

[HIGH COURT OF AUSTRALIA.]

WATKINS AND ANOTHER APPELLANTS ;
 DEFENDANTS,

AND

COMBES AND ANOTHER RESPONDENTS.
 PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
 TASMANIA.

Practice—Supreme Court of Tasmania—Will—Probate not granted—Suit against executor—Transfer of land and appointment of executor obtained by fraud—Equitable jurisdiction. H. C. OF A. 1921.

A suit will not lie in the Supreme Court of Tasmania in its equitable jurisdiction by a beneficiary under a will of which probate has not been granted against the person named therein as executor, for a declaration that a transfer of land by the testator to such person, or the appointment of such person as executor, has been procured by his fraud.

MELBOURNE,
 May 30, 31.

KNOX C.J.,
 Higgins and
 Rich JJ.

Decision of the Supreme Court of Tasmania (*Crisp J.*), reversed.

APPEAL from the Supreme Court of Tasmania.

Laura Josephine Reynolds, who died on 12th November 1919, had made two wills. By the first, dated 21st November 1917, she appointed David Saunders and Percy Rutherford Henry her executors and trustees, and devised and bequeathed to them all her real and personal estate on trust to divide the proceeds of the realization and sale thereof into two equal parts, and to hold one of such parts upon trust for her nephew Algernon James Combes for life and after his death for his two children in equal shares ; and to pay the other of such parts to Arundel Sims. By the second will, dated 14th November 1918, she appointed Daniel Watkins

H. C. OF A.
1921.

WATKINS
v.
COMBES.

her executor and trustee, and devised and bequeathed to him all her real and personal property upon trust to pay to Algernon James Combes two-thirds of the proceeds of realization and sale thereof and to pay the remaining one-third to Arundel Sims. At the time the wills were made Mrs. Reynolds was the registered proprietor of a certain piece of land, and on 14th July 1919 she transferred that land, subject to mortgages amounting to £370, to Daniel Watkins and his wife, Ellen Margaret Watkins, the consideration for the transfer being an agreement by Watkins and his wife to maintain Mrs. Reynolds for the remainder of her life. A certificate of title was subsequently issued upon such transfer. At the date of the death of Mrs. Reynolds the land above referred to was valued at about £1,850 and the rest of her property at about £30. After the death of Mrs. Reynolds Daniel Watkins applied to the Supreme Court of Tasmania for probate of the will of 14th November 1918, and a caveat was entered by David Saunders and Percy Rutherford Henry against such probate being granted. A caveat was also entered against any dealings with the land by David Watkins and his wife.

A suit in equity was then brought by Algernon James Combes and Arundel Sims against Daniel Watkins and his wife and David Saunders and Percy Rutherford Henry in which the plaintiffs, by their bill of complaint, claimed (*inter alia*) a declaration that the transfer by Mrs. Reynolds to Daniel Watkins and his wife of the piece of land was obtained by their fraud and undue influence and was void; a declaration that the appointment of Daniel Watkins as executor and trustee of the will of 14th November 1918 was procured by the fraud, undue influence and constraint of Daniel Watkins and his wife and was void; an injunction restraining Daniel Watkins and his wife from receiving, getting in or dealing with the estate of Mrs. Reynolds; and an order appointing a receiver of the estate of Mrs. Reynolds pending a grant of administration. One of the defences was that the Supreme Court in its equity jurisdiction had no jurisdiction to entertain the claim.

The suit was heard by *Crisp J.*, who made a decree in which (*inter alia*) he made the declarations, granted an injunction and appointed a receiver as prayed, and reserved liberty to the plaintiffs

to file a supplemental bill for the removal of Daniel Watkins from the office of executor and trustee. H. C. OF A. 1921.

From that decision Daniel Watkins and his wife now appealed to the High Court. *WATKINS v. COMBES.*

Gregory (*Hoggins* with him), for the appellants. Probate of the will of Mrs. Reynolds not having been granted, the plaintiffs have no cause of action with regard either to the transfer of the land or to the appointment of the executor of the will. They have no interest which entitles them to equitable relief, and so there was no jurisdiction to declare that either the transfer or the appointment of the executor of the will was procured by fraud and was void.

[HIGGINS J. referred to *Williams on Executors*, 9th ed., p. 236.

[RICH J. referred to *Davis v. Chanter* (1); *Daniel's Chancery Practice*, 8th ed., vol. I., p. 349.]

L. L. Dobson for the respondents. The plaintiffs have an interest which entitled them to seek the protection of the Court. A Court of equity will entertain an action by a beneficiary to recover a legacy under a will which has not been proved against an executor who is concealing the will (*Tucker v. Phipps* (2)), and on the same principle it will entertain an action in the circumstances of this case. On the face of the pleadings as between the plaintiffs and the defendants Daniel Watkins and his wife, the plaintiffs are entitled to the land subject only to proof of their title, and they are merely prevented from proving their title until probate is granted.

[RICH J. referred to *In the Goods of Bootle* (3).]

The defendant Daniel Watkins is propounding a will under which the plaintiffs are the sole beneficiaries, and it does not lie in his mouth to say that the plaintiffs are not entitled to sue. The Court may order the appeal to stand over until probate has been granted (*Pinney v. Hunt* (4)).

[RICH J. referred to *Priestman v. Thomas* (5).]

KNOX C.J. We are all of opinion that there is a fatal defect as to parties.

(1) 2 Phil., 545.

(2) 3 Atk., 358.

(3) L.R. 3 P. & M., 177.

(4) 6 Ch. D., 98.

(5) 9 P.D., 70; 210.

H. C. OF A.
1921.

WATKINS
v.
COMBES.

The following consent order was subsequently made :—

The appellants by their counsel undertake not to deal with the land in question or to register or procure to be registered any document in existence relating thereto for one month after the granting of probate to enable the plaintiffs to take proceedings, and to consent to the extension of the caveat for that time, the intention being that the status quo as to the land shall be preserved for that time. The appellants undertake also to speed the application for probate on the plaintiffs' undertaking to procure the withdrawal of the caveat against probate and to pay the taxed costs of an unopposed application for probate as from this date. The plaintiffs undertake to indemnify Daniel Watkins against payment of any probate duty, but if the transfer to Daniel Watkins and his wife ultimately takes effect any duty payable in respect of the land transferred is not covered by this indemnity. On these undertakings appeal allowed, suit dismissed, parties to pay their own costs in the High Court and the Supreme Court.

Solicitors for the appellants, *Hollow & Haughton* for C. D. Hoggins, Hobart.

Solicitors for the respondents, *Dobson, Mitchell & Allport*, Hobart.

B. L.