1923

*Feb. 13.
*May 1.

GEORGE H. CROSBY (DEFENDANT).....APPELLANT;

AND

CHARLES O. PRESCOTT, EXECUTOR AND ADMINISTRATOR OF MARY LOUISE CROSBY AND GEORGE A. CAMPBELL (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Right of action—Foreign administration—Promissory notes—Situs—Action in Manitoba—Ancillary probate—Private international law.

C., domiciled in Massachusetts, died there leaving among the assets of her estate promissory notes payable to her order but not indorsed. The maker lived in Manitoba. The Probate Court of Massachusetts appointed P. administrator of C's. estate.

Held, affirming the judgment of the Court of Appeal (32 Man. R. 108) that the situs of the notes was in Massachusetts they being transferable by acts done solely there, and the administrator or his transferee alone could sue on them.

Held also, that the administrator could maintain an action against the maker in the Manitoba courts without taking out ancillary administration in that province.

APPEAL from a decision of the Court of Appeal for Manitoba (1) reversing the judgment at the trial (2) in favour of the defendant.

The facts of the case are sufficiently stated in the headnote. The only question for decision on the appeal is whether or not the administrator with the will annexed, appointed by a Probate Court in Massachusetts, must take out administration in Manitoba also to enable him to sue the maker there of promissory notes in his possession as administrator.

The trial judge held that the action could not be maintained but his judgment was reversed by the Court of Appeal.

Hudson K.C. for the appellants. The foreign administrator cannot maintain this action. Williams on Executors (11 ed.) 264; *Enohin* v. *Wiley* (3).

*PRESENT:—Sir Louis Davies C.J. and Duff, Anglin, Brodeur and Mignault JJ.

(1) 32 Man. R. 108; 68 D.L.R. 250.

(2) [1921] 3 W.W.R. 746.

(3) 10 H.L. Cas. 1.

Simple contract debts are assets where the debtor is found. A promissory note is merely evidence of title and does not change the character of the debt. *Attorney General* v. *Bouwens* (1); *Commissioner of Stamps* v. *Hope* (2).

Browns v. *Browns* (3) relied on by the Court of Appeal is distinguishable. The debtor in that case resided in the foreign state at the time of the creditor's death.

Hollands for the respondents.

THE CHIEF JUSTICE.—I do not consider it useful for me to add anything to what has already been said by the learned Chief Justice of Manitoba and by the late Mr. Justice Cameron in whose reasons for the judgment of the Appellate Court I concur. Ancillary administration from the Surrogate Court of Manitoba was, under the circumstances, unnecessary to enable the plaintiff to maintain his action.

I would dismiss the appeal with costs.

DUFF J.—The action which has given rise to this appeal was brought upon three promissory notes made by the appellant, payable to the order of Marie Louise Crosby. The appellant, at the time the notes were given, resided in Manitoba, and the payee in Massachusetts. Mrs. Crosby died in 1918 in Massachusetts, and the respondent, Prescott, became in due course, by a grant of letters of administration with will annexed in Massachusetts, administrator there of her estate. As in my opinion the claim of the administrator is the only one requiring consideration, I shall make no reference to the circumstances upon which the alternative claim of the respondent Campbell is based. The promissory notes sued upon, being then past due and unpaid, came into the possession of the respondent Prescott as such administrator in the ordinary course of administration in Massachusetts. No grant of letters of administration, ancillary or otherwise, was ever received by the respondent from Manitoba.

The appellant contends that in the absence of such a grant the respondent has no status to maintain an action

(1) 4 M. & W. 171. (2) [1891] A.C. 476.
(3) 15 Alta. L.R. 77.

1923
CROSBY
v.
PRESCOTT
Duff J.

in Manitoba upon debts due by a person residing therein to the testator. The point is an important one, and it is impossible, I think, to say that there is any actual decision which concludes the matter. I have come to the conclusion, however, that the facts of the case bring it within the principle upon which the Court of Appeal based its judgment. It is, of course, a perfectly well settled doctrine of English law that simple contract obligations due to the deceased by a debtor residing in England are deemed for the purposes of administration and collection to have a situs within the jurisdiction where the debtor resides, and consequently no action can be maintained in England to enforce such obligations against a debtor residing there by a foreign administrator who is not clothed with authority to administer the assets of the deceased in England by an English grant. *Commissioner of Stamps* v. *Hope* (1). The old form of declaration in debt was *debit et debinet* (2 Saund. 117b.); and the presumption was not an unnatural one that the assets to satisfy the debt would be found in the jurisdiction where the debtor had his domicile.

