H. C. OF A. 1911.

SMITH v. MILLARS' KARRI AND JARRAH CO. (1902) LTD.

O'CONNOR J. I agree in thinking that the reasoning of *McMillan* J. is conclusive.

Appeal allowed. Order appealed from discharged. Appeal from McMillan J. dismissed with costs, and his judgment restored. Respondent to pay the costs of this appeal.

Solicitors, for the appellant, *Lawson & Jardine* for *James & Darbyshire*, Perth.

Solicitors, for the respondents, *Blake & Riggall* for *Stone & Burt*, Perth.

B. L.

[HIGH COURT OF AUSTRALIA.]

GREENWAY . . . . . APPELLANT;

AND

McKAY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *June* 7, 8, 9.

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

Administration ad litem—Necessity for notice of application—Reasons for granting—Poverty—Action for death caused by negligence—Administration and Probate Act 1890 (*Vict.*), (*No.* 1060), *secs.* 14, 110—*Probate and Administration Rules* 1906 (*Vict.*), *rr.* 4, 15—*Wrongs Act* 1890 (*Vict.*), (*No.* 1160), *secs.* 14, 15, 16.

The Supreme Court of Victoria having jurisdiction under the *Administration and Probate Act* 1890 to grant administration *ad litem* may do so under r. 15 of the *Probate and Administration Rules* 1906 without the previous publication of the notice required by r. 4.

Sec. 16 of the *Wrongs Act* 1890 requiring that an action in respect of the death of a person caused by negligence must be brought within twelve months of his death, the facts that, unless administration is granted immediately, the twelve months will have expired and that the applicant, the widow of the intestate, has been prevented by poverty from applying earlier, are sufficient reasons for granting administration *ad litem*.

Semble, the Supreme Court having granted administration *ad litem* has no jurisdiction to revoke that grant on the motion of the defendant in the proposed action.

Decision of *Hood* J. : *In re Greenway*, (1910) V.L.R., 469 ; 32 A.L.T., 169, reversed.

APPEAL from the Supreme Court of Victoria.

Elizabeth Marcella Greenway, the appellant, was the widow of Edmund Joseph Greenway who died intestate on 20th September 1909 from injuries received while in the employment of Hugh Victor McKay, the respondent, leaving him surviving his widow and one infant child.

On 15th September 1910 the appellant published in a Melbourne newspaper a notice that after the expiration of 14 days from the publication she would apply for administration of the estate of her deceased husband.

On 16th September 1910 application was made by motion to *Hood* J. on behalf of the appellant for administration, The application was supported by two affidavits made by the appellant in which she stated that the intestate left personal property not exceeding in value £4 15s. and no real property; that she and her child were the only persons entitled to share in the estate ; that she had no money and property, and therefore had not applied before for administration ; that she had on 21st March 1910 given a notice of claim to the respondent in respect of her husband's death, but that she had no funds and could not proceed with the action against him ; and that since then she had been carrying on a small shop and was desirous of taking proceedings against the respondent under the *Employers and Employés Act* 1890.

Hood J. made an order that administration should be granted to the appellant for the limited purpose only of bringing an action against the respondent on the appellant undertaking on the issue

H. C. OF A. 1911.

GREENWAY v. MCKAY.

of the writ of summons in the action to serve the respondent with a notice informing him that he might apply to the Court to set aside this order and that no objection would be taken that the respondent was not a party interested in applying to have this order set aside.

On 19th September 1910 the appellant instituted proceedings against the respondent to recover £300 damages in respect of her husband's death, and on 28th September 1910 the respondent moved on notice that the order for administration of 16th September 1910 should be set aside, and *Hood* J. made an order revoking that previous order: *In re Greenway* (1).

From this last-mentioned order the appellant now by special leave appealed to the High Court.

Sanderson, for the appellant. The Supreme Court has jurisdiction to make limited grants of probate: *Administration and Probate Act* 1890, secs. 14, 110; *In re Lawrence* (2); *Davis* v. *Chanter* (3). Administration for special purposes may be granted without publication of the notice required by r. 4 of the *Probate and Administration Rules* 1906: *Wolfskehl* v. *Mitchell* (4); *In re Clarkington* (5). The learned Judge had all the facts before him when he made the order granting administration, and that order was properly made. He had no jurisdiction to revoke that order except on the application of a person interested in the estate, in the sense that he is either beneficially entitled or a creditor and on sufficient grounds. The respondent was not interested in the estate. The Courts are very loath to revoke administrations: *Williams on Executors*, 10th ed., vol. I., p. 452; *Lopes* v. *Hartley* (6). It is in applications for administration *pendente lite* and not for administration *ad litem* that the Court requires it to be shown that the estate is in jeopardy: *Rogers's Ecclesiastical Law*, p. 1046; *Tristram and Coote's Probate Practice*, 11th ed., p. 127; *Maclean* v. *Dawson* (7). The application was for the benefit of the estate for it was for the benefit

