CASE LAW AND COMMENT

Bankruptcy—Proof of Debt by Secured Creditor

In re Civic Constructions Pty. Limited (in liquidation) (Supreme Court of Papua New Guinea, unreported, November 2, 1971) was a case in which Raine J. had to consider the position of a secured creditor who had lodged a proof of debt in the winding up of the debtor company.

The debtor was the registered proprietor of certain leases. The liquidator of the mortgagee of these leases filed a proof of debt in the winding up of the debtor, specifically referring to the mortgage in the body of the proof. In his evidence, the liquidator of the mortgagee said that he had taken this action "to clarify the position and inform the liquidator of Civic of the true position. At no time did I intend that the first mortgage security of Alwin [the mortgagee] should be in any way affected". He also gave evidence that the liquidator of Civic had acknowledged this intention (which the liquidator confirmed) and that neither he nor anyone else on behalf of the mortgagee had acted inconsistently with the interest as mortgagee, and had not voted at creditors' meetings.

The winding up of Civic Constructions Pty. Limited took place under the *Companies Ordinance* (1964) of Papua New Guinea, which is virtually identical to the *Australian Uniform Companies Acts*. Sec. 291 of the Ordinance incorporates into the Ordinance the law currently in force in Papua New Guinea relating to bankruptcy, which is the *Insolvency Ordinance*, 1951. This Ordinance is modelled on the *Insolvency Act* of 1874 (Qld.), and the rules applicable are the *Queensland General Rules in Insolvency* of 1876. Sec. 137(1) of the *Insolvency Ordinance* provides that a creditor who holds a specific security on the property of the insolvent or any part thereof may, on giving up his security, prove for his whole debt. This action is substantially similar to sec. 90(2) of the *Commonwealth Bankruptcy Act* 1966. Both these sections are embodiments of the same principles of bankruptcy law laid down in *Re Plummer and Wilson; Ex parte Shepherd* (1841) 2 Mont. D. & De G 204; 1 Ph. 66; 41 E.R. 552 by Lord Lyndhurst L.C. and also by Sir George Jessel M.R. in *Re Turner; Ex parte West Riding Banking Co.* (1881) 19 Ch.D. 105, 112, see also *In re Dutton Massey & Co.; Ex parte Manchester & Liverpool District Banking Co.* [1924] 2 Ch. 199, 205. Both the *Commonwealth Bankruptcy Act* 1966 (sec. 63(3)-(4)) and the *Insolvency Ordinance* of Papua New Guinea (sec. 206) provide that the voting rights of a secured creditor at a meeting of creditors will depend on the secured creditor giving up his security, or assessing the value of the security and proving only for the excess.

Raine J. was required to determine whether, in the circumstances, the mortgagee had elected to give up his security in order to prove in the winding up. His Honour determined that in the circumstances the action of the liquidator of the mortgagee did not amount to a surrender of the security, and relied on the case of *Re Ferguson and Another; Ex parte Elder's Trustee and Executor Company Limited* (1943) 13 A.B.C. 1. In that case Paine J. held that the executor of a creditor who held a second mortgage over the property of the bankrupt did not abandon his security by reason of the fact that he had proved in the bankruptcy in the mistaken belief that his security was valueless, and had, in effect, assessed the value of his security as nothing. Paine J. so held notwithstanding a provision in the Rules applying at that time that a secured creditor who voted at a creditors' meeting

was deemed to have abandoned his security. His Honour considered the doctrine of election as it applies to secured creditors, and found that there had not been an election within the test laid down by Lord Atkin in *United Australia Limited* v *Barclay's Bank Limited* [1941] A.C. 1, 30:

> "If a man is entitled to one of two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other which after the first choice is by reason of the inconsistency no longer his to choose."

Raine J. found that the creditor may not have had full knowledge of the effect of what he was doing, and his action in lodging a proof of debt which specifically mentioned the second mortgage and the creditor's belief that it was worthless because the first mortgagee had foreclosed, was equivocal. His Honour relied on similar fact situations in the cases of *In re Chidley; Ex parte Lennard* (1875) 1 Ch.D. 177 and *In re Balbirnie; Ex parte Jameson* (1876) 3 Ch.D. 488.

