was born in 1862 in Tortola, one of the British Virgin Islands, and was accordingly a British subject by birth. He retained his British nationality all his life, but at the age of fourteen he went to live in the Island of St. Thomas in the Virgin Islands, which was then a Danish colony under Danish law, and lived there until 1913 when he went to live in Germany, where he remained until his death in 1917. He married the plaintiff in London in 1905, and it is common ground that at the time of his marriage and thereafter down to his death he was domiciled in St. Thomas.

Great Thatch Island had formerly belonged to the testator's father, on whose death intestate in 1902 it devolved upon the testator as his heir at law under the English law of inheritence then in force with respect to freehold land.

At the time of the testator's death Great Thatch Island was still (to use a neutral expression) vested in him.

There were two children of the testator's marriage to the plaintiff namely a daughter Waldfriede who was born in 1906 and died in 1939 and the defendant who was born in 1908, and who as the only son of the testator became on the testator's death entitled as his heir at law to any freehold property devolving on the intestacy of the testator under the English law of inheritance then in force.

No settlement of the property of either spouse was made on their marriage, and in view of this and of the testator's domicil in the Island of St. Thomas it is common ground that (it may be with exceptions not relied on before their Lordships as material in the present case) the marriage had the effect under Danish law of subjecting to the Danish system of community of property between spouses (which appears to

have been wholly or partially codified by a Danish Royal Ordinance of 21st May, 1845) all movable property wherever situate, and all immovable property situate in St. Thomas, belonging to either spouse at the time of the marriage or subsequently acquired during, or in certain circumstances after the termination of, the marriage. The question whether so far as immovable property is concerned the Danish system of community in the eye of Danish law extended also to immovable property (such as Great Thatch Island) belonging to one of the spouses but situated outside St. Thomas, and in the territory of a foreign sovereign state, whose own laws did not include the Danish or any other system of community of property between spouses, is a cardinal issue in the present appeal.

It is also common ground that with the important qualifications mentioned below the application of the Danish system of community in any given case had the effect of making the joint property divisible on the death of either spouse between the surviving spouse and the children of the marriage. But this general proposition was qualified under the Ordinance of 1845 (*a*) by the reservation to the husband, should he be the survivor, of the right to retain the whole of the joint property undivided until his death or re-marriage, with power to dispose (within certain limits) of capital as well as income, thereby postponing and (to the extent of any legitimate expenditure of capital) defeating the interests of the children ; and (*b*) by the reservation to the husband of a power to confer by will on the wife if she survived him the same right to retain the whole joint property undivided until her death or re-marriage.

By way of assertion and exercise of the right and testamentary power so reserved to the testator by the Ordinance of 1845 he and the plaintiff on the 25th April, 1911, made a joint will which provided (inter alia) as follows:—

Paragraph 1

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

Paragraph 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. Paragraph 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. 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.
>
> 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, 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.

Paragraph 2 went on to require the plaintiff to pay or provide for certain annuities as therein mentioned and concluded as follows:—

> Finally, if Mrs. Elsa E. Callwood's retaining of our joint estate should cease only ⅓ say One Third Part of our whole joint estate

should accrue to me, Mrs. Elsa E. Callwood, while the balance of ⅔ say Two Third Parts shall accrue to our joint children share and share alike, as their paternal inheritance.

Paragraph 3 contained provisions with respect to thirteen properties in the town of Charlotte Amalie on the Island of St. Thomas, all recorded in the name of the testator's sister Mrs. Peiffer " but of which the greater part belongs to us " (sc. to the testator and the plaintiff as part of their joint estate). According to a list of these properties given in paragraph 3 one of them, known as No. 38 Dronningensgade, Charlotte Amalie, belonged beneficially to the testator and Mrs. Peiffer in equal shares, two others belonged beneficially as to one-third to Mrs. Peiffer and as to two-thirds to the testator and the whole beneficial interest in the remaining ten belonged to the testator, but it is clear that the beneficial interests attributed to the testator were regarded by paragraph 3 as part of the joint estate. Put very shortly the effect of the provision of paragraph 3 with respect to these properties was that Mrs. Peiffer should convey the legal title to the plaintiff but should take a beneficial life interest in all of them upon certain conditions.

It is to be observed that the will contained no specific reference to Great Thatch Island and therefore only purported to deal with it if it could be considered as included in the general references to " our whole joint estate " and " our joint estate ' contained in the will.

