PATRICK COSGRAVE, JOHN COSGRAVE AND LAWRENCE JOSEPH COSGRAVE ..... APPELLANTS;

AND

DAVID BOYLE EXECUTOR OF THE LAST WILL AND TESTAMENT OF JAMES STEWART DECEASED..... RESPONDENT.

1881

*March 8.

*April 11.

APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Promissory note—Death of endorser—Notice of dishonor—33 Vic., c. 47, sec. 1 D.

The appellants discounted a note made by *P.* and endorsed by *S.* in the Bank of Commerce. *S.* died, leaving the respondent his

*PRESENT.—Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, J. J.

1881

COSGRAVE v. BOYLE.

executor, who proved the will before the note matured. The note fell due on the 8th May, 1879, and was protested for non-payment, and the bank, being unaware of the death of *S.*, addressed notice of protest to *S.* at *Toronto*, where the note was dated, under 37 *Vic.* c. 47, sec. 1 (D) (1). The appellants, who knew of *S's* death before maturity of the note, subsequently took up the note from the bank, and, relying upon the notice of dishonor given by the bank, sued the defendant.

Held, reversing the judgment of the Court of Appeal for *Ontario*, that the holders of the note sued upon when it matured, not knowing of *S's* death, and having sent him a notice in pursuance of sec. 1, c. 47, 37 *Vic.*, gave a good and sufficient notice to bind the defendant, and that the notice so given enured to the benefit of the appellants.

APPEAL from the Court of Appeal for *Ontario*. The action was commenced by the appellants against the respondent on the 10th of April, 1879, to recover the sum of $500, due by the respondent as the executor of *James Stewart*, endorser of a promissory note, made by one *Margaret Purdy* to the appellants.

There was but one count in the appellants' declaration, viz.: The statutory count against the endorsers.

The respondent pleaded among other pleas, that there had not been due notice of the dishonor of the note.

The case was tried at *Toronto* by Mr. Justice *Cameron*, without a jury, and a verdict entered for the defendant on this plea. This verdict was sustained by the majority of the Court of Queen's Bench.

On appeal to the Court of Appeal for *Ontario*, the judges were equally divided for and against the ap-

(1) 37 *Vic.*, c. 47, sec. 1: Notice of the protest or dishonor of any bill of exchange or promissory note payable in *Canada*, shall be sufficiently given, if addressed, in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature, on such bill or note, designated another place, when such notice shall be sufficiently given, if addressed to him, in due time, at such other place; and such notices, so addressed, shall be sufficient, although the place of residence of such party be other than either of such before mentioned places.

pellants, and so the judgment of the majority of the Court of Queen's Bench was allowed to stand.

The note was made and dated at *Toronto*, November 5th, 1878, payable four months after date, and was therefore due on the 8th of March, 1879. On this latter date it was protested for non-payment by the notary of the Canadian Bank of Commerce, *Toronto*, and notices duly mailed to Mrs. *Margaret Purdy* (the maker), *Toronto*; Mr. *James Stewart* (endorser), *Toronto*; Messrs. *Cosgrave & Sons* (appellants), *Toronto*.

James Stewart died on the 5th of December, 1878, one month after the note was made, and three months before it fell due, and the respondent is the executor of *James Stewart*.

Stewart did not designate under his signature on the note his Post Office address, which appears to have been *Lansing*, a village near *Toronto*.

Neither the Bank of Commerce nor their notary knew of the death of *Stewart* when the note matured, and the notice of protest was on the 8th of March, 1879, addressed to *Stewart* at *Toronto*, pursuant to 37 *Vic.* c. 47, sec. 1.

Mr. *O'Sullivan* for appellants:

The sole contention in this case is in reference to the third plea: had the respondent due notice of dishonor of the note in question? It is admitted that neither the bank, who were the holders of the note for value, nor the notary, knew that the indorser was dead when the note fell due on the 8th of March, 1879. They gave a sufficient notice to bind the indorser and his representatives, and such notice enures for the benefit of all parties (1).

