IN THE MATTER of the Probate and Administration Ordinance 1951 of the Territory of Papua and New Guinea

and

IN THE WILL of HECTOR ALEXANDER HETHERINGTON, late of Salemi Plantation, Manus, in the Territory of New Guinea, Native Overseer, deceased.

REASONS FOR ANSWERS GIVEN ON 16th OCTOBER, 1953 BY THE CHIEF JUDGE TO QUESTIONS REFERRED BY THE REGISTRAR UNDER ORDER 71, RULE 7.

No. P. 9 of 1953.

IN THE MATTER of the Probate and Administration Ordinance 1951 of the Territory of Papua and New Guinea

and

IN THE WILL of HECTOR ALEXANDER HETHERINGTON, late of Salami Plantation, Manus, in the Territory of New Guinea, Native Overseer, deceased.

REASONS FOR ANSWERS GIVEN ON 16TH OCTOBER, 1953 BY THE CHIEF JUDGE TO QUESTIONS REFERRED BY THE REGISTRAR UNDER ORDER 71, RULE 7.

The Registrar has referred to the Court, pursuant to Order 71, rule 7, two questions arising upon a Petition of the Public Curator of Papua and New Guinea praying that probate of the will of the abovenamed deceased be granted to him, or in the alternative, that an order to administer with the will annexed be granted to him as Public Curator.

On the 16th of October, last, after hearing the Registrar and the Public Curator, I answered the two questions that had been referred, and announced that written reasons for my answers would be delivered later.

Those reasons are as follows:-

(A): As to the Registrar's first question:-

That question was in these terms:- "To prove the will of the deceased (the will having been signed but not attested), is it necessary to require the filing of two affidavits of disinterested persons to prove that the signature is that of the testator or will the affidavit of handwriting made by" (the Public Curator himself), "in the circumstances, be sufficient."

As bearing on that question, the Registrar cited Halsbury's "Laws of England," 2nd edition, Vol. XIV, p. 201, where it is stated, in regard to a soldier's or sailor's privileged will, that, "if the document be unattested an affidavit of two disinterested persons to prove that the signature is that of the testator is required." The Registrar also cited the case In the Goods of Glastonbury Neville (deceased), heard in 1859, and reported in 4 Swaboy & Tristram (Supp.), p. 218, (also in 164 E.R., p. 1500), in which case the affidavit of handwriting sworn by a person who took a benefit under the will as legatee was considered insufficient and it was said:- "When it is necessary to prove the signature to a will to be in the testator's handwriting, the rules require this to be proved by the affidavit of two disinterested persons."

The authorities cited by the Registrar overstate the effect of the rules a little, I think, but show that, in England, there was, and still is, a Rule concerning the matter raised in his first question. That Rule is now Rule 20 of the (Probate) Non-Contentious Rules of 1862: (See "Annual Practice,"

1953, at page 3771). That Rule is as follows:- "If the will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses the affidavit of two disinterested persons to prove the signature to be of the handwriting of the testator will be sufficient to entitle the paper to probate."

So the Registrar's first question amounts to this:- Does a rule, similar to the English Rule 20, apply in New Guinea? The answer to that question calls for quite an amount of research, as the following remarks may show:-

Subsection (3) of Section 136 of the Probate and Administration Ordinance 1951, as originally enacted, provided that, subject to Rules made under that Ordinance (and none have been made under that Ordinance) the "practice and procedure of the Supreme Court," in so far as it relates to the jurisdiction conferred by that Ordinance, "shall be regulated as nearly as may be according to the Rules of Court regulating the practice and procedure of the Supreme Court." Now it will be noted that that Subsection spoke, simply, of "the practice and procedure of the Supreme Court," without any express reference to time or date: thus the Subsection did not say, in so many words - "the practice and procedure of the Supreme Court as at the commencement of thes Ordinance;" nor did it say, in so many words, "the practice and procedure of the Supreme court in force from time to time." It could be contended that the Subsection left it doubtful which of those meanings was intended by the legislating authority. But it is a general rule of statutory construction that an enactment speaks from its operative date, unless, it is clear from its text that the legislating authority intended otherwise. If that canon is applied to Section 136 (3), as it was originally enacted, the Subsection would be read as referring to the Supreme Court practice and procedure in existence when the Subsection became operative, that is to say, the practice and procedure existing as at the 3rd July, 1952. Support for such an interpretation comes from the fact that the legislature itself later passed an Ordinance, No. 1 of 1953, that was designed, inter alia, to amend Section 136 (3) of the Probate and Administration Ordinance 1951 by making it refer in express terms to "the practice and procedure of the Supreme Court in force from time to time under the Supreme Court Ordinance 1949-1952." That amending Ordinance has not yet become operative (so far as I am advised); so the position seems to be that, for the purpose of finding the answer to the Registrar's first question, we have to look at the Supreme Court practice and procedure in existence on the 3rd of July, 1952.

