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Wills and the Administration of Estates

This symposium of opinions on sixteen vital questions in the field of Wills and the Administration of Estates took place at the Midwinter Meeting of the Ontario Section of the Canadian Bar Association at Windsor on January 31st, 1953. All members of the panel are acknowledged specialists in the field and their thoughts, expressed informally in keeping with the occasion, are both instructive and entertaining. Mr. Edson L. Haines, Q.C., Chairman of the Ontario Legal Education Committee, acted as moderator. The members of the panel are:

CHARLES A. BELL, Q.C., *Bell & McCready, Windsor*
JAMES GOW, Q.C., *Blake, Anglin, Osler & Cassels, Toronto*
DONALD GUTHRIE, Q.C., *Cassels, Brock & Kelley, Toronto*
G. M. HUYCKE, Q.C., *Osler, Hoskin & Harcourt, Toronto*
TERENCE SHEARD, Q.C., *Johnston, Sheard & Johnston, Toronto*

QUESTION 1

To what extent does a lawyer warrant a man's testamentary capacity by taking instructions from him and drawing a will?

THE CHAIRMAN: Mr. Sheard, would you open the discussion?

MR. SHEARD: Well, Mr. Chairman, the late Chancellor Boyd dealt with this question in his judgment in the well-known case of *Murphy* v. *Lamphier* (1914), 31 O.L.R. 287, which was affirmed by the Appellate Division at 32 O.L.R. 19. The portions of his judgment in which the Chancellor deals with the question are too long to quote in full, but he took an extremely strict view of the duties

of a solicitor in such circumstances, beginning his remarks at page 319 with this sentence:

> . . . the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that testable capacity exists and is being freely and intelligently exercised in the disposition of the property.

Of course, any pronouncement of Sir John Boyd is entitled to the highest respect, and I hope no one will think me lacking in respect if I remind you that at the time he delivered this judgment Sir John had been on the bench for over forty years; he had dwelt so long on the Olympian heights that his remarks were directed perhaps more to the angels who are said to dwell there than to those of us who have to discharge our duties to the public in the heat and dust of the market-place.

The trouble is that it is not easy to make up your mind whether testable capacity exists or not. The characteristic case is something like this, I think. A woman comes to see you, perhaps she is an old client and perhaps she is not, and she says, "Mother always intended to leave the house to me, but I find she has never made a will, and now she is getting old and she would like to make one and make sure I get the house". You go to see her mother and you find an old lady who is suffering from what the doctors call cerebral arterial sclerosis. She has had one or two slight strokes and she seems reasonably bright but a little vague. You get permission to interview the doctor and you ask him what he thinks, and he says, "Well, you know, some days she is quite bright". I will leave it to my colleagues to tell you what to do in such circumstances.

THE CHAIRMAN: Mr. Huycke, he has passed the ball to you. And while you are answering that question would you also consider the position of a lawyer asked to draw a will when the testator is on the point of death? The relatives tell you what they believe are the testator's wishes. You find the patient quite low and in no position to answer many questions either as to the disposition of the estate or his testamentary capacity.

MR. HUYCKE: Mr. Chairman, I think the answer depends to a large extent on your knowledge of the family, your knowledge of the circumstances. For example, how large a family is it, how many children are there? It depends to some extent on the nature of the disposition she wishes to make. If it is a simple, straightforward, routine disposition and you think she knows what is going on, you would probably try to give her a will and get it done as quickly as possible, pointing out at the same time that it may

not be good. But if you are in serious doubt, I think it would be wise to adopt delaying tactics and let nature take its course.

THE CHAIRMAN: Mr. Guthrie, would you care to discuss a variation of the same problem? Take the case of an old lady for whom you drew a will ten years ago and in the meantime, say, two or three codicils. Over the years her mind has steadily deteriorated until now you have some doubts about her capacity. She wants you to draw another codicil.

MR. GUTHRIE: I think Mr. Huycke has suggested what is probably the correct solution here too: masterly inactivity would be best. I remember reading a book recently in which a certain Scottish lawyer was praised for his genius for procrastination. Without taking that lawyer as an example for all cases, I think that when one knows the circumstances of a particular client who is obviously losing testamentary capacity, or perhaps has already lost it, and that client wants to make a foolish disposition, one would be quite justified in gracefully taking instructions but not acting too quickly upon them. The chances are that within a few days the client will have completely forgotten what he wanted you to do. I can think of no more practical way of dealing with the problem than that.

