THE CANADIAN BAR REVIEW

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☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 1, Ontario.

CASE AND COMMENT

CONFLICT OF LAWS—MORTGAGES OF LAND PERSONAL ESTATE WITHIN LORD KINGSDOWN'S ACT.—In the recent case of *Re Gauthier*[1] the testatrix, a British subject, made a holograph will in the province of Quebec, where she was then domiciled. She was domiciled there also at the time of her death. but this fact is immaterial to the case. The question was whether this will, admittedly valid by the domestic law of Quebec, was valid in Ontario under s. 19 (1) of the Wills Act, R.S.O. 1937, c 164 (which re-enacts a provision of the Wills Act, 1861, (U.K), commonly known as the Lord Kingsdown's Act), so as to pass the right of the testatrix, as mortgagee of land situated in Ontario, to the mortgage money.

The provision of the Ontario Wills Act in question is as follows:

> 19.—(1) Every will made out of Ontario by a British subject, whatever may be his domicile at the time of making the same or at the time of his death, shall, as regards personal estate, be held to be well executed for the purpose of being admitted to probate in Ontario, if the same was made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the law then in force in that part of His Majesty's Dominions where he had his domicile of origin.

The case invites comparison with the earlier case of *Re Landry and Steinhoff*.[2] The situation which arose in that case may be briefly restated. The testatrix, domiciled in Louisiana, and not being a British subject, was the mortgagee of land situated in Ontario. She made in Louisiana a holograph will,

[1] [1944] O.R. 401, [1944] 3 D.L.R. 401.
[2] [1941] O.R. 67, [1941] 1 D.L.R. 699.

valid as to both land and movables by the domestic law of Louisiana, but not valid by the domestic law of Ontario and therefore, under Ontario conflict of laws, ineffective to pass to the sole beneficiary any interest of the testatrix in land *in* Ontario, although it would have been effective as regards movables situated in Ontario, if there had been any. The beneficiary, also named as executrix, obtained probate in Ontario limited to personal estate, but it was held that the will did not vest in her as executrix the mortgagee's interest in the land, and consequently she could not validly exercise the power of sale so as to convey the land to a purchaser, unless she obtained letters of administration in Ontario.

In an annotation in the Dominion Law Reports[3], I ventured to state, somewhat dogmatically, that the result in *Re Landry and Steinhoff* would have been different if the testatrix had been a British subject, because in that event the will would have validated in Ontario by the statute commonly known as Lord Kingsdown's Act, and subsequently adopted in Ontario and now being s. 19 of R.S.O. 1937, c. 164. In other words, whereas succession to any interest in land, including the interest of a mortgagee[4], is governed in English and Ontario conflict of laws, as a general rule, by the *lex rei sitae*, this statute provides in effect, by way of exception, that if the particular interest in land is "personal estate", a will, as to that interest, is also valid if it is made abroad in accordance with the forms prescribed by any of the three laws specified in the statute. My statement was based on the hypothesis that the interest of a mortgagee in the mortgaged land is characterized as personal property, not real property.

In one essential particular the situation in *Re Gauthier* corresponded with the hypothetical situation stated by me, but different from the actual situation in *Re Landry and Steinhoff*. The testatrix was a British subject, and therefore her holograph will, valid by the domestic law of Quebec—the law of the place of making as well as the law of her domicile at the time of making—was, by virtue of Lord Kingsdown's Act, effective in Ontario as regards "personal estate". In another respect, however, the situation in *Re Landry and Steinhoff* differed from that in *Re Gauthier*. In the former case the mortgagee's interest in the mortgaged land was specifically in question. In the latter case only the right to the mortgage money was in question; the mortgagor in fact paid the money to the administrator who had been appointed in Ontario on the erroneous supposition that the

[3] [1941] 1 D.L.R. 703, at p. 705; *cf. Immovables in the Conflict of Laws* (1942), 20 Can. Bar Rev. at p. 125, and LAW OF MORTGAGES (1942) 809.

[4] *Cf. In re Hoyles*, [1911] 1 Ch. 179, at p. 187.

testatrix had died intestate as regards her right to the mortgage money. Rose C.J., in a carefully reasoned judgment, which is notable for its accurate statement of conflict rules relating to land, held that the right of the testatrix to the money was "personal estate" within the meaning of Lord Kingsdown's Act and therefore passed to the executrix under the holograph will. He found, however, that it was not necessary for him to decide, and therefore did not decide, whether the holograph will would have been effective to pass to the executrix all the rights of the testatrix as mortgagee. In other words he did not decide that on the facts of *Re Landry and Steinhoff* the result would have been different if the testatrix had been a British subject.

