CONFLICT OF INHERITANCE LAW AND CUSTOM IN NUIGINI

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The *Wills Probate and Administration Ordinance* 1966, which was brought into force on 14th May, 1970, some four years after its enactment, created a major change in the law of sucession in Papua and New Guinea. It aimed to apply English law's principles of succession to native estates. Long as the delay between the enactment of the Ordinance and the bringing of it into operation was, the changes wrought by the Ordinance in this respect were short-lived, for at the beginning of August the *Wills Probate and Administration (Amendment) Ordinance* 1970, came into effect. The amending Ordinance, which operates retrospectively to the date when the main Ordinance came into force, revived customary intestate succession for the Territory, at least as a temporary measure.[1] It specifically continued in operation earlier legislation which had provided that customary rules should govern intestate succession to the estates of indigenes. The main purpose of this article is to examine the wisdom of legislation which affects customary succession by endeavouring to apply English statutory rules of intestate succession and will-making to indigenous estates.

INTESTATE SUCCESSION

In both Papua and New Guinea the law previously provided that a deceased native's customary heirs succeeded to his property upon his death. The situation was governed in both Territories by the Native Regulations. For Papua, the relevant regulation was number 144, which read, "In the absence of a will the property of a deceased native shall descend to those persons who in accordance with native customs are entitled to it."[2] Regulation 70 of the New Guinea Regulations was to the same effect. These Regulations were repealed when the *Wills Probate and Administration Ordinance* 1966, was brought into force in May, 1970, but were "re-enacted" by the Amendment Ordinance in August.

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1 In his Second Reading Speech on the Bill, the Secretary for Law, Mr L J. Curtis, said, "I have spoken of this Bill as being of a temporary measure only It is generally agreed that some further legislation will be required. The problem of intestacy and of the kind of will that should be required in this country has been the subject of much debate It seems obvious, for example, that the requirements for a valid will should be modified to suit the circumstances of this country This has already been done elsewhere It is desirable that the process of making a will should be as simple as possible consistent with preventing fraud or duress In the case of intestacy, it is clearly desirable that registered land should not descend according to custom What changes, if any, ought to be made will have to be the subject of careful study and consideration It is proposed to embark on that study immediately"

2 There was initially some doubt whether this Regulation extended to "modern" property such as leasehold estates and motor cars In 1968 Clarkson J considered whether customary principles could apply to such property See *In the Goods of Bimai Noimbano* [1967-1968] P & N G L R 256

(i) The Customary Rules of Succession in Papua and New Guinea

Who are the persons entitled to succeed "in accordance with native customs"? The answer to this question varies considerably throughout the Territory. Furthermore, although communities living in the same area are likely to have similar rules, marked differences do occur over short distances. Generally speaking, the rules of succession are patrilineal, but some are bilateral and others matrilineal. Matrilineal succession is found in the Melanesian-speaking areas on the north coast of New Guinea, and in many islands off the north-eastern coast such as Manus Island, New Britain, New Ireland, the Trobriand Islands, Dobu and part of Bougainville. The variations between societies are so great, however, that any generalizations must be treated with caution.[3]

The matrilineal societies are the most interesting in considering possible changes in succession laws, because it is there that the greatest conflict between the traditional rules on the one hand, and modern pressures on the other, develops. In matrilineal societies, a child inherits the property of his mother's brother, and takes nothing or practically nothing from his father's estate. The social unit for inheritance (and many other) purposes is the man, his sister, and his sister's children. This unit is so strong that it may be accorded a name. In Dobu, for instance, it is referred to as the "susu" (mother's milk). According to Fortune,[4] the susu "extends down the generations so that it may include a man, his sister, his sister's children, and his sister's daughter's children, but not his sister's son's children, and so on. The children of any male member of the susu go out of it . . . Each village is a small number of susu, from four or five to ten or twelve, all claiming a common female ancestress and unbroken descent from her through females only."[5]