With respect, it seems that although it might be possible to say that the act of the Liquidator of the mortgagee in the *Civic Constructions* Case was equivocal, in that the mortgage was specifically referred to in the proof of debt, it cannot be said that the liquidator of the company acted without knowledge. His very position as liquidator of a company would presuppose that he was familiar with one of the basic principles of bankruptcy law. In view of this, it is difficult to say even that the action of the liquidator of the mortgagee was not equivocal. Fortunately for him there was no provision in the *Insolvency Ordinance* or the *Insolvency Rules* which are to the same effect as the rules which were before Paine J in *Re Ferguson* (*supra*). The rule relating to election by a secured creditor is, it is submitted, one which should be applied strictly, in furtherance of the policy of the bankruptcy laws, which is to treat all creditors equally; if a secured creditor indicates that he does not wish to enforce his security, then the other creditors should be able to reap the benefits of his abandonment.

The case is of importance also in that it states definitely that the *Insolvency Ordinance* is incorporated into the law of winding up under the *Companies Act*. Previously there had been some doubt as to whether there was a law of 'bankruptcy' in Papua New Guinea which could be so incorporated. However, the incongruity of the *Insolvency Ordinance* remains granted that there are higher priorities in law reform in Papua New Guinea. Apparently no Papuan or New Guinean has ever been made insolvent under the Ordinance. However, if companies do play an increasing role in the commercial life of the country, it is important that on winding up their assets should be made available to creditors in an orderly way under a comprehensive statute.

John Goldring.

The Death Sentence in Papua New Guinea

In *the Queen* v *Peter Ivoro* (30th November, 1971), the Full Court of the Supreme Court of Papua New Guinea considered an appeal by a wilful murderer who had been sentenced to death by the trial judge. The murder, and the surrounding circumstances, were nothing short of gruesome. Ivoro had killed the victim, a native woman named Daimon Jago, by stabbing her a number of times with a bayonet. Shortly prior to this killing, Ivoro had killed the girl's European male companion by shooting and stabbing him. Earlier that night, he had shot another European man after breaking into the man's house. His rifle he had stolen about a month earlier, and shortly after the theft he had shot and wounded a European woman.

Medical evidence called at the trial indicated that Ivoro was an aggressive person who over the years had attacked many persons for trivial reasons. A psychiatrist's report stated that he was not suffering from any form of mental disorder to which

one could reasonably assign any standard diagnostic category, although he was influenced by factors which could reasonably be considered as reducing his capacity to control his actions. These were that he had a low threshold for aggression, that there was a heavy incidence of mental illness in his blood relatives, and that at the time of all three killings his mind was affected by alcohol.

In sentencing Ivoro to death, the trial judge had found that there existed no "extenuating circumstances such that it would not be just to inflict the punishment of death" (S. 305 of the *Criminal Code Amendment (Papua) Ordinance* 1965). In so holding, the trial judge made history, since this was the first time since 1965, when the discretion as to whether or not to impose the death sentence for wilful murder was vested in the judges, that a judge had imposed the death sentence. In the intervening years, many excuses have been accepted as either constituting or contributing to "extenuating circumstances"—including primitiveness, remoteness, ignorance of government, lack of education, family situation, obedience to tribe and tribal custom, and youthfulness.[1]

In the Full Court, an application on behalf of Ivoro for leave to submit fresh evidence was granted. This evidence tended to confirm Ivoro's aggressiveness and violence, but it also showed that he was a classical example of a psychopathic personality and that, by reason of this condition, his capacity to control his actions was substantially diminished.

By reason of this evidence, the majority (Frost A.C.J. and Kelly J.), found that "extenuating circumstances"[1] existed, and substituted a sentence of life imprisonment. The concept of "extenuating circumstances" was elucidated in the judgment. It was said to be "the existence of some relevant circumstances which operate so as to diminish the culpability of the prisoner, not in the strict legal sense but broadly, regard being had not only to moral considerations but to all the considerations which might reasonably be taken into account in order to determine whether it would not be just that the law should be applied in its full rigour and the punishment of death inflicted." Their Honours emphasised that they were not concerned with the merits or demerits of the death penalty as such. However, it "would not be in accordance with the moral and ethical standards of this community to execute a man, however heinous his crime might be, whose capacity to control his actions was affected in the way in which the appellant's capacity had been shown to be affected".