To ascertain what that practice and procedure was then, we should first turn to the Supreme Court Ordinance 1949-1952, - (as it was before it was amended by Ordinance No. 123 of 1952, which amending Ordinance did not become operative until the 8th of December, 1952, - some months after the 3rd of July, 1952, the date that is, ex hypothesi, the one relevant to the present discussion). That Supreme Court Ordinance sounded, of course, in the Papua and New Guinea Act 1949-1952, Section 62 of which provided that "the jurisdiction, practice and procedure of the Supreme Court shall be as provided by or under Ordinance," - "Ordinance" being defined in Section 5 of that Act as "an Ordinance made under, or continued in force by, this Act": (See also S. 32 of that Act, as to the continuance of the laws of the Territory of Papua, the laws of the Territory of New Guinea, and the laws of "both the Territory of Papua and the Territory of New Guinea"). The question then is :- What practice and procedure had been or was" provided by or under " Ordinance"? Looking at the Supreme Court Ordinance 1949-1952 (before its amendment by Ordinance No 123 of 1952) we find that its Section 12 empowered the Judges of the Supreme Court to make Rules of Court regulating and prescribing the practice and procedure of the Court; and that power extended to "the making of rules of Court repealing or amending any rules of court continued in force" by that Ordinance or by the Papua and New Guinea Act 1949-1952. We further find that its Section 8 (1) provided:- "Subject of rules of court

made under this Ordinance and except as otherwise directed by the Supreme Court at any stage of the matter, the practice and procecure in and in relation to a matter in the Supreme Court shall be - (a) in the case of a civil matter of any kind, other than a matter on appeal - the practice and procedure provided by law in relation to matters of that kind in the former Supreme Court of the part of the Territory in which is situated the registry of the Court in which the documents initiating the matter are filed ...." But, as no Rules of Court relating to the matter now under consideration had been made by the Judges - under the powet given in Section 19 of that Ordinance - up to the 3rd of July, 1952, (which, it may be repeated, is situated in Papua, it follows, because of Section 8 (1) (a) of the Ordinance, that the practice and procedure of the former Supreme Court of Papua should be applied in the matter now before me, unless "otherwise directed by the Supreme Court at any stage of the matter" pursuant to the power given in Section 8 (1). However, as the matter from which the Registrar's reference springs is, I apprehend, one of a kind that would, but for the provisions of paragraph (a) of Subsection (1) of Section 8, have been a "New Guinea matter," it seems to me right and proper that I should now direct, and I hereby direct, that this matter shall be governed by the "practice and procedure" of "the former Supreme Court" of the part of the Territory that was fowmerly the Territory of New Guinea. (In passing, and as a matter of interest, it may be mentioned that the effect of that direction is much the same as the effect that would have been achieved by the amendment of Section 8 (1) (a) made by ordinance no. 123 of 1952, had that amending Ordinance been operative as on the 3rd of July, 1952).

The quest narrows a little then, into an inquiry as to what was the practice and procedure of the former Supreme Court of the Territory of New Guinea, still current at the 3rd of July, 1952 and presently relevant. But, to ascertain the answer to that inquiry, we have to travel a long way back, because the Territory of New Guinea has experienced great changes and these were accompanied by the passage of constitutional measures that prescribed, or continued in force, the practice and procedure of the Supreme Court, subject to such modifications as might be made by the Judges - which modifications have been rare.