The appellants purchased the note for value from the bank, and they are entitled to all the remedies which

(1) 37 *Vic.* c. 47, sec. 1., and Cons. Stats. C. c. 5, sec. 6, sub-sec. 8 and Cons. Stats. U. C. c. 2. sec. 12.

1881

COSGRAVE v. BOYLE.

the bank could claim. The American case relied on by the court below of *Beale* v. *Parrish* (1), I think, is quite distinguishable from this case. The plaintiffs in that case misled the owners of the note. Of course, if the bank had inquired from the appellants and they had misled them, it would be a different case. But this was not the case, and I submit no authority can be found which will show that it was the duty of appellants to go and inform the bank that the endorser was dead.

The learned counsel relied on *Bigelow* on Bills (2): *Ex parte Baker in re Bellman* (3); *Merchants' Bank* v. *Birch* (4); *Beals* v. *Peck* (5).

By the Civil Code of *Lower Canada*, art. 2328, notice of protest sent to the residence, or usual place of business of a deceased endorser, is good, and this taken in conjunction with the provisions of 37 *Vic.*, c. 47, sec. 1, would render the notice sent in the present case good, wherever the code is in force. In the absence of direct English or Upper Canadian authority, this is an argument in favour of their contention.

Dr. *McMichael*, Q.C., respondent:

The question for the consideration of the court is, whether the notice addressed to Mr. *James Stewart*, *Toronto*, after the death of *James Stewart* (*Toronto* never having been his place of residence and not being his last place of abode, and not being the post-office nearest to his last place of abode), was sufficient to charge his executor. Previous to the Act of 1874, cap. 47, sec. 1, it would not have been sufficient. That statute altered the law in this respect.

Had *Stewart* been alive at the time the notice was sent, the notice would have been sufficient by virtue

(1) 20 N. Y. 408.
(2) P. 282.
(3) 4 Ch. D. 795.
(4) 17 Johns. 25.
(5) 12 Barb. 251.

of the statute, because it would have been addressed to the party to the note entitled to the notice, to the place where the note was dated. But it cannot be said that a deceased man was the man entitled to such notice, and there being at the time such notice was given an executor, he was the party entitled to the notice and it should have been addressed to him. If the statute was not complied with, then the usual principles as to notice must prevail.

The appellants had knowledge of the death of the party, and it was their duty to let the bank know or send notice themselves and not rely on the statute, which could not avail them. The appellants, who were subsequent endorsers, had knowledge, and not giving it to the holder, they cannot avail themselves of a notice given by the bank. For when the bank was paid, the contract with the bank was at an end, and the whole thing is transferred to the other endorser, who must rely on his rights; and the common law provides that notice must be sent to the executor unless the party is ignorant of his death.

The argument may be summed up thus:

The statute does not repeal or displace the rules of the common law. It declares that the taking certain steps shall be regarded as compliance with it. These steps have not been taken, and therefore the plaintiffs' rights and liabilities are under the common law. When notified of the dishonour of the note the burden was cast upon them, if they wished to hold the next endorser liable, to do what the law required to make him liable. No one was bound to do it for them. If they chose to rely upon another, and he neglected, they must take the consequence.

They could have complied with the law, but neither they, nor any one for them, have done so.

1881

COSGRAVE v. BOYLE.

Chapman v. *Keane* (1); *Harrison* v. *Ruscoe* (2); *Willis* v. *Bank of England* (3); and *Parsons* on Notes and Bills (4).

Mr. *O'Sullivan* in reply.

RITCHIE, C. J.:—

[After stating the facts of the case and reading the 1st sect. of c. 47, 37 *Vic.*, D., proceeded as follows]:—