The Danish Virgin Islands were ceded to the United States of America on the 31st March, 1917, but Danish law remained in force there until the 1st July, 1921.

On the 23rd April, 1951, judgment was given in the United States Court of Appeals in the case of *Callwood* v. *Kean*, which was an action originally brought by the plaintiff against her former agent Osmond Kean for an account of the proceeds of the sale of No. 38 Dronningensgade, but which on the intervention of the present defendant developed into a contest as to the title to such proceeds.

It appears that after the testator's death Mrs. Peiffer as contemplated by paragraph 3 of the will (and with the concurrence of her husband who predeceased her) made over to the plaintiff all the thirteen properties in Charlotte Amalie, and in particular No. 38 Dronningensgade, retaining in all of them a life interest which she continued to enjoy down to her death on 11th July, 1947. It further appears that No. 38 Dronningengade was sold in 1946 by Osmond Kean, purporting to act as attorney for both the parties to the present action. In these circumstances the question which was raised for decision between the present plaintiff and defendant in the United States Court of Appeals (on appeal from the District Court of the Virgin Islands) was in effect whether the entire net proceeds of sale of No. 38 were, as contended by the plaintiff, her absolute property, or, as contended by the present defendant, belonged as to the half share acquired by the plaintiff from Mrs. Peiffer to the plaintiff absolutely, and as to the other half share formed part of the joint estate and were subject accordingly to the provisions of the Danish law of community and of the joint Will made by the testator and the plaintiff under those provisions. The United States Court of Appeals decided this question in the sense contended for by the present defendant, in substance affirming the decision of the District Court. Their Lordships have thought it right to refer at some length to the subject matter of this earlier litigation in view of the use which, as will shortly appear, was made in the present action of the exposition of the Danish law of community contained in the Judgment of the Court of Appeals, directed though it was to the destination under that law of the proceeds of sale of immovable property admittedly situated in territory subject to that law, and in no way concerned with the question whether in circumstances such as those of the present case the Danish system of community in force in the Island of St. Thomas at the material time was in the eye of Danish law applicable to immovable property situated in British territory and subject to English law.

On or about the 14th August, 1948, Osmond Kean purporting to act as agent for the plaintiff granted to the defendant a lease of Great Thatch Island for twenty-five years from that date at the yearly rent of $50. This lease was admittedly invalid because (assuming that Osmond Kean had authority to grant such a lease) it was not executed under seal and was not recorded in the Register of Titles of the Presidency of the Virgin Islands as required by law. The defendant however entered into possession of Great Thatch Island on the strength of this invalid lease and has remained in such possession ever since without payment of rent.

In these circumstances the plaintiff by Writ dated the 5th April, 1955, commenced the present action in the Supreme Court of the Windward Islands and Leeward Islands, claiming a declaration that Great Thatch Island was by virtue of the joint will of herself and the testator the property of the plaintiff; possession of Great Thatch Island; and damages for use and occupation.

By her statement of claim the plaintiff alleged (inter alia) (1) that she was the widow of the testator; (2) that the testator was the owner (on the death of his father intestate in 1902) of Great Thatch Island and continued as such owner until the date of his death in 1917; (3) that by the joint will it was agreed by the plaintiff and the testator that she should have the right to retain their joint estate in accordance with the Royal Danish Ordinance of the 21st May, 1845, Chapter 18, Section 1, under the Danish laws then in force in the Island of St. Thomas; and (4) that the plaintiff had elected in accordance with the said law to retain Great Thatch Island as her property, and not to divide the same with her son the defendant. The plaintiff went on to allege the facts already mentioned concerning the invalid lease and concluded by claiming the relief already described.

By his Defence (paragraph 2) the defendant made no admission of any right in the plaintiff to Great Thatch Island as her property and alleged:—(i) that the will of the testator was ineffective in so far as it related to real property situate in the British Virgin Islands and consequently the testator died intestate as regards Great Thatch Island; and (ii) that on the death of the testator Great Thatch Island devolved on the defendant who was the only child (sc. son) of the testator. By paragraph 3 he admitted the facts alleged concerning the invalid lease, but said he entered into it in the mistaken understanding that the plaintiff was entitled to Great Thatch Island for life.

The case was tried at first instance by Lewis J. The only evidence of Danish law before the Court consisted of an affidavit of a Mr. James August Bough, an Attorney and Counsellor at Law practising in the Island of St. Thomas, and the Judgment of the United States Court of Appeals already mentioned, to which reference was made in such Affidavit.

