

REASONS FOR JUDGMENT.

Application for Probate was made by the Executrix. There being a doubt as to whether the Court would in the circumstances of this case grant Probate without the exercise of discretion in favour of the applicant, the Registrar referred the matter into Court.

I think that the Registrar undoubtedly took the right course. Although Section 10 of the Probate and Administration Ordinance 1951 states that if the Registrar is of the opinion that the Court would grant Probate he may do so, I think that the Section should only be taken to cover cases where it appears to the Registrar to be plain that the Court would issue a grant in all the circumstances. The opening words of the Section might be apt to cover cases of difficulty yet in all cases where the Registrar forms the necessary opinion the grant is to be made by him "as of course." I think that this implies that the Registrar should not make a grant "as of course" unless he thinks that the Court would do likewise.

In the present case the Applicant who is normally resident in New South Wales, has come to the Territory for the express purpose of winding up the estate. She proposes to stay here only for the time necessary to achieve this purpose. She has paid all the known debts and so far as can be ascertained nobody but herself has any interest in the estate.

The question is whether the Court will grant Probate to the Applicant unconditionally or whether in the present circumstances it would require that some person resident within the Territory and amenable to the jurisdiction of the Court should take out Letters of Administration on her behalf. It appears from the authorities cited in argument that the Court exercises a discretion either to grant or withhold a grant of probate to an executor who is resident abroad. At the same time there appears to be no obligation upon an executor to remain within the jurisdiction throughout the period of administration of the estate. There are provisions in the Ordinance designed to facilitate administration of estates on behalf of executors overseas and Section 23 is one such

provision, but the existence of such a provision does not throw any light on the right of an executor living abroad who prefers to obtain a grant in person.

Under Section 8 the Court has jurisdiction to grant probate of the will of any deceased person who leaves property within the Territory. It is usual or at least common practice for the Court of the domicile of the deceased to grant probate in the first instance and for the probate to be resealed wherever necessary to collect assets which may be situated abroad. However the Court of the domicile does not possess exclusive jurisdiction and the Court of any country within which property is at law deemed to be situated may make an original grant to a person deemed to be fit and proper to administer the estate. Prima facie the Court will accept an executor as a fit and proper person but it appears that the Courts have always exercised a discretion whether to grant or withhold probate in favour of an executor resident abroad.

So far as authorities throw light on the matter, I think that the correct view is that the granting or withholding of probate is always a matter of discretion in the last resort but that it is an almost unanimous rule that the Court will accept the appointment of an executor without further question. In cases where the executor resides abroad and the Court can exercise no real control over him, it is necessary to consider the interests of various other persons who may have a claim against the estate. For example local creditors have an obvious claim to the protection of the Court under whose control the assets are.

In the present case the executrix is in fact within the jurisdiction of the Court and subject to its control. Nevertheless her normal residence is abroad and she is normally outside the Court's effective control. I think that the question before me is not one of refinement such as would arise if I were giving effect to the precise wording of some statutory provision. I do not think that I have to determine whether the Applicant should be regarded as "normally" resident abroad or whether it is in fact sufficient if she is within the jurisdiction at the moment of making her application or at any other specific point of time. I think that the discretion of the Court is broader than that and must be exercised upon a full regard for all the circumstances of the case.

The applicant has very properly come to the

jurisdiction in person to see that the affairs of the estate are promptly wound up. There are no creditors and so far as appears at the moment nobody whose interests will be affected. Regarding her as a person who is temporarily and therefore somewhat imperfectly subject to the jurisdiction of the Court, I think that it is a matter of discretion for the Court to decide whether she ought to be allowed to prove or whether the circumstances require the appointment of an Administrator c.t.a. who could be compelled to give appropriate security for due compliance with the requirements of the Court. Upon that footing I think that the circumstances indicate that it is proper that the Court's discretion should be exercised in the Applicant's favour and that a grant should issue.

Accordingly I direct that a grant is to be made and issued as prayed subject to the formal requirements of the Registrar.

C.J.