The influence of the matrilineal unit for inheritance purposes differs from one society to another. It clearly conflicts with natural ties between father and son. But in places such as the Trobriand Islands[6] and the island of Dobu, the strength of the matrilineage is so great that it almost completely excludes the father-son tie. Fortune discovered that one of the few things a father may give to his own son is his magic and he normally does so, but the influence of the susu is so great that he usually gives it to his sister's sons as well. A father may give to his son a legacy of one half of his garden land, but the influence of the susu is again seen in the form of a strict rule that, when a man dies, no child may eat any fruit or crop on land that belonged to him. The son in Dobu also has the right to live in common with others on the father's house site (in Dobu, a married couple has two houses, one being the husband's and the other belonging to the wife). Apart from the items mentioned, the entire estate a man has, devolved through the susu. Accordingly, the sister's son (or sons) takes the corpse and skull, the village land and trees, any canoes and fishing gear, the personal name and status of the deceased, and half of the garden land (including the right to the crop growing at the time of the owner's death).

In the patrilineal societies women are of no significance in ascertaining

3 It would appear that Bougainville and Rossel Island are the only places in the Territory where matrilineal succession is found among non-Melanesian speaking people. In both instances, there are Melanesian speakers living close by.

4 Fortune, R. F., *Sorcerers of Dobu,* London, 1932.

5 Fortune, *op. cit.,* p. 3.

6 See Schneider, D. M. (ed.) , *Matrilineal Kinship,* University of California Press, 1961.

the lineage, and a father's property passes on his death to his sons, or to his sons and daughters. An example of patrilineal inheritance without any apparent matrilineal influence of any kind is found in the Korafe-speaking peoples around Tufi, on the north coast of Papua. Here, personal property passes from father to son. If there is more than one son, the property is divided among the sons by the eldest of them, and it is accepted that the eldest son can prefer himself when the distribution is being made. It is well accepted that the eldest son takes his father's house and his canoe, and any items of symbolic importance to the family. He will be expected to allow his brothers to make reasonable use of the house and the canoe, but there seems to be no doubt that he takes these items as his own. If the son is not of age, the father's brothers look after the property until the son is old enough to receive it. The widow receives only the household goods (and she may have to share these with her daughters-in-law, if her sons are married), with the exception that she might receive some money if the husband had a large amount of cash on his death, and the further exception that she and the children can have any vegetables growing in the husband's garden. The wife may also take possession of some of the deceased husband's personal effects, but she only does so if the sons are young, and she takes them on their behalf. The widow can, however, continue to live in her deceased husband's house and his brothers must support her. Daughters generally take nothing at all. If there are no sons, the property goes to the brothers.

There has recently been an interesting change in custom relating to the destruction of the deceased's property on his death. In the past, the deceased's clothing and mats used to be burnt, pots would be smashed, and betel nut trees would be cut down. Some of the deceased's property would be kept, but much would be burnt or buried. It is probably missionary influence which is causing the progressive abandonment of this custom. All burning has now stopped, although some personal effects are still buried with the deceased. The normal practice is to bury the deceased clad in his ceremonial dress.

Patrilineal societies are sometimes found to be subject to matrilineal influence. Thus, among the Kyaka, Professor Bulmer concluded that, while the emphasis was strongly patrilineal, inheritance being generally through the father or the maternal grandfather, about a quarter of the male members of the clan owed their clan allegiance to a female link. He was also informed that, when the Administration purchased large tracts in the Baiyer Valley, sister's sons, including the majority who were not living with their mother's group of origin, received a very substantial share, alongside or from the patrilineal claimants.[7]

The rules of customary succession vary in many ways other than in their paternal and avuncular emphasis. In some areas, for instance, a distinction is drawn between self-acquired property, and ancestral (but nevertheless individually owned, as compared with "lineage-owned") property. This distinction, which is commonly made by African customary systems, has been discovered by Oliver among the Siuai people of south-west Bougainville.[8] Whereas self-acquired property went on death to the eldest son, the ancestral property became vested in the widow, the eldest son, and the eldest daughter, all of whom decided what to do with it. Among the Siane people of the

[7] For this material I am indebted to Professor R. N. H. Bulmer, Professor of Social Anthropology at the University of Papua and New Guinea. The information is taken from his field reports on the Kyaka.

