

He died in November, 1911; and she in September, 1915. Probate of her will was granted to Alexander T. MacDonell, of Lima, Ohio; he died in November, 1919, leaving a will whereby he appointed three executors, all residents of Ohio, who had obtained probate thereof in Ohio, but not in Ontario. These three executors had executed what, the solicitor said in his affidavit, "purports to be a good and sufficient discharge of the mortgage." It was also said that the money due on the mortgage had been paid; and counsel stated that it had in fact been paid by the mortgagor to the same solicitor, who had been also solicitor for Susan McKay, and who received the money as solicitor for her or her estate.

The discharge referred to was presented as affording sufficient evidence of the consent of the executors of Alexander to the order asked for. It might be sufficient to justify proceeding in their absence; but there were several difficulties in the way of making an order under sec. 9.

Reference to *Re Worthington and Armand* (1915), 33 O.L.R. 191.

The legal personal representative of Allen should have notice of the application. The fact that he is described as a trustee in the mortgage is no reason for excluding him from all consideration. The legal estate, vested in him as mortgagee, passed on his death to his legal personal representative, whether he was a mere trustee or not. There was no evidence that the legal estate ever passed to Susan McKay or to her estate.

Even assuming that Alexander, as the Ontario executor of Susan McKay, was entitled to give a valid discharge of the mortgage without joining in it the legal personal representative of Allen, the Ohio executors had no status in this Province until they proved the will here. The instrument signed by these executors "purports," the solicitor said, "to be a good and valid discharge;" but that is open to serious question.

It was likewise open to serious question whether "the money due in respect of the mortgage has been paid to a person entitled to receive the same," within the meaning of sec. 9. It was not clear when the money was paid to the solicitor. The Ohio executors were not entitled to be paid until they obtained probate in Ontario; and the position was not altered by shewing that some one in Ontario was holding the money on their behalf.

The application should be dismissed, but without prejudice to the right of the applicant to renew it on additional material, if so advised.