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IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

TEDEP & ORS.

-v-

THE CUSTODIAN FOR EXPROPRIATED PROPERTY
AND THE ADMINISTRATION.

(RE: VARZIN LANDS).

REASONS FOR JUDGMENT.

PORT MORESBY.
MANN C.J.
31/5/63.

The question at present to be dealt with is whether evidence is required or is admissible to prove what law was in force in New Guinea between 1902 and the date when the Mandate to the Commonwealth of Australia became effective. This question was argued before me on the 6th May shortly prior to going to Vunadadir to hear the evidence as to facts remaining in issue.

For the assistance of Counsel I intimated whilst at Vunadadir that as at present advised I was disposed to take the view that the law in force in New Guinea over the period mentioned was a matter governed by Ordinances of the present Territory and that as a matter of construction the so-called "German" law became a species of adopted law and was to be regarded not as foreign law but as part of the law of the Territory. I indicated that I would state my final conclusion and reasons as soon

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as possible after my return to Port Moresby.

I have had the benefit of well-considered arguments on this point and would have little or no doubt that if this were a question to be decided under the general law, the German law previously in force would be regarded as foreign law in the present forum. I was referred to a good deal of authority to show that laws formerly in force in various countries are still to be regarded as part of the laws of those countries. As a corollary it has been held in some cases that a person practising today as a lawyer in a country may be regarded as expert in some quite foreign legal system which was formerly in force in his country. This is no doubt upon the footing that a practitioner is deemed to be an expert in the whole of the law in force in the country where he practises, and appropriately enough, this includes past laws and even archaic laws of that country. Nevertheless in none of these cases did I detect any suggestion that the law of a particular country included laws which were never applied or administered by the Courts of the Sovereign power of that country, but had only been administered previously as law in the same area by Courts of a foreign power which then governed that area. In other words it seems to me that the practical questions which have generally arisen have been formulated in such a way that British Courts, for example, today might well regard Saxon law as part of the law of their forum upon the assumption that it continued to be recognised and applied in appropriate cases after the Norman Conquest, but that there is no rule established which would extend the jurisdiction of the Courts of the present Sovereign in such a way as to incorporate the laws previously applied and enforced by

some totally different and foreign power, but never continued in force afterwards.

Apart from statute, therefore, I think that the German law in New Guinea would inevitably be foreign law, not the law of this forum, and would be appropriately proved as a fact by experts in that law.

Turning to the legislation at present in force in the Territory, we have such provisions as the Laws Repeal and Adopting Ordinance of New Guinea appearing in Volume III of the Annotated Laws 1921-1945 at p. 3003. This Ordinance took effect on the 9th May, 1921, the same date as that upon which the Commonwealth New Guinea Act of 1920 came into force. This Act is reprinted in Volume I of the New Guinea Laws at p. 5. The statutory declaration of the existence of the Territory and the authority to the Governor-General to accept the Mandate when issued are contained in this Ordinance, and upon a reading of the preamble's definitive provisions it would appear that the Territory of New Guinea came into existence on that date as a politic entity. Contemporaneously with that, the Laws Repeal and Adopting Ordinance provided for the cessation of German laws. Notwithstanding this general cessation of operation of the German laws provided for in Section 4, the Ordinance provides in Section 5 and subsequent Sections a saving for the validity of a variety of transactions and matters which owed their original force to the pre-existing German law. Native interests, native customs and various other things are not to be affected by the provisions of the Ordinance. These Sections do not in terms extend the operation of the former law. They preserve transactions and interests which arose under that law. The Ordinance is, in my view, as a matter of construction consistent with but not indicative

of an intention that for some limited purposes the Territory Courts should recognise and apply German law in relation only to matters which arose before the 9th May, 1921. The Sections would be equally served whether the German laws were received as fact or applied as law.

More positive indications of intention are, however, to be found in the Judiciary Ordinance of 1921-1938 appearing in Volume I of the Laws of the Territory of New Guinea at p. 607. This Ordinance also took effect on the 9th May, 1921. By Section 4 of this Ordinance the German Courts previously established in the Territory were to cease to operate, and by Section 5 the Courts constituted by that Ordinance were to have jurisdiction, power and authority to apply and give effect to the law that prior to the commencement of the Laws Repeal and Adopting Ordinance 1921 was in force in the Territory. Although Section 5 confers this jurisdiction on the new Courts only for specified purposes, the terms of this specification are both wide and varied and cover every kind of justiciable question that one can readily imagine. The jursidiction therefore is a matter of substance and not some mere trivial exception or anomaly.