The question thus left undecided in *Re Gauthier* is specifically whether "personal estate" in Lord Kingsdown's Act includes a mortgagee's interest in the mortgaged land, that is, a freehold estate in land conveyed to the mortgagee subject to a condition subsequent expressed in a proviso for defeasance or a proviso for reconveyance. It is clear that a leasehold estate held either absolutely or by way of mortgage is personal property, and for a long time has been so regarded at law. So in equity, except that if the estate is held upon trust for sale and investment of the proceeds in real property, then what is in fact personal property may be virtue of the equitable doctrine of conversion be treated as already converted and therefore as being real property.

Clearly, at law, a freehold estate is real property. On the death of the freeholder intestate the legal estate formerly descended to his heir, and under a general devise of real property the legal estate passed, whether the freehold estate was held absolutely or by way of mortgage. In equity the freehold estate, if held upon trust for conversion into personality, might be treated as already converted. Apart from this possibility, which is mentioned only for the sake of completeness, equity, unlike law, differentiated between a freehold estate held absolutely and one held by way of mortgage. On the mortgagee's death his right to the mortgage money devolved upon his personal representative, and, as will be stated more fully later, the mortgage was regarded as merely security for the payment of the money. Consequently, although the legal estate in the land descended to the heir, the heir held the legal estate as trustee for the personal representative, and under a general devise of real property the beneficial interest in the mortgaged land did not pass. (It may be noted in passing that a mortgage of land does pass under a general bequest of personalty.[5]) The incongruity between the

[5] *Re Dods* (1901), 1 O.L.R. 7.

devolution of the right to the money upon the personal representative and the descent of the legal estate to the heir was removed in England by the Conveyancing and Law of Property Act, 1881, s. 30, adopted in substance in Ontario in 1910, and now being s. 7 of the Devolution Estates Act, R.S.O. 1937, c. 163, under which the legal estate of the mortgagee devolves upon his personal representative. In the meantime, in Ontario by the Devolution of Estates Act of 1886, and in England by the Land Transfer Act, 1897, the broader principle was adopted that real property generally, like personal property, devolves upon the personal representative, so that devolution upon the personal representative has completely ceased to be a distinguishing characteristic of personal property. These statutes, which assimilated real property and personal property as regards devolution upon the personal representative, do not of course affect the question now under discussion, namely, whether a mortgagee's freehold estate in land is personal property. The answer to this question must be found in the former law, and particular reference must be made to the definitions of "personal estate" and "real estate" contained in the Wills Acts. In England the Wills Act, 1837(U.K.), s. 1, provides in part as folows:

> In this Act, except where the nature of the provision or the context of the Act shall exclude such construction . . . . the words "real estate" shall extend to manors, advowsons, messuages, lands, titles, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein.

In Ontario the Wills Act, R.S.O. 1937, c. 164, s. 1, provides:

> (c) "Personal estate" shall include leasehold estates and other chattels real, and also money, shares of government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property, except real estate, which by law devolves upon the executor or administrator, and any share or interest therein.
> (d) "Real estate" shall include messuages, land, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein.

In England the Wills Act, 1861, (Lord Kingsdown's Act), contains no definition, but might be construed as a statute *in*

pari matria to which the definition in the Wills Act, 1837, would be applicable. In Ontario Lord Kingsdown's Act has been incorporated in the Wills Act, which contains a definition of "personal estate". It is proposed now to examine some features of these definitions.

The only significant difference between the definitions of "personal estate" in the Wills Act, 1837, and the Ontario Wills Act respectively is that in the former statute it is provided that personal estate includes "all other property whatsoever which by law devolves upon the executor or administrator", whereas in the Ontario statute the corresponding words are "all other property, except real estate, which by law devolves upon the executor or administrator." The former wording furnishes an intelligible, and perhaps controlling, test under the old law for distinguishing personal property from real property. whereas the insertion of the words "except real estate" in the Ontario definition obviously deprives the whole clause of any value as a general test. The present Ontario wording made its appearance in the statutes of 1910, c. 57, s. 2. Presumably it was realized at that time that the English wording, which still appeared so late as R.S.O. 1897, c. 128, s. 9, had become inappropriate since 1886 in Ontario. It is submitted that what was required in the circumstances was not the insertion of the words "except real estate", but something like the following: "and all other property whatsoever which before the coming into force of the Devolution of Estates Act of 1886 devolved by law upon the executor or administrator."

