As regards the question of public policy, it is submitted:

i. A condition may be contrary to public policy if it can *only* be satisfied by the doing of something contrary to public policy, or if it has a harmful tendency in that its likely result would generally be the doing of something contrary to public policy.

ii. It is the policy of the law that the *consortium* of matrimony should not be interfered with.

iii. The holding void of the provision in *Ebbeck's Case* is justified in that the likely result of such a provision would generally interfere with such *consortium*.

iv. *Ebbeck's Case* is genuinely distinguishable from *Ramsay's Case*.

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COMMUNITY OF PROPERTY AND THE CONFLICT OF LAWS

CALLWOOD v. *CALLWOOD*

In the conflict of laws one difficult problem concerns the extent to which courts of England or New South Wales should apply principles of foreign law which have no local counterpart. A second problem concerns the scope to be allowed to foreign law when rights to local immovable property are involved. These two problems arose together to confront the Privy Council in *Callwood* v. *Callwood*[1] where the Court was invited to decide that the Danish system of community of property between spouses determined the rights of a widow to certain land in a territory subject to English law. Testator at the time of his marriage, and thereafter until his death, was domiciled in a territory in which Danish law was in force. Under Danish law the effect of the marriage was to subject the property of either spouse to a system of community of property. Within this system the husband and wife had power, *inter alia*, to execute a joint will under which the surviving spouse was, during his or her life, to retain the whole joint estate undivided until death or remarriage. Such a joint will was executed. At the time of his death the testator owned Great Thatch Island in the British Virgin Islands, which was subject to English law. The question arose between the testator's widow and his son whether the will could effectively render the island part of the joint estate vesting in the widow, or whether it devolved, in accordance with the English law of intestacy, upon the son. One party thus claimed that the issue was to be decided according to the Danish system of community of property, the other that it was to be decided according to the English law of intestate succession to realty.

Unfortunately the Privy Council did not find it necessary to decide the important issue of private international law which, at first sight, appeared to be raised. Their Lordships found for the son on the ground that the widow had failed to prove that the Danish law of community of property purported to operate extraterritorially upon foreign immovables. The widow, carrying the onus of proving such operation, first referred the Court to a judgment of Maris, J. in the United States Court of Appeals in the case of *Callwood* v. *Kean*[2] (an action brought by the widow concerning the proceeds of a sale of immovables situated in Danish territory), and then produced an affidavit sworn by a Mr. Bough, an attorney and counsellor at law practising in that territory. Mr. Bough, in his brief affidavit, stated that he had read the judgment of Maris, J. and that

[1] (1960) 2 W.L.R. 705.
[2] (1951) 189 F. 2d 565.

it accurately set out "the law on this question".[3] The decision referred to related solely to immovable property in Danish territory, and gave no clue to the Danish law regarding foreign immovables.

Lord Jenkins, who delivered the advice, said:

> 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 the 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 . . . arrogated to itself this extraterritorial effect. The question is one of fact to be proved by evidence, and the onus is upon the plaintiff to prove it. . . . 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 . . . applied in the eye of Danish law to land situate in foreign, or, in particular, British, territory.[4]

The decision does not advance the law concerning the mode of proof of foreign law. The Court "strongly deprecated"[5] the method adopted before it, but did not specify the precise grounds of the deprecation, contenting itself with approving the statement of Kekewich, J. in *De Nicols* v. *Curlier (No. 2)*[6] that proof of foreign law is "a matter of fact with which the Court can only deal according to the testimony of those qualified to give it". One is left to speculate about whether the mode adopted would have been sufficient had the American decision been relevant, and had Mr. Bough's affidavit simply repeated the opinion of Maris, J.[7]

The important issue of substantive law which would have arisen if the plaintiff had proved the facts she sought to prove, is whether the English Court, if it had been satisfied that the Danish community of property law attached to immovables in English territory, would have given effect to that law in preference to English law, the *lex situs*. Lord Jenkins commented on this aspect:[8]

> 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 recognized 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 oversimplification 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 their 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*.[9]

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[3] (1960) 2 W.L.R. at 711. [4] *Id.* at 715. [5] *Id.* at 711.
[6] (1900) 2 Ch. 410.
[7] *Private International Law* (5 ed., 1957) 130.
[8] *Op. cit.* at 718.
[9] (1891) A.C. 639.