THE CHAIRMAN: Would the panel care to express an opinion on the practice, advocated by some solicitors, of taking a stenographer along to record the conversation between the solicitor and client when the solicitor is inquiring about testamentary capacity?

MR. GUTHRIE: I think you can go too far with that. After all, the making of a will—the taking of the instructions, the drawing of it, its execution—is a big task, and I think that to require a solicitor to arrange for a record of conversations is perhaps overdoing precaution.

THE CHAIRMAN: Does anyone disagree with that? Some lawyers think it a good practice, but apparently you do not feel that it is necessary.

MR. GUTHRIE: Well, I think, too, that some clients would probably resent the fact that you had a stenographer taking down everything they say.

THE CHAIRMAN: Would you mind discussing the following problem, Mr. Gow: Does a doctor by becoming a witness to a will vouch for the testamentary capacity?

MR. GOW: Before I answer that, it seems to me that there has been a certain amount of masterly evasion here on the part of the rest of the panel. The question we are asked is, To what extent does a lawyer warrant a man's testamentary capacity? I do not

think we warrant a man's capacity at all. We have certain duties to perform and we do our best to perform them, and no more than that is required of us.

But I think the doctor is in a different position. There is a decision of Chief Justice Falconbridge's, *Dougon* v. *Allan* (1914), 6 O.W.N. 713, in which he criticized a medical man who had acted as witness to a will and then gave evidence that the testator lacked testamentary capacity. In that case Chief Justice Falconbridge, referring to an earlier decision of his own, said that a medical man who acts as a witness to a will ought to be prepared to say that the testator had sufficient mental capacity for the purpose of making the will. I do not know whether you can get the doctors to come in and act as witnesses, but there is a hint for you.

MR. GUTHRIE: It has just occurred to me that we might sum it up in this way: when taking instructions and having a will executed the lawyer should remember that some day he may have to go into the witness box and give evidence as to the circumstances. If he keeps that in mind, I think he will realize his responsibilities. Perhaps Chancellor Boyd's judgment *is* a counsel of perfection, but if you have not fulfilled your duty pretty much as he lays it down, you may some day have a very awkward time in the witness box.

MR. GOW: Just before we go on, I do commend the decision of *Murphy* v. *Lamphier* to everybody. If you have not read it for some years, go back and read it again. It may be counsel of perfection, but it is a beautiful judgment and it deals with the very thing we are discussing—just what you should do in these very difficult situations. It is well reasoned and traces step by step the procedure you should follow. For example, it strongly recommends that in such circumstances as we are discussing you should go back to your office and make a memorandum to put away among your papers, with perhaps a copy attached to the original will.

MR. HUYCKE: I think, Mr. Chairman, that what Mr. Gow says is most important, that in taking instructions from any person, especially if there is doubt as to capacity, you ought to make copious notes and retain them in your file, so that when the time comes to prove the will you will have full notes made at the time and setting out your whole conversation—your instructions and what questions you asked—and will not have to rely on your memory. I think it would be a good thing for the doctor to make a memorandum as well.

QUESTION 2

A client is buying a new house. He wants to know whether he should take the title in his own name, in his wife's name, or in the names of both as joint tenants. What advice do you give him?

MR. GUTHRIE: First of all, the way the question is framed assumes that the client asks your advice. I think that even though he does not ask, the advice should probably be offered, because so many people buying a house do not realize the alternatives they have before them.

I suppose the object of putting a property in a wife's name, or in the joint names of husband and wife, was originally protection. That is probably the most common reason, to put property safely in the wife's control and away from the husband's creditors, so that she will have something in the event of his death or bankruptcy—the family home—no matter what happens. If that is the object, I cannot see how it is really accomplished by putting the property in joint tenancy with the husband, or even by holding it as tenants in common, because both tenancies, as you all know, can be severed at the instance of either party or of creditors and, although the wife will have something, she will not have the whole property. So if protection is the object, you might just as well put the house in the wife's name to start with. That is my firm opinion on that.