Thus, the Judges not having exercised their powers under Section 19 of the Supreme Court Ordinance 1949 - 1952 to make Rules of Court concerning the practice and procedure in the Probate jurisdiction, we must try and ascertain what the practice and procedure in New Guinea was before that Ordinance became law. First, we may note that the Judiciary Ordinance 1946 (No. 6 of 1946), (now repealed), gave the Judges power to make Rules of Court: but no Rules were made, under that Ordinance, so far as the Probate jurisdiction was concerned. Next we may note that Section 16 of the Papua-New Guinea Provisional Administration Act 1945 continued in force, inter alia and in effect, the jurisdiction, power and authority of, and rules of court made by, the pre-war Supreme Court of New Guinea and (during the war) the Supreme Court of the Australian Capital Territory. As the Supreme Court at Canberra did not, so far as I am aware, make any Rules of present relevance, we must now examine the practice and procedure of the Supreme Court of New Guinea in its Probate jurisdiction as that practice and procedure existed immediately prior to the Japanese invasion of New Guinea, and the consequent interruption of civil administration, within that Territory, in 1942. The position in that respect in pre-war New Guinea was as follows:- By virtue of the New Guinea Act 1920 and the Laws Repeal and Adopting Ordinance 1921, the Papuan Probate and Administration Ordinance 1913-1915 had been adopted as law of New Guinea together with Rules of Court made under that Papuan Ordinance; those Rules provided, generally speaking, that probate practice and procedure should, as nearly as circumstances would admit, be in accordance with the practice and procedure of the Supreme Court of the State of Queensland "for the time being." The adopted Papuan Ordinance was later repealed and

replaced by the Administration and Probate Ordinance of 1937, Section 133 of which empowered the Chief Judge to make rules concerning probate practice and procedure. Although rules regarding Curator's commission were made pursuant to that power, no general probate rules were made under that repealing Ordinance. But the Chief Judge also had a general power, under Section 19 of the Judiciary Ordinance 1921 - 1938, to "make Rules of Court for the conduct of business in the Supreme Court, and for regulating all matters of parctice and procedure therein": further, Subsection (4) of that Section provided as follows:- "Unless and until Rules of Court are made in relation to any pasticular matter, the Rules of Court of the Supreme Court of Queensland on that matter which were in force in Queensland on the fifth day of December 1932 shall regulate the practice and procedure of the Supreme Court but the Chief Judge may make rules repealing, amending, adding to, or in substitution for those Rules." As the Chief Judge had not made comprehensive or general Rules of Court governing the practice and procedure in probate matters, it followed that the practice and procedure to be observed in such matters was governed by the "Rules of Court of the Supreme Court of Queensland ... which were in force" on the 5th of December, 1932.

Obviously, that description refers to "The Rules of the Supreme Court of 1900," as amended and in force in Queensland on the 5th of December, 1932; and we must therefore look at them. But first it must be noted that these Rules do not profess to be complete in themselves. The introductory part of those Rules provides that where "the manner or form of procedure is not prescribed by these Rules or by the parctice of the Court" a party may apply to a Judge for directions. See also Order 93, rule 22, which reads:- "When no provision is made by law or by these Rules, the procedure and practice used at the time of the coming into operation of these Rules shall remain in force." But, should a problem of practice or procedure arise for which the Rules of 1900 (as amended to the 5th of December, 1932) do not themselves provide, and as to which recourse has therefore to be had to the former procedure and practice, we in New Guinea are at once faced with the practical difficulty that the necessary books of reference are not available here. We know that, before the Rules of 1900, Rules of Court made under the Queensland Justicature Act of 1876 were in force and that they were preceded by earlier Rules of Court; but we have no copies of any of those Rules here. Similarly, we know that Section 8 of the Queensland Probate Act of 1867 provided that the practice under that Act of the Supreme Court should, except where otherwise provided by that Act or by rules or orders from time to time mdae under that Act, be, so far as the circumstances of the case would admit, according to the practice of the Court of Probate in England: but, without copies of such rules or orders as may have been from time to time made under that Act, we do not know to what extent the English practice had been modified, if at all.

Bearing those cautions in mind, we must now examine "The Rules of the Supreme Court of 1900", as amended and in force in Queensland on the 5th of December, 1932, to discover whether or not they contain some provision relevant to the Registrar's first question, and, in particular, whether or not they contain a rule similar to Rule 20 of the English (Probate) Non-contentious Rules of 1862. It is clear that the framers of the Queensland Rules of 1900 were well avase of the English Non contentious Rules of 1862, because a number of these English Rules have been copied or paraphrased in the Queensland Rules, particularly in Order 71. It seems equally clear that Rule 20 of the English Rules was not copied, in so many words, in the Queensland Rules. Does it follow, because no exact or near counter-part of the English Rule 20 is to be foulnd inthe Queensland Rules, that we have to assume that the Queensland Rules made no provision for the practice and procedure to be followed as to the proof of the handwriting of the testator of a will purportedly signed by him but lacking an attestation clause, and that guidance on this matter must therefore be sought in the practice and procedure obtained before