As a general rule it may be said that questions affecting immovable property will be decided by the *lex situs*.[10] When this is coupled with the principle limiting jurisdiction to adjudicate upon rights in immovables to the courts of the *situs*,[11] it will be seen that the circumstances in which an English tribunal will determine rights to immovables in accordance with a foreign law are few. It is settled that the *lex situs* determines capacity to take[12] and transfer[13] immovables, the formal validity of a transfer of immovables[14] and the permissibility of any particular interest in land.[15] Cheshire says of the *lex situs*:[16] "That law governs exclusively the tenure, title and descent of immovables". It regulates intestate succession to immovables,[17] and where they are the subject of a will, it decides the testator's capacity and the will's formal validity.[18] On the other hand, the validity, interpretation and effect of a contract relating to immovables is governed by the proper law of the contract, which is not necessarily the *lex situs*.[19] It is when the parties come to execute a transfer of the land pursuant to the contract that the *lex situs* relating to capacity, formal validity of transfers and permissible interests becomes decisive.

If the court in the present case had been forced to determine the effect to be given to a foreign system of community within this pattern of principles, it would have had to come to terms with a difficult problem of reconciliation of authority. The decision of Kekewich, J. in *De Nicols* v. *Curlier (No. 2)*[20] proceeds on the basis that an English court may characterize a foreign system of community of property as a matter of implied contract, and it is the proper law of this contract which is to determine rights of spouses to immovables wherever situated. This decision purports to be simply an application of the principle laid down by the House of Lords in *De Nicols* v. *Curlier (No. 1)*.[21] The facts in that case were that a husband and wife at the time of their marriage were domiciled in France and according to French law their rights as to property, including that acquired in the future, were subject to the law of community of goods. They subsequently went to live in England, where the husband died leaving a will disposing of his property in disregard of his wife's rights under the French community system. The House of Lords, in an action concerning the movable property, held that the widow's rights to the husband's property were determined by the French law. The Court reached this conclusion by classifying the wife's rights under the community system as contractual and therefore governed by French law, the proper law of the implied contract. These "contractual" rights, unalterable by unilateral Act, governed the husband's power of disposition of movables. In *De Nicols* v. *Curlier (No. 2)* Kekewich J. held that the wife's rights to the real and leasehold property in the deceased's estate were similarly governed by the French community system to the exclusion of the English will. His Lordship considered that the decision in the former case proceeded on the broad principle that the rights of the widow to all property were to be determined according to the implied nuptial contract.[22] Having been satisfied on the evidence that the French law of community of goods covered foreign immovables acquired

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[10] G. C. Cheshire, *Private International Law* (5 ed. 1957) 554 and see *Nelson* v. *Bridport* (1845) 8 Beav. 547.
[11] G. C. Cheshire, *op. cit.* 556 and cases cited.
[12] *Id.* at 562 and cases cited.
[13] *Id.* at 563 and cases cited.
[14] *Id.* at 563 and cases cited.
[15] *Id.* at 567.
[16] *Id.* at 567.
[17] *Id.* at 571.
[18] *Id.* at 571.
[19] A. V. Dicey, *Conflict of Laws* (7 ed. 1958) 512, 524.
[20] (1900) 2 Ch. 410.
[21] (1900) A.C. 21.
[22] His Lordship qualified this by pointing to the overriding limitation that there must be nothing in English law to make the contract unenforceable, such as the Statute of Frauds.

after marriage, he applied that law to the English land. It is to be noted in his support that there appears to be nothing in the wording of the judgments in the House of Lords in the former case which restricts their application to movable property only. If we therefore assume that the approach of Kekewich, J. is a correct application of the reasoning of the House of Lords in *De Nicols* v. *Curlier (No. 1)*, and apply it to the present case, then the devolution of Great Thatch Island would be held to take place according to the contractual relations between the spouses, under which the joint will took effect. The widow would thus succeed.