A second consideration, and one that is increasingly important now, is to avoid taxation. There is no ready answer to, "Will I save money by putting the house in the wife's name or will I not?" It depends of course on the size of the husband's estate—I am thinking now of succession duties—and the size of the wife's estate. It may easily be that by putting property in the wife's name you raise her over the taxable limit and she will then have to pay succession duties, or her estate will, whereas if the house had not been put in her name she would have been exempt, and succession duties, even at the lowest rate, come to a good round sum as you know.

Another aspect of taxation you must consider is gift tax, and that, I think, is one that a great many purchasers of property forget. It seems clear that by putting a house in your wife's name, or even by giving her a partial interest in it, you may be making yourself liable to gift tax. It is easy to overlook the possibility at the time. The gift may not be declared on the income tax returns, but

I can assure you that when the donor dies the chances are about ninety-nine out of a hundred that it will be discovered and the tax be demanded with interest. So if the property is to be put in a wife's name, remember the gift tax. If the value of the property is over the exemption, which normally is four thousand dollars in any year, it is possible to give her a partial interest year by year —for instance, a third undivided interest one year, a third undivided interest another, and a third undivided interest in yet another— and so keep within the taxable limit. As an alternative the property can be conveyed to the wife and the husband can take a mortgage back and year by year forgive principal.

To sum up, my advice is, if you want to protect your wife, put the property in her name outright, not in joint tenancy or anything of the sort, and do not forget the possibility of gift tax when you are doing it. It may be unnecessary, but perhaps it is good practice, to warn the client that when he makes a gift he has made it, and he cannot get it back.

MR. GOW: Sometimes she dies before he does.

THE CHAIRMAN: Mr. Bell, would you mind commenting on the position of a small estate as compared with a larger one? Is there any difference?

MR. BELL: I think there is a great deal of difference, Mr. Chairman. Take, for example, a young married couple with children. The couple have a joint deed of their home. They have no other assets except a joint bank account and some life insurance payable to the wife. If there should happen to be a premature death in this family, the survivor, because of the joint deed, takes over the assets easily. There is no succession duty, no gift tax and no cost of probate. I believe that in Windsor at least half the homes are held in joint tenancy, and I think rightly so, because the majority of couples probably have little besides the home in their joint names.

If the home is not joint, the husband or the wife in whose name the home is registered should make a will, and we all know that young people give little thought to wills. To have the husband or wife die without a will, with the deed registered in his or her name, might leave the children with vested interests in the property, which is a situation that conveyancers are always anxious to avoid.

I know, Mr. Chairman, that you are thinking of the problems that arise where there is a joint deed followed by unhappy marriage relations. When a client consults me about a joint deed, I sometimes ask him, "Are you happily married and have you every prospect of remaining so?" He always says "Yes". But a man who

has a deed jointly with his wife is not much worse off in domestic troubles than the man with one in his own name. Certainly he is much better off than the man with one in his wife's name; she is going to tell him to get out, but with my joint tenancy I have a chance to stay for a little while at least.

The cases of *Klimushko* v. *Klimushko*, [1950] O.W.N. 243, and *Szuba* v. *Szuba*, [1951] O.W.N. 61, dealing with the partition and sale of property owned jointly by married couples, are frightening situations, I admit. But all unhappy domestic relations are unfortunate and cases of this kind are few among the many thousands of successful joint tenancies. So my plea is to adopt the joint tenancy except for the estates of wealthy clients.

THE CHAIRMAN: What do you think, Mr. Guthrie?

MR. GUTHRIE: I am afraid I disagree. I do not like joint tenancy.

There was one thing I meant to remark on, and that is that thanks to Mr. Sheard's efforts in *Re Hommel* the question of succession duty seems to have been clarified. As you probably know, the departments have always held that, if a man puts a house in his wife's name and continues to live there, he has retained a benefit and it is still taxable, notwithstanding that three or five years have elapsed. But if *Re Hommel Estate*, [1953] O.R. 64, is sustained on appeal, and I must say that Mr. Justice Judson's reasons sound convincing, a husband may put a house in his wife's name, continue to reside there to the time of his death and the gift is treated as a good and completed gift at the time it was made.