I think the holder, the *Canadian Bank of Commerce*, fulfilled its duty when it sent notice to the place at which the note was dated, being the place which the law has fixed as the place at which the indorser, or whoever should be a party to the note, was to be found for the pnrpose of receiving notice. The law may be said to have domiciled the bill there so as to entitle the holder to treat that as the place to which a notice of dishonor should or might be sent to whomsoever should be or become a party to the note, whether such party should be an indorser or a representative of an indorser, who, by reason of the death of the indorser, became, as his representative, a party to the note. The statute was passed, in my opinion, to relieve holders from the difficulties and risks so likely to arise from the necessity of observing the very strict technical rules in regard to notices of dishonor, and instead of requiring such notices to be sent to the residence or place of business of drawers or indorsers of negotiable instruments, and imposing on holders the burthen of discovering the proper addresses to which notices should be sent, substituted, in lieu of the implied contract in respect thereto, a statutory contract by which the holder was relieved from all difficulty and risk, by enacting that all notices should be sufficient, if addressed in due time to the party upon whom liability was to be fixed, at the place at which the note was dated,

(1) 3 Ad. & El. 193.
(2) 15 M. & W. 231.
(3) 4 Ad. & El. 21.
(4) p. 627.

1881

COSGRAVE v. BOYLE.

Ritchie, C.J.

unless another place is designated. This provision, wholly irrespective of previously existing requirements as to notice, arbitrarily fixed as by agreement between the parties that notice sent to the place of the date of the instrument should be sufficient.

The fallacy in this case, I humbly think, was in supposing that there was *omission* on the part of the holders, the bank, or that they were entitled to recover by reason of their ability to show a sufficient excuse for such omission, that is want of knowledge of the indorser's death, and that the present plaintiffs, not having that excuse, are endeavoring to avail themselves of the *excuse* of the bank; but such is not, in my opinion, the case.

The bank, in my opinion, gave *due notice*, and might have declared against defendant, alleging that the defendant had had due notice of presentment and dishonor, without alleging an omission to give due notice and matter of excuse for such omission; and the evidence of the notice here given would, in my opinion, have sustained such an allegation of due notice, and a liability, so regularly established, I think enured to the benefit of the other indorsers.

When the plaintiffs paid this note to the bank, and the bank transferred the note by delivery to the plaintiffs, they transferred their complete title and substituted the holders to their rights as against all parties so duly notified in strict accordance, in fact in literal compliance, with the provisions of the statute.

The right of the testator was to receive a notice of dishonor at the place of date, the right of the holder was to fix a liability by a notice addressed there. On the death of the testator, his representative had, I think, the same right his testator had, no other and no greater. If the testator could not insist on the holder addressing the notice elsewhere than to the place where

1881

COSGRAVE v. BOYLE.

Ritchie, C.J.

the note was dated, I do not think his representative can impose a larger or more extended obligation on the holder. The indorser might have designated another place, it was optional with him, or he might, as is often done, have waived notice altogether; in either of which cases I fail to see how his representative can claim to occupy any other or better position than the original contractor. I am, therefore, not prepared to say that if the bank had known of the death of *Boyle*, a notice addressed as this was would not have been sufficient, but, as they did not know, the notice, in my opinion, was clearly good, and plaintiffs, now standing in the shoes of the bank, are clothed with all the rights the bank had against indorsers prior to the one so taking up the note.

I think this conclusion is not only in the interest of trade and commerce, as simplifying the dealings with and the duty cast on holders of bills or notes, but is giving effect and carrying out the policy of the Dominion statute, in reference to which, I think, it may be said, that no lawyer who has enjoyed a large mercantile practice but must have witnessed manifold failures of justice arising from non-observance of, or difficulties in connection with, the strict technical rules relating to notices of dishonor, and must appreciate the expediency and wisdom of an enactment such as this, and, therefore, I think it is our duty to give this legislation full force and effect, certainly not to hamper or unnecessarily limit its operation.

STRONG, J.:—

By the statute of the Dominion, 37 *Vic.*, c. 47, sec. 1, it is enacted that:

Notice of the protest or dishonor of any bill of exchange or promissory note, payable in *Canada*, shall be sufficiently given, if addressed in due time to any party to such bill or note, entitled to such notice, at the place at which such bill or note is dated, unless any such party has, under his signature on such bill or note, desig-

nated another place, when such notice shall be sufficiently given if addressed to him in due time at such other place; and such notices so addressed shall be sufficient, although the place of residence of such party be other than either of such before-mentioned places.

Strong, J.