[8] Oliver, D. L., *A Solomon Island Society,* Harvard University Press, 1955.

eastern highlands, a distinction is made for succession purposes between "permanent" and "non-permanent" property.[9]

Again, variations exist as to who may take in both patrilineal and matrilineal societies. There appear to be three main possibilities—the eldest son, the sons generally, and sons and daughters—and variations occur within individual societies according to the nature of the property. The preference given to the eldest son discovered by Oliver among the Siuai and seen among the Korafe-speaking peoples of Tufi points up a considerable emphasis (although of varying degree) on the eldest son in many customary systems in the Territory. While it can nowhere be said that this amounts to a system of primogeniture, preference to the eldest son in some form or another makes an appearance time and time again. In Dobu, for instance, Fortune discovered that the privilege of bequeathing magic outside the susu extended only to giving it to the eldest son. In the areas studied by Professor Berndt in the eastern highlands a principle of "seniority" favouring the eldest son applied, often causing friction and sometimes death.[10] Again, among the Kapauku, Pospisil concluded that the eldest son was exclusively entitled to his father's house, bows and arrows, net carrying bags, necklaces and charm stones.[11] He was also entitled to all his animals except pigs, which were shared with the other sons. In the case of all other items, the eldest son took the "estate" subject to a duty to share it among himself, his brothers and (in the case of certain property) his sisters, but he frequently gained preference in the distribution.

It is also clear that, in many areas at any rate, sons are favoured over daughters, often to the extent of excluding the daughters entirely. In the Baiyer River settlement claim referred to by Professor Bulmer, it is interesting to note that sisters shared the purchase monies along with their brothers; but it is also significant that, when the question arose as to which of the sister's children were to take, the sons were included in the share but not the daughters.

One generalization that may legitimately be drawn about the customary rules of succession applicable in the Territory is that they are worked out everywhere according to a system of cognatic descent. Only relatives are entitled to share the estate, and generally descendants take, to the exclusion of husbands, wives, brothers, sisters and parents. Although parents retain their rights over "lineage" property, there is little or no evidence of them succeeding to individually-owned property. The wife is in much the same position, the only item of individually-owned property which she generally inherits from her husband being the "female" household possessions, such as pots and gardening knives.[12] As will be seen, the poor treatment of the wife under customary succession has been the main cause of dissatisfaction with the customary rules in Africa.

One final comment which might be made about the customary rules of succession is that, although rigid in the sense that a "testator" is not free to dispose of his property outside them, they are not nearly as rigidly applied by the beneficiaries themselves. In practice, there is a good deal of scope for compromise, the final result being no doubt determined to a large extent by the relative strength of the personalities involved. The compromises effected

9 See *In the Goods of Bimai Noimbano*, [1967-1968] P. & N.G.L.R. 256.
10 Berndt, R. M., *Excess and Restraint*, University of Chicago Press, 1962, p. 294.
11 Pospisil L., *Kapauku Papuans and their Law*, Yale University, 1958.
12 Although there was in many places a tradition of exchanges of gifts at funerals which often involved a transfer of property to the *kin* of the widow.

are no doubt also influenced by inter-community relations, and by the degree of pressure on land resources.[13]

(ii) The "Imported Rules"

The approach of English law, and the legal systems which are based on it, to the distribution of a man's property when he dies without a will is quite different from any of the customary systems applicable in the Territory. The English system may be traced back to the Statute of Distributions[14] which provided that, where the deceased was survived by a wife and children, the wife was entitled to one-third of the estate, and the children to two-thirds. If there were no children, the wife took one-half of the estate and next-of-kin of the husband shared the other half. In the event of there being no wife, the property was to be distributed equally among the children. These provisions have been enacted into the law of both Papua and New Guinea, where they have been applied to the estates of expatriates who die domiciled in the Territory.

The *Wills Probate and Administration Ordinance* 1966, modifies this style of distribution. The new rules, which are set out in section 91 of the new Ordinance, are as follows:—

(i) where there is a spouse and children, the spouse takes one-third of the estate and the children share the other two-thirds;

(ii) where there is a spouse, and a father and/or mother, but no children, the spouse takes one-half of the estate and the father and mother (or either of them) the other half;

(iii) where there is a spouse, and no issue, father or mother, the spouse takes the entire estate;

(iv) where there is no spouse, the entire estate goes to the children;

(v) when children take the estate, or part thereof, it is divided among them equally.

As noted earlier, the Ordinance, until it was swiftly amended, purported to apply these rules to indigenes. Is there any justification for applying "imported" rules of succession to native estates?

