1949
*June 15, 16
*Dec. 5

WILLIAMINA D. LUNN, Administratrix with the Will Annexed of George Wellington Lunn, deceased (PLAINTIFF) .... APPELLANT;

AND

SAMUEL W. BARBER (By Order to Proceed) (DEFENDANT) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors and Administrators—Foreign Administration—Action on Promissory Notes brought in Ontario—Plaintiff residing out of jurisdiction died before action came to trial and foreign administratrix joined as party by Court Order—Defendant satisfied to proceed—On appeal it appeared for first time notes were within jurisdiction at date of testator's death—Proceedings stayed to permit filing of ancillary Letters and an Order adding grantee as party—The Succession Duty Act, R.S.O., 1937, c. 26, s. 18(3).

The plaintiff residing in New York State, sued on two promissory notes in Ontario but died before the action came to trial. A New York Surrogate Court named his widow Administratrix with will annexed of his estate and she, as widow and sole beneficiary, was subsequently by *praecipe* order under Ontario rule of Practice 301 named as a party plaintiff. The defendant applied to the Master to rescind the order but on being refused did not appeal therefrom and at the trial upon the New York Letters of Administration with will annexed being tendered in evidence accepted the position that he was bound by the order. On argument before the Court of Appeal it appeared that the notes at the date of death were in Ontario and were subsequently transmitted to the widow in New York State.

Held: per Kerwin, Taschereau and Locke JJ., that the defendant having acquiesced in the order of the Master and the trial having proceeded upon the basis of such order being correct, the defendant should not now be allowed to change position. On the merits no ground had been shown for setting aside the trial judge's finding against the defendant and therefore since a grant in Ontario of letters of administration with the will annexed would have appointed some one who could have been added as a party to represent the Estate, an opportunity should be given the plaintiff to take such steps. Upon filing of the Ontario grant of letters of administration and an order adding the grantee as a party, judgment should go allowing the appeal and restoring the judgment at trial.

Per: Rand and Kellock JJ.: In view of the provisions of s. 18(3) of the *Succession Duty Act,* R.S.O., 1937, c. 26, the Ontario Court of Appeal, upon the true facts being made to appear, of its own motion was entitled and should have stayed the action until ancillary administration had been taken out in Ontario and such administrator made a party.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

APPEAL from a decision of the Court of Appeal of Ontario, (1), setting aside the judgment of Wilson J., (2), after a trial without a jury, in favour of the plaintiff.

E. C. Fetzer, K.C. and *A. C. Fleming, K.C.* for the appellant.

W. J. Anderson for the respondent.

The judgment of Kerwin, Taschereau and Locke, JJ. was delivered by:

KERWIN J.: This action was commenced by George Wellington Lunn on September 2, 1930, against the respondent, Barber, on two promissory notes, each bearing date August 19, 1927. The statement of claim and statement of defence were delivered in May and June 1931, in the latter of which it is alleged that the plaintiff was a Canadian citizen. Nothing further was done during the lifetime of the plaintiff, who died October 28, 1934. On January 5, 1938, the Surrogate's Court of Essex County, in the State of New York, granted letters of administration with the will annexed to the deceased's widow, Williamina D. Lunn, in which grant the deceased is stated to have been a resident of Schroon Lake in the County of Essex. The next step in the action was on December 14, 1946, when, upon the application of the plaintiff's solicitor, Williamina D. Lunn, the widow and sole beneficiary of the deceased under his will was named as party plaintiff by *praecipe* order to proceed in accordance with rule 301 of the Ontario Rules of Practice. The plaintiff's reply and defence to the counter-claim was filed October 31, 1947. On February 3, 1948, the defendant applied to the Master to rescind the *praecipe* order of December 14, 1946, and at the same time, the plaintiff applied to vary such order by adding after the name or style of the plaintiff the words "and administratrix with the will annexed of the said George Wellington Lunn."

The second application was granted while the first was refused, the Master stating:—

The evidence before the Court as to the manner in which Williamina D. Lunn now holds the notes is not conclusive but I think it is reasonable to assume and may properly be assumed for the purpose of the present

(1) [1950] 1 D.L.R. 242.

(2) [1949] 1 D.L.R. 98; [1949] O.W.N. 13.