The Court of Appeal in Manitoba has held, rightly as I think, that there is an exception to this rule in the case of negotiable instruments; and that, as regards these, if they are reduced into possession by a foreign administrator within the territory from which he has received his grant and where they were at the time of the death of the creditor, it is competent to him to enforce them by action in the English courts, even in the absence of an English grant. This exception is said to be based upon the circumstance that the debt evidenced by such an instrument being transferable by delivery, is capable of being reduced into possession by means of acquiring possession of the instrument itself, and that such an instrument having been reduced into possession by the administrator in the lawful execution of his authority as such in the jurisdiction from which he derived his grant, his title to the debt due upon it is as good as his title to corporeal chattels reduced into possession in similar circumstances.

It is not open to doubt that a debt due to a deceased foreign creditor by an English debtor may be subject to

(1) [1891] A.C. 476.

be reduced into possession by the administrator of the foreign creditor within the foreign jurisdiction in such a way as to entitle him to enforce it in England without an English grant. Mr. Westlake gives an example of such a debt having been so reduced into possession by the recovery of judgment for it in a foreign jurisdiction, and the authorities referred to by him on page 127, *Vanquelin* v. *Bouard* (1); *Re Macnichol* (2); support his proposition that in such a case the judgment creditor may enforce his judgment by action in England without obtaining an English grant. It is beyond question also that the debts due upon negotiable instruments held in England at the time of his death by a creditor dying abroad are English assets in respect of which probate duty is payable; *Attorney General* v. *Bouwens* (3); *Winans* v. *Attorney General* (4); and this on the ground that such instruments are of a chattel nature capable of being transferred in England and "sold for money" in England. In like manner the foreign administrator may transfer and give a good title to the debt due by an English debtor upon a negotiable instrument coming into his hands as such administrator, and the transferee could, of course, maintain an action upon the debt so transferred to him. I think Story's proposition (Conflict of Laws, par. 517) follows from this, viz., that a foreign administrator who reduces such a negotiable security into possession is entitled to sue the debtor upon it in any other jurisdiction where he may be found, without obtaining a grant from that jurisdiction. Mr. Westlake sums up the matter in a passage at page 126, Private International Law, which in my opinion states the true rule. It is in the following words:—

> 96. But to the rule in par. 95*a* the debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

(1) [1863] 15 C.B.N.S. 341.
(2) [1874] L.R. 19 Eq. 81.
(3) 4 M. & W., 171.
(4) [1910] A.C. 27.

1923
CROSBY
v.
PRESCOTT
Duff J.

There are two points, however, raised by Mr. Hudson in his argument, which require special consideration. The first is based upon the fact that the promissory notes sued upon, being payable to the order of the testator, were not indorsed by the respondent, and consequently they never were in a state in which they were transferable by delivery alone. Therefore it is said that the administration never acquired a title to these negotiable instruments which enabled him to sue in any character other than that of administrator of the testator's estate, and that this character he does not bear outside the jurisdiction from which he received his grant.

The passage in Story no doubt contemplates instruments transferable by delivery; that is to say, instruments payable to bearer or instruments which, if payable to order, have been indorsed by the payee; and no case has been referred to, I think, in which the foreign administrator was suing in his own name upon a non-indorsed instrument payable to his testator's order.

In principle, however, the right of the foreign administrator to sue appears to depend upon the fact that the instrument has been reduced into possession, and through it the debt due under it. The debt due under a promissory note payable to the testator's order is sufficiently reduced into the administrator's possession for the relevant purpose if the administrator, within the jurisdiction from which he receives his grant, gets possession of it and indorses it in blank, for the reason that his power of disposition of the debt by delivery of the instrument is as complete as if it were a movable chattel. Can it then be said that the administrator, having the note in his possession and having power by the manual act of putting his name on the back of it to put it into a state for immediate transfer by delivery, has not by the fact itself of acquiring such control, sufficiently taken possession of the instrument, and with it the debt, within the meaning of the rule? His power over the instrument and over the debt is complete and this, I think, does constitute such possession. To hold otherwise would appear to involve the introduction of a distinction based upon form and technicality rather than upon principle or substance.