Omitting formal parts, the Affidavit was in these terms:—

> 1. I am an Attorney and Counsellor at Law, and have practiced 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 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.

Their Lordships strongly deprecate this mode of providing evidence of foreign law. The discussion of the Danish law of community in the United States Court of Appeals was directed to the particular matter in hand viz. the destination in view of that law of the proceeds of sale of a particular piece of immovable property admittedly situated in territory which at the material time was Danish territory and accordingly subject to Danish law. The Judgment of the United States Court accordingly provides no answer to the vital question whether in the eye of Danish law the property of spouses to which the rules of community attached on their marriage included immovable property such as Great Thatch Island, not situated in Danish territory but in the territory of a foreign sovereign state whose own law with respect to immovable property so situated did not include the Danish or any other system of community. The judgment of the United States Court was likewise not concerned with, and therefore expressed no opinion upon, the rights of spouses subject to the Danish system of community as regards the enjoyment or disposal of the joint property during the continuance of the marriage.

Their Lordships think it desirable to quote at some length from the discussion of the Danish law of community contained in the Judgment of the United States Court delivered by Maris, J.. inasmuch as the views therein expressed, as approved by Mr. Bough, provide the only evidence of the Danish law of community adduced in the case.

At page 573 and following of the Report in 189 Federal Reporter 2nd Series the learned Judge says this:—

> "Since the will involves the title to real estate in St. Thomas it is to be construed in accordance with the rules of law in force in that island when the will went into effect on January 17, 1917, the date of the testator's death. At that time the law in force in St. Thomas was that of Denmark. The Danish law in force when the island was one of the Danish West Indies remained in force, after the change of sovereignty, until July 1, 1921, when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the Danish law rules of law based upon the common law of England as understood in the United States.
>
> 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 recognised 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.
>
> It will be observed that the right thus given by the Danish law to a husband by his will to authorize 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 authorized 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. Accordingly if the testator here had not imposed upon the plaintiff the restrictions upon alienation to which we have already referred, and the validity of which we will presently discuss, she would unquestionably have had the right to sell, mortgage or otherwise dispose of the real estate in St. Thomas belonging to the joint estate of the testator and herself and also the right to take possession of and invest or otherwise dispose of the proceeds, being responsible at the most merely to compensate their children for any undue dimunition, as the result of gifts made by her, in the value of their share of the joint estate upon her remarriage or death or the earlier division of the property.

The rights thus given by the Danish law to the surviving spouse who retains the joint estate in community cannot be described in terms of common law concepts since those rights are quite foreign to the common law. Specifically they cannot be described as those of trustee and beneficiary, as the district court suggested in its opinion. Nor is it necessary for us to attempt to classify them under the common law. It is sufficient to note the rights which the Danish law conferred upon a widow under these circumstances and to point out that these rights vested in the plaintiff upon the death of the testator with respect to the property in St. Thomas which they held in community, subject only to such restrictions as the testator by his will validly imposed upon her."

And at page 577:—

"As we have said, under the Danish law, a surviving spouse retaining possession of the community property is ordinarily entitled to sell or mortgage it or otherwise to deal with it as absolute owner. In the present case, however, as we have seen, the testator by his will placed definite restrictions upon the right of the plaintiff as surviving spouse to deal with the property. Thus he provided that it might only be sold or mortgaged with the consent of Jacob Peiffer or Otto Zwanziger and then only in case of unforeseen events which might make it necessary for the plaintiff to use principal or to make a change in the properties in which the joint estate was invested. Moreover he provided that she should deposit in banks to be designated by Jacob Peiffer or Otto Zwanziger all money and securities belonging to the joint estate, including the proceeds of the sale of any properties."

And again at page 577:—

"It appears that under the Danish law a husband who by his will conferred upon his surviving wife the right to possession of the community property had also the right to stipulate that she could dispose of that property only with the consent of an individual who in Danish is called a 'Tilsynsvaerge' which may perhaps best be rendered in English as 'guardian'".

And at page 578:—

"Accordingly when the testator named Jacob Peiffer and Otto Zwanziger in his joint will as persons whose consent was required to the sale or other disposition of the joint property by his widow he was exercising a right which the law then in force in St. Thomas gave to him. His appointment of these individuals successively to assume the duties of guardian for his widow was accordingly entirely valid."