The public discussions following the case showed that the death penalty is an issue upon which opinion in Papua New Guinea is sharply divided. Many feel that it should be abolished, whereas others argue that it should be mandatory for at least wilful murder. In view of the extensive use of the penalty for crimes of violence in some emerging African nations, it is probable that the debate in Papua New Guinea has only just begun.

J. A. Griffin.

1 Some of the cases concerned with 'extenuating circumstances' are referred to in the judgment of Prentice J. (dissenting) in the Full Court.

When is a Customary Law Marriage not Customary in Papua New Guinea?[1]

A comment on Darusila Kuang v Eliab Tovivil[2]

This case was about a marriage under customary law in which the question was whether a wife of a customary law marriage can apply for maintenance under section 5 of the *Deserted Wives and Children's Ordinance.*

1 The Territory of Papua and the Territory of New Guinea have been considered one unit for the purposes of this paper. I am indebted to Mr Peter Fitzpatrick and Mr Roger Gyles, colleagues at the Faculty whose critiques of an earlier draft were of great help. However, the views and errors expressed in this note are my sole responsibility.

2 P. & N.G.L.R. [1969-70] 24.

The case raises a number of issues about customary marriage, including the extent to which a customary marriage should be subjected to the "general law".[3] The difficulties of proving a customary marriage and the question of internal conflict of laws are matters which are discussed in the case note.

Preliminary Remarks

The legal system of Papua New Guinea is pluralistic in that the law recognises two systems of law; the "general law" and the customary law.[4]

The *Native Customs Recognition Ordinance*[5] uses the words 'native custom' to refer to the customs of the peoples of the country. In this paper the term customary law has been used, since the term customary law appears to be the most acceptable description of the customs of the peoples for the following reasons:

(1) It avoids any such objectionable term as "native custom".

(2) The term customary law accepts the 'custom and usage' of the peoples as another system of law having the force of law. This term, therefore, distinguishes between 'habits and social customs' on the one hand and 'legal custom' on the other hand.[6]

The legal basis for the application of the customary law in the courts in Papua New Guinea is derived from the *Native Customs (Recognition) Ordinance*[7] (hereunder referred to as NCRO). Section 4 of the NCRO defines 'native custom' or any associated or analogous expression "as a reference to the custom and usage of the aboriginal inhabitants of the Territory obtaining in relating to the matter in question at the time when and the place in relation to which that question arises, regardless of whether or not that custom or usage has obtained from time immemorial". Sections 6, 49(2), and 55(2) define the word 'native'.

The definition of the words 'native custom' and 'native' raise problems, but the discussion of these problems has been omitted since they bear no relevance to the purpose of this paper.

In addition to NCRO, section 55(1) of the *Marriage Ordinance* 1963 provides that ". . . a native, other than a native who is a party to a subsisting marriage under Part IV[8] of the Ordinance, may enter, and shall be deemed always to have been capable of entering into a native customary marriage in accordance with the custom prevailing in the tribe or group of natives to which the parties to the marriage or either of them belong or belongs".

Sub-section (2) of section 55 enacts that "subject to this Ordinance, for the purposes of any law in force in the Territory or a part of the Territory, a native customary marriage whether entered into before or after the commencement of this Ordinance, shall be as valid and effectual as a marriage under part IV of this Ordinance".

3 The term "general law" here is used to mean the principles and rules of common law and equity as received, and any statutory law applicable including a local enactment. The term, however, does not in any sense indicate the generality of the application of such laws to the peoples of the country.

4 The term customary law as used in this paper should not be taken to connote that there is one single customary law of the peoples of Papua New Guinea. Papua New Guinea includes different societies, and therefore, there may be differences in the customary law from a society to society. There are, for example, about 700 linguistic groups.

5 The Ordinance generally provides the legal basis for the application of the customary law in Papua New Guinea.

6 See Allen *'Law in the Making'* O.U.P. 1964—7th edition, 67, 68.

7 No. 28 of 1963. It is arguable that the reception clause importing common law provides the legal basis for the application of the customary law in appropriate cases. See O'Regan, *The Common Law in Papua & New Guinea*, The Law Book Co. Ltd., 1971, pp. 12-16. However, this argument is of academic significance only.