(1) (1910) V.L.R., 469; 32 A.L.T., 169.
(2) "The Argus," 25th Oct., 8th Nov., 1872.
(3) 2 Phil., 545.
(4) 8 S.C.R. (N.S.W.) (Eq.), 22.
(5) 2 Sw. & Tr., 380.
(6) 7 N.C. Supp., 31.
(7) 1 Sw. & Tr., 425.

of those interested in the estate. There was no power to impose the condition upon the original grant.

Kilpatrick, for the respondent. Although the Court has jurisdiction to grant limited administration it will not grant limited administration to a person entitled to general administration except for special reasons: *Williams on Executors*, 10th ed., vol. I., p. 385. Poverty might be a sufficient reason, but there is no evidence of poverty at such a time as prevented the appellant from obtaining general administration within the year. Rule 4 applies to applications for limited administration as well as to those for general administration. [He referred to sec. 110 of the *Administration and Probate Act* 1890; *In re Richardson* (1).] The "peculiar circumstances" under which administration may be granted, as mentioned in r. 15, mean peculiar circumstances having regard to the protection of the estate. The power must be exercised for the benefit of the estate. Here administration is sought not for the benefit of the estate, but for the benefit of persons who in this case happen to be the only persons interested in the estate. No creditor of the estate could share in the fruits of the action, and no probate duty would be payable in respect of them. The respondent was a person aggrieved by the original order for administration and might apply to have it revoked.

Sanderson, in reply.

Cur. adv. vult.

9th June.

GRIFFITH C.J. The appellant is the widow of Edmund Joseph Greenway, who died intestate on 20th September 1909 from the result of an accident while he was employed as a workman. He left a widow, the appellant, and one child. The estate was worth less than £5. The appellant claims to be entitled to recover damages under the *Wrongs Act* 1890 and the *Employers and Employés Act* 1890. Such an action must be brought within twelve months of the death of the deceased. On 16th September 1910 a motion was made on behalf of the appellant

(1) 4 A.L.T., 1.

H. C. OF A. 1911.

GREENWAY v. McKAY.

Griffith C.J.

to *Hood* J. for a grant of administration under the *Probate and Administration Rules* 1906. Rule 4 provides that:—"No probate of any will or administration of the estate of any deceased person shall be granted to any person, except after the expiration of fourteen days from the publication of an advertisement by him or some proctor on his behalf in one of the Melbourne daily newspapers of his intention to apply for the same." Rule 15 provides that:—"Applications for probate or administration under peculiar circumstances, not expressly referred to herein, shall be made upon such grounds and materials as have been heretofore acted upon by the Court, or as near thereto as circumstances permit, and the forms of affidavits, orders and documents heretofore in use shall be followed in all matters not expressly hereby provided for and not inconsistent herewith or with the *Administration and Probate Act* 1890." The advertisement of intention to apply for administration was not published until 15th September. It was therefore impossible, having regard to rule 4, to make a general grant of administration, but *Hood* J. made a limited grant to the appellant for the limited purpose only of bringing an action against the respondent. He, however, required the appellant to undertake that, on the issue of the writ of summons in the action, she would serve the respondent with a notice informing him that he might apply to the Court to set aside the order granting administration, and that no objection would be taken that he was not a party interested in applying to have the order set aside. On 19th September the action was brought in the County Court, and on 28th September the respondent moved on notice to the appellant that the order granting administration should be set aside. No new materials were brought before the Court, but on the same day the learned Judge made an order purporting to revoke the order of 16th September granting administration. That is the order now appealed from.