MR. BELL: May I say something about the *Hommel* case, Mr. Chairman? I am sorry that again I do not agree with Mr. Guthrie. The result in the *Hommel* case is against the advice I have been giving clients for a long time. I have said, "The gift of the home to your wife will not place the home outside your estate, because you will continue to live in it. You are continuing to enjoy the subject of the gift and consequently the limitation period provided by the succession duty acts never starts to run." Mr. Sheard was the counsel for the successful appellant in *Re Hommel* and it is disconcerting to have to say that I do not agree with the decision. Mr. Justice Judson held that continued residence in the house does not confer a benefit on the husband within the meaning of the Act; the husband is there because of the marriage relationship. With all respect, this seems to me to be splitting hairs. The wording of the exemption in section 4(1)(g) of the Ontario Succession Duty Act is clear, and I should say that the husband, by residing

in the home, is enjoying the home and in possession of it. Certainly, the home is not "retained to the entire exclusion" of the husband.

THE CHAIRMAN: Mr. Sheard, what have you to say to that?

MR. SHEARD: I might point out the extreme impropriety of Mr. Bell's comments on a case that is still *sub judice*. [Laughter] I can only hope that no vacancy in the Court of Appeal occurs in the near future which he might be invited to fill. [Laughter] Personally I have not the slightest concern over the case. [Laughter]

I think Mr. Bell rather underestimates the importance of a possible split in the family. Of course it may be less important in Windsor; there would be less danger here than in Toronto. But I have found that husbands who put their houses in joint tenancy, and whose wives leave them in circumstances that disentitle them to alimony, are apt to be bitter towards the solicitor who advised the joint tenancy when they discover that, no matter what she does, the wife is going to be entitled to half the value of the house. This is a consideration that has to be kept in mind and I am inclined to agree with Mr. Guthrie. There is no tax advantage in the joint tenancy and I think there are some grave disadvantages.

QUESTION 3

A testator consults solicitor A, *who draws his will. Later, he has a new will drawn by solicitor* B, *which contains the usual clause revoking all former wills. Later still, the testator goes back to* A *and requests him to prepare a codicil leaving a legacy of $500 to a named beneficiary, but tells* A *nothing of the will drawn by* B. *The codicil as executed recites that it is a codicil to the earlier will, referring to it by date, and ends with the provision, "In all other respects I confirm my said will". On the testator's death, of what documents should probate be granted?*

THE CHAIRMAN: Mr. Huycke?

MR. HUYCKE: Mr. Chairman, on the facts as stated, I think it is almost impossible to give a definite answer as to what document or documents should be probated. There are many cases on this subject and probably about four different answers that might be given by a court.

The first possible answer is that the earlier will as well as the second will and the codicil should all be granted probate. There is a second case where the codicil has been deemed to be sufficient to revoke the later will and to revive the earlier will, in which case

probate would be granted of the earlier will and the codicil, disregarding the second will. In the third case, the codicil is deemed to be sufficient to revoke the later will but insufficient to revive the earlier will; then there is probably an intestacy. There is a fourth case where the codicil is deemed to be of no effect in so far as it refers to the earlier will by date, the reference to the earlier will being regarded as a *falsa demonstratio*.

Probably the usual answer would be that if the codicil were sufficient to revoke the later will and to revive the earlier will—all other things being equal—the first will and the codicil are the documents to which probate will be granted. But all this points up the dangers in codicils and series of codicils. However convenient codicils may be, they make for difficulties.

I think that the safe rule is to avoid the use of codicils whereever practicable, but if a solicitor is expressly instructed to prepare one, he should insist on having before him the will to which he is preparing it—the original will, not a copy. I remember one case in my practice where an intending testator came and asked me to prepare a codicil to a will; he presented a copy of his will and said that he did not want—his previous solicitor had died—he did not want to go back and ask the solicitor's office for the original.

MR. GOW: It's all right. It was my office. [Laughter]

MR. HUYCKE: He was embarrassed, but he insisted that the copy he left with me was a copy of his last will, and on his insistence I proceeded to draw the codicil. Quite a few changes were made by the codicil and unfortunately within a year the testator died.