The greatest advantage of the application of such rules to native estates is that there would then be uniformity of the rules of intestate succession applicable throughout the Territory. Uniformity of succession is helpful in the administration of other areas of the law, such as land registration. A land registration system suffers because of the divergence among the customary rules. On the death of every proprietor, an inquiry has to be conducted by someone to find out what customary succession rules are applicable. The main witnesses in such an inquiry will themselves be potential beneficiaries. The need for uniform rules was recently recognized in Kenya when the Government set up a Commission on Succession.[15] In announcing the appointment of the Commission, the Attorney-General said that Kenya was striving to achieve a uniform law of succession to replace the infinite variety of customary and imported rules applicable in the country which differ according to whether the deceased was European, Hindu, Moslem, Buddhist or African (and in the event of his being an African, any one of a myriad of

13 For an excellent discussion of the relationship between customary succession and pressure on land resources, see Kelly, R. C., "Demographic Pressure and Descent Group Structure in the New Guinea Highlands", *Oceania,* Vol. 39 (1968), pp. 36-63.

14 Imperial Act 22 and 23 Car. 2 C. 10 ss. 5-9 (1670).

15 See the *Journal of African Law,* Spring 1967 issue, pp. 1-2.

customary systems could apply). The Attorney-General is quoted as saying that a "uniform law of succession is after all an essential prerequisite to sound economic development. Furthermore, in the circumstances of Kenya, the success of our land registration programme depends to a large extent on the introduction of a uniform law of succession."[16]

The application of the new rules to native estates also has the advantage that they would allow the wife a much fairer share. Whether it was because of a feeling that the wife was "paid for" when the bride-price was delivered, or perhaps because the wife herself was an item of property capable of being inherited, the fact is that, in the Territory, the wife was neglected by the customary rules of succession. In the subsistence economy, this is of little significance. But with the emancipation of women and the development of the economy, and the enjoyment by women whose husbands acquire some degree of wealth of a higher standard of living, justice demands that the wife take a share of her husband's estate.

The cry for a fairer deal for the wife has been the main reason behind such attempts as there have been to change the customary system of succession in Africa.[17] The most interesting experiment has been in Malawi where, in its efforts to provide the wife with a share, the legislation seems to have resulted in over-fragmentation of the estate.[18] The *Wills and Inheritance (Kamuzu Mbumba's Protection) Ordinance* 1964 provided that, in cases where succession would previously have been governed by customary rules, four-fifths of the estate would now go in accordance with the imported rules of succession, and one-fifth according to the customary rules. This change was described as "an open acceptance of the rights of the wives and children of the deceased"[19] indicative of the change in family structure that was taking place. Before the Ordinance came into operation, however, it was superseded by the *Wills and Inheritance Ordinance* 1967. This Ordinance, which is now in force, increased the proportion of the estate devolving in accordance with customary law to one-half, and in some cases to three-fifths. Whether this change was made because it was thought that the 1964 Ordinance represented too radical a break from the customary rules is not clear. It should be added that the Malawi legislation provides that a wife always succeeds to the household belongings of her intestate husband, a provision which seems an eminently sensible one.

It is also in favour of the application of the imported rules of succession to everyone in the Territory that the rules have a rational foundation. The rationale behind many of the customary rules, especially in matrilineal societies, has long since ceased to be obvious. The theory of Bachofen and some other nineteenth-century anthropologists was that matrilineal societies preceded the patrilineal. Bachofen argued that the idea of succession first came into vogue at a stage when people lived in a state of "primitive promiscuity". In such a society there would often be uncertainty as to who the father of a child was, and accordingly for succession and other purposes the mother-

16 *Ibid* at p. 2.

17 For materials on the customary law of succession in Africa, see Derrett, T. D. M., *Studies in the Laws of Succession in Nigeria,* Oxford University Press, 1965; Elias, T. O., *Nigerian Land Law and Custom,* London, 1953; Okoro, N., *The Customary Laws of Succession in Eastern Nigeria,* Sweet & Maxwell, 1966; Ollennu, N. A., *The Law of Testate and Intestate Succession in Ghana,* London, 1966.