An especially interesting feature of the definition of personal estate, in both the English and Ontario versions, is the phrase "leasehold estates and other chattels real". As to what might in the old common law be included in the expression "chattels real", Pollock and Maitland, History of English Law before the Time of Edward 1 (2nd ed. 1898) 116, say:

> To a modern Englishman the phrase 'chattel real' suggests at once the 'leasehold interest,' and probably it suggests nothing else. But in the middle ages the phrase covers a whole group of rights, and the most prominent member of that group is, not the leasehold interest, but the seignorial right of marriage and wardship. When a wardship falls to the lord, this seems to be treated as a windfall; it is an eminently vendible right, and he who has it can bequeath it by his will. At all events in the hands of a purchaser, the wardship soon becomes a bequeathable chattel: already in John's reign this is so . . . . Is there any economic reason for this assimilation of a term of years to a wardship, and for the treatment of both of them as bequeathable chattels? We believe that there is, namely, the investment of capital, and by the way we will remark that the word *catallum*, if often it must be

> translated by our *chattel*, must at others be rendered by our *capital*. Already in the year 1200 sums of money that we must call enormous were being invested in the purchase of wardships and marriages.

See also Holdsworth, History of English Law, vol. 3, (3rd ed. 1923) 215.

Compared with the assimilation of leasehold estates and wardships in the middle ages, the similar assimilation of leasehold estates and mortgages belongs to a later period of the law, and was the result of Chancery's treatment of mortgages, and in particular of the development of the equitable doctrine that the mortgagor has an estate in the land and is the beneficial owner, and that the mortgagee's estate is merely security for the payment of the money. In the editions of Williams on Real Property which appeared before the law of England was fundamentally changed by the Law of Property Act, 1925, there were two pages (introducing the discussion of leaseholds and mortgages) from which the following passages (23rd ed. 1920, pp. 541-542) are quoted, without the footnotes:

> The principal interests of a personal nature derived from landed property are a term of years and mortgage. The origin and reason of the personal nature of a term of years in land have already attempted to be explained; and at the present day, leaseholds interest in land, in which, amongst other things, all building leases are included, form a subject sufficiently important to require a separate consideration. The personal nature of a mortgage was not clearly established till long after a term of years was considered as a chattel. But it is now settled that every mortgage, whether with or without a bond or covenant for the repayment of the money, forms part of the personal estate of the lender or mortgagee. And when it is known that the larger proportion of the lands in this kingdom is at present in mortgage, a fact generally allowed, it is evident that a chapter devoted to mortgages cannot be superfluous. It may be pointed out that mortgages, as well as leaseholds, are included in personal estate as passing to the executor or administrator, without reference to the question whether they are things specifically recoverable. As will be seen further on, the estate of a mortgagee may have the quality and incidents of real estate *at law*, but will nevertheless form part of his personal estate *in equity*.

It will be observed that Williams in effect suggests the same economic basis for the assimilation of leaseholds and mortgages as Pollock and Maitland suggest for the assimilation of leasehold and wardships, that is, that they are modes of investment of capital.

As noted by Rose C.J. in *Re Gauthier*, there has been no doubt since the judgment of Lord Nottingham in *Thornborough* v. *Baker*[6] in 1675 that on the death of a mortgagee the right to the mortgage money belongs to his executor or administrator, not to

[6] 3 Swans, 628.

his heir.[7] Only a few years later, in 1686, in *Canning* v. *Hicks*[8] and in 1699 in *Tabor* v. *Grover*,[9] both cited by Rose C.J., not merely the mortgage money, but also the "mortgage in fee," is treated in equity as personal estate; and in 1737 in *Casborne* v. *Scarfe*,[10] Lord Hardwicke's famous and much discussed statement that the mortgagor's equity of redemption is an estate in the land concludes with the assertion that "a mortgage in fee is personal assets". In 1803 in *Attorney-General* v. *Vigor*,[11] Lord Eldon said: "Where a person dies entitled to a mortgage interest, that is personal estate at that time." The whole passage in which this sentence occurs was quoted and applied, and the law was stated by Buckley J. in *In re Loveridge, Drayton* v. *Loveridge*[12] as follows:

> The whole question to be determined is whether, after possession for three years by the testator followed by possession by the widow, the property is, for purposes of devolution from the testator, to be treated as realty or personalty.
>
> Regarding this matter upon principle, it seems to me that the property is for purposes of devolution to be treated as personalty. The testator at the time of his death was entitled to the mortgage debt, which was personalty, and as security for that the land was vested in him subject to redemption. The estate in the land descended to the heir; but at the moment of the testator's death the heir was, as it appears to me, only a trustee for the legal personal representative, who was entitled to the debt and to the beneficial interest in the land in respect of the debt. After the lapse of many years the equity of redemption became barred, and the estate of the heir was no longer subject to redemption. But I see no reason why the estate of the heir, of which he was up to that time trustee for the legal personal representative, became at that date or at any time his property. Some one at the testator's death became entitled to this property. Unquestionably as regards the mortgage debt that person was the legal personal representative. The right against the land by way of security was the property of that same person, and, although at a later date the rights in respect of the land became enlarged from rights subject to redemption to rights freed from redemption, that can have no effect in discharging the legal owner of the land from his trusteeship for the owner of the debt.

In other words, notwithstanding that, until the law was changed by modern statutes, the legal freehold estate of the mortgagee continued to descend to his heir, it had become the settled rule in equity, long before the definition of personal estate was enacted in the Wills Act, 1837, that the beneficial interest

[7] *Cf.* HOLDSWORTH, HISTORY OF ENGLISH LAW, vol. 6 (1924) 546.
[8] 1 Vern. 412.
[9] 2 Vern. 367.
[10] 1 Atk. 603, at p. 605.
[11] 8 Ves. 256, at p. 277.
[12] [1902] 2 ch. 859, at pp. 862, 863.

in that estate devolved upon the executor or administrator (he being the cestui que trust under the trust imposed upon the heir in equity) and was personal estate within that definition. For this purpose the actual condition of the legal estate had become immaterial, as is illustrated by the parallel case of the legal freehold estate held upon trust for conversion into personalty. On the death of the cestui que trust his interest was treated as personalty by virtue of the equitable doctrine of conversion and for this purpose the actual condition of the legal estate was immaterial. See especially *In re Lyne's Settlement Trusts*[13]: "There can be no doubt that by law this property devolves upon the executors."

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THE MEANING OF "PROPERTY"—An interesting general point recently arose concerning the meaning of the term *property* in a clause in the Constitution of the Commonwealth of Australia. Section 51 states that "Parliament shall. . . . . have power to make laws. . . . with respect to . . . . (xxxi) the acquisition of property on just terms from any State or person". Under statutory authority certain regulations and orders were made which laid down rules for assessing compensation in cases of compulsory acquisition. The Minister then took possession of certain land which D held under lease and on which he conducted the profitable business of running a car park. The compensation allowed to him on the correct interpretation of the relevant order was the rental value. This indemnified D so far as concerned the rent owed to the landlord, but gave no compensation whatever for the entire loss of his business. D was unable to obtain vacant land nearby and so lost his livelihood. The question arose whether such an order conflicted with the requirement of the Constitution that the acquisition of *property* should be on just terms.[1]

Latham C.J. pointed out that *property* was an ambiguous term since sometimes it meant title to a res and sometimes the res over which title existed. The Constitution should be liberally interpreted and the benefit of both meanings given to the subject. But the Chief Justice decided that the taking of possession for a limited period was not an acquisition of property—such possessory rights should not be described as proprietary, as the Commonwealth was really only a licensee although acting with statutory authority.

[1] *Minister of State for the Army* v. *Dalziel*, [1944] Argus Law Reports 89.
[13] [1919] 1 ch. 80, at p. 98.