To my consternation, when Mr. Gow sent me over the will in his office it turned out that it was dated several months after the will of which I had a copy. Fortunately the will he sent me made no changes in the substance of the earlier will. In that case all the facts were presented to the court and the copies of both wills—the original of the earlier will had in the meantime been destroyed—and probate was granted of the subsequent will and my codicil, the court being satisfied that the two wills were substantially the same.

That is an example of the difficulties codicils give rise to. You cannot generalize about determining the true intention of the testator from the various documents which are presented. Intention is the sole guide in deciding whether a will has been revoked or revived. I think it is essential that the solicitor should insist upon having the original documents before him and, if possible, prepare a new will instead of a codicil.

THE CHAIRMAN: Mr. Sheard, would you wind up the discussion on this question?

MR. SHEARD: After Mr. Huycke's encyclopedic analysis of it, I have nothing to add except to say that I agree with him. As you know, the question was not included with any expectation that we would be able to find a categorical answer to it. The problem, as Mr. Huycke has indicated, is extremely difficult and the cases are confusing. The question was included merely for the purpose of emphasizing a difficulty which is recurrent because it is inherent in human nature, the client will not tell you if he has been to another solicitor, and therefore you must assume that perhaps he has.

THE CHAIRMAN: Thank you, Mr. Sheard.

QUESTION 4

To what extent is it the duty of a solicitor to inquire into the circumstances, both financial and family, of a person for whom he is drawing a will? In other words, is the solicitor obligated merely to take instructions as they are given to him or is it his duty to make inquiries and, if so, to what things should these inquiries be directed?

Mr. Gow, would you start?

MR. GOW: Yes, Mr. Chairman. When the testator comes to you he wants to make a will. That does not mean that he wants a document only; he wants a will that is going to stand up under attack. He does not want it to be the subject of an application for interpretation later on, but an efficient vehicle for the administration and distribution of his estate. As long as his instructions are clear, you will have no difficulty—if you are a Sheard—in drawing an intelligible document. But you cannot perform for your client the other services for which he has consulted you unless you know something about his means and his responsibilities. An improvident will is a precarious will, and you cannot tell whether it is improvident without knowing his circumstances and whether the will is likely to be vulnerable to an application under the Dependants' Relief Act or to an allegation of undue influence. And he probably does not know anything about succession duties.

I might say that we had an understanding of sorts—it was not quite firm enough to suit me—that if any references made here to the book of the learned author of *Canadian Forms of Wills* stimulated sales, perhaps something might come to the members of this panel. [Laughter] You will find on the very first page of Mr.

Sheard's book his own views on this problem and I can do no more than endorse them. Often it *is* difficult to get the information you need. The testator comes in and for some reason best known to himself does not want to talk. You must stick at it and shake the information out of him. He may walk out of the office in a huff, but it should be only as a last resort that you give up and say, "Well, all right, if that is the way you want it, I will draw the will for you without knowing anything about you, or your affairs, or your family". But, if you do that, I suggest you make a record for yourself. You may not feel you have to write him a letter, but at least put a memorandum away in your file, because certainly you cannot fulfil your responsibilities unless you get full instructions.

THE CHAIRMAN: Thank you, Mr. Gow. Does anyone disagree with Mr. Gow's observations?

MR. SHEARD: No, though I might add this, Mr. Chairman: in case anyone finds my book an insufficient authority, the same view is expressed by Chancellor Boyd in the case I have already referred to. [Laughter]

QUESTION 5

When a lawyer is taking instructions to draw a will for a man with a wife and children, to what extent should he call attention to the provisions of the Dependants' Relief Act, and is it malpractice to fail to do so? Can the provisions of the Dependants' Relief Act be waived? What is the position where the man has been divorced and the first wife is still living?

THE CHAIRMAN: Mr. Sheard, would you take that question?

MR. SHEARD: Dealing with the first part, Mr. Chairman, I do not know whether it is malpractice or not, but obviously there is not much point in drawing a will you feel sure will be modified on an application under the Act, at least without telling the testator the result that may easily follow.