The other point requiring notice is that the promissory notes now in question having been overdue at the testator's death are not within the rule enunciated by Story and Mr. Westlake. It is true that overdue promissory notes are not instruments fully negotiable in the sense in which notes still current are; that is to say, they are not part of the currency of the country to which title may be acquired by a *bona fide* taker for value from a person who has no title. Nevertheless such instruments, though overdue, are transferable by delivery, and such delivery has the effect of transferring not only the document, but the debt as well, and in that respect the resemblance to corporeal movables is complete; and accordingly I think the circumstance of their being overdue does not take them out of the rule.

The appeal should be dismissed with costs.

ANGLIN J.—The plaintiff, Prescott, though described as an executor and administrator of the estate of Mary Louise Crosby (he is in fact administrator cum test. annex.), in reality brings this action in his own right and personal capacity as the holder of the notes sued upon. His title to them was perfected under the law of Massachusetts and the letters of administration granted him by the Probate Court of the county of Middlesex in that State, where the testatrix resided and the notes were at the time of her death. In my opinion he did not require ancillary administration from the Manitoba Surrogate Court having jurisdiction where the defendant resided in order to maintain this action. I cannot usefully add to the reasons for so holding assigned by the Chief Justice of Manitoba and the late Mr. Justice Cameron.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The action of the respondent Prescott is on three promissory notes dated and signed by the appellant at Elkhorn, Manitoba, and payable to the order of Miss Mary Louise Crosby, a resident of the state of Massachusetts. Two of these notes, for $2,700 and $686.44, respectively, indicate no place of payment; the third, for $289, was made payable at Westford, Mass. Mary Louise Crosby died in Massachusetts not having indorsed the

1923
CROSBY
v.
PRESCOTT
Mignault J.

notes, and left a will bequeathing her entire estate to her sisters, Annie (Mrs. Campbell) and Lavinia (Mrs. Wightman). These two sisters however predeceased Miss Crosby, the former leaving a will devising a house and contents to her two sisters and bequeathing all her money to her sons, George Campbell and Llewellyn Campbell. The latter died in Saskatchewan and left a will which gave a legacy of $1,000 to a Mrs. Labossière, and the rest of his estate to his brother George Campbell. Miss Crosby had confided these notes to the respondent Prescott for safekeeping, in Westford, Massachusetts, where she lived with Prescott and his mother as their housekeeper, and after her death Prescott was named, by the Massachusetts court, administrator with will annexed of her estate. In this action the respondent Prescott described himself as executor and administrator of the estate of Mary Louise Crosby. George Campbell was joined as plaintiff and alleged that an equitable assignment of the notes had been made to him, and also claimed that under his mother's and his brother's wills he was entitled thereto. The notes had merely been sent to him unindorsed and I will dispose at once of his contention that an equitable assignment of the notes was made to him by saying that in my opinion it is not borne out by the facts. Nor do I think he can assert his claim, if he has one, to Miss Crosby's estate in this action. The action must therefore be dealt with on the basis that Prescott is the only competent plaintiff.

The question raised by the plea of the appellant, who has always resided in Manitoba, is whether the Massachusetts administrator can take this action against him without obtaining letters of administration in Manitoba.

Perhaps the point would be better stated thus:—

Was the situs of these notes in Massachusetts at Miss Crosby's death, and if so, could the Massachusetts administrator, on the strength of his nomination as such by the local court, sue the appellant on the notes without being appointed administrator in Manitoba?

Was the situs of these notes in Massachusetts at the time of Miss Crosby's death?