8 Part IV provides for the solemnisation of marriage under the *Marriage Ordinance*. A marriage solemnised under part IV will be a marriage as defined by section 45 as being "the union of a man and a woman to the exclusion of all others voluntarily entered into for life". *Hyde* v *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 type.

Tovivil's Case

The case went to the Supreme Court of Papua New Guinea on appeal from the order of the District Court at Rabaul.

The District Court had dismissed a complaint made by the appellant (wife) under section 5 of the *Deserted Wives and Children's Ordinance* 1951-1961 (hereinafter referred to as DWCO), that the respondent (husband) had left her and the children of the alleged customary marriage without means of support.

The learned Stipendiary Magistrate ruled that the appellant cannot bring an action under section 5 of the DWCO or section 29(1) of the *District Court Ordinance* 1964. The reason for the ruling was that the marriage between the parties was a 'native customary marriage' and therefore was potentially polygamous; this being the case it did not confer on the appellant any right under the DWCO.

The learned Stipendiary Magistrate then went on to say that the DWCO applied to monogamous marriages (meaning *Hyde* v *Hyde* type marriages) and section 55 of the *Marriage Ordinance* "did not operate to render a native customary marriage a valid and effectual one for the purposes of the DWCO".

On appeal, His Honour accepted that the common law principles were as stated by Dicey & Morris on *The Conflict of Laws*;[9] viz., "The matrimonial jurisdiction of the court is confined to marriages which are the voluntary union for life of one man and one woman to the exclusion of all others." His Honour, in support for this principle cited, *Baindail* v *Baindail* [1946] 122, 125; *Sowa* v *Sowa* [1961] 70; *Ng Ping On* v *Ng Fung Kam* [1963] S.R. N.S.W. 782.[10]

His Honour, however, did not agree with the learned Stipendiary Magistrate on the construction of section 55 of the *Marriage Ordinance*. His Honour went on to say that the only meaning that could be put on the wide terms of sub-section 2 of section 55 especially the words "for the purposes of any law in force in the Territory" was that the common law rule of construction that the matrimonial jurisdiction was confined to monogamous marriages (*Hyde* v *Hyde* type) was abrogated and a customary marriage whether potentially polygamous or not should be treated as a valid and effectual marriage for the purposes of DWCO.[11]

The practical difficulties involved in proving a customary marriage did not prevent His Honour from taking the position His Honour did in construing sub-section (2) of section 55 of the *Marriage Ordinance*.[12] His Honour also referred to section 23 of the DWCO and section 18 of the *Local Courts Ordinance* 1963-1966.[13] The former requires the complainant at the hearing to produce direct evidence of her marriage, failing which she should produce an affidavit setting forth the time, place and circumstances of the marriage. The latter so far as is relevant, provides that the jurisdiction defined by the DWCO may be exercised by a local court in the case of a marriage by 'native custom'.

His Honour held that the effect of section 55 of the *Marriage Ordinance* was to extend the provisions of the DWCO to customary law marriages. Appeal by the wife was allowed, the order of the District Court was set aside and the case was remitted for rehearing to the District Court.

9 8th edition—p. 293.

10 His Honour also stated that the children of a potentially polygamous marriage will be treated differently in view of the rights conferred by the DWCO upon the mother of a child born outside lawful wedlock, citing *Ng Ping On* v *Ng Fung Kam* and *Bamgbose* v *Daniel* [1954] 3 All E.R. 263 (P.C.).

11 His Honour reasoned that the legislature felt it necessary to exclude a customary law marriage from the application of the provisions of the *Matrimonial Causes Ordinance* 1963; perhaps implying that there were no such express provisions excluding customary marriage from the provisions of the DWCO.

12 This was a commendable judicial approach to customary law.

13 The local court is established by the *Local Courts Ordinance* and has jurisdiction to try matters arising from customary law in civil matters provided that the claim does not exceed $200.