Turning to the second part—whether the rights under the Act can be waived—of course the simple answer is yes, because nobody is compelled to institute proceedings under the Act. But I take it that the intent of the question is, Can a person contract out of her rights under the Act? and here, I think, it is necessary to consider the problem from two different points of view, because it has been held by the Ontario Court of Appeal, in *Olin* v *Perrin*, [1946] O.R. 54, as you may remember, that a wife—and this

question only arises in practice in connection with a wife's rights —can contract out of her rights under the Act while the testator is alive. That opinion is based on a provision of our Act, not found in some of the Acts in other jurisdictions, which debars a wife who is living apart from her husband under conditions that disentitle her to alimony, and Chief Justice Robertson said that that included a disentitlement as a result of a separation agreement.

When you come to the position after the death of the testator, I would have said that there was clearly no objection to effecting a settlement of the widow's rights, if it were not for the recent decision in *Re Close*, [1952] O.W.N. 660. I have read that decision two or three times and I find it difficult to understand what was decided. I can scarcely believe that the Court of Appeal intended to hold that in no such case could a valid settlement ever be made unless it is approved by the court, and yet if it did not decide that, I do not know what it decided. My doubts in the matter were reinforced when I discovered that they are shared by Mr. Chitty, if I have correctly read his comments on the case in Chitty's Law Journal.

Turning to the final point, on divorce, the question could only arise of course if there is some question about the validity of the divorce, and here I should like to draw attention to the recent English decision of *Re Peete*, also by the way adversely commented on by Mr. Chitty, which is found in [1952] 2 All E.R. 599. The court held that in any case where the question of the validity of a marriage is raised, the onus is on the wife claiming under the corresponding English Act to establish the validity of the marriage. So it is not sufficient for her merely to tender evidence that the marriage ceremony was performed under a licence that was issued, and that the parties cohabited as husband and wife. Once it is shown that there is some question about the validity of an antecedent divorce on which the validity of the marriage depends, she must prove her whole case in every detail. That is an extremely important decision, because I think there are other decisions in Western Canada which rather go the other way.

THE CHAIRMAN: Thank you, Mr. Sheard. I take it, then, that there is a real problem where someone has crossed the border, secured a divorce in the United States and then come back to live in Ontario.

MR. SHEARD: I agree that there is a very real problem, yes.

THE CHAIRMAN: Thank you. Mr. Bell, have you anything to add?

MR. BELL: I was wondering if the other members of the panel would deal with the case where the wife waives alimony in a marriage settlement agreement, an agreement made before marriage. I should think that that is an important question, particularly for people who marry late in life. I could not find any decision on the point myself, but there may be one.

MR. SHEARD: The point was dealt with in *Re Duranceau*, [1952] O.R. 584, where the Court of Appeal held that such an agreement would not prevent the wife from applying under the statute.

QUESTION 6

In the execution of a will, how should the testator be instructed to sign, that is, by his usual signature, by using all his initials, which may not be his usual signature, or by his name in full?

THE CHAIRMAN: Mr. Guthrie, what do you think of that?

MR. GUTHRIE: I suppose that is one of the commonest questions you are asked when you are having a will executed —"How do I sign my name?" Strictly, I suppose, the answer is that it does not matter a particle. You can sign any way you like. You can put all your names in full, you can put all your initials, or you can put only your usual initials, so long as you intend what you write to be your signature. As you all know, under the Wills Act the testator does not have to sign the will at all; he can get somebody else to do it for him.

As I say, the manner of signature does not affect the legal validity of the will. From a practical standpoint, however, I think it is essential to tell your client to sign his will as he would sign his name to a cheque or any other document, to use his customary signature. The importance of doing so is, of course, that if both witnesses are dead when you come to prove the will, you have to find someone who is prepared to swear to the testator's signature as being his customary signature. So there is some practical advantage in having the testator sign in his usual and customary way.

