RE: RUNDNAGEL DECEASED.

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6/2/59.

This was an applicat' for directions in relation to proceedings taken under the estator's Family Maintenance Ordinance 1952 as amended an. the substantial point argued by Counsel was whether any useful purpose could be achieved by giving directions which would involve substantial expense to both parties in view of the fact that the Defendant proposed to raise a preliminary objection to the effect that the Court could not hear the proceedings in view of the provisions of Section 8 of the Ordinance which provide in substance that the application should not be heard unless it is made within nine months after the date of the grant etc.

Mr. Cromie for the Respondent relied on the fact that the summons was dated the First day of September 1958 and that Probate was granted and issued on the 30th day of August 1957.

Mr. Kirke for the Applicant contended that the word "Application" used in the Ordinance does not mean the approach to the Court made by the parties and submitted that the filing of the summons would be the application envisaged by the Section.

It appears that on the 3rd April 1958 Mr. Kirke delivered to the Assistant Registrar a form of summons left blank together with the proper fee for issuing the summons and requested the Assistant Registrar not to issue the summons until the Affidavit in support of the application which Mr. Kirke proposed to have sworn in Australia and returned to Port Moresby for the purpose was ready for filing. Mr. Kirke apparently regarded his action as "filing" the summons and he thereafte' wrote a letter to the solicitor acting for the Respondent to the effect that the summons had been filed.

The letter was not produced on the hearing but it was clear that it was intended that it should serve as a notification to the Solicitor for the Respondent that the proceedings had been commenced and purported to be a compliance with the requirement that they be commenced within the time limited. It was not suggested that any answer to the letter was received which would have the effect of misleading Mr. Kirke or raising any estoppel against the Respondent and preclude him from relying on the point which is now raised.

I say nothing as to the merits of the point involved since applications of this kind frequently affect the interests

of infants and others to whom executors and trustees may owe a duty not to waive objections of this character.

During the course of argument it occurred to me that there were two grounds which might support an argument to overcome the situation in which Mr. Kirke now finds himself. The first was that since the Assistant Registrar accepted the document and retained it in the Court file and also accepted the fee for issuing the summons it might be said that Mr. Kirke had done all that he could do towards the process of having the summons issued and that thereafter the duty of sealing the document necessary to complete the process was one for the Registrar to perform and that therefore Mr. Kirke would not be responsible for any delay on the part of the Court staff in issuing the document. A somewhat similar ruling was given in relation to Company debentures by Mr. Justice Fullagar in Victoria in Re Nirens and Sons Pty. Ltd. 1947 V.L.R. p although rulings to the contrary effect have also been given in relation to the registration of motor cars. I do not need to pursue this possible line of argument any further however since it appears that the document in fact was not issued at Mr. Kirke's own request because he did not regard himself as being ready to issue it. On the 1st September 1958 when the affidavit was ready and the Assistant Registrar was notified to that effect the summons was promptly issued and thereafter was served on the Defendant.

The other point which occurred to me was that the application might be supported by reference to practice rules established in relation to applications for final judgment under the usual form of rules based on the English Rules of the Supreme Court Order XIV Rules 1 and 2. The basis of these rules is that at the appropriate time the Plaintiff may make application for final judgment within a limited time after appearance and that the application is made upon an affidavit complying with specific conditions. Rule 2 provides that the application shall be made by summons. It has long been settled that the apparent difficulty of complying with all the conditions prescribed is to be resolved by reading the rule in such a way that the application is not the summons itself nor the hearing conducted upon the return date of the summons (which depending on the state of the list may take place a long time after the time limited for the application) but is something which takes place when a completed set of affidavits necessary to support the application is lodged with the Judge's Associate or other officer who thereupon issues the summons referred to under Rule 2. According to the proper practice the summons itself recites that the application has been made for final judgment and should recite upon what affidavits it was based.

In the absence of any assistance from Counsel on this point I took time to consider the matter as the opportunity arose. In determining whether there is any analogy appropriate to the present case it must be borne in mind that for the purposes of the Testator's Family Maintenance Ordinance there are no special requirements as to the form of the affidavit in support nor do I see any provision requiring that the evidence upon which the applicant proposes to rely must be filed before any summons is issued. So far as I can see therefore there was no reason in fact why the summons should not have been issued straight away and the affidavit filed at a later date.