The question of the situation of property usually does not admit of much discussion. If the property consists of

real estate or corporeal movables, it has a local situation which is apparent to any one. And if under certain statutes, by reason of the language used, a fictional situation is given to property notwithstanding its real situation, it is obvious that these fictions cannot be extended to any case other than the one provided for. There is no necessity to refer here to the maxim *mobilia sequuntur personam,* which is by no means of general application, except to observe that the deceased was domiciled where these notes were locally situate when she died.

But there is a real difficulty when the property consists of debts or generally of *choses in action.* As to this species of property, the general rule is that it must be held to be situate where resides the debtor or other person against whom the claim exists. (Dicey, Conflict of Laws, 3rd ed., p. 342.) In other words, simple contract debts (which expression excludes debts created by deed or judgment debts) have no local situation other than the residence of the debtor where the assets to satisfy them would probably be. *Rex* v. *Lovitt* (1).

Does this rule apply to negotiable instruments such as bills of exchange, promissory notes, etc., which are locally situate at the place where the deceased resided at his death? In *Attorney General* v. *Bouwens* (2), which has been since recognized as a leading authority and on which reliance was placed by both the majority and the minority judges in the court below, it was held that the English probate duty was payable in respect of bonds of foreign governments, of which a testator dying in England was the holder at the time of his death, and which had come to the hands of his executor in England, such bonds being marketable securities within the kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of the kingdom in order to render the transfer of them valid.

In this case, the bonds or securities had been issued respectively by the Russian, the Danish and the Dutch Governments, dividends on the two former being paid by an agent in London, and on the latter in Amsterdam. Lord

(1) [1912] A.C. 212, at p. 218.

(2) 4 M. & W. 172.

1923
CROSBY
v.
PRESCOTT
Mignault J.

Abinger, speaking for the court, distinguished the case from two prior decisions, *Attorney General* v. *Dimond* (1), and *Attorney General* v. *Hope* (2), dealing with French *rentes* and American stock, which could only be transferred in France and the United States, respectively.

The question in the *Bouwens Case* (3) was whether the defendant was liable for probate duty in respect of these securities, and it thus involved the question of the situs of the securities. This situs was to be determined according to the practice, so far as it has not been changed, of the ecclesiastical tribunals which formerly had jurisdiction in these matters, and Lord Abinger, after citing the rules that had been thus laid down, said (page 192):—

> These distinctions being well established, it seems to follow that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad, and incapable of being transferred here; and therefore no duty would be payable on the probate or letters of administration in respect of such effects. But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate.

Further Lord Abinger said (pages 192, 193):—

> Let us suppose the case of a person dying abroad, all whose property in England consists of foreign bills of exchange, payable to order, which bills of exchange are well known to be the subject of commerce, and to be usually sold on the Royal Exchange. The only act of administration which his administrator could perform *here* would be to sell the bills and apply the money to the payment of his debts. In order to make titles to the bills to the vendee, he must have letters of administration; in order to sue in trover for them, if they are improperly withheld from him, he must have letters of administration (for even if there were a foreign administration, it is an established rule that an administration is necessary in the country where the suit is instituted (Story on Conflict of Laws, 421): and that these letters of administration must be stamped with a duty according to the saleable value of the bills, the case of *Hunt* v. *Stevens* (4), is an express authority.

The importance of this decision is that it considers as situate (and therefore subject to probate duty) within England, foreign securities capable of being transferred or

(1) 1 C. & J. 356.
(2) 1 C.M. & R. 530.
(3) 4 M. & W. 172.
(4) 3 Taunt. 113.

sold in England, without it being necessary to do any act out of the kingdom to render the transfer valid. And the converse of the case supposed by Lord Abinger—a testator dying in England possessed of foreign securities capable of being sold and transferred there—is equally a case where the English probate duty would be payable, for it is the precise case passed upon by the Exchequer of Pleas in the *Bouwens Case* (1). See also *Winans* v. *The Attorney General* (2).

I may refer again to Dicey, at page 344, who states as follows the effect of the *Bouwens Case* (1).

> When bonds, again, or other securities, e.g., bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.