Although it is not covered by the question, I might add that it is a common practice for many solicitors, when a will is being executed, to have an affidavit of execution completed and attached to it. I personally think it is a good practice to follow, but unfortunately some of our surrogate court judges, perhaps all of them, I am not sure, disagree and will not receive such an affidavit, on the ground that you cannot properly entitle it, "In the Surrogate Court" or "In the Matter of the Estate" of someone

who is still alive. But to my mind that does not seem to be a real objection. I do not see why you cannot anticipate and entitle an affidavit "In the Surrogate Court" or "In the Matter of the Estate", and I think that an affidavit made immediately after the execution is likely to be more valuable than one made perhaps twenty years later, when the witnesses may have forgotten all about it.

THE CHAIRMAN: Mr. Gow, would you care to add something to that?

MR. GOW: The matter of the wisdom of making an affidavit was discussed at a mid-winter meeting at Niagara Falls of the Ontario members of the Canadian Bar Association in 1949. A motion was made that the Surrogate Courts Act should be amended to make such an affidavit admissible. The motion was killed at the meeting after quite a vigorous discussion. As I remember, the present Chief Justice put the last nail in the coffin. He said that, the proof of wills being so important a thing, he did not like to think of a will being proved on an affidavit that might be very old.

MR. HUYCKE: Mr. Chairman, on the affidavit of execution, under rule 68 of the surrogate court rules, where the will is deposited for safe-keeping in the office of the registrar of the surrogate court, an affidavit of due execution may be deposited with the will and, when it is, no further affidavit need be furnished upon the application for probate unless required by the judge. So if the will is deposited with the surrogate court for safe-keeping, there is already provision for a contemporaneous affidavit.

THE CHAIRMAN: Thank you, Mr. Huycke. One of the things I have been wondering is whether many people take advantage of that provision and deposit wills in the surrogate court office.

MR. GOW: I have never heard of it being done.

QUESTION 7

Should wills be executed in duplicate?

THE CHAIRMAN: Mr. Sheard, would you lead off?

MR. SHEARD: It has always seemed to me that this question involves a contradiction in terms, because it is the later document only that is the last will and one of two copies must be later than the other. Nevertheless, we know that wills *are* executed in duplicate. The difficulty arises of course from the application of the presumption of revocation; in other words, if either counterpart is in the possession of the deceased and is not forthcoming at his death, the presumption is that it has been destroyed with the in-

tention of revoking it, and that revokes both. Therefore, strictly speaking, you must produce both at the time of probate, which, instead of simplifying your problem, complicates it. So I think the practice of executing wills in duplicate is pernicious and I never adopt it.

THE CHAIRMAN: Does anyone disagree with that?

MR. GUTHRIE: No, I agree. But it seems to me that the same object can be accomplished by having the testator execute one will, of which you make exact copies, and you note on the copies where the original is. Then if the testator, who is travelling for example, wants to take the copy with him and dies during his trip, as so many people seem to do, anyone finding the will will know where to look for the original. I think this procedure solves any difficulty there may be and avoids the complications Mr. Sheard has referred to.

QUESTION 8

Should a client who has executed a will be told that it ought either to remain with the solicitor or be deposited elsewhere with advice to the solicitor?

THE CHAIRMAN: Mr. Bell, would you like to take that one?

MR. BELL: I usually advise a client to put his will in a safe place. I warn him not to leave it at home or among his personal effects, unless they are in a safety deposit box. My customary question is to ask him if he has a safety deposit box and, if he has, I think that is where it should be. But, also, I offer the facilities of our office, since we have fire-proof equipment there.

MR. HUYCKE: Although, Mr. Chairman, there are obvious advantages in having the will deposited in your will box, certain responsibilities are involved. I know we have in our box some wills dated as far back as 1890 and we are afraid to destroy them. I suppose we will keep them there until the year 2000. It should be borne in mind, I think, that the will is the testator's property and he is the person to direct where it should be deposited. There is really no disadvantage in keeping it in a safety deposit box, because the succession duty departments are quick to give you permission to open the box and get it out on a moment's notice. And although it may be nice to have the will in your will box, I do not think one should be too insistent.

THE CHAIRMAN: Here is a problem I should like to discuss with

you, gentlemen. Does a solicitor incur any liability for loss or mutilation of a will left in his custody? What do you think about that, Mr. Gow?