The Courts constituted by the Judiciary Ordinance include the Supreme Court which by subsequent legislation became one of the predecessors of the present Supreme Court of the Territory of Papua and New Guinea. Further the Supreme Court of New Guinea as established under that Ordinance was a Court belonging to the present "regime" and although it appears to be clear from Ffrost v. Stevenson 58 C.L.R. 528 that the Mandated Territory was not to be regarded as part of the British Dominions in any sense,

it is clear that the unbroken line of Courts and jurisdictions which subsist to this date have or have had the jurisdiction and therefore by necessary implication the duty to give effect to the former German Laws.

It seems to me to follow that these German laws are part of the "law of the forum" at any rate for the purposes of any question coming within Section 5 of the Judiciary Ordinance 1921. This does not mean that they are part of the general body of "living law", but rather that the post-mortem inquiry involved is in the specified Courts, to be a judicial legal process.

A subsidiary question arises, whether the repeal of the Judiciary Ordinance 1921 makes any difference to this situation. By Section 3 of the Supreme Court Ordinance 1948, the Judiciary Ordinance 1921-1938 of the Territory of New Guinea is repealed except for Sections 23 and 23A. The Judiciary Ordinance of 1946 is also repealed. Nevertheless by Section 6 of the Supreme Court Ordinance the present Supreme Court is to have the same jurisdiction as was immediately before the commencement of the Ordinance exercisable in relation to the Territory of Papua-New Guinea, the Territory of Papua or the Territory of New Guinea. It seems to me therefore that the effect of Section 5 of the Judiciary Ordinance of 1921 in conferring jurisdiction on the Courts, is fully preserved, at any rate so far as the Supreme Court is concerned, by Section 6 of the Supreme Court Ordinance.

These express provisions in the Ordinances would serve no purpose if the Court were to apply the ordinary principles applicable to foreign law, and to treat questions of law arising before the constitution

of the Territory, as question of fact. Once the Court has a duty to exercise a jurisdiction to apply and give effect to a system of law, even a past system of law, I think that it follows that that law is to be understood as taking effect as law and not merely as a fact. To make this possible Sections 4 and 5 are, in my opinion, to be read as meaning that notwithstanding the general cessation of operation of German Courts and laws as such, the German law has been adopted as a special part of the law of the Territory to be administered by the new Courts. It follows, in my view, that the Courts of the Territory must for the purposes specified be regarded as aware of that law and as having the duty of informing themselves what, at the relevant time the state of that law was, for the purpose of enabling them to exercise jurisdiction for which they are responsible.

I have considered the judgment of my learned predecessor Sir Beaumont Phillips given in the Mortlock Islands Land Case on the 29th April, 1930. With respect I agree with the conclusion which he reached in that case.

Whether the same view applies to Land Commissioners generally is another matter. It applies to the Supreme Court as a consequence of a particular jurisdiction conferred upon it.

The position is analogous to that of the English Courts, including the House of Lords, in relation to Scottish Law. See Halsbury 3rd Edition, Volume 15, p. 335, para. 610. Here I think that the law of German origin specified in the Territory Ordinances is not adopted as part of the general law of the Territory but that in the specified Courts, whenever the question arises by virtue of our laws, "What was the

former law?" - those Courts, and only those Courts, determine the question judicially.

The Commissioner could and I think should treat it as foreign law and admit evidence of it as a fact. On appeal the Supreme Court will of course be assisted by that evidence, but, perhaps inappropriately under present conditions, would be bound to come to its own conclusions without the assistance of further evidence.

The question arises whether the Supreme Court, on appeal, can admit evidence on this subject which might have been admitted by the Commissioner, acting under Section 56 of the New Guinea Land Titles Restoration Ordinance 1951. Much to my regret I think that such a course is not open to me. In effect it would mean that the Court was avoiding the responsibility of exercising a jurisdiction expressly conferred on it, by reference to Sections which are there for a mere procedural purpose.

I hold therefore that evidence as to the laws in force prior to the 9th May, 1921, cannot be received, not being evidence of fact, but of law.