1900? I think not, for these reasons:- Obviously, the existence of the English Rule 20 must have been known to the framers of the Queensland Rules of 1900. If the English Rule 20 be examined, it will be seen that it is not a mandatory rule, but an advisory rule and one designed to prevent fraud or malpractice. Let us again study the words of that Rule. They run as follows:- "If the Will, codicil, or testamentary paper is signed at the end of it by the testator but is unattested, and there is nothing to show an intention that it should be attested by witnesses, the affidavit of two disinterested persons to prove the signature to be the handwriting of the testator will be sufficient to entitle the paper to probate." The Rule does not go so far as to say that, in such a case, proof short of the affidavits of two disinterested persons will never be sufficient. Although that Rule was not copied, word for word, in the Queensland Rules of 1900, its effect seems to me to have been indirectly embodied in those QueensalndRules in this way:- Whereas the English Non-Contentious Rule 48 reads - "The registrars may, in cases where they deem it necessary, require proof, in addition to the oath of the executor or administrator, of the identity of the deceased, or of the party applying for the grant," the Queensland Order 71, Rule 9, reads - "The Registrar may in any case make or cause to be made such inquiries as he thinks fit as to the identity of the deceased or of the applicant, or as to any other matter which appears to him to require proof or explanation, and may require that such inquiries shall be answered by affidavit." The additional words in the Queensland Rule seem to me to be a significant and a deliberate addition, and one intended to give the Registrar a wide discretion and a wide range in requiring proof or explanation, and in requiring proof or explanation by affidavit. It is difficult to imagine anything that would be more likely to induce a Registrar to call for "proof" or explanation" by affidavit than the purported signature of a testator to a will that was unattested. For obvious reasons, affidavits from disinterested persons are to be preferred to affidavits from interested persons, as In the Goods of Glastonbury Neville (deceased) shows. For obvious reasons also, a requirement by the Registrar of affidavits from two disinterested persons would, in the great majority of cases, be a better safeguard against possible fraud than a requirement of an affidavit from only one disinterested person. Consequently, one would expect reasons of sheer prudence and common-sense to persuade a Registrar to require affidavits from two disinterested persons, save in exceptional circumstances. On the other hand, it does not necessarily follow that a rigid insistence by the Registrar on proof by theaffidavit of two disinterested persons would be warranted in every case. For instance, it is conceivable that, because of the circumstances obtaining in this Territory and because of its geographical situation, cases could occur in which it was impracticable to find, or to discover without great difficulty and prohibitive expense, more than one disinterested person who could depose to knowledge of the handwriting of a testator: in such a case, I consider that the affidavit of one disinterested and credible person might be accepted as sufficient, unless there was some manifest, positive and cogent reason against its acceptance.

In the instant case, the Public Curator of Papua and New Guinea himself has sworn that he personally knew the testator and the testator's handwriting, and that the handwriting and signature in thw will are those of the testator. The Public Curator takes no benefit under the will and, in all the circumstances, I see no reason why his affidavit should not be accepted as sufficient proof of that handwriting and signature.

For these reasons, my answer to the Registrar's first question is this:- In the circumstances of this particular case, the affidavit of handwriting sworn and filed herein by the Public Curator of Papua and New Guinea on the 9th day of October, 1953, may be accepted as sufficient to prove that the signature in the will was that of the testator.

(B): As to the second question referred by the Registrar:-

It was as follows:- "Should probate issue to the Public Curator of Papua and New Guinea in the will referred to as the Public Trustee or should an Order to Administer with the will annexed merely be granted?"

One of the alternative prayers in the Public Curator's Petition was, that probate of the will should be granted to him; and, in his affidavit in support of that Petition, sworn and filed on the 9th day of October, 1953, he stated, that he was the "sole Executor" named in the will, "according to the tenor thereof."

The will in this case was a "soldier's will," purportedly made by the testator at Port Moresby in the Territory of Papua on the 13th of February, 1945. At that date, the testator,- (a Scot who had for a number of years before the War been living in the Territory of New Guinea), - was in actual military service with A.N.G.A.U. The will was on the common printed Army form, and by it, the deceased left all his property to his sister in Scotland, Agnes Hetherington. In appointing an executor, however, the testator merely wrote the words "Public Trustee" in the printed form, so that that portion of the will reads:- "I appoint Public Trustee executor(s) of this my Will."