The majority decided otherwise. Rich J. considered that the language of the relevant section was perfectly general, and he was quite unable to understand how this transaction could be regarded otherwise than as an acquisition of property. "Property, in relation to land, is a bundle of rights exerciseable with respect to the land. The tenant of an unencumbered estate in fee simple has the largest possible bundle. But there is nothing in the placitum to suggest that the Legislature was intended to be at liberty to free itself from the restrictive conditions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating." Indeed, in English law the term special property was invented to denote the rights of a possessor not being owner. Starke J. treated the right of possession as a *ius in re aliena* and therefore as a right of property. Williams J. considered that if wrongful entry into possession of land created an interest in land, it must necessarily follow that the taking of possession under a statutory title which gives an exclusive, although limited, right to possession must be an acquisition of an interest in land. The Commonwealth secured a right in rem, valid against persons generally.

The majority therefore decided that such taking of possession was an acquisition of property and that the Constitution required that just compensation must be given.

This case merely underlines the ambiguity of the term property—a subject discussed by Noyes in his monumental work.[2] English law is deficient in general theory and in clear and accurate use of legal terminology. In addition to the confusion mentioned above, which is caused by the double use of the term property, there are other difficulties. In order to secure the advantage of remedies devised to protect property rights, the law sometimes feigns a tinge of property in what is really a personal interest. If it is desired to protect the privacy of letters, search is made for some element of property as an excuse for the granting of a remedy. Economically also the term property has been extended to cover assets which, according to the technique of the common law, are only choses in action. Even lawyers speak of a share certificate, a cheque or a bill of exchange as property. Hence we can no longer be sure that the term is confined to a res that is material, and it is difficult to determine exactly what is covered by a constitutional protection of "property".

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[2] *The Institution of Property.*

WAR—ALIEN ENEMY—ACTION FOR CANCELLATION OF CONTRACTS—ISSUE AND SERVICE OF PROCESS EX JURIS.—*The Bayer Co. Ltd.*, v. *Farbenfabriken Verm Friedr. Bayer & Co et al.*[1] was an action in the Ontario High Court in which the plaintiff sought to cancel executory contracts for the payment of money annually to certain corporations resident in enemy territory. The defendants in the action were the enemy corporations, against which alone the plaintiff claimed relief, and the Secretary of State for Canada in his capacity as Custodian under the Revised Regulations respecting Trading with the Enemy. (1943).[2] On the merits Urquhart J. held that the outbreak of war did not effect a dissolution of the contracts because the money payable thereunder was, by s. 29 of the Regulations, payable to the Custodian, so that the continuance of the contracts involved no benefit to or intercourse with the enemy.[3] On the procedural side, it appeared that a concurrent writ for service out of Ontario had been issued and further that an order had been made for substituted service personally on a certain officer in the Argentine and by mailing to the enemy corporations in care of Germany's Argentine embassy. While Urquhart J. questioned the method of service he proceeded with the case because he was satisfied that the Custodian had put forward everything that could be said in support of the contracts. The Ontario Court of Appeal dismissed the plaintiff's appeal on the ground that there was no jurisdiction to issue the concurrent writ for service out of Ontario.[4]

Three questions arise in connection with this case: (1) Jurisdiction to issue a writ against enemies *ex juris:* (2) service of process upon such enemies; and (3) effect of the Revised Regulations respecting Trading with the Enemy (1943) on actions against enemies.

Rule 25(1), paragraphs (a) to (m), of the Ontario Rules of Practice and Procedure,[5] provide for the issue of writs *ex juris*. The Court of Appeal, on the original hearing of the appeal and on a further re-hearing[6] pointed out that none of the numbered paragraphs of Rule 25(1) authorized the issue of a writ *ex juris* in the present case. Paragraph (i), providing for the issue of a writ *ex juris* where "a person out of Ontario is a necessary or proper party to an action properly brought against another person duly served within Ontario", could not be invoked since no claim,

[1] [1944] 2 D.L.R. 616, affirmed on other grounds, [1944] 3 D.L.R. 602, and on a re-hearing.

[2] P.C. 8526, dated November 13, 1943; see Can. War Orders and Regulations, 1943, vol. 4, p. 713.

[3] [1944] 2 D.L.R. 616, at p. 629.

[4] [1944] 3 D.L.R. 602.

not even for costs, was brought against the Custodian, so that no action was "properly brought" against an Ontario defendant. Nor would any amendment be allowed. The disposition of the case on this ground turned hence on general procedural rules and not on any particular provisions affecting non-resident enemies.