The following species of property have been held to be subject to probate duty in England, because they were considered to be situate there:—

Certificates of shares in a foreign company made out in the name of the shareholder, having indorsed thereon a form of transfer and power of attorney in blank, *Stern* v. *The Queen* (3); it would appear that on some of these certificates the form of transfer had been signed by the person named as owner of the shares, and in others it had not:—

Certificates of shares in foreign railway companies, *Goods of Agnese* (4):—

Shares of mining companies in South Africa, when there was in London a duplicate register where the shares could be transferred. *In re Clark, McKecknie* v. *Clark* (5).

Returning to the *Bouwens Case* (1) each of the parties here rely on it as an authority which supports his contentions. I think it may be taken to establish that inasmuch as notes such as Miss Crosby possessed in Massachusetts were marketable securities there and could be sold and transferred without it being necessary to do any act outside

(1) 4 M. & W. 172.
(2) [1910] A.C. 27.
(3) [1896] 1 Q.B. 211.
(4) [1900] 1 P. 60.
(5) [1904] 1 Ch. 294.

1923
CROSBY
v.
PRESCOTT
Mignault J.

of Massachusetts to render the transfer valid, these notes are to be held situate in Massachusetts, although the monies thereunder were payable by a person domiciled elsewhere. At least one of the notes was payable in Massachusetts.

The only difficulty is that these notes had not been indorsed by Miss Crosby. But this difficulty is apparent only, for the respondent as administrator could indorse these notes in blank and then transfer them by delivery. He could also sue on the notes himself without indorsing them. As far as any act was required in order to sell or transfer these notes, such act could be performed in Massachusetts.

I think, therefore, that the situs of these notes, which are negotiable securities, was, under the authorities I have referred to, in Massachusetts at Miss Crosby's death.

This point being determined, it is difficult to appreciate why letters of administration should be taken out in Manitoba in respect of personal property situate in Massachusetts and in the possession there of the Massachusetts administrator.

Indeed it appears clear that the court in Manitoba would not have jurisdiction to make a grant of administration when no property of the deceased is situate in that province. *Tucker, in Goods of* (1), and Williams on Executors, 11th ed. vol. 1, p. 340. See also Manitoba *Surrogate Court Act* (R.S.M. ch. 47, sec. 19). And on the question whether in such a case the foreign administrator can sue before the courts of the country where the debtor is domiciled, in recovery of debts situate in the country where the deceased was domiciled, I may refer to Westlake, *Private International Law,* 5th ed., at page 132, who says that debts due on negotiable securities are an exception to the rule governing simple contract debts, because they can be sufficiently reduced into possession by means of the paper which represents them. And he adds, basing his opinion on *Attorney General* v. *Bouwens* (2):

(1) 3 Sw. & Tr. 585.

(2) 4 M. & W. 172.

They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

Westlake further refers to Story, *Conflict of Laws*, 8th ed., par. 517, page 736, who supports his view in these terms:—

> The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name; and he need not take out letters of administration in the state where the debtor resides, in order to maintain a suit against him. And for a like reason it would seem that negotiable paper of the deceased, payable to order, actually held and indorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such indorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country as the legal indorsee, and allowed to sue thereon accordingly, in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situate in such foreign country.

I think these authorities shew that no grant of letters of administration in the state or country where the debtor is sued is necessary, when the foreign administrator became legal owner and holder of negotiable securities by virtue of his appointment as administrator of the deceased's estate in the state or country where the deceased was domiciled, and when the negotiable securities were in the deceased's possession at his death. It does not seem to me to matter whether notes or bills to order had or had not been indorsed by the deceased, for if they had not, the administrator could indorse them, and inasmuch as he himself sues on them indorsation is unnecessary. The respondent here describes himself as "executor and administrator of the estate of Mary Louise Crosby." He was not executor, but only administrator with will annexed. I regard, however, these words as being merely descriptive and not as precluding the contention that the respondent is the legal owner and holder of the notes.

I may add that I am generally in accord with the opinions expressed by Chief Justice Perdue and the late Mr. Jus-

1923

CROSBY v. PRESCOTT

Mignault J.

tice Cameron in this case. See also the judgment of Chief Justice Harvey of Alberta in *Browns* v. *Browns* (1).

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hudson, Ormond, Spice & Symington.*

Solicitors for the respondents: *Bonnar, Hollands & Philp.*

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(1) 15 Alta. L.R. 77.