Comment

Two reasons either standing together or in the alternative, appear to have influenced the Supreme Court in deciding the way it did.[14]

(1) Sub-section 2 of section 55 of the *Marriage Ordinance* had the effect of abrogating the common law rule, thus bringing customary law marriage within the ambit of the DWCO.

(2) Section 18 of the *Local Courts Ordinance* expressly provided that the jurisdiction conferred by the DWCO may be exercised by a local court, in case of marriage by 'native custom'.

Section 30 of the DWCO 1951-55 as it had formerly stood provided that "an order shall not be made under the DWCO against a native". Section 30 has now been repealed by the DWCO—1961—the reason for such a move was to apply the DWCO to 'natives'.[15]

As stated earlier on, His Honour referred to section 23 of the DWCO which provides that upon the hearing, the complainant shall "produce direct evidence of her marriage with the defendant, or if she is unable to produce direct evidence to the satisfaction of the Court, shall make and produce an affidavit setting forth the time, place, and circumstances of the marriage".

The onus of proving the marriage with the defendant lies with the complainant. In a society where there is a recognised form of ceremony one can by producing witnesses who were present at such a ceremony show that the complainant and the defendant went through a certain ceremony of marriage. Furthermore, the question of whether the ceremony created a valid marriage may not be difficult to ascertain. In other words, built-in, in the section are two assumptions, namely, that in a given society there is a recognised form of ceremony and that there is an organised set of rules indicating whether the ceremony constituted a valid marriage under the law.

In a customary society, this may not be so since there may not be any rules about the formation of a marriage and if there are any rules they may be flexible in their application. This lack of organised rules and the flexibility of such rules where they exist, may give rise to a number of different versions of what constitutes a valid customary law marriage for the purpose of the Court's enquiry.[16]

In like situations where a particular statute provides a certain way of proving a matter the courts should also take into account section 5 of the NCRO. Section 5 provides, *inter alia*, that the court is not bound in considering the questions of the existence and nature of 'native customs' to observe strict legal procedure or apply technical rules of evidence but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion) and shall otherwise inform itself as it sees fit. After referring to particular ways in which the court may inform itself including its own motion requiring the opinions of such persons as it thinks fit, the section further provides that nothing therein contained shall be deemed to limit in any way the discretion of the court in obtaining evidence or informing itself on the question of customary law.

It is apparent from the foregoing provisions that the court is given a very wide discretion as to the way in which it should inform itself as to what is the customary

14 It is submitted that it should be the second reason that should be considered the basis for the decision. As to the reasons for such a submission, see *infra* pp. 96.

15 See, *Legislative Council Debates*, Fifth Council, Second Meeting of the 1st Session, Vol. VI No. 2, 89. The repeal of section 30 would still have left room for the argument that 'natives' under section 30 referred to 'natives' who were married under the *Marriage Ordinance*. However, section 18 of the *Local Courts Ordinance* has the effect of bringing a customary law marriage under the provisions of the DWCO.

16 The problem will arise when the application under section 5 of the DWCO is contested on the ground that there was no customary law marriage; making and producing an affadavit will create the same problem.

law and its application to any particular set of circumstances.[17] Since section 5 is essentially addressed to the courts, it is hoped that the court would on questions of customary law apply this relaxed standard of ascertaining customary law notwithstanding the strict procedures laid down by a particular statute.

The case also raises the question of judicial approach in matters of internal conflict of laws. An internal conflict situation arises when a court is required to choose between two or more systems of law which are not territorially distinct and the choice is therefore limited to laws "which apply concurrently and without spatial separation within a single territorial jurisdiction".[18] There may be two types of internal conflicts in Papua New Guinea—(1) the "general law" versus customary law (2) conflicts between customary laws.[19]

In the case under review there was no internal conflict situation and if there was one section 18 of the *Local Courts Ordinance* had resolved the conflict by providing that the wife of a customary law marriage can apply for maintenance under the DWCO. The court however, referred to the common law rule of the conflict of law, which it is submitted was not relevant for the purposes of the decision of the case. This approach of the court does raise, however, the question of whether the court should resort to conflict of law rules in solving internal conflict problems. This case note is not meant to be discussing these problems, but suffices to say that the rules of conflict of laws were developed in response to peculiar circumstances and were applied in cases where foreign element was involved and these rules essentially deal with external conflict problems.[20] The application of the rules of conflict of laws may prevent the court from considering the local nature of the cases and the policy reasons for recognising the different systems of law in the country.