The first point that occurs to one is that in general a Judge having once made an order is *functus officio* and cannot recall it, and that any objection to the order must be taken by way of appeal. It is true that a grant of administration may be recalled on the application of a person interested in the estate, but

not otherwise. It is equally clear that the respondent is not a person interested in the estate, although he may be interested in another sense in diminishing the estate. Under these circumstances the question arises as to the validity and effect of the undertaking which the appellant gave. If the order on the face of it appears to be bad, the Court may take the objection although the appellant may be precluded from taking it. In effect, what the learned Judge did was to say that he would not grant administration except on the terms that the appellant should agree to his having jurisdiction to review his own order upon the application of a stranger to the proceedings—that is, in point of law *ex mero motu*—and, to say the least of it, I doubt very much whether the Court could impose such terms and whether the appellant should not be released from her undertaking. The most favourable view that can be taken of the condition is that, if the grant were made, not as an order to which the appellant was entitled as of right, but in the exercise of a discretion which is not the subject of appeal, then the undertaking might be read as an agreement that the Judge should have an opportunity of reviewing his discretion. In that view this Court might, perhaps, decline to consider the objection. But that is not the case. The learned Judge made the order granting administration because he thought that the appellant was entitled to it. He revoked it because he thought he had not been justified in law in making it on the facts which were originally before him. I will deal with the matter, however, as if this difficulty were out of the way.

It is contended by the respondent that the learned Judge could not proceed in the face of r. 4. The learned Judge thought that rule did not stand in his way. The general jurisdiction of the Court to make limited grants of administration is well known, and arises from the necessity of the case, and limited grants are expressly recognized by sec. 110 of the Act. In my opinion r. 4 does not absolutely forbid the grant of limited administration without advertisement, and in a proper case. I think r. 15 was intended to apply to grants of limited administration. The learned Judge was of that opinion, and I entirely agree with him. The reasons the learned Judge gave for revoking his order are these (1):—"I think that I had jurisdiction to dispense with the

(1) (1910) V.L.R., 469, at p. 471.

H. C. OF A 1911.

GREENWAY v. McKAY.

Griffith C.J.

rules and to make an order granting limited administration, but I consider that it should only be done under circumstances which require the interference of the Court for the purpose of protecting the assets of the estate—that it must be shown that the estate was in jeopardy—and that it was necessary to make the order for its protection. This order was not for the benefit of the estate but for the benefit of the widow and children." Those reasons are applicable primarily to an application for administration *pendente lite*, which is analogous to the appointment of a receiver. But, even if those reasons be applicable to grants of this kind, the case falls within the rule suggested by the learned Judge. Although administration limited to bringing an action is not, in one sense, for the protection of the assets of the estate—that is, the physical assets—yet that limited administration is granted in order to secure for the estate what would not otherwise be available as assets, which is the same thing in principle. If what might so become available is in danger of being lost, surely that is the best reason for prompt action, and the granting of administration for the purpose of bringing an action is just as much for the benefit of the estate as a general grant which is for the benefit of the persons interested in the estate, that is, the next of kin. With regard to the claim sought to be enforced against the respondent, certain persons only are entitled by law to share in the money when recovered, but the fact that the administrator is trustee for a limited class of the next of kin instead of the creditors and next of kin as a whole makes no difference in principle. In my opinion, therefore, the reasons which induced the learned Judge to revoke his earlier order are insufficient.

Apart from that, the learned Judge thought on 16th September that he ought to make the order, and he made it. I agree with him. If he had refused to make it on the ground of the insufficiency of the evidence, it might have been difficult to appeal from his refusal, but he did not. The result is that the order of 16th September for the grant of administration was properly made, and the reasons for revoking it, if the learned Judge had the power to revoke it, are invalid, and the order should be restored. I am of opinion that the appeal should be allowed.

BARTON J. I agree in what the learned Chief Justice has just said, but I should like to add a few words. The grounds upon which the respondent applied to *Hood* J. to set aside his first order were—(1) That the Court had no jurisdiction to grant administration till after the expiration of 14 days from the date of the advertised notice. (2) That the Court had no jurisdiction to grant letters differing from those set out in the advertisement. (3) That on the facts disclosed in the appellant's affidavits the Court should not have granted administration. There was a fourth ground which now becomes immaterial. On the hearing of the application the learned Judge held that he had jurisdiction to make the grant and to dispense with the notice, but he made an order revoking the grant. He came to the conclusion that the third objection was unanswerable and that he had made the grant erroneously. In his opinion it ought to have been shown that the estate was in jeopardy and that the order was necessary for its benefit and protection, whereas the order he had made was not for the benefit of the estate, but for the benefit of the widow and child (see the *Wrongs Act* 1890, sec. 15) to enable the administratrix to bring an action for her own benefit which she was in danger of losing, because she had not taken out letters of administration, or had not taken them out early enough. She had applied for administration at the last moment merely for the purpose of bringing the action; not for the benefit of the estate, but to avoid the statutory limitation provided by the *Wrongs Act* 1890, sec. 16.