There was no designation in the promissory note upon which this action is brought of any other place than that at which the note was dated as the residence of the endorser, the testator of the present defendant.

I regard this enactment as creating a statutory presumption, not to be controverted, that the place of residence of an endorser is, in the absence of any designation of another place being written under the endorsement, at the place at which the bill or note is dated. This note was dated at *Toronto*, and we are therefore to presume that the residence of the indorser was at *Toronto*.

In the absence of any decisions upon the point in our own courts as well as in *England*, we may have recourse to American authorities to ascertain what constitutes sufficient notice in case of the death of an indorser at the maturity of a note, and we find it established by high authority that if the holder is, without negligence on his part, ignorant of the death of the indorser, a notice addressed to the indorser and sent to his last place of residence is sufficient

In *Daniel* on negotiable instruments (1) the law is thus stated:

> It is likewise sufficient, if notice be addressed to the deceased, when, without negligence, the holder is not aware of his death;

and the cases of *Barnes* v. *Reynolds* (2), and *Maspero* v. *Pedexlaux* (3), *Merchants Bank* v. *Birch* (4), and *Planters' Bank* v. *White* (5), are decisions to that effect.

(1) 2nd Ed. sec 1001.
(2) 4 How. (Miss.) 114.
(3) 22 La. 227.
(4) 17 Johns. 25.
(5) 2 Humph. 112.

1881

COSGRAVE v. BOYLE.

Strong, J.

In *Parsons* on notes and bills (1) we find the same doctrine enunciated. He says:

> If the death is not known, and nothing appears to show that the sender ought to have known this fact, notice addressed to the deceased endorser will be sufficient.

In the present case the notice was sent through the post, addressed to the deceased endorser at *Toronto*, where the note was dated, and it is not even suggested, nor could it have been suggested, that there was any negligence on the part of the bank in not discovering the fact of death and the proof of the will. Therefore, according to these American authorities the bank did all that was requisite to charge the executor, so far as to make him liable to them.

The only English authority which in any way touches the question is the case of *Ex parte Baker in re Bellman* (2), in which it was held that notice of dishonor sent to a bankrupt after the bankruptcy was sufficient to charge the assignee, and to entitle the holder to prove against the endorser's estate for the amount of the bill. *James* L. J., in this case says:—

> It does not appear to me that any good reason can be suggested why the holder of a bill should give notice of dishonor to any one but the persons whose names he finds upon the bill.

This I regard as an authority strongly in the appellants favor, inasmuch as it shows that in this, as in all questions of commercial law, the courts will, in the absence of direct authority, be influenced by considerations of mercantile convenience. Now, in the present case, were we to say that the law requires the holders of negotiable instruments, at their peril, to ascertain the fact of an endorser's death, and the appointment of his personal representatives, we should be manifestly laying down a rule which it would be impossible for bankers and other large holders of commercial paper to

(5) Vol. 1, p. 501. (2) 4 Ch. D. 795.

comply with, and the interference of the legislature would be indispensable to make such an alteration in the law as would enable them to carry on their business with safety. I think, therefore, we may well adopt the rule of the American courts already stated, and determine that the notice given by the Bank of Commerce was sufficient to make the defendant liable to the bank.

Next arises the question, are the plaintiff's entitled to avail themselves of the notice given by the bank? There are numerous general dicta that a notice sufficient to entitle the actual holder at the time of maturity to recover enures to the benefit of a subsequent party who may take up the paper. In *Beale* v. *Parish* (1), which is relied on in the judgment of some of the learned judges in the court below, it was said that there can be no subrogation to a right arising out of an excuse for omitting to give notice founded on an honest ignorance of the holder of the fact of death. But it may be remarked that when notice is given, under the circumstances of the present case, the liability is not put on the ground that the holder has excused himself from giving notice, but the notice is treated as sufficient. If then, where the excuse of notice is a personal privilege of the holder, the right of a subsequent indorser to be substituted does not apply; that doctrine can have no application to the present case.

But it appears plain on principle that if the right of action is once fixed and absolute in the holder a subsequent indorser taking up the paper is subrogated to his rights.