MR. GOW: He probably does, but I am not sure to whom. We cannot owe a duty to the dead, though we may owe one to the beneficiaries. We have an envelope in our office, which I think came down from past generations. Printed across the top of it in bold type are the words: "Without assuming any obligation for its safekeeping or for the disposal of it should it become operative, please deposit in your vault . . .", and it is supposed to be signed by the testator. I could never bring myself to put it in front of the fellow to sign. [Laughter]

MR. GUTHRIE: There is another problem that occurs to me in connection with the custody of wills, which often causes a good deal of embarrassment. To whom may one divulge the contents and to whom may one deliver the will? I know of several cases where a father's or mother's will has been in our custody, perhaps the testator is ill or something of the sort, and a member of the family comes in and wants to have just a peek at it to make sure that such and such a thing is covered. Unless one is on guard, one is apt to divulge the contents without the slightest authority. In the same way, one must never deliver a will or a codicil without the most precise instructions from the person who executed it. Those are additional responsibilities that must be kept in mind when you accept custody.

THE CHAIRMAN: Thank you, Mr. Guthrie. Now, gentlemen, we pass to a question that may be rather controversial.

QUESTION 9

What are the advantages and disadvantages of a co-executorship with a trust company, and when should a lawyer advise one?

Mr. Guthrie, will you tee off?

MR. GUTHRIE: If you like. I think it is almost impossible to lay down any general rule. The answer depends almost entirely upon the circumstances of the individual case. By and large, where you are dealing with the estate of a married man, a wife is apt to feel resentful if she is not named as an executrix. The appointment gives her a feeling that her husband knew she would be interested in the estate and that she has some measure of control over what is going on. In most cases it is sound to call the testator's attention to the fact that most wives like to be remembered. Although she

may not do much, she can often with advantage be appointed an executrix.

Again, where there is a large family of young children, although the trust companies do their best, I do not think they are really as well fitted to take care of a growing family, to see that they are educated and generally looked after, as an individual who is in close contact with the family. This is definitely a case where a co-executor can be valuable and should be suggested by the solicitor who is drawing the will or giving advice.

Then, again, it is a great advantage to the children of a testator to get some business experience. If the burden of administration is cast on a trust company alone, it has the custody of securities, it keeps the accounts, and so forth, and the children learn little or nothing. A child, and I think particularly a daughter, by acting as co-executor can learn a great deal about business methods that otherwise she might be totally ignorant of. To make the trust company educate the children at its own expense may be to impose a bit of a burden, but nevertheless this is a point to keep in mind.

But you should remember not to overdo the appointment of co-executors. As you probably know, in England the court will grant probate now to not more than four executors, and that, to my mind, should certainly be the maximum for Canada as well. Even four executors can be a perfect nuisance. I am now a trustee of an estate of which there are four: one lives in Brantford, one lives out in the country, and my partner and myself are in Toronto. You cannot get anything signed quickly; it is a nuisance getting cheques signed or securities endorsed. And this is just one example of the difficulties that can be caused by having too many executors. So four to my mind is the limit, and even four may be too many.

One other point you might keep in mind, when appointing or thinking of appointing a co-executor, is not to appoint someone who is likely to have business relations with the estate, someone who has a conflicting interest, for example, somebody who may be going to buy property from the estate. It is wiser to exclude him altogether.

THE CHAIRMAN: Thank you. Mr. Huycke, would you like to add something?

MR. HUYCKE: Mr. Chairman, there is the point that the presence of a co-executor may occasionally relieve the trust company from unmerited criticism. If a wife, son or friend of the family is appointed, he can act as a buffer between the family and the trust

company when friction develops. It is always easy to criticize the executors and trustees for selling a stock at thirty, which six months later goes to sixty; but if a member or friend of the family is co-executor, he has equal responsibility and probably has discussed the transaction with the other executors and the family, and there will not be the same opportunity for criticism.

QUESTION 10

What is the position of a solicitor when a will is drawn by a trust company and sent by the company to the solicitor for approval on behalf of the testator? For example, should he (a) talk first to the client, (b) feel free to recommend a change in the names of the executors, (c) approve a recommendation to change insurance from preferred beneficiaries and make it payable to the trustees on similar and separate trusts?

THE CHAIRMAN: Mr. Huycke, would you take