It may be remarked that the reasons given by the learned Judge would be far-reaching in their effects in all applications by the dependents of persons losing their lives by the wrongful act or default of others, where the deceased person has left little or nothing behind him. There is in such cases practically no estate to be benefited, nor can an action, if rendered possible by the grant of administration, be for the benefit of the estate in the sense in which the learned Judge used those words, since the law prescribes that it shall be for the benefit of the dependents. Hence, if the benefit of the estate in that sense is to be the criterion, the beneficent provisions of what is known as *Lord Campbell's Act* will

H. C. OF A. 1911.

GREENWAY v. MCKAY.

Barton J.

become useless in all that class of cases, which may be regarded as having in a peculiar degree prompted the legislature to pass the Act. I think, however, that the grant was for the benefit of the estate in a sense which *Lord Campbell's Act* has made material.

In my view the delay in making the application arose from lack of means, and was sufficiently accounted for in the appellant's affidavits, and the special circumstances of the case fully justified the learned Judge in granting the letters *ad litem* (see *Probate and Administration Rules* 1906, r. 15) without the condition imposed. That grant was the only means by which the appellant could be admitted to the remedy which the law had provided for the benefit of herself and her child; and, in providing that the action must be brought by and in the name of the executor or administrator, the intention of the Statute was that persons in the position of the appellant should not be hindered in obtaining the means of availing themselves of the statutory remedy.

In my opinion the original order was right, and, even conceding that there was power to revoke it, I think, with much respect, that the revocation was made in error. I agree that the appeal must be allowed.

O'CONNOR J. Rule 15 of the *Probate and Administration Rules* 1906, which enables probate and administration to be granted under peculiar circumstances, introduces the old practice of the Probate Court Under that practice administration might be granted under special circumstances and without the trammels of procedure which had to be followed in ordinary cases. If the jurisdiction conferred by the practice were not of that ample character, it really would have been of small value. I take it, therefore, that in the exercise of jurisdiction under sec. 14 of the *Administration and Probate Act* 1890 the Judge here is in the same position as the Ecclesiastical Court would have been in in granting a similar application under the old practice. It is contended that r. 4, which necessitates the giving of certain notices, is applicable to applications under r. 15. The learned Judge below held that it is not, and in that he was, in my opinion, right. Having held that, the only other question which was before him for consideration in the first instance was whether there were peculiar circumstances entitling him to exercise the

jurisdiction allowed him by the rule. I agree with Mr. *Kilpatrick's* argument that there must be some circumstances shown to be out of the common to justify the Judge in exercising a jurisdiction which relieves the applicant from the ordinary rules of procedure. I think there were circumstances of that kind in this case. The *Wrongs Act* 1890 gives a right, the same as that given under *Lord Campbell's Act*, to the wife of a person who has been killed by the negligence of another to have administration granted to her. It is clear that the remedy conferred by that Act would be of no avail if administration could only be granted in cases where there was an estate to be administered. The widow therefore had the right to obtain grant of administration for the purpose of bringing an action on behalf of herself and her child. She might, no doubt, have made application in the ordinary way on notice and have obtained administration of the ordinary kind. Unfortunately she let the time go by and, if she had followed the ordinary course, her action would have been barred by the statutory limitation. I think Mr. *Kilpatrick* was right in his contention that, unless she satisfied the Judge that she was not to blame for the delay, there would not have been special circumstances which would justify the Judge in acting under sec. 15. But I gather from the affidavits, and I think the learned Judge ought to have drawn the same inference, that she was prevented by absolute poverty from making the application earlier. Under the circumstances I think the Judge was justified in taking the action he did by making a limited grant of administration for the purpose of bringing the action.

The learned Judge seems from the first to have taken the view that, on an application for a grant of administration under r. 15 for the purpose of bringing an action, the person against whom the action was to be brought was a person interested in the application, because he made an order that that person should have notice, and he imposed upon Mr. *Sanderson* a condition which that gentleman was obliged to accept, viz., that he should not object afterwards, if an application were made to set aside the order for administration, that the defendant to the action was not an interested party. Mr. *Sanderson*, of course, was bound by the undertaking, but there is no reason why this Court should

H. C. OF A. 1911.

GREENWAY v. MCKAY.