It has been shown, under the first head, that the right of action is vested in the holder so soon as he does all that the law requires him with his means of knowledge to do. Then no matter how the right of action which the holder has acquired against the prior indorser has

(1) 20 N. Y. 408.

1881

COSGRAVE v. BOYLE.

Strong, J.

arisen, on payment by the subsequent indorser he ought to be subrogated. The principle of subrogation always applies in favor of a surety. A party liable in that character, paying, is entitled to all securities and rights of action held by and vested in the creditor (1). Then, every indorser is a surety for those liable before him. Next, the holder's right of action against the first indorser is distinct from that which is satisfied and extinguished by the payment made by the second indorser. The second indorser paying only satisfies the several and distinct right of action of the holder against himself, and if the holder retains the note in his possession he may, after payment by the second, sue the first indorser and recover the full amount of the note. This is established by the elaborate judgment of Lord *Truro* in *Jones* v. *Broadhurst* (2).

The holder recovering under such conditions will, however, be held to be a trustee for the second indorser, who has paid, and the latter may recover from him as for money had and received. If, however, instead of retaining the instrument he hands it over to the second indorser, the distinct right of action which the holder retained against the first indorser, so long as he held the paper, will, if the note is endorsed in blank, pass with it.

Formerly, at common law, a title gained by subrogation could not be worked out in the case of transfers of rights of action not arising on negotiable instruments, and the aid of equity was indispensable, but where the liability was attached to a negotiable instrument, the title to which passed by delivery or endorsement, the intervention of equity was not required.

(1) See *Duncan Fox & Co.* v. *North and South Wales Bank*, 11 Ch. D. 88.

(2) 9 C. B. 173. It is said in *Cook et al* v. *Lister*; 13 C. B. N. S. 586; that although this judgment was delivered by *Cresswell*, J., it was written by Lord *Truro*.

From these considerations, therefore, I deduce the conclusion that the bank, after payment by the plaintiffs, still retained a right of action against the defendant, by means of which they might have enforced payment of the full amount of the note, and that this right of action passed with the note on its delivery to the plaintiffs.

Further, this doctrine of subrogation is now recognized by statute, and the indorser paying could insist upon all rights of action against parties liable before himself being expressly transferred, if they did not pass by the mere delivery of the note endorsed in blank. And under the procedure in the province of *Ontario*, established by the Administration of Justice Act, the plaintiffs are entitled to avail themselves in this action of all their equitable rights.

We are also to consider that the plaintiffs, by suing in the name of the bank as their trustee, could have recovered on the strength of the bank's title. To me there is nothing either illogical or inconvenient in holding that they became substituted to this same right of action when they retired the note. I am of opinion that the appeal should be allowed, and that judgment should be entered in the Court of Queen's Bench in favor of the plaintiffs for the amount of the note and interest, and that the respondent must be ordered to pay the costs in this court, as well as in the Court of Appeal.

FOURNIER, J., concurred.

HENRY, J.:—

I entirely concur in the views that have been expressed in this case by the learned Chief Justice and my brother *Strong*. It is the holder of a note which becomes dishonored who is always expected to give all

1881

COSGRAVE v. BOYLE.

Henry, J.

the requisite notices. When a note is dishonored it is protested, and the duty of the party protesting, or of the party for whom the protest is made out, is to give the notice to all the parties that are liable. An intermediate or immediate endorser has the right to assume that the holder of the note has given all the notices that are required. The indorser of the note has the right to conclude that that being done the law has been complied with, and all that is necessary was done for the bank to recover, and therefore when he is called upon subsequently by the bank for payment, he has, according to the views which are laid down here and which are applicable to this case a right to sue for this note by subrogation when he pays the note to the bank. I have no doubt that is the law, and that such a judgment will further the commerce and trade of the country, and that a contrary judgment would have a contrary effect. I am glad to find that the law will enable this court to come to a conclusion so favorable to the trade of the country, and at the same time sufficient to protect the rights of all the parties to such bills and notes. I think the notice posted by the Bank quite sufficient in this case.

