[HIGH COURT OF AUSTRALIA.]

CONNOLLY AND OTHERS . . . . APPELLANTS;

AND

MACARTNEY AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *October* 9.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Practice—Joinder of parties—Administration action—Trustee sued as representative—Refusal of trustee to appeal—Joinder of cestuis que trustent—Rules of the Supreme Court of Victoria 1906, *Order XVI., r.* 8.

Where a trustee is sued as a representative of his *cestuis que trustent*, and a judgment adverse to them is given from which the trustee refuses to appeal, the *cestuis que trustent* before the judgment is drawn up are entited *ex debito justitiæ* to be added as parties so that they may appeal.

Judgment of *Hood* J. reversed.

APPEAL from order of *Hood* J. in the Supreme Court of Victoria.

An administration suit was begun in the Supreme Court of Victoria in 1880, in reference to the will of William Kesterson deceased, and a decree was made therein. Subsequently, in August 1908, the trustees of the will of the testator applied by motion for directions as to the proper application of a certain share of the income of the estate, which, up to April 1908, had been paid to Ellen Braithwaite, a daughter of the testator, who died in that month, having made a will by which she appointed Robert Beckett her executor. The question raised by the motion was whether the share of income referred to was payable to the beneficiaries under the will of Mrs. Braithwaite or to the sisters

of Mrs. Braithwaite. Beckett was made a party to the suit as representing the beneficiaries under the will of Mrs. Braithwaite. The motion was referred to the Full Court and their judgment was adverse to the beneficiaries under the will of Mrs. Braithwaite: *Macartney* v. *Macartney* (1).

Those beneficiaries thereupon requested Beckett to appeal to the High Court, but he refused to do so. They then applied to *Hood* J. to be added as parties to the action in order that they themselves might appeal. The judgment of the Full Court on the motion had not at that time been drawn up. *Hood* J. refused the application on the grounds that it would be unfair to the other parties to practically substitute the beneficiaries for Beckett, and also that the Court had no jurisdiction to make such an order after the judgment had been delivered.

The beneficiaries now by special leave appealed to the High Court from the order of *Hood* J

Cohen, for the appellants. The order of the Full Court is not yet drawn up, and the appellants should have been added as parties under Order XVI., r. 8, of the *Rules of the Supreme Court* 1906.

[He was stopped.]

Hayes, for the respondent Jane Macartney. The appellants no doubt are entitled to be heard. They can by leave of the Court use the name of Beckett for the purpose of appealing on giving him an indemnity.

Davis, for other respondents. The judgment of the Full Court was final and conclusive as far as the appellants are concerned, and the Court had no jurisdiction to add them as parties after that judgment. Even when the judgment is not drawn up the Court will not re-open the matter except for the purpose of correcting errors. The jurisdiction will be limited by the universal practice, which is not to add parties for any purpose like this after a final decision.

[ISAACS J. referred to *Keith* v. *Butcher* (2).]

(1) (1908) V.L.R., 649; 30 A.L.T., 77. (2) 25 Ch. D., 750.

H. C. OF A. 1908.

CONNOLLY v. MACARTNEY.

[He referred to *Attorney-General* v. *Birmingham* (*Corporation of*) (1); *Durham Brothers* v. *Robertson* (2); *Hurst* v. *Hurst* (3); *Heard* v. *Borgwardt* (4); *The Duke of Buccleugh* (5).]

Weigall K.C., for the respondents trustees of the will of Kesterson.

The judgment of the Court was delivered by

GRIFFITH C.J. Rule 8 of Order XVI. of the *Rules of the Supreme Court* 1906 provides that:—"Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties." That rule does not affect the substantive rights of parties interested, but is merely a rule for convenience of procedure. The present appellants were the beneficiaries under a will, the executor of the will having been made party to a pending suit to represent their interest.

A judgment adverse to the appellants having been given by the Supreme Court, they desired to appeal to this Court. The executor, who nominally represented them, refused to appeal. Then they applied to the Supreme Court to be made parties to the action in order to give them a *locus standi* to come to this Court. *Hood* J. dismissed the application with costs.

It appears to us that they were entitled to the order *ex debito justitiæ*. They are the parties interested, and they are entitled to have recourse to this Court, and, if any technical difficulty was in the way of their assertion of that right, it was the duty of the Supreme Court to remove it. The only possible difficulty was that the judgment of the Court had been pronounced. I doubt whether that is sufficient in the abstract, even when the order is a final order, *a fortiori* when the proceeding is merely incidental

(1) 15 Ch. D., 423.
(2) (1898) 1 Q.B., 765, at p. 774.
(3) 21 Ch. D., 278, at p. 289.
(4) W.N. (1883), 173.
(5) (1892) P. 201.

to administration. But in the present case neither of those things comes in the way, for the order had not been drawn up, and until an order is drawn up the Court can correct it. So that the Supreme Court had jurisdiction at the date of the application to make the appellants parties to the action, and we think they were entitled *ex debito justitiæ* to be made parties.

The appeal will therefore be allowed and the order of the Supreme Court will be discharged. By consent the costs of all parties will be paid out of the general corpus of the estate, including the costs of the application to *Hood* J.

Appeal allowed. Order appealed from discharged.

Solicitors, for appellants: *Abbott & Beckett.*

Solicitors, for respondents: *N. J. Casey*; *W. H. Lewis*; *J. B. Kiddle.*

B. L.

Disod Goldman v Hargrave (1966) 115 CLR 458

[HIGH COURT OF AUSTRALIA.]

SPARKE . . . . . APPELLANT;
DEFENDANT,

AND

OSBORNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *July* 27, 28, 31.

Adjoining landowners, liability of—Failure to keep down noxious weed—Prickly pear growing naturally on land—Injury to neighbour's fence—Nuisance.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

An occupier of land is under no duty at common law to keep down a noxious weed, such as prickly pear, growing naturally on his land so as to