[HIGH COURT OF AUSTRALIA.]

HOLMES AND ANOTHER . . . . APPLICANTS;

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED AND OTHERS } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1931-1932.

SYDNEY, *Dec.* 17, 1931; *Feb.* 16, 1932.

Rich, Evatt and McTiernan JJ.

*Will—Probate granted in New South Wales—Resealing in North Australia—As effective as if original grant—Testator's Family Maintenance Ordinance* 1929 (*N.T.*) (*No.* 21 *of* 1929), *secs.* 4*, 5*—*Northern Territory Acceptance Act* 1910-1919 (*No.* 20 *of* 1910—*No.* 24 *of* 1919), *sec.* 7—*Northern Australia Act* 1926 (*No.* 16 *of* 1926), *sec.* 38—*Administration and Probate Act* 1891 (*S.A.*) (*No.* 537), *secs.* 26, 29.

On 23rd August 1929 probate of a testator's will was granted by the Supreme Court of New South Wales, and an exemplification of such probate was resealed in North Australia on 10th June 1930. An application which was made on 18th November 1930, and at a later date renewed pursuant to leave reserved, under the *Testator's Family Maintenance Ordinance* 1929 (N.T.) by the testator's widow and child was dismissed by the Supreme Court of North Australia for want of jurisdiction. On appeal to the High Court,

*Held*, that by virtue of sec. 26 of the *Administration and Probate Act* 1891 (S.A.), which continued to be in force in North Australia, the resealing of the

* The *Testator's Family Maintenance Ordinance* 1929 (N.T.) provides:—"4. (1) If any person (in this ordinance called 'the testator') disposes of or has disposed of his property by will in such a manner that the wife . . . or children of the testator, or any of them, are left without proper maintenance, education or advancement in life, the Court may, at its discretion, on application by or on behalf of the wife . . . or children, or any of them, order that such provision as the Court thinks fit shall be made out of the estate of the testator for the maintenance, education and advancement of the wife . . . or children, or any of them. . . . 5. An application for an order shall not be heard by the Court, unless the application is made within six months after the date of the grant by the Supreme Court of North Australia of probate of the will" &c.

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probate was as effective for the purposes of the *Testator's Family Maintenance Ordinance* 1929 as if it were an original grant, and the Supreme Court accordingly had jurisdiction to entertain the application.

APPLICATION for leave to appeal and appeal from the Supreme Court of the Northern Territory.

In the matter of the will of Ernest Felix Holmes, late of Port Darwin, Northern Territory, deceased, his widow, Cleopatra Holmes of New South Wales, and his infant daughter, Lilian Cleo Holmes (by her next friend, the said Cleopatra Holmes) applied, by originating summons, to the Supreme Court of North Australia for an order that such provision as the Court thought fit should be made out of the estate of the testator for the maintenance, education and/or advancement of the applicants. The respondents to the originating summons were the Permanent Trustee Co. of New South Wales Ltd. and Sydney Seller Godfrey as executors of the will of the testator, Godfrey in his capacity as a beneficiary, and other persons as beneficiaries. Probate of the will of the testator was granted in New South Wales to the executors above mentioned and an exemplification of the probate was resealed in North Australia. Certain terms of settlement were agreed upon by all parties to the summons, but the Supreme Court dismissed the application on the ground that the *Testator's Family Maintenance Ordinance* 1929 (N.T.), under which the application was made, was limited to cases in which probate or letters of administration with the will annexed had been granted by the Supreme Court of North Australia and the resealing was not equivalent to a grant.

The applicants now applied to the High Court for leave to appeal from such dismissal.

Further material facts are sufficiently stated in the judgment of *Rich* J. hereunder.

*Jordan* K.C. (with him *Wickham*), for the applicants. An appeal will lie to this Court from the Supreme Court of the Northern Territory in a matter of this nature (*Buchanan* v. *The Commonwealth* (1) ). The matter is one of urgency because at present the executors

(1) (1913) 16 C.L.R. 315.

are unable to make any provision for the testator's widow and child. All parties are willing that this application be granted and the appeal proceeded with.

*Godsall* and *Sheldon*, for the respondent the Permanent Trustee Co. of New South Wales Ltd.

*J. A. Ferguson* and *Dignam*, for the other respondents.

RICH J. We grant leave to appeal, and the appeal may be proceeded with now.