18 See Roberts, S., "A Revolution in the Law of Succession in Malawi", *Journal of African Law,* Vol. 10 (1966), p. 24; and Roberts, S., "The Malawi Law of Succession: Another Attempt at Reform", *Journal of African Law,* Vol. 12 (1968), p. 81.

19 Roberts (1966) *op. cit.,* p. 30.

child relationship was highlighted.[20] The theory is apparently no longer acceptable to many anthropologists. Whether true or not, it serves as a reminder that the basis of matrilineal succession had been eroded even before the advent of the white man in the Territory, with the exception perhaps of societies strongly reliant upon a cohesive female work-force and societies where polygamy is frequently practised. The coming of missionary influence with its emphasis on the natural family, and the introduction of the English-type legal system whose influence is similar, set the stage for an obvious conflict between the matrilineage and the natural family. The sole fact that there is no obvious rational basis on which succession rules operate does not mean, however, that they should be replaced. The mere fact that they are embedded in the traditions of, and well understood by, the people making use of them may well constitute a sufficient reason for their retention, at least in the absence of a more acceptable system which can be effectively substituted.

Indeed, despite all these very good reasons why the application of the imported rules of succession to native estates should succeed, it may be confidently predicted that this would not be the case. The Territory simply does not have the administrative man-power to ensure that native estates are distributed in accordance with the new rules. In these circumstances, the people would continue to distribute estates in the way they have in the past, and the result would be a divorce between the law as it reads in the statute book and what is actually happening in the towns and villages. In the case of registered land, the result would be that the registered owner was the person or persons entitled to the estate under the imported rules of succession, whereas the people in occupation of the land were the customary heirs. There would develop a discrepancy between *de jure* and *de facto* ownership, which would be exacerbated rather than eased by the effluxion of time.

Another reason why English-type intestacy legislation cannot suddenly be applied to land owned by natives is that it is based on certain pre-suppositions that do not apply in the Territory. One of these is that, in default of agreement, beneficiaries who are to take shares of the estate in given proportions will be prepared to, and will be able to, sell the property in order that a distribution may be made. In the Territory, there is a strong tradition that real property is inalienable as a matter of law; and, in many rural areas, it is in fact inalienable. What is likely to happen when A, the owner of a rural holding of little if any value except to himself, dies leaving a wife and four children? Is the wife to be registered as the owner of a one-third interest, and the children of one-sixth each? If so, these interests must surely be registered separately as tenancies in common. Assuming that the land is not sold but that the wife and children continue in occupation, the position will be inordinately difficult to follow by the time the wife and children have died, and their interest has passed on to the children in the next generation. Indeed, by then, the picture would be more like that of customary or lineage ownership than registered individually-owned land.

If, on the other hand, the wife and four children were registered as joint tenants (it is difficult to see how this could be done as the size of the interest taken by the heirs may differ), so that the land would eventually be owned by the ultimate survivor, by the time the ultimate survivor is known the land will be in the *de facto* possession of the ultimate survivor and the children of the earlier descendants. The latter are not likely to appreciate the fine legal

[20] See Schneider, D. M., *op. cit.*, p. vii, referring to Bachofen, JJ., *Das Mutterecht* (1861).

point that it is only the ultimate survivor of the initial owners who has any legal right to the land, and the ultimate survivor may not appreciate it himself, particularly if he takes no steps to have himself registered as the surviving sole proprietor The situation is likely to be hopelessly confused by the time when, in a succeeding generation, someone has to determine who is the rightful owner or owners of the property Needless to say, it is even worse if, on the death of the owner, the people who went into occupation were not the wife and children but the customary heirs

The difficulty in making a "fractional" distribution of the estate is seen almost as clearly in the case of personal property, especially where the property is of no great value When a coastal native, for example, dies leaving a house in the village, a canoe, fishing nets, betel nut and sago palm trees on clan land, some spears and hunting nets, and a dog and a pig, it is plainly impossible to distribute it by dividing the "estate' into fractions

TESTATE SUCCESSION

Until the new Ordinance came into effect, natives had a very limited right to dispose of property by will The provisions of the now superseded *Wills Ordinance,* which enabled the disposition of any property by will provided the will was in writing and signed by two witnesses who must sign the will in the presence of the testator and in the presence of each other, were not applicable to natives [21]