Assuming that a writ for service *ex juris* may be issued, what is the applicable law respecting service of process upon enemies *ex juris?* In the leading case of *Porter* v. *Freudenberg*[7]) Lord Reading pointed out that the "alien enemy. . . . is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against him." In most cases, orders for substituted service are sought, and in this connection the rule was laid down in *Porter* v. *Freudenberg* that it must be shown that "there exists a practical impossibility of actual service" and that "the method of substituted service. . . . is one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ. . . . to the defendant." The problem which this rule poses was faced by the court in a recent English case, *Churchill & Co. Ltd.*, v. *Lonberg*,[8] where an order for substituted service was refused because the court felt that the proposed method of service by advertisement, while the only one feasible, would be ineffective to bring knowledge of the writ to the defendant. Following this decision, an amendment was made to the English rules of Court under which service might be dispensed with in respect of a defendant who is an enemy within the Trading with the Enemy Act, provided that the applicant can show that the merits of the action are in his favour. Provision has also been made recently by the United States for substituted service upon persons in enemy territory; it is effected by serving the Alien Property Custodian and by his filing a written acceptance.[9]

The Canadian Revised Regulations respecting Trading with the Enemy (1943) provide in section 7(2) that "no person shall bring, take or continue against an enemy in any court in Canada an action or other proceeding of any kind whatsoever unless such person has obtained the written consent of the Custodian". The trial judgment in the *Bayer* case indicates that if the Custodian does not raise the question of lack of consent he may be estopped from relying on it in bar of the action. While the Regulations

[5] 1942 consolidation.
[6] [1944] O.W.N. 580.
[7] [1915] 1 K.B. 857.
[8] [1941] 3 All E.R. 137.
[9] See *Domke, Trading with the Enemy in World War II.* c. 16, pp. 236 ff.

make no specific reference to service of process, it may be that this matter is covered by the general and inclusive terms of section 17, reading as follows:

> Where by any statute, order in council, regulation, rule, by-law, contract or otherwise any notice is required to be given to a person who, under these Regulations, is an enemy, such notice shall be deemed to have been duly given if it is addressed to the enemy in care of the Custodian and delivered or mailed to the Custodian.

If this section does not directly authorize service upon a non-resident enemy through the Custodian, it may be an invitation to orders for substituted service upon the Custodian.

B. L.

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WILLS—GIFT OVER TO BENEFICIARY'S "LAWFUL HEIRS"—DISTRIBUTIVE SHARES.—In *Re Wallis*,[1] a testator made a bequest of less than $5000 to A and, on a certain event (which happened), over to A's "lawful heirs". A had died without assets leaving a widow and an infant child. Urquhart J. held that the bequest was divisible equally between them.

It is clear, as the learned trial Judge stated, that, in the absence of any contrary intention, a bequest to "heirs" is a gift to those who would take on an intestacy under the Statute of Distribution.[2] It appears further, however, (and *Bullock* v. *Downes*[3] supports this proposition) that such persons take in the same proportions as on an intestacy.[4] The widow in the instant case was apparently relying on this rule in claiming the whole bequest, because under s. 11 of the Devolution of Estates Act, as amended,[5] the widow of a deceased is entitled to the first $5000 of the estate. Urquhart J. made the point that the gift in *Re Wallis* passed under the testator's will and not through A so that the Devolution of Estates Act was inapplicable. Yet if the Act is applicable to determine who are the beneficiaries, it should be equally applicable to determine the proportions in which they share. And if the widow is a beneficiary, should she not be entitled at least to the amount which she would be entitled to out of her husband's estate, if any?[6]

[1] [1944] 3 D.L.R. 223 (Ont.)
[2] *Re Ferguson* (1897), 28 S.C.R. 38. *Cf.* 3 *Page on Wills* (1941, 3rd ed.), ss. 1009, 1085.
[3] (1860), 9 H.L.Cas. 1.
[4] See also *Martin* v. *Glover* (1844), 1 Coll. 269.
[5] R.S.O. 1937, c. 163; m. 1941 (Ont.), c. 19, s. 1.
[6] *Cf.* 3 *Page on Wills* (1941), 3rd ed.), s. 1085.

As a matter of construction, the learned Judge may have been right in saying that the will contemplated a division among two or more persons, but it does not necessarily follow that the division should be in equal shares. Accepting that the gift passed under the testator's will and not through A, the widow would not have been entitled to anything had she, for example, been a subscribing witness to the will. Moreover, to say that the Devolution of Estates Act is inapplicable discounts the fact that it was the testator who invoked it as a "shorthand" method of naming beneficiaries and their distributive shares.

