PARTIES:	HARRY, Timothy Romilly (Re Pridmore, deceased)
TITLE OF COURT:	Supreme Court of the NT
JURISDICTION:	Probate
FILE NOS:	No. 37/84
DELIVERED:	Alice Springs 22 February 1996
HEARING DATES:	21 November 1995
JUDGMENT OF:	Angel J

CATCHWORDS:

Wills, Probate and Letters of Administration - Probate and Letters of Administration - Grant of Probate - Will executed out of the Territory - Only one attesting witness - Incapable of admission to probate in Territory - Incapable of admission to probate in State when made without Court dispensation - Whether will completed according to "the forms required" in State where made - Is according to "the forms required" if capable of admission to Probate in that State

Wills Act (NT) ss8, 13
Wills Act (SA) ss8, 12(2)

In the Will of Lambe [1972] 2 NSWLR 273, considered
Stokes v Stokes (1898) 78 LT 50, considered
Lyne v De La Ferte & Dunn (1910) 102 LT 143, considered

REPRESENTATION:

Counsel:

Applicant: J Stirk

Solicitors:

Applicant: McBride & Stirk

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 37 of 1984

IN THE MATTER of JOHN FRANCIS PRIDMORE late of Alcoota Station via Alice Springs in the Northern Territory of Australia Deceased

AND:

IN THE MATTER of the Administration and Probate Act

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 22 February 1996)

By application dated 21 November 1995, Timothy Romilly Harry of Port Hedland in Western Australia seeks a grant of Probate in solemn form of a copy of a certain paper writing dated 18 August 1983 of John Francis Pridmore deceased, late of Alcoota Station, via Alice Springs in the Northern Territory of Australia, who died at Adelaide in the State of South Australia on 5 December 1983.

It is unnecessary to relate the full history of this ill-starred matter, or of the delays, or of the unfortunate circumstances in which the original paper writing was lost. Suffice it to say, various people have had various difficulties with the matter, illness of the applicant at one stage supervened, and the matter has at last come before the court in the capable hands of Mr Stirk, solicitor and counsel for the applicant.

There is no need to give a detailed account of the facts.

The material facts of the matter can be summarily stated as follows:

1. The paper writing was executed by the deceased on 18 August 1983 in South Australia.
2. The paper writing was witnessed (in the sense of signed) by one and not two witnesses as prescribed by s8 of the Wills Act (NT) and s8 of the Wills Act (SA).
3. The deceased died in South Australia on 5 December 1983.
4. The deceased was domiciled and normally resident in the Northern Territory of Australia when the paper writing was executed.
5. The deceased was domiciled and normally resident in the Northern Territory of Australia when he died.
6. The deceased's estate is comprised of personalty only.

7. Upon the death of the deceased, the paper writing (via s12(2) Wills Act (SA)) might have been admitted to Probate in South Australia, ie it was in a form such that it was capable of admission to Probate in South Australia.

8. The paper writing, though not conforming to the requirements of s8 of the Wills Act (SA), was beyond a reasonable doubt intended to constitute the deceased's last will and testament such as to satisfy s12(2) of the Wills Act (SA); more particularly, I find as a fact that, assuming jurisdiction, were an application to be made pursuant to s12(2) of the Wills Act (SA), a South Australian court would deem the paper writing to be the will of the deceased and admit the paper writing to Probate as the last will of the deceased. The jurisdiction of the South Australian Court would depend on presence of property within the jurisdiction: s5 Administration and Probate Act (1919) SA.

9. There being no Northern Territory statutory equivalent of s12(2) of the Wills Act (SA) at the time the paper writing was executed, it did not conform to the requirements as to execution prescribed by s8 Wills Act (NT) and thus was incapable of admission to Probate in the Northern Territory (s13 Wills Act (NT) apart).

The application is made pursuant to s13 Wills Act (NT) which provides:

> "Every will made out of the Territory by a testator who died before the commencement of the Wills Amendment Act 1985 (whatever the domicile of the testator at the time of making the will or at the time of his death) shall, as regards his personal estate,be held to be well executed for the purpose of being admitted in the Territory to probate, if it is made according to the forms required either -
>
> (a) by the law of the place where it was made;
>
> (b) by the law of the place where the testator was domiciled when it was made; or
>
> (c) by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

The question is whether the paper writing executed in South Australia may be held to be well executed for the purpose of being admitted to Probate in the Northern Territory pursuant to s13 Wills Act (NT), ie, whether the paper writing was "made according to the forms required ... a) by the law of the place where it is made."

I am of the opinion there are a number of reasons why "the forms required" comprehended by s13 Wills Act (NT) are not confined to the formalities as to execution prescribed by s8 Wills Act (SA).

Section 13 Wills Act (NT) speaks of "made according to the forms required", it does not, for example, speak of

"executed according to the forms required". Significantly, s8 of the Wills Act (SA) is expressed to be "subject to this Act", which includes s12(2).

Such little authority as I have found supports the view that s13 Wills Act (NT) when it uses the words "if it is made according to the forms required ... by the law of the place where it was made" is speaking of a document in a form such that it is capable of admission to Probate in the place where it was made.

I think this conclusion is supported by the decision of Helsham J in *In the Will of Lambe* [1972] 2 NSWLR 273. In that case Helsham J refused to grant a reseal of Probate which had been granted in Victoria because to do so would permit the applicant to do indirectly that which it could not, by reason of the relevant New South Wales law, do directly. As appears from his judgment at p280, his decision would have been otherwise had New South Wales had a local equivalent of Lord Kingsdown's Act of which s13 Wills Act (NT) is the Northern Territory equivalent.

In *Stokes v Stokes* (1898) 78 LT 50 the testator, an English subject residing in the Congo Free State, made a will in holograph unattested form. In that State there was no law relating to wills requiring formalities in the execution of

wills. The evidence was that if the validity of the will had been argued in the Congo, Belgium Judges would have heard the case, but in the absence of specific laws relating to wills, they would have applied general principles of law and equity with special regard to the law of Belgium. Under Belgium law a will, entirely in the handwriting of a testator and signed by him, would be the sufficient mode of expressing and carrying out testatory intention.

The English court found the will had been properly executed under the law of the Congo and admitted it to probate. In the course of the judgment, President Sir F H Jeune dealt with an argument that Lord Kingsdown's Act could only apply where the law of a foreign country made specific and prescribed forms. It was held that such a construction contended for was too narrow and that it was sufficient if the will complied with all that was required by the law of the place where it was made.

In *Lyne v. De La Ferte and Dunn* (1910) 102 LT 143 a domiciled English woman residing in France drew up in her own handwriting and signed a document purporting to dispose of her personal estate. Owing to an inadvertent error it was incorrectly dated by her. Under the relevant French law a holograph will, in order that it may be valid had to bear the date on which it is made, and the date like the rest of the

document had to be in the testator's own handwriting. Also by the French law, a wrong date was regarded as no date and the holograph will, wrongly dated was prima facie invalid. But the invalidity could be rebutted by showing that the mistake was brought about by accident or inadvertence.

On the proved facts it was found that the document although incorrectly dated was otherwise a valid testamentary document according to French law, and the date having been inserted under circumstances that the French courts would grant relief, was entitled to be admitted to Probate in England under Lord Kingsdown's Act. It was further held that it was not necessary for the document to have been adjudicated upon in the French courts but that it was sufficient to prove how the French courts would have dealt with it. The President, Sir J.C. Bigham said:

> "Looking at the terms of this instrument, I have no doubt that it is testamentary. It directs how the testatrix's property is to be disposed of, and it is to take affect at her death. Then is it made according to the forms required by French Law? I think it is, for I am satisfied that the French tribunals could and would so hold notwithstanding the mistake in the date."

The test was, whether the courts of the place where the will was made would have regarded the will as being valid in form. The precise language of the French legislation does not appear in the Report. It appears the French courts had a discretion much as the South Australian courts have a

discretion under s.12(2) of the Wills Act (SA), to preserve a will in certain circumstances notwithstanding an informality which prima facie makes it invalid.

I am of the view that if a document is in a form such that it is capable of admission to Probate in the place where it was made, it may be admitted to Probate in the Northern Territory of Australia pursuant to s13 Wills Act (NT).

The paper writing in question is in the handwriting of the deceased and purports, on its face, to be his last will and testament. It is testamentary. It directs how the deceased's property is to be disposed of, and it purports to take effect upon the death of the deceased. The applicant is the named executor. The paper writing is a will in every sense, save it does not bear the signature of the second witness who was present when the deceased executed it. The second witness did not sign the document because she thought the sole signature of a Justice of the Peace was sufficient.

There will be a grant of Probate in solemn form as sought. There will be an order dispensing with production of the original paper writings. I direct the solicitors for the applicant to bring in Minutes of Order. Costs of and incidental to the application are to be taxed as between

solicitor and client and paid out of the estate of the deceased.