Lastly, one cannot avoid the discussion of sub-section 2 of section 55 of the *Marriage Ordinance*. The sub-section provides that a customary law marriage will be regarded as a valid marriage for the purposes of "any law in force in the Territory".

The sub-section is drafted in general terms. The question, therefore, is of putting a construction which would not defeat the idea behind the institution of marriage under the customary law. One can take this extreme position and hold that once a customary law marriage has been proved to be valid it should be subjected to all other family legislation (i.e. *Married Women's Property Ordinance—1953-1970, Law Reform (Husband and Wife) Ordinance—1970*), unless a customary law marriage is expressly excluded from the application of a particular statute.[21] This construction, though possible, may be undesirable and may well defeat the purpose of the NCRO and perhaps section 55 of the *Marriage Ordinance* if the purpose was not only to pay a lip-service to customary law marriage, but also apply the customary law in the matrimonial relationship of the spouses. When introducing the Marriage Bill, Mr Watkins, then the Secretary for Law, said that the purpose of section 55 was to provide for uniform recognition of customary law marriages and regard such marriages "as valid and effectual as marriages solemnised under the *Marriage Ordinance*".[22] This brief statement on section 55 of the *Marriage Ordinance* does not provide any guidance on the question of the purpose of this section. Be that as it may, it is submitted that the most desirable construction would be to subject customary law marriage to the statutory law in cases where the latter

17 This procedure was accepted by the Supreme Court in *Avi Guikau and Vada Craiko* v *Heau Edersi*—Supreme Court judgment dated 16th March, 1972.

18 See *Allott's Essays in African Law*, Butterworths, 1960, 154.

19 Conflictual problems arising from the construction of reception clauses has been omitted here. But see O'Regan *Reception of the Common Law in PNG*, the Law Book Co., 1971.

20 All the cases cited by His Honour in this case were cases where foreign element was involved.

21 This is the case under secton 8 of the *Matrimonial Causes Ordinance* which expressly excludes its application to a customary law marriage.

22 See, Legislative Council Debates, 19th September, 1963, p. 916.

expressly provides that its provisions will apply to customary law marriages.[23] Where the statutory law is silent, customary law should govern the matter before the court in connection with a customary law marriage unless customary law is not applicable for the following reasons:

(i) Where it is repugnant to the general principles of humanity;

(ii) where it is inconsistent with an Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory;

(iii) where its recognition or enforcement would result, in the opinion of the court, in injustice or would not be in the public interest.[24]

However, one can use the provisions of sub-section 2 of section 55 of the *Marriage Ordinance* by treating a customary law marriage at par with a marriage under the *Marriage Ordinance* at least in the following cases:

> Husband and wife of a customary law marriage should be treated as such for purposes of section 58 of the *Evidence and Discovery Ordinance* 1913-1964 (Papua) and section 6 of the *Evidence Ordinance* 1934-1964 (New Guinea) and thus only compellable to give evidence at the trial of either the husband or wife as the case may be in cases specified by those sections.[25]

The matrimonial privilege extending to communication made during marriage should equally apply to the spouses of a customary law marriage.[26]

F. M. Kassam.

23 This was the position in the case under review whereby section 18 of the *Local Courts Ordinance* provided that in cases of a customory law marriage the jurisdiction under the DWCO will be exercised by the Local Court.

24 See section 6 of the NCRO, sub-section (1)(d) has been omitted since it bears no relevance to the point made.

25 It has been submitted that this is the position at present—see, O'Regan "Family Law in Papua and New Guinea" *Proceedings of the Family Law Internal Group*—A.U.L.S.A. published by H. A. Finlay, Monash University, 1970, esp. footnote 13, p. 27.

26 See section 7 of the *Evidence Ordinance* 1934-1964 (New Guinea) and section 60 of the *Evidence Ordinance* 1934-1964 (New Guinea) and section 60 of the *Evidence and Discovery Ordinance* 1913-1964 (Papua).