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NEGLIGENCE—INTERVENING ACTS.—In previous notes in this REVIEW,[1] criticism was directed against the tendency to use the language of causation where acts of others intervene between a defendant's negligent conduct and the actual harm to the plaintiff; and it was pointed out that in such a case, "cause" as a fact is not in issue but rather the extent of a defendant's liability, which is largely a question of the social policy underlying the law of torts. If it is once established that a defendant is negligent, i.e., that a foreseeable risk of harm is created by his conduct, the intervention of other forces which produce the resulting harm raise questions as to the extent of his liability; and, unless these forces are outside the risk created by the defendant's conduct and produce unforeseeable results, the defendant may, notwithstanding them, be held liable. On this basis, a defendant may be fixed with legal responsibility even though another's act, which may be negligent, intervenes in connection with the final result. In other words, the "last wrongdoer" doctrine, relied on in some of the cases, is not properly an insulation against a defendant's liability if the wrongdoing is a normal incident of the risk which the defendant set in motion.[2]

That the Ontario courts appear to have accepted the foregoing principles is indicated in the way in which they have set themselves against the doctrine of ultimate negligence and have preferred to invoke the apportionment provisions of the Negligence Act.[3] It may be, of course. that a too violent swing away from ultimate negligence or from the "last wrongdoer" doctrine will produce hardship or injustice in individual cases, but the avail-

[1] (1938), 16 Can Bar Rev. 137; (1941), 19 Can Bar Rev. 610.

[2] See on this question generally *Prosser. Torts*, p. 352 ff.

[3] *Cf. Gives* v. *C.N.R.*, [1941] 4 D.L.R. 625 (Ont.); but see, *contra Towne* v. *B. C. Electric Ry.*, [1943] 3 D.L.R. 572 (B.C.); see Notes, (1941). 19 Can. Bar Rev. 754; (1943), 21 Can. Bar Rev. 663.

ability of an apportionment statute and the ready resort to it suggests that on the whole the burden of losses will be more equitably spread.

Three recent cases in the Ontario courts are illustrative of the problems raised by intervening acts subsequent to a defendant's negligence. *Yachuk* v. *Oliver Blais Co. Ltd.*,[4] was a case in which a gasoline station attendant sold a small quantity of gasoline to two small boys who carried it away in a lard pail. They dipped a bulrush into the pail and ignited it for use as a torch, but the bulrush, flaring up, set fire to the gasoline in the pail with the result that one of the boys was severely burned. The Court found that the gasoline station attendant was negligent in that a risk of harm such as might result from lighting the gasoline could reasonably be expected from the sale thereof to two small boys. A finding of contributory negligence was also made against the injured boy. It was then urged by the defendant's counsel that the boy's conduct amounted to ultimate negligence and "was therefore the only efficient cause of the accident". To this the Court replied: "There is much to be said for this point of view, but I cannot see that the negligence of the defendant is not a causa causans. Furthermore, I am faced by the recent decision of *Gives* v. *C.N.R.* . . ."[5]

Walker v. *De Luxe Cab Ltd.*,[6] was a case in which a taxi-cab driver, calling at night to transport the plaintiffs to the railway station, left his car at the curb with the ignition key in it and with the dome light on. After he had placed the plaintiff's baggage in the car and had gone back to wait for the plaintiffs inside the house, the car was stolen. The Court held that the plaintiffs were entitled to recover the value of their baggage because of the driver's negligence in failing to remove the key from the ignition switch. The theft of the car was an intentional act of wrongdoing by another person subsequent to the driver's negligence and yet in the view taken by the Court it had no insulating effect so far as the liability of the taxi-cab company was concerned. We must hence assume, although the judgment is not explicit on the point, that the loss of the baggage was a foreseeable result of leaving it unattended and the fact that it occurred through an act of theft did not exonerate the taxi-cab company. Either the act of theft was expectable or, if not, the actual loss was, and in either case, the liability of the company attached. This decision certainly departs from the "last wrongdoer" rule.

[4] [1944] 3 D.L.R. 615 (Ont.).
[5] *Ibid.*, at p. 615.
[6] [1944] 3 D.L.R. 175 (Ont.).