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application that the notes came into her possession as administratrix with the Will annexed in the ordinary course of administration in the State of New York.

No appeal was taken from the order of the Master and while the defendant took the position at the trial that the plaintiff should "produce her evidence as to her right to bring this action", upon the letters of administration with the will annexed being tendered in evidence and the trial judge asking counsel for the defendant with refererence to the Master's order "Am I not bound by that?", the reply was "Well I am afraid so." The letters of administration were thereupon filed and also an authenticated copy of the will.

Upon the argument before the Court of Appeal, counsel for the plaintiff, without any question being addressed to him, volunteered the information that the notes had been in his possession at the time of the death of George Wellington Lunn and that sometime thereafter he had sent them to the widow in New York State. The Court decided that the question as to the right of the administratrix to maintain the action was not one for decision by the Master and, upon counsel's statement, allowed the appeal and dismissed the action on the basis of the decision of this Court in *Crosby* v. *Prescott* (1).

The proceedings have been set out in some detail in order to make it clear that no opinion is expressed upon the points decided by the Court of Appeal but the appeal should be allowed on the grounds that the defendant not only acquiesced in the order of the Master but that the trial proceeded upon the basis of that order being correct and that the defendant should not now be allowed to take a different position. Nor should it be presumed that the Master's order was correct in law. The ordinary rule is that the *situs* of simple contract debts is where the debtor resides. An exception has been made in the case of negotiable instruments if they were at the time of the death of the payee in the jurisdiction where the latter resides: *Crosby* v. *Prescott supra.* In *Provincial Treasurer of Manitoba* v. *Bennett* (2), the exception was declared to include a certain deposit receipt issued by a bank in the Province of Manitoba but found in the possession of the holder at the time of his death in Minnesota. This Court

(1) [1923] S.C.R. 446.

(2) [1937] S.C.R. 138.

has not had occasion to consider the case where a negotiable instrument, although outside the jurisdiction of the residence of the holder at the time of his death, was later sent to the personal representative of the deceased within that jurisdiction and it is unnecessary to determine that point at the present time.

This is not like a case where an action is allowed to proceed upon an undertaking by the plaintiff that letters probate would be produced at the trial because that assumes the appointment by a deceased of an executor whose title flows from the will but who cannot prove his title except by the production of a grant. However, a grant in Ontario of letters of administration with the will annexed would have appointed someone who could have been added as a party to represent the estate of the deceased since there is no question that the cause of action survived. Even at this late date an opportunity should be given the plaintiff to take such steps. On the merits of the action, the trial judge found against the defendant and no ground has been shown for setting aside that finding.

The principal amount of each note sued upon is $1,841.96 but because of the accrued interest the judgment at the trial was for $8,283.71 and costs. As the trial judge pointed out, the defendant might have moved to dismiss the action for want of prosecution but this was not done. On the other hand, this Court did not have the benefit of any real argument on any of the points and I gather that the Court of Appeal was in the same position. For that reason and because an indulgence is being granted, the proper order appears to be that upon the filing in this Court of an Ontario grant of letters of administration with the will annexed and upon an order being made adding the grantee as a party (all at the plaintiff's expense), judgment should go allowing the appeal and restoring the judgment at the trial. The plaintiff may have her costs in the Court of Appeal but only one-third of the costs of the appeal to this Court.

RAND J.:—Under No. 300 of the rules of practice of the Supreme Court of Ontario, an action does not abate on the death of a sole plaintiff unless the cause of action is one which ceases with his death; No. 301 provides for the continuance of the action by the person to whom the

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interest or title to the matter in question has been transmitted. In the case of a transmission outside of Ontario, the principle of *Crosby* v. *Prescott* (1), would apply, and the foreign administrator would be entitled to revive the proceedings.

In this case, as a result of the order of the Master based upon a finding of fact, the defendant acquiesced in the revived proceedings as then constituted, and the trial was proceeded with on that basis. This is concluded by counsel's answer to the question of the trial judge whether he was not bound by the order of the Master, from which no appeal had been taken: "Well, I am afraid so. There is a judgment of the Supreme Court of Canada" meaning that in the *Crosby* action. From the standpoint of the parties, the defendant would not thereafter be permitted to change his position.