Their Lordships have thought it sufficient to cite these passages from the text of the judgment, as representing the conditions drawn by the

Court from the sources referred to in the supporting footnotes, to which (and the full judgment as reported) reference may be made.

Before Lewis J. at first instance counsel for the plaintiff put the essence of his case in this way: he said (see Record page 9) " 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'."

Counsel for the defendant on the other hand stated his leading argument thus (Record p. 10): " 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 ".

In the course of his judgment (delivered on the 14th June, 1957) Lewis J. said (at p. 21):—

> " 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."

At p. 23 he said:—

> " . . . it " (i.e. Great Thatch Island) 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."

At p. 24 he said:—

> " 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.
>
> 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."

The learned Judge went on to hold (at pp. 24 and 25) that the joint will was in a form apt to include land in the British Virgin Islands under the Wills Act cap. 26 there in force, and at p. 25 expressed his conclusion on the question of title in these terms:—

> " 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."

He accordingly made an order upon the defendant to give up possession of Great Thatch Island on 30th September, 1957 and to pay mesne profits at the rate of $.40 per month for the six years ending on that date.

On appeal by the defendant to the Federal Supreme Court of the West Indies (Sir Eric Hallinan C.J., Rennie and Archer J.J.) that Court in a judgment delivered by Hallinan C.J. on the 21st and 22nd July, 1958 in which the other members of the Court agreed, accepted Lewis J.'s conclusions both as to inclusion of Great Thatch Island in the joint estate and the efficacy of the joint will, and dismissed the appeal, save that the mesne profits were reduced to a total of $.840, representing $.80 per annum for a period of ten years.

The learned Chief Justice (at p. 33) observed :—

> "I consider that the Trial Judge had sufficient evidence before him to hold that the joint will comprised and destined the lands in question."

From that judgment the defendant has now appealed to this Board.

Mr. Foster, appearing for the defendant, based his argument in support of the appeal primarily on the submission that there was no evidence on which it could be held that the property to which the Danish system of community attached on the marriage of the testator and the plaintiff included in the eye of Danish law Great Thatch Island, situated as it was in British territory and subject to English law.

If that submission is well founded the present appeal must in their Lordships' opinion clearly succeed. The plaintiff's case is that according to Danish law Great Thatch Island formed part of the joint property to which the Danish system of community attached on the marriage of testator and the plaintiff, and devolved on the death of the testator in accordance with that system to the exclusion of the *lex situs* in the shape of English law. It is for her to prove that in this matter of community the Danish law as it stood in the Island of St. Thomas at the material time arrogated to itself this extra-territorial effect. The question is one of fact to be proved by evidence, and the onus is upon the plaintiff to prove it. As their Lordships have already observed, the only evidence of the Danish law of community adduced by the plaintiff consists of the judgment of the United States Court of Appeals as approved by Mr. Bough in his affidavit. Their Lordships are satisfied that there is nothing in this judgment which can be regarded as evidence that the Danish system of community in force in the Island of St. Thomas at the material time applied in the eye of Danish law to land situate in foreign, or in particular British, territory. It is true that in various parts of the judgment general references are to be found (for example) to "the property", "the entire joint estate" and "the community property" without qualifying words restrictive of their locality; but this in their Lordships' opinion is not enough. The law of one country concerning the devolution of land cannot, and prima facie is not intended to, affect the devolution of land situated in the territory of another. The learned Judges in the United States Court of Appeals were not directing themselves to the application of the Danish community system in the case of land situated outside Danish territory, and their Lordships find it impossible to assume that, if the question whether Great Thatch Island was according to Danish law to be regarded as part of the testator's and the plaintiff's joint estate under the Danish system of community had been before the United States Court, it would have been answered in the affirmative.

It is to be observed that in *De Nicols* v. *Curlier* (No. 2) [1900] 2 Ch. 410, where Kekewich J. held that the contract imputed by the French system of community to spouses domiciled in France and marrying without any express contract (as to which see *De Nicols* v. *Curlier* (No. 1) [1900] A.C. 21), had the same effect as an express contract in like terms, and was enforceable in England against freehold and leasehold property situated there, the learned Judge had before him expert evidence to the effect that the term "immeubles" was not confined to immovables in France, but applied equally to immovables in other countries. At p. 414 of the report he said this :—

> "The difficulty which arose was whether the term comprised immovables abroad—that is, beyond France. The words of the Code are, apparently, wide enough to cover all, wherever situate, and, if it could be treated as an English instrument which the Court is competent to construe, it would be impossible to avoid the conclusion that this is its real meaning. But to arrive at a conclusion respecting the construction of the Code in this particular is beyond the competence of the Court. **It is a** matter of fact with which the Court can only deal according to the testimony of those qualified to give it."