O'Connor J.

not take cognizance of an excess of jurisdiction in making any order if that excess of jurisdiction appears on the face of the order, as it does upon the face of the original order here. I have no doubt, and I agree with the learned Chief Justice in that respect, that the learned Judge had no right to impose that condition on the applicant. The defendant in the proposed action was an absolute stranger to the proceedings. They are for the purpose of enabling the party bringing the action to qualify herself by getting the title which the *Wrongs Act* 1890 makes a necessary condition of bringing the action. That title is as administratrix of her husband's estate, and with the obtaining of that title the defendant to the action has nothing to do. When the matter came before the learned Judge on the second occasion he seems to have taken the view that his jurisdiction to act under r. 15 was limited to cases in which the estate was in jeopardy, and the application must be for the protection of the assets of the estate. I see no ground under any circumstances for so limiting the jurisdiction, but, in regard to this special grant made, not for the purpose of dealing with existing assets and collecting new, but for another purpose altogether, it seems to me it is quite immaterial whether there is an estate, or whether there is any money in the estate. I think, therefore, the ground upon which the learned Judge acted in making the second order had really no foundation in law.

I therefore agree that the first order was properly made, and that the second order rescinding the first was wrongly made, first, because it was made on the application of a person who was a perfect stranger to the proceedings, and therefore in law not interested in them at all, and, secondly, because the order was rescinded upon what I think was a wrong view as to the limitations which may be imposed upon proceedings under r. 15. I agree, therefore, that the appeal must be allowed.

Appeal allowed. Order appealed from rescinded. Motion to revoke probate discharged. Respondent to pay costs of the appeal.

Solicitors, for the appellant, *Snowball & Kaufmann.*

Solicitors, for the respondent, *Malleson, Stewart, Stawell & Nankivell.*

H. C. OF A. 1911.

B. L.

GREENWAY v. McKAY.

Cons *State Chamber of Commerce & Industry* v *Cth* 61 ALJR 459

Dist *Mutual Pools & Staff Pty Ltd* v *FCT* (1992) 22 ATR 856

Dist *Mutual Pools & Staff Pty Ltd* v *FCT* (1992) 104 ALR 545

Appl *Mutual Pools & Staff Pty Ltd* v *Comr of Taxation* (1992) 66 ALJR 222

Cons *Cormack* v *Cope* (1974) 131 CLR 432

Appl *Northern Suburbs General Cemetery Reserve Trust* v *Commonwealth* (1993) 67 ALJR 290

Appl *Northern Suburbs General Cemetery Reserve Trust* v *Commonwealth* (1993) 112 ALR 87

Appl *Northern Suburbs General Cemetery Reserve Trust* v *Commonwealth* (1993) 25 ATR 1

Appl *Northern Suburbs General Cemetery Reserve Trust* v *Commonwealth* (1993) 176 CLR 555

Foll/Appl *Cornell* v *Deputy Commissioner of Taxation (SA)* (1920) 29 CLR 39

Refd to *DPP* v *Brown* (1998) 100 LGERA 181

Cons *Marquet* v *A-G (WA)* (2002) 193 ALR 269

[HIGH COURT OF AUSTRALIA.]

OSBORNE . . . . . PLAINTIFF;

AND

THE COMMONWEALTH AND GEORGE ALEXANDER McKAY (COMMISSIONER OF LAND TAX) . . . . . DEFENDANTS.

H. C. OF A. 1911.

MELBOURNE, *May* 23, 24, 25, 26, 29, 31.

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

Commonwealth legislation, validity of—Incorporation of Act not yet assented to—Form and substance of Act—Direct and indirect effect—Power of taxation—Act imposing taxation—Act dealing with more than one subject of taxation—Act dealing with matters other than taxation—Severability—The Constitution (63 & 64 *Vict., c.* 12), *secs.* 51, 55, 99, 114—*Land Tax Act* 1910 (*No.* 21 *of* 1910), *sec.* 2—*Land Tax Assessment Act* 1910 (*No.* 22 *of* 1910).

The incorporation into the *Land Tax Act* 1910 by sec. 2 of that Act of the *Land Tax Assessment Act* 1910, which was not assented to until the following day, is effectual and the *Land Tax Act* 1910 with that incorporation is in substance and in form an Act imposing taxation and not an Act to prevent the holding of large quantities of land by single persons.

Per Griffith C.J., *Barton, O'Connor* and *Isaacs* JJ.—The *Land Tax Assessment Act* 1910 is not an Act imposing taxation within the meaning of sec. 55 of the Constitution.

Per totam curiam.—The *Land Tax Act* 1910 does not deal with any other subject of taxation than land, and does not in that respect infringe sec. 55 of the Constitution.

Semble, the effect of the second clause of sec. 55 of the Constitution is to render invalid an Act imposing taxation which deals with more than one subject of taxation.