But the Court of Appeal of its own motion raised the question not of the jurisdictional fact in particular but of the presence in the action as plaintiff of the foreign administratrix. It then appeared by admission of counsel that at the moment of the death of the original plaintiff the promissory notes were in Toronto in the solicitor's custody. They were afterwards sent by him to the administratrix for the State of New York, the residence and place of death of the deceased and the place of the principal administration; and at some time later were returned to Toronto and made exhibits at the trial. Whether the possession of these notes in New York by the administratrix so obtained, would vest in her the contractual obligation which they embodied, and whether in the circumstances the principle of *Crosby* would apply, I do not decide; as between the parties, for the reasons stated, the question could not be raised. But if from the facts disclosed an overriding law or consideration of public policy is brought to the notice of the Court, then the matter is no longer between the parties only.

That paramount consideration is found in section 18(3) of the *Succession Duty Act* of the Province, which reads:—

Unless the consent in writing of the Treasurer is obtained, no person (whether or not acting in any fiduciary capacity) shall deliver, transfer, assign or pay, or permit any delivery, transfer, assignment or payment of any chattel mortgages, book debts, promissory notes, moneys, shares

(1) [1923] S.C.R. 446.

of stock, bonds or other securities whatsoever (whether registered or unregistered) belonging to a deceased person, or in which such deceased person had any beneficial interest whatsoever, and which may be liable to duty in Ontario, or with respect to which there is a transmission within Ontario, whether such deceased person died domiciled in Ontario or elsewhere; provided that nothing contained in this subsection shall apply to any person when acting solely in the capacity of executor.

From this it appears that in sending the notes out of Ontario as he did, the solicitor unwittingly violated the section. If the notes had remained in Ontario, ancillary administration would have been necessary, and that result cannot be avoided by an act done contrary to the law of the province.

The Court could, then, act of its own motion, but the question arises whether what was done, i.e. the dismissal of the action, was in the circumstances the proper disposal of the appeal. The action as originally constituted remained in good standing until the death of the plaintiff and thereafter until steps had been taken either to proceed or to dismiss. The invalidity of the revivor cannot affect its standing up to that point, and the subsequent stages, including trial, cannot be challenged by the respondent. The proceedings should, therefore, have been stayed until an administrator with the will annexed for Ontario had been made a party: *Rylands* v. *Latouche* (1).

On the point of merits, the contest at the trial depended upon the credibility of the witnesses; the trial judge has found in favour of the claim and nothing has been suggested on the argument before us to call in any serious question that finding.

The appeal should be allowed and the judgment at trial restored, but, subject to the rules of the Supreme Court, all proceedings should be stayed until an administrator under ancillary letters of administration has been made plaintiff. When that is done, the present appellant may be dismissed from the action without costs. The judgment will thereupon come into full operation. The appellant should have costs as proposed by my brother Kerwin.

KELLOCK J.: The notes here in question were not in the State of New York at the time of the death of the payee but in Ontario. Assuming, without deciding, that the appellant, by the subsequent receipt of the notes, acquired a good title

(1) (1820) 4 E.R. 449.

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so as to sue the maker in any jurisdiction without taking out administration elsewhere than in New York, that result cannot obtain in this action in view of the provisions of section 18, subsection 3, of the *Succession Duty Act*, R.S.O., 1937, c. 26.

By reason of this legislation, the courts of Ontario cannot give any assistance to the appellant which would enable the latter to avoid its effect and upon the true facts being made to appear in the Court of Appeal, the court of its own motion was entitled and obliged to stay the action until ancillary administration were taken out in Ontario. I think, therefore, that such an order should now be made but, in the circumstances of this case, the judgment at the trial on the facts should stand. I therefore concur in the order proposed by my brother Kerwin.

Upon the filing in this Court of an Ontario grant of letters of Administration with the will of George Wellington Lunn annexed and upon an order being made adding the grantee as a party, all at the plaintiff's expense, judgment will go allowing the appeal and restoring the judgment at the trial. The plaintiff shall have her costs in the Court of Appeal and one third of the costs of the appeal to this Court.

Solicitor for the appellant: *Ernest C. Fetzer.*

Solicitors for the respondent: *Parkinson, Gardiner, Willis & Roberts.*