There is, however, grave difficulty in reconciling the above approach with that of the House of Lords in the earlier case of *Welch* v. *Tennent*.[23] The husband and wife involved in that case were domiciled in Scotland. The Court was asked to examine the effect of a sale by the wife of certain English land which had belonged to her prior to marriage, the proceeds of which were received by the husband, and a subsequent revocation by the wife of all donations in her husband's favour. The significant feature for our purposes is that the House of Lords, in considering the rights of the parties to the land and the effect of the transaction, took no cognizance of Scottish matrimonial law but analyzed the problem solely in terms of the English law of real property. In considering the effect of marriage upon the proprietary rights of the spouses, Lord Herschell said:[24]

> There can be no doubt. . . . that the rights of the spouses as regards movable property must, in the circumstances of this case, be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estates are governed by the law of the place where it is situate.

Later[25] he said, without referring to any authority:

> But it is manifest that the *lex loci rei sitae* must determine whether the estate be heritable estate of the wife's during coverture, and what is the nature and extent of her right in respect thereof. It becomes necessary, therefore, to inquire what was the effect of the marriage according to the law of England upon the heritable estate of which the wife was then possessed.

Lord Watson and Lord Morris delivered concurring judgments.

Applying Lord Herschell's remarks to the facts of *Callwood v. Callwood* it seems that an English court would be bound to disregard the Danish law of community of property in determining the devolution of Great Thatch Island, and would be compelled to decide rights to that property according to the *lex situs*. One is bound to ask, therefore, what magic is possessed by the French community system which in 1900 compelled recognition of its application to English land, whilst some nine years previously the Scottish matrimonial law was allowed no such liberties. In neither case was there any express contract. Although, as Falconbridge points out,[26] the very characterization of the French law of community of goods as a matter of implied contract, which was the basis of the *De Nicols* v. *Curlier* case, is open to doubt, the decision in *Welch* v. *Tennent* cannot be regarded as the result of a different characterization of Scottish law of matrimonial property, which was dismissed as irrelevant. On the other hand, in its approach to the law the House of Lords in *De Nicols* v. *Curlier (No. 1)* can hardly be held to have chosen to depart from the principle of *Welch* v. *Tennent* which was apparently not cited either in argument or in the judgments.

It is submitted that we have here encountered an overlapping of two prin-

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[23] (1891) A.C. 639.
[24] *Id.* at 645.
[25] *Id.* at 646.
[26] *Conflict of Laws* (2 ed. 1954) 108.

ciples of private international law whose scope has never been clearly defined: the one, that title to and descent of immovables is governed by the *lex situs;* the other, that the *lex domicilii* — where it is the proper law of a contract affecting the proprietary interests of parties, may determine their rights to foreign immovables. We are confronted, to use Professor Stone's terminology, with legal categories of competing reference.[27] There would have been no logical compulsion upon the Privy Council in *Callwood* v. *Callwood* to have chosen one approach in preference to the other. Accordingly, it becomes of more than academic interest to consider their practical merits.

The attitude adopted by Lord Herschell in *Welch* v. *Tennent* is, it is suggested, symptomatic of a tendency in English private international law to exaggerate the role of the *lex situs* in disputes concerning immovable property. This attitude is seen at its extreme in the principle, stated in the *Moçambique Case,*[28] that an English Court has no jurisdiction to try an action for damages for trespass to foreign land. The effective administration of the land law does require that certain aspects of that law be left to the exclusive control of the *lex situs.* The country in which land is situated clearly has an interest in requiring that the formalities of its conveyancing system be observed, and that interests in land be within the scope of its real property and conveyancing laws; *a fortiori* where a system of public registration of title operates. But so long as the local law concerning the nature of interests in land, and their modes of transfer, be complied with, then surely the source of these interests must not be governed by the *lex situs.*

The chief merit of the *De Nicols* v. *Curlier* approach is that in most cases it will give effect to the intention of the parties. It is reasonable to assume, for example, that a husband and wife whose domiciliary law provides for a system of community of property would regard their dealings with all their property, including foreign immovables as operating within that system. Thus in the case under discussion it is probable that a decision in favour of the widow would have given effect to the intentions of the testator. If the law is to frustrate the intentions of parties, justice requires that there be some reason of policy behind it. Mere timidity in the face of unfamiliar legal conceptions is not sufficient.