The Native Regulations of both Territories governed the disposition of property by will, and the Regulations applicable in each Territory differed considerably The New Guinea Regulations recognized a will made in accor dance with native custom Was there ever such a thing as a will by native custom? Obviously a non literate people could not have a custom of will-making in the English sense Hogbin discovered among the Wogeo a practice of a property owner walking around his estate with his sons and informing them which part they were each to have on his death,[22] and Pospisil discovered among the Kapauku a tradition of a "last words' testament in which the testator on his death bed stated how his property was to be distributed [23] In both cases it is clear that the statement by the testator amounted to little more than a restatement of what would happen if the property devolved according to the customary rules of intestate succession, and a "will" which represented too great a departure from the customary rules was invalid and would not be accepted by the relatives

The New Guinea Regulations also permitted a native to make by will any disposition not forbidden by native custom [24] The will had to be either made in writing and signed in the presence of a patrol officer or District Officer, who must himself have signed as a witness, or alternatively, the native could tell the officer what disposition he wished to make, whereupon the officer wrote down the will and himself signed it The District Officer was required to keep a Register of the wills so made in his district

21 See the *Wills Ordinance* 1956 s 4 Nothing in this Ordinance contained applies to a Native or to a Will made by a Native

22 Hogbin I and Lawrence P *Studies in New Guinea Land Tenure* Sydney University Press 1967 p 21 I often heard father saying as we walked through the groves together You re to collect the fruit and nuts from these trees after your marriage you re to make gardens for your wife and children here Your younger brother is to look after that plot there Should I die while he s still a child you re to keep it for him but after he s married he s to climb the trees and till the soil

23 Pospisil L *op cit* p 2

24 Regulation 78 (1) of the New Guinea Regulations

In Papua, the situation was governed by some extremely ill drawn Native Regulations Regulation 142 provided that "A native cannot dispose by will of any interest possessed by him in land when such interest is possessed by him simply because he is a native" Presumably, this provision would prevent the disposition of converted land, but not a leasehold estate taken from the Administration in the same manner as a European could have done The distinction is practically immaterial, however, as the Regulations did not provide any way in which a native can make a will A will by native custom would of course be validated by the *Native Customs Recognition Ordinance* 1963, and as the provisions of the Wills Ordinance did not apply to natives, this was the only manner in which a Papuan could make a will

Under the *Wills Probate and Administration Ordinance* 1966, any person may dispose of individually owned property or an interest in property by will [25] This part of the Ordinance has been in no way affected by the amending Ordinance There is an exception as to native land, and property "the rights to which are regulated by native custom except to the extent to which they could devolve in accordance with a customary will" The new Ordinance sets out the familiar English formal requirements for validity, the most significant ones being that the will must be in writing and signed by the testator and two witnesses However, by section 43 of the Ordinance, failure to comply with such formal requirements does not invalidate the will "if it be proved that the testator intended the will to be his last will and testament and that intention is clear" This is a piece of law reform which, to use the words of the High Court of Australia in relation to other legislation, seems to call itself rather urgently for reform [26] One can sympathize with the draftsman who no doubt wished to validate native customary wills, and not to penalize natives for failure to comply with what are, after all, rather stringent formal requirements However, by allowing the possibility of verbal wills being proved valid because the intention of the testator was clear, wide scope is allowed for argument and uncertainty as to whether a man has left a will, and if so, what its provisions are It will result in litigation between persons who claim that an "informal" will has been made, and the heirs who would take in the event of intestacy, and also between protagonists who claim that different "informal" wills were made The great advantage in the rigidity of the formal requirements is that they allow only limited scope for litigation over a will, which is normally confined to the meaning of its provisions

Experiments conducted in Africa suggest that little is to be gained by removal of the formalities required for a valid will In Kenya, simplified procedures for will making by Africans were introduced by the *African Wills Ordinance* 1963, but the procedures have been rarely utilized Malawi enacted a simplified procedure in its *Wills and Inheritance Ordinance* 1964 [27] This Act, however, was never brought into operation and its successor, the *Wills and Inheritance Ordinance* 1967, reverted to the old rules This is not to say that the Territory should not, in the interest of having will making made easier for native testators, experiment with relaxed formalities It is essential, however, that the rules be rigid and not allow scope for argument such as is the case with section 43 of the *Wills Probate and Administration*