Here it should be recorded that, formerly, the Territory of New Guinea had a "Curator of Intestate Estates" (appointed under the Administration and Probate Ordinance 1937-1937 of New Guinea) and the Territory of Papua had a "Public Curator of Papua" (appointed under the Probate and Administration Ordinance 1913-1950 of Papua). After the Japanese invasion of New Guinea and Papua in 1942 and since the resumption of Civil Administration in those Territories, the duties of the New Guinea "Curator of Intestate Estates" and of the Papuan "Public Curator of Papua" have, I understand, been performed by one person: later, when the Probate and Administration Ordinance 1951 came into force, and because of Section 4 (3) of that Ordinance, he was "deemed to be appointed Public Curator of Papua and New Guinea." That person is still "Public Curator of Papua and New Guinea" and is the petitioner in this matter.

The Registrar has contended, before me, that the mere words "Public Trustee," which appear in the will, are not a description that clearly and positively identifies the Public Curator of Papua and New Guinea as the person the deceased wished to appoint as the executor of his will; and that they do not suffice to make the Public Curator an "executor according to the tenor" of the will. The Registrar cited the following passages from Halsbury's "Laws of England", (2nd edition), Vol XIV, para. 243, at page 161:- "Should a question arise as to the identity of the person" (appointed as executor), "the Court will look at the surrounding circumstances at the date of the making of the will. It will not, however, accept evidence of the actual intention of the testator, except in a case where the description is equally applicable in all its parts to two or more persons. Where there is an individual exactly answering to the name and description, the Court will not admit evidence to show that some other person was intended. There may be such an uncertainty with regard to the person intended as to render the appointment entirely void." The Registrar submitted that, although there was A "Public Trustee" in England and in some of the Australian States, that term has not been used either in Papua or New Guinea; in short, the words "Public Trustee" as used in the will of the testator did not clearly point to any particular person and were so uncertain that an appointment purportedly made by suing these words could only be void. He referred to In the Goods of Baylis, ((1862) 2 Swabey and Tristram, 613; and 164 E.R. 1135), a case in which an appointment of "any two of my sons" was held void for uncertainty.

The Public Curator's agrument, in support of his

submission that he might be granted probate as "executor according to the tenor" of the will, was as follows:- The deceased had lived for a number of years in the Territory of New Guinea, prior to the Japanese invasion, and, at the time he made his will, was at Port Moresby in the Territory of Papua. As far as was known, he had no other assets than those in the Territory of Papua or the Territory of New Guinea. It was more reasonable to suppose that the testator, when he wrote the words "Public Trustee" in the will, intended to appoint as his executor either the Public Officer who usually handled the estates of deceased persons in the Territory of New Guinea or the Public Officer who usually handled the estates of deceased persons in the Territory of Papua than it was to suppose that he intended to appoint as his executor the Public Trustee of a country outside the Territory of Papua and New Guinea altogether. If the testator's intention was to appoint as executor either the Public Officer who handled the estates of deceased persons in New Guinea or the Public Officer who handled such estates in Papua, the present Public Curator of Papua and New Guinea stood, so to speak, in the shoes of either of those Public Officers. Yet the fact remains that even the Public Curator, in the course of his argument, suggested two different possible constructions of the words "Public Trustee" appearing in the will; and he had to admit that he could adduce nothing that might show which of those alternative constructions should be preferred.

As is said in Mortimer's "Probate Law and Practice," (2nd Edition, at page 215):- "Whether an executor is appointed by express terms or by implication, there must be no uncertainty as to the identity of the person intended." In the present instance, there seems to me to be no certainty whatever about the identity of the person the deceased intended to appoint as his executor. He used the words "Public Trustee;" yet these bear no verbal resemblance to the title of "Curator of Intestate Estates" that was used in New Guinea, the place in which he had lived for years. They are a little closer to, yet not identical with, the title "Public Curator of Papua", the title used in the Territory in which he made his will. Why he chose the title "Public Trustee" has not been shown. He came from Scotland, and no doubt he has visited England and Australian States in which there are "Public Trustees." But in my opinion it is impossible to say with any certainty whom he intended to appoint as his executor and any attempt to decide whom he intended could only be based on sheer guess-work. For those reasons I see no justification for a grant of probate of the will to the Public Curator either as executor or as executor "according to the tenor." On the other hand, I see no reason why the Public Curator shouldnot be granted an Order to Administer the estate of the deceased, with the will annexed, in the ordinary way.

My answer to the Registrar's second question is therefore as follows:- In the circumstances of this case, probate may not be granted to the Public Curator of Papua and New Guinea as executor according to the tenor of the will but the Registrar may, if satisfied that there is no objection otherwise to the application of the Public Curator, grant the Public Curator an Order to Administer the estate of the deceased, with the will annexed.

J.