GWYNNE J.:—

The right of the plaintiffs to recover in this action depends upon the right which the Bank of Commerce, who were the holders of the promissory note declared on when it matured, would have had, if they had been the plaintiffs, to recover against the defendant upon issue joined to a plea traversing an averment in the declaration that the defendant had due notice of dishonor of the note by the maker. There is no express authority in the English courts upon the subject, neither is there in *England* an act of parliament of the nature of the act in force here—viz.: 37 *Vic.*, c. 47, s. 1. The object of that act plainly was, as it appears to me, to

compel the parties to bills of exchange and promissory notes, payable in *Canada*, to designate under their hands, upon such bills and notes, their domicile, for the purpose of receiving notice of dishonor thereof, by making the place where such bill or note upon its face purported to be drawn or made to be the domicile for such purpose of all the parties thereto not so designating their domicile for that purpose; and the effect of the act, as it appears to me, is to make a notice of dishonor, mailed by the holder in due time to any party to such note, at the place designated, if any be designated or mailed to the address of such party at the place where the bill or note purports to have been drawn or made, if none be designated, equivalent to the delivery of such notice at the actual domicile or residence of such party. If, therefore, delivery by the Bank of Commerce of notice of dishonor in due time after maturity at the last actual domicile or place of residence of a deceased payee would have been a good notice, entitling them to recover against his personal representatives under the circumstances appearing in evidence, it will be equally good although only mailed and addressed to the payee by name at *Toronto* where the note purports to have been made. Now, in the absence of authority in *England*, we find that in *Stewart's Exors vs. Eden* (1), it was held in 1804 by the Supreme Court of the state of *New York*, that notice directed to and inserted in the key-hole of the last dwelling house which was shut up of a deceased endorser was good notice and well served, the holders having been ignorant of his death. This doctrine was re-affirmed in the same court in 1819, in the *Merchants Bank* vs. *Birch* (2), and again in 1843, in *Willis* vs. *Green* (3), and by the Supreme Court of the

(1) 2 Caines 121.
(2) 17 John. 25.
(3) 5 Hill 243.

1881

COSGRAVE v. BOYLE.

Gwynne, J.

state of *Pennsylvania* it was held, upon the authority of the above cases in *Lendermen's Executors* vs. *Guldenchal*, in appeal (1), that in the case of the death of an endorser of a promissory note before its maturity, if his decease be unknown to the holder, it is sufficient, in order to charge his estate, to direct notice of non-payment to the deceased endorser, by name, at the post office nearest his last place of residence; and these cases proceed upon the ground, that notice so given is, under the circumstances, good notice, not that the circumstances constitute a legal excuse for the omission to give good notice.

Upon the authority of the above cases and upon the true construction of the statute, in the absence of any express authority in *England* to the contrary, it must, I think, be held that if the *Bank of Commerce* had been plaintiffs, the evidence of the mailing of the notice of dishonor to the address of the deceased payee, at *Toronto*, where the note upon its face purports to have been made, was a good and sufficient notice, entitling the bank to have recovered on the issue traversing the averment in the declaration of notice of dishonor; in this view, the case of *Beale* vs. *Parish* (2) has no application, and the notice having been a good and sufficient notice, given by the holders at maturity to the payee, inures to the benefit of the plaintiff, notwithstanding that he was aware of the decease of the payee; a contrary decision would defeat what I cannot but take to have been the object of the statute, namely: To relieve holders of over-due notes and bills from all anxiety and difficulty arising by reason of their being ignorant of the actual place of residence of the parties on the note or bill, or of the fact appearing here, namely, the decease of the party to whom the notice was addressed.

(1) 34 Penn. 55. (2) 20 N. Y. 408.

1881

COSGRAVE v. BOYLE.

Gwynne, J.

The appeal must, therefore, be allowed with costs, and the rule in the court below be made absolute with costs for the entry of a verdict for the plaintiffs, pursuant to the leave reserved, for $409.28, with subsequent interest.

Appeal allowed with costs.

Attorneys for appellants: *O'Sullivan* and *Perdue.*

Attorneys for respondent: *McMichael, Hoskin & Ogden.*