25 *Wills Probate and Administration Ordinance* 1966 s 16

26 *Bitumen and Oil Refineries (Australia) Ltd* v *Commissioner for Government Transport* (1955) 92 C L R 200 at p 206

27 See Roberts *op cit*

Ordinance 1966. One way to do this would be to remove the necessity for the witnesses to actually sign the will. Another would be to establish an additional manner of making a will something akin to the system set up by the New Guinea Native Regulations, whereby each District Office could establish a Wills Register. Anyone who wished to make a will could state his wishes to the District Officer, who could then record the will and sign it. This will could be presumed to be the last will of the testator in the absence of evidence to the contrary. Evidently the machinery set up by the New Guinea Regulations was not often used, but this is not to say that such a procedure would not become increasingly useful.

But no matter to what extent the formalities are relaxed, indigenes are not likely to start making wills to any significant extent. In a country where there is no tradition of freedom of inheritance, and where a large number of people are illiterate, it would be futile to except otherwise. One can expect, however, that the number desiring to do so will increase as more people enter the cash economy and acquire assets, and learn what will happen to those assets on death, whether the rules applicable on intestacy are the customary rules or those applied by the imported law. In this process, the desire of women to obtain a greater share of the estate than would be allowed them under either of the intestacy systems, will be a significant factor.

PROPOSAL

It is not in any way suggested that there are easy solutions to the problems canvassed. Succession touches too many aspects of life and the law to be summarily altered. It would be ideal if a Commission could be set up to investigate succession.[28] Such a Commission could undertake the necessary research, and would obtain great assistance by following the course taken by the Kenya Commission on Succession. Such a Commission could consider *inter alia* the following major questions:

(a) Whether it is possible to find a uniform succession law acceptable to all sections of the community. It is believed that the complete repeal of customary rules and their replacement by imported rules would not succeed, but it may be possible to find an acceptable middle-of-the-road solution. If an integrated law can be found, it might be possible to allow succession outside the rules by agreement; that is, where all the relatives agree that the property should devolve in a particular way. The latter provision would enable customary succession to continue in the villages and other places still rooted in custom, where, no matter what changes are made in the law, customary succession will in any event continue to apply for many years to come.

(b) Whether it is practicable to establish a new and extremely simplified probate procedure in the Local Court. The *Wills Probate and Administration Ordinance* 1966 goes a limited distance in this direction by allowing a Distributor of a small estate (which is defined as an estate comprised of personal property not exceeding One thousand dollars in value, or real estate not exceeding Ten thousand dollars in value or both) to apply to a District Court or a Local Court for an order enabling him to pay the debts of, and distribute, the estate. (It is not clear whether such an order would allow the Distributor to effect the alteration of the registration particulars at the office of Titles.) It should be possible to extend these provisions to allow any

28 The author's proposal for a Commission on Succession was endorsed by Mr. S. Rowton-Simpson in his *Report on Land Problems in Papua and New Guinea*, p. 32.

administrator to apply for a full administration order in relation to a small estate. It then would be completely unnecessary to go to the Supreme Court for a grant of letters of administration, and it would also be unnecessary for the Director of District Administration to provide the Registrar with the transmission certificate showing who the heirs are. In the case of the death of the owner of a registered property, the heirs could refer the matter to the Local Court for a succession order. On the order being granted, it would simply be necessary for the title and a copy of the Court order to be sent to the Registrar to enable the alteration of registration to be effected.

(c) Whether the Local Court might be given jurisdiction in all cases of succession of registered land with a view to preventing multiple ownership. This jurisdiction could replace the procedure established by the *Land (Tenure Conversion) Ordinance* 1964-7 and would enable the court to take action, in the case of the devolution of any registered land, to prevent the registration of the land in the name of more than six persons. To this end, the Court could give effect to any agreement reached by the beneficiaries, and could order that compensation be paid. In the normal case, this jurisdiction could be exercised at the same time as the succession order is being made.

(d) Whether, in the interest of ensuring a change in registration upon death, it should be made an offence punishable by fine for beneficiaries to fail to notify the Local Court of the death of a property holder. Such a provision could extend not only to land, but also to items of personal property such as life insurance policies and bank accounts.

(e) Whether is is desirable to introduce any, and if so what, simplified will-making procedures.