Looking at the provisions of the Testator's Family Maintenance Ordinance the requirement of Section 5 is that the application shall be made by summons in Chambers. This wording is for the present purposes identical with that of Order XIV Rule 2 to which I have previously referred. I do not think that the wording of the Section leads to the conclusion that the "application" is the same thing as the summons. Indeed I think that the more normal view is that the summons is no more than the vehicle by means of which the application is conveyed to the Court. According to usual practice it has the useful function of commencing the Court record and putting the applicant at risk as to costs. At a later stage and having used this vehicle to convey him to the Court the applicant will normally make an oral application and I think that the proper view is that as from the date of the issue of the summons the application contemplated by Section 5 is a continuing process which exists until it is brought to an end by the order of the Court.

Turning now to Section 8 the question is whether the word "application" in that section means precisely the same thing as the application referred to in Section 5. I think it is plain that for the purpose of Section 8 the application does not necessarily include the entire process right up to the date of the order since the verb used is "is made" and not "is commenced" which would be more usual phraseology. I think that it would be unreasonable to read Section 8 as meaning that the entire application must be completed right up to judgment within the time limit, since the parties cannot reasonably be made responsible for any delays which may arise from necessity or the business of the Court. The purpose of Section 8 is clearly to protect the estate and enable due distribution to be made by closing the door to any further application after a period of nine months. On its proper construction therefore I think that the application referred to in Section 8 means the -

commencing point of the application which according to normal proper practice would be marked by the issue of the summons.

The point remaining therefore is whether by analogy with the practice which has developed under the provisions of Order XIV it is possible for an "application" within the meaning of Section 8 to exist before the issue of the summons. That it could be so if the rules so provided or the appropriate practice were established is I think clear from the established practice under Order XIV and I think that it would be a fair interpretation of Mr. Kirke's actions at the time to understand them as meaning in effect that he was asking the Court to entertain an application under the Ordinance and that he was then tendering documents and the prescribed fees as an assurance that he proposed to use the appropriate vehicle to approach the Court as soon as the affidavit was ready. If there was any rule or practice which would authorize the Assistant Registrar to do what he did I think that it is clear that Mr. Kirke's action should be regarded as a preliminary application made orally in the first instance and sufficient to satisfy the provisions of Section 8. I have however taken some trouble to ascertain whether there is any justification for saying that such a practice exists and I am unable to find anything which would suggest such a conclusion.

From time to time in consequence of the movement of Judges in the Territory on circuit it has been something of a practice of convenience for practitioners to leave with the Registrar documents containing blanks (such as Notices of Motion) and for the Registrar to fill in the name of the Judge and the date upon which the application may be made when he has been able to satisfy himself that a Judge will be available to hear the application on that date. However undesirable such a practice may be, I think that if this had been the reason in the present case I ought to accept the practice but here the fact is that the applicant was not waiting upon the Court in any way but was mistakenly waiting upon the arrival of an affidavit and I think that this puts the matter in a different position. I think I must regard what happened as wholly unauthorized by any rule or known practice and therefore as not constituting in any sense an application to the Court. I reach this conclusion with some regret because I think it is clear that Mr. Kirke intended by the action taken to commence his application and that when he wrote the letter to the Respondent's solicitor he thought that he had done so. I think also it is to be regretted that the action of the Assistant Registrar, although not contributing to the error did nothing to put Mr. Kirke on his guard. I have given instructions that documents which do not comply with the rules

and established practice of the Court must not be accepted even for the purpose of leaving that document on the Court file. If such a practice became established it would mean that documents having no legal effect as proceedings so as to put the party concerned at risk as to costs or under the effective control of the Court might nevertheless operate as a kind of caveat which would lead to great embarrassment on the part of other proposed parties to the proceedings and cause a good deal of difficulty and confusion. Where a document requires a return date and a fixed date for the hearing cannot yet be ascertained the document should be issued and served or otherwise appropriately dealt with with the next convenient sittings of the Court indicated by reference to the first business day of the month of that sittings. An application to fix a specific day may be made at any time thereafter and if for any reason the case is not to be proceeded with on the commencing day of the sittings it can be adjourned to some other date or sittings or to a date to be fixed.

Although the provisions of the Testator's Family Maintenance Ordinance are substantially taken from the legislation introduced some years ago in New Zealand, Canada and the Australian States it has not been brought up to date by making provision for extension of time within which an application may be made in appropriate cases in which the estate might not be prejudiced and I propose to recommend that such a provision be inserted in the Territory Ordinance.

In the result I think that the only order that I can make is that the application which commenced when the summons was eventually issued on the 1st September 1958 be forever stayed since the Ordinance does not appear to contemplate that the application should be dismissed but rather intends that it should not be heard by the Court.