Indeed, the recent decision of the Queen's Bench Division in *Phrantzes* v. *Argenti*[29] indicates a greater boldness in this respect. In that case Lord Chief Justice Parker held that an English Court would recognize, in favour of a Greek woman marrying in England, an obligation cast upon her father by Greek law to provide a dowry, although a declaration in her favour was refused by the Court on the ground that no machinery existed whereby English Courts could grant the form of relief to which she was entitled under Greek law. His Lordship quoted with approval the dictum of Cardozo, J. in *Loucks* v. *Standard Oil Co. of New York*:[30]

> If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare . . . A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong simply because we deal with it otherwise at home.

Applying this to the present context, it is submitted that, to the extent of

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[27] *The Province and Function of Law* (1946) 176. Professor Stone describes such a situation as one "where two or more legal categories, or their respective logical consequences, each prescribing different rules, overlap in their application to a particular situation".

[28] *British South Africa Co.* v. *Companhia de Moçambique* (1893) A.C. 602, 626.

[29] (1960) 2 W.L.R. 521.

[30] *Id.* at 528.

that the policy requirements outlined above are not offended, our courts should recognize the efficacy of foreign legal systems in creating interests in local land. The search for the sources of such interests in implied contractual relations is, however, somewhat clumsy, and, as observed above, technically suspect, and it may be that a more scientific solution would be found in a recognition of equitable rights.

To sum up, although the Privy Council expressed doubt as to whether, if we had found it necessary to decide the substantive issue raised in *Callwood* v. *Callwood,* it could have looked beyond *Welch* v. *Tennent,*[31] it is submitted that there would have been no logical necessity to apply that decision, and its application would have gone far beyond the requirements of public policy and created an unfortunate precedent.

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UNCONTROLLABLE IMPULSE AS EVIDENCE OF INSANITY

ATTORNEY-GENERAL v. *BROWN*

Attorney-General for South Australia v. *Brown*[1] is a case in which the factor which assumed outstanding importance in both the High Court and Privy Council appeals was one which counsel for the accused had most strenuously tried to keep out of the trial. The importance assumed by the issue of uncontrollable impulse in all three appeals is remarkable, considering that counsel for the accused did not raise the issue at the trial, nor was any evidence given on behalf of the accused that uncontrollable impulse played any part in the crime. Uncontrollable or irresistible impulse was first mentioned by the trial judge in his direction to the jury and it is his comments on this issue that caused the rare difference of opinion between a unanimous High Court and the Privy Council. Despite the strange way the issue entered the case, *Attorney-General* v. *Brown* will no doubt always be cited as one of the leading cases on the relationship between legal insanity within the M'Naghten Rules and uncontrollable or irresistible impulse.

It is now well settled that the fact that the accused, at the time of the commission of the crime, could not resist the impulse to commit the crime does not by itself constitute a defence to the charge of murder.[2] Although medical evidence may be to the effect that the accused was "insane" he is not considered legally insane unless he either did not know the nature and quality of his act or he did not know that what he was doing was wrong. This is the test of criminal responsibility laid down in the so-called M'Naghten Rules. In the circumstances it is not surprising that counsel for the accused in *Brown's Case* did not rely on any contention that the accused was acting under an uncontrollable impulse.

To understand the issues in *Brown's Case* it is necessary to go into the facts fully. John Whelan Brown, the accused, was charged and convicted of the murder of Neville Montgomery Lord on an outback sheep station in South Australia. There was no apparent motive for the crime. Brown had been employed as a station-hand on Lord's property for three days when the shooting occurred and there was no evidence of any quarrel between them. The rifle Brown used to shoot Lord had belonged to another station-hand on the property who, at the time of the shooting, was away from the property. The rifle had been left in his room in a position where it was visible from the door. According to a statement

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[31] (1891) A.C. 639.
[1] (1960) A.C. 432; (1960) 34 A.L.J.R. 18.
[2] *R.* v. *Kopsch* (1925) 19 Cr. App. R. 50; *R.* v. *Flavell* (1926) 19 Cr. App. R. 141.