As is indicated above, it would have been preferable had the Court found that the taxi-cab driver's negligence consisted in leaving his car unattended with the baggage in it. The key was in the ignition switch before the car was loaded with the baggage so that leaving the key there was not negligence of which the plaintiffs could complain. Their concern was not for the safety of the car as such but for that of their baggage; and, of course, theft is not an unforseeable result of leaving property unattended.

In *Fetherston* v. *Neilson and King Edward Hotel (Toronto) Ltd.*,[7] a member of a hotel dance orchestra playing at a New Year's eve function sponsored by the hotel had his violin damaged when a guest at the function caused a pillar, placed on the orchestra platform to provide light, to fall on the violin. The Court held the guest to be negligent, but it also found negligence on the part of the hotel in that the fixture in question was unsuited to a crowded dance floor and it was foreseeable that dancers would come into contact with it, and further, in that the hotel had allowed overcrowding by admitting more persons than could be reasonably accommodated. The guest's intervening act was, hence, in the eyes of the Court, a normal incident of the hotel's negligence and the resulting harm was not an unforseeable consequence of the hotel's negligence. This is again a fairly emphatic repudiation of the "last wrongdoer" doctrine.

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COURTS—JURISDICTION—SERVICE OF PROCESS ON SOLDIER TEMPORARILY WITHOUT TERRITORY—*Lawrence* v. *Ward*[1] is a decision of the Master of the Supreme Court holding that the Ontario courts have jurisdiction over the person of a defendant who is within the province only by reason of military duties as a member of the armed forces and whose residence and domicile are ordinarily elsewhere. Accordingly an application to set aside the writ and service thereof on the defendant was dismissed and the Master rejected the contention that the defendant was in the position of a person enticed within the jurisdiction or brought in by the use of force.[2]

The action against the defendant was for breach of promise of marriage. It appears from the judgment that there was doubt as to where the contract was made or where the breach occurred so that the plaintiff did not invoke the rules respecting

[7] [1944] O.W.N. 547.
[1] [1944] 2 D.L.R. 724.
[2] It was accepted by the Master that jurisdiction would be nullified in such cases.

the issue of writs for service out of the jurisdiction but proceeded on the basis of the "personal" jurisdiction of the Ontario courts. It might, of course, have been somewhat incongruous if the plaintiff were compelled to issue a writ for service out of the jurisdiction[3] and then to have it served (perhaps by an order for substituted service) upon the defendant at his military encampment within the province.

The primacy of "personal" jurisdiction is underscored by the generally prevailing rules respecting the enforceability of foreign judgments;[4] but Courts may exercise jurisdiction on grounds other than the presence of the defendant within the territory, grounds which in Ontario are specified in Rule 25.[5] It is commonly stated, however, that jurisdiction over the person of a defendant is nullified if he has been enticed within the territory for the purpose of being served[6] or has been brought in forcibly.[7] A person in the position of the defendant in the present case has clearly not been enticed within the jurisdiction for the purpose of being served. Nor has he been brought in by physical force. Any force attaching to his presence in the province is rather "legal". Should this nullify jurisdiction? It is said that "if a person is brought into a state by legal process, as by extradition, he cannot be served in a civil case unless he has had an opportunity to remove from the state."[8] Is a soldier like the defendant within this exception? The Master did not think so, and his conclusion seems fortified by the fact that a soldier remains subject to the ordinary law, even if he also becomes subject to a military code. The immunity from jurisdiction recognized in the case of foreign sovereigns and diplomats is one of which the soldier can hardly avail himself. If he deserves immunity from service of process, he deserves also to be free from any civil liabilities while he is on military service. The question thus becomes a general one which can only be answered through legislation.

[3] Assuming that the case came within rule 25 of the Ontario Rules of Practice and Procedure which is the "code" on the question of when service out of the jurisdiction may be allowed.

[4] *Cf. Sirdar Gardyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 670 (P.C.).

[5] Consolidated Rules of Practice and Procedure, 1942.

[6] *Cf. Watkins* v. *North American Land and Timber Co., Ltd.*, (1904), 20 T.L.R. 534 (H.L.); *Lewis* v. *Wiley* (1923), 53 O.L.R. 608. The rule does not apply if a plaintiff merely takes advantage of a defendant's presence in the territory for some *bona fide* purpose in which the plaintiff is interested.

[7] *Cf. Beale, Conflict of Laws*, Vol. 1, p. 341;

[8] *Ibid.*