If the learned Judge's view as to the construction which an English court would place on the French code if competent to construe it turned merely on the absence of any express restriction of its provisions to immovables situated in France, their Lordships take leave to doubt its correctness, but they entirely agree with the learned Judge in holding that the question whether the French code did on its true construction include immovables outside France was a question of French law and as such "a matter of fact with which the Court could only deal according to the testimony of those qualified to give it".

Again in *Chiwell* v. *Carlyon* 14 Cape of Good Hope Law Reports p. 61 the first question put by Stirling J. for the opinion of the Supreme Court of the Colony was whether certain immovable property in England fell within the community created under the law of the colony by the marriage of spouses domiciled in the colony; and the Supreme Court of the colony held that this question should be answered in the affirmative.

These cases indicate that the question whether the system of community in force in a given country is regarded by the law of that country as applying to immovables situated outside it is, for the purposes of proceedings in an English court, a question of foreign law, and therefore of fact, to be determined by competent evidence as to the law of the foreign country concerned. True it is that in *De Nicols* v. *Curlier* (supra) the French system and in *Chiwell* v. *Carlyon* (supra) the Cape of Good Hope system were proved to extend to immovables situated in another country; but this of course affords no evidence at all on the question whether the Danish system of community in force in the Island of St. Thomas during the period material to the present case purported to include immovables situated in other countries.

Mr. Le Quesne, for the plaintiff, contended that there were concurrent findings of fact by both courts below to the effect that the community here in question included immovables situated in the territory of a foreign state, such as Great Thatch Island.

Their Lordships cannot agree. It appears to their Lordships that both courts erroneously regarded the judgment of the United States court, as approved by Mr. Bough in his affidavit, as affording evidence that the Danish system of community in force in the Island of St. Thomas during the material period included Great Thatch Island notwithstanding that it was situated in the territory of a foreign country. For the reasons already stated their Lordships are of opinion that the affidavit and judgment afforded no such evidence. It further appears to their Lordships that basing themselves on this, as their Lordships think erroneous, view of the evidence, the courts below went on to hold that inasmuch as the community property according to the relevant Danish law included Great Thatch Island the general references in the joint will to "our whole joint estate" and "our joint estate" must be construed accordingly as including Great Thatch Island, a conclusion from which, had there been evidence that according to the relevant Danish law the community property did include Great Thatch Island, their Lordships would not have been disposed to dissent. The next step in the reasoning of the courts below appears to have been that inasmuch as the joint will was in point of form and execution adequate to pass land situated in British territory (a matter which their Lordships are content to assume in favour of the plaintiff without deciding it) the joint will should be recognised by English law as effectively entitling the plaintiff to the beneficial interest it purported to give her in Great Thatch Island as part of the joint estate. This seems to their Lordships to be an over-simplification of the problem. Even if there had been proof of the inclusion of Great Thatch Island in the joint estate according to the relevant Danish law, and granting the adequacy of the joint will, in point of form and execution, to create with respect to Great Thatch Island, as part of the joint estate, the beneficial interest which it purported to confer on the plaintiff, there would still have remained the difficult question whether it would have been proper in the circumstances of this case to resolve the conflict between English law and Danish law with respect to the devolution

of Great Thatch Island otherwise than by applying the *lex situs* (i.e. English law) in accordance with the general rule :—(see for example *Welch* v. *Tennent* [1891] A.C. 639). Their Lordships are much indebted to counsel for their full and careful argument on this question ; but as it appears to their Lordships that the case is concluded against the plaintiff by her failure to prove that Great Thatch Island formed part of the joint estate under the relevant Danish law, no useful purpose would be served by debating it further.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the Supreme Court of the Windward Islands and Leeward Islands and of the Federal Supreme Court of the West Indies should be set aside, and that the action should be dismissed.

The respondent must pay the costs in the courts below and the costs of this appeal.

(39152) Wt 8078—37 100 4/60 D.L.

In the Privy Council

CLIFFORD W. L. CALLWOOD

v.

ELSE E. CALLWOOD

DELIVERED BY LORD JENKINS

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