H. C. OF A. 1918.

SEYMOUR BROS. v. DEPUTY FEDERAL COMMISSIONER OF LAND TAX (S.A.)

of the land with one deduction only of £5,000. Costs to be costs in the appeal.

Order accordingly.

Solicitors for the appellant, *Davison & Daniel*, Mount Gambier, by *Rupert Pelly*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

DRUMMOND . . . . . APPELLANT;

AND

THE REGISTRAR OF PROBATES (SOUTH AUSTRALIA) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1918.

ADELAIDE, *Oct.* 1.

Barton, Isaacs and Gavan Duffy JJ.

Administration and Probate—Resealing foreign probate—Person entitled to apply—Executor of deceased executor—Administration and Probate Act 1891 (*S.A.*) (*No.* 537), *sec.* 26 (1)—*Additional Rules under the Administration and Probate Act* 1891 (*S.A.*), *rule* 94.

Sec. 26 (1) of the *Administration and Probate Act* 1891 (S.A.) provides that "When any probate . . . granted by any Court of competent jurisdiction . . . in the United Kingdom . . . shall be produced to and a copy thereof deposited with the Registrar, such probate . . . shall be sealed with the seal of the Supreme Court of South Australia, and shall have the like force and effect and the same operation in South Australia, and every executor . . . thereunder shall have the same rights and powers, perform the same duties, and be subject to the same liabilities, as if such probate . . . had been originally granted by the Supreme Court of South Australia."

Rule 94 of the *Additional Rules under the Administration and Probate Act* 1891 provides that "Application for the sealing of any probate . . . under sec. 26 of the Act may be made by the executor . . . or the attorney (lawfully authorized for the purpose) of such executor . . . either in person or through a solicitor."

Probate of the will of A, who had real estate in South Australia, was granted by the High Court of Justice of England to his executor, B. B having died, probate of his will was granted by the same Court to his executor, C, and was sealed with the seal of the Supreme Court of South Australia.

Held, that C was entitled as of right under sec. 26 (1) to have the probate of the will of A sealed with the seal of the Supreme Court of South Australia.

In the Goods of Gaynor, L.R. 1 P. & M., 723, distinguished.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

On 25th June 1913 probate of the will of the Right Honourable George Wyndham, who owned certain real property in South Australia, was by the Principal Probate Registry of the High Court of Justice of England granted to Percy Lyulph Wyndham, his son and the sole executor appointed by the will. On 15th September 1914 Percy Lyulph Wyndham died, and on 20th November 1914 probate of his will was granted by the Principal Probate Registry of the same Court to George Henry Drummond, one of the executors named in the will, power being reserved to the other executor. On 10th December 1917 the probate of the will of Percy Lyulph Wyndham was sealed with the seal of the Supreme Court of South Australia. On 26th March 1918 application was made on motion to that Supreme Court on behalf of John Whinham Packard, the attorney of George Henry Drummond, for an order that an exemplification of the probate of the will of George Wyndham should be sealed with the seal of the Supreme Court. The application was heard by the Full Court, which by a majority (*Murray* C.J. and *Buchanan* J., *Gordon* J. dissenting) dismissed it.

From that decision the applicant now appealed to the High Court.

Sir Josiah Symon K.C. (with him *Browne*), for the appellant. The appellant was entitled under sec. 26 (1) of the *Administration and Probate Act* 1891 (S.A.) to have the probate of George Wyndham's will resealed. The appellant being the executor of Percy Lyulph

H. C. OF A. 1918.

DRUMMOND v. REGISTRAR OF PROBATES (S.A.)

Wyndham, probate of whose will had been resealed in South Australia, became the executor of George Wyndham within the meaning of sec. 26 (1). The case of *In the Goods of Gaynor* (1) has no application here. In that case the application was for a grant of administration, and the decision has nothing to do with the question of resealing an English probate, which is a purely ministerial act. The appellant is applying to do what the executor of the deceased executor of the testator had failed to do in that case. The objection that the only person who can apply for the resealing is a person who is recognized in South Australia as executor would equally apply to an application by the original executor.

Poole, for the respondent, the Registrar of Probates. The word "shall" in the expression "shall be sealed" is not mandatory, and the Court is not bound to order the resealing without any inquiry as to the title of the applicant (*In re Buckley* (2)).

[*Sir Josiah Symon* K.C. The contrary has been held in *In re Rankine* (3) and *In re Thornley* (4).]

[ISAACS J. By sec. 34 of the *Acts Interpretation Act* 1915 "shall" is mandatory.]

The statement in *Tristram & Coote's Probate Practice*, 15th ed., p. 68, to the effect that an executor of a deceased executor is the executor of the original testator is followed by the condition that the will of each testator shall have been duly proved in the same Court. The chain of executorship was broken when Percy Lyulph Wyndham failed to have probate of his father's will resealed here. To hold that the applicant is entitled to have probate of George Wyndham's will resealed would be contrary to the provision in sec. 54 that where an executor has died without taking out probate his right in respect of the executorship wholly ceases. In rule 94 of the *Additional Rules under the Administration and Probate Act* 1891 the word "executor" means the person who in South Australia is executor.

[ISAACS J. referred to *Meyappa Chetty* v. *Supramanian Chetty* (5).]

(1) L.R. 1 P. & M., 723.
(2) 15 V.L.R., 820; 11 A.L.T., 100.
(3) 34 T.L.R., 294.
(4) 4 S.R. (N.S.W.), 246.
(5) (1916) 1 A.C., 603, at p. 608.

BARTON J. There are certain things in this case that seem to be clear. In the first place, the rule laid down in *Tristram & Coote*, 15th ed., p. 68, is clear, namely, that "an executor having taken probate of his own testator's will becomes executor, *ipso facto*, not only of that will, but also of the will of any testator of whom the other was the sole or surviving executor." Next, I think it is clear that this case comes within that rule. I also think it is clear that there is no break in the chain. Finally, I think it is quite clear that the judgment of *Gordon* J., terse as it is, is correct, and for the reasons which he has given, and which I entirely endorse, I think that the appeal should be allowed, and that the Registrar should be directed to seal the probate.

ISAACS J. I agree that the appeal should be allowed. The difference between this case and the case of *In the Goods of Gaynor* (1) is that here the applicant is endeavouring to do that which the applicant in that case had failed to do. I also think that the word "shall," in its own inherent application in sec. 26 (1) of the *Administration and Probate Act* 1891 and upon the provisions of sec. 34 of the *Acts Interpretation Act* 1915, is mandatory.

GAVAN DUFFY J. I agree that the appeal should be allowed. I do not think it necessary to add anything to the reasons given by *Gordon* J.

Appeal allowed. Order appealed from discharged and Registrar of Probates directed to reseal the probate.

Solicitors for the appellant, *Symon, Browne, Symon & Povey.*

Solicitor for the respondent, *F. W. Richards*, Crown Solicitor for South Australia.

B. L.

(1) L.R. 1 P. & M., 723.