*Jordan* K.C. (with him *Wickham*), for the appellants. The *Administration and Probate Act* 1891 (S.A.) is in force in the Northern Territory. By virtue of secs. 26 and 29 of that Act the resealing in the Northern Territory of the probate granted in New South Wales operates as an original grant of probate as from the date of such reseal. There is no reason for giving a restricted meaning to sec. 26. Nothing in sec. 5 of the ordinance makes it necessary to hold that sec. 26 cannot be applied to it. The purpose of sec. 5 is to ensure that time shall not run against an applicant until someone has, in the relevant jurisdiction, been vested with authority to represent the estate: the period of six months is fixed as being the time within which it is reasonable for any such application to be made. The ordinance is obviously a remedial ordinance, and it contains nothing which suggests that sec. 26 of the *Administration and Probate Act* cannot be applied to a particular case because such application would frustrate some intention existing in the ordinance itself.

*Godsall* and *Sheldon*, for the respondent the Permanent Trustee Co. of New South Wales Ltd.

*J. A. Ferguson* and *Dignam*, for the other respondents.

RICH J. We are all of opinion that the learned Judge had jurisdiction, and we therefore set aside the order made by him. Our reasons for so doing will be put in writing and delivered at some future date.

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Feb. 16, 1932.

The following written judgments were delivered :—

RICH J. This is an appeal by leave from an order of the Supreme Court of the Northern Territory of Australia (*Porter* v. *The King*; *Ex parte Yee* (1); *Wall* v. *The King*; *Ex parte King Won and Wah On* [*No.* 1] (2)). The order, which was made on 7th November 1931, dismissed an application made under the *Testator's Family Maintenance Ordinance* 1929 (N.T.). The application was made by the testator's widow and infant daughter under the *Supreme Court Ordinance* 1911 (No. 9 of 1911) (N.T.). Under that ordinance a Supreme Court of the Northern Territory was established which should have in the Northern Territory all the jurisdiction and powers of the Supreme Court of the State of South Australia immediately prior to the acceptance by the Commonwealth of the Northern Territory. The testator made his will dated 4th August 1928 whereby he appointed the respondents the Permanent Trustee Company of New South Wales and Sydney Seller Godfrey, executors. The testator died on 1st August 1929 without having revoked or altered his will. He was domiciled in Darwin in the Northern Territory and the bulk of his property is situated there. On 23rd August 1929 probate of his will was granted to the executors by the Supreme Court of New South Wales. On 10th December 1929 and 10th June 1930 exemplifications of such probate were respectively resealed in the State of Victoria and in the Northern Territory (then called North Australia). On 18th November 1930 the application to which I have referred was made to the Supreme Court of North Australia (now again the Supreme Court of the Northern Territory of Australia) (see No. 7 of 1931, sec. 5). On 29th November 1930 the application was dismissed, but liberty was reserved to apply again at any time before 1st August 1931. On 22nd July 1931 the application was renewed pursuant to leave reserved. On 7th November 1931 the Court, considering that it had no jurisdiction, dismissed the application without considering the merits. The reason given by the learned Judge was that although the application had been made within six months after resealing, resealing was not equivalent to a grant of probate and a grant of probate or letters of administration was indispensable. The Northern Territory was annexed to the Province

(1) (1926) 37 C.L.R. 432.

(2) (1927) 39 C.L.R. 245.

of South Australia by letters patent dated 6th July 1863 issued under 24 & 25 Vict. c. 44. Pursuant to sec. 122 of the Constitution, South Australia surrendered the Northern Territory to the Commonwealth, and by the *Northern Territory Acceptance Act* 1910, which provided for the surrender and acceptance, it is enacted that " all laws in force in the Northern Territory at the time of the acceptance shall continue in force, but may be altered or repealed by or under any law of the Commonwealth." By the *Northern Territory (Administration) Act* 1910, sec. 5, it is provided that where any law of the State of South Australia continues in force in the Territory by virtue of sec. 7 of the *Northern Territory Acceptance Act* 1910, it shall, subject to any ordinance made by the Governor-General, have effect in the Territory as if it were a law of the Territory. Sec. 13 of the same Act empowered the Governor-General to make ordinances having the force of law in the Territory. This section was superseded by a similar provision in sec. 59 of No. 16 of 1926. By the *Testator's Family Maintenance Ordinance* (No. 21 of 1929) it is provided as follows :—" 4. (1) If any person (in this ordinance called ' the testator ') disposes of or has disposed of his property by will in such a manner that the wife, husband or children of the testator, or any of them, are left without proper maintenance, education or advancement in life, the Court may, at its discretion, on application by or on behalf of the wife, husband or children, or any of them, order that such provision as the Court thinks fit shall be made out of the estate of the testator for the maintenance, education and advancement of the wife, husband or children, or any of them. (2) The applicant shall serve on the executor or on such other persons as the Court directs, notice of the application referred to in the last preceding sub-section. (3) The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person on the ground that his character or conduct is such as, in the opinion of the Court, disentitles him to the benefit of an order, or on any other ground which the Court thinks sufficient. (4) In making the order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or periodic or other payments. 5. An application for an order shall not be heard by the Court, unless the application is made within six months after the date of

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the grant by the Supreme Court of North Australia of probate of the will, or letters of administration with the will annexed of the estate, of the testator: Provided that, in any case where the testator has died after the thirty-first day of December one thousand nine hundred and twenty-four and before the date of the commencement of this ordinance, an application for an order may be heard by the Court if the application is made within six months after the date of the commencement of this ordinance or within six months after the date of the grant by the Supreme Court of North Australia of the probate or letters of administration, whichever is the later date."

As the Supreme Court of the Northern Territory has all the jurisdiction and powers of the Supreme Court of South Australia prior to the acceptance of the Territory, it is necessary to examine the law in South Australia as to the effect of resealing probate. By sec. 26 of the *Administration and Probate Act* 1891 (S.A.) (see *Buchanan* v. *The Commonwealth* (1) ) it is provided that "When any probate or administration granted by any Court of competent jurisdiction in any of the other Australasian Colonies, or in the United Kingdom, or any probate or administration granted by a foreign Court, shall be produced to and a copy thereof deposited with the Registrar, such probate or administration 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 and administrator thereunder shall have the same rights and powers, perform the same duties, and be subject to the same liabilities, as if such probate or administration had been originally granted by the Supreme Court of South Australia." Probate includes exemplification of probate (sec. 29).

Now, the New South Wales probate having been sealed by the Supreme Court of the Northern Territory, the New South Wales probate had thereupon the like force and effect and the same operation in the Northern Territory as if it had been originally granted by the Supreme Court of South Australia. The words are plain enough. The resealing operates as an original grant when it takes place. There is no reason for giving a restricted meaning to sec. 26. The resealing

(1) (1913) 16 C.L.R. 315.

has the same operation as a grant for all purposes, as much for the purposes of sec. 5 of the *Testator's Family Maintenance Ordinance* 1929 as for any other purpose. Sec. 5 contains nothing which makes it necessary to hold that sec. 26 cannot be applied to it. Sec. 5 does not create substantive rights. It is merely a machinery section. It insures, on the one hand, that time shall not run against an application until there is some one who can represent the estate in the Northern Territory, and, on the other hand, that any application shall be made within a reasonable time after a representation is constituted (fixed at six months). This is secured just as much by resealing as by an actual grant. There is no difference between actual probate and constructive probate material for the purposes of the *Testator's Family Maintenance Ordinance*. It cannot be suggested that any purpose of that ordinance would be frustrated unless, notwithstanding sec. 26, constructive probate is excluded and the operation of sec. 26 restricted. There is no reason for restricting the section, and it clearly applies to sec. 5 of the ordinance. This kind of legislation is not novel. It prevails within the Commonwealth and in New Zealand. In the days of Henry II. the power of disposing did not extend to all a man's property. That is the general law of Scotland at the present day. Similar provisions exist in Latin countries, analogous, I suppose, to the Roman law of *quarta legitima*. The ordinance brings the Territory into line with the States of the Commonwealth, and is remedial in its character and "must be so construed as to give the most complete remedy which the phraseology will permit" (*Gover's Case* (1); *Bull* v. *Attorney-General for New South Wales* (2)). "Nor ought a Court of law to be alert in placing a restricted construction upon the language of a remedial Act" (*Samuel* v. *Newbold* (3); *Wilson* v. *Moss* (4)).

For these reasons I am of opinion the learned Judge was wrong in declining jurisdiction. It becomes unnecessary to consider whether Ordinance No. 4 of 1931 applies to or affects the present application.

(1) (1875) 1 Ch. D. 182, at p. 198.
(2) (1913) 17 C.L.R. 370, at p. 384.
(3) (1906) A.C. 461, at p. 467.
(4) (1909) 8 C.L.R. 146, at p. 165.

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EVATT J. I agree with my brother *Rich* that the appeal should be allowed.

McTIERNAN J. The appeal should be allowed. I agree with the judgment of my brother *Rich*.

*Appeal allowed. Order of Supreme Court set aside. Matter remitted to be dealt with according to law. Costs of all parties out of the estate, those of the personal representatives and of the widow as between solicitor and client.*

Solicitor for the applicants, *J. S. Harris*, Darwin, by *A. C. Boyle & Co.*

Solicitors for the respondent the Permanent Trustee Co. of New South Wales Ltd., *Minter, Simpson & Co.*

Solicitors for the other respondents, *S. H. Henderson* and *Vindin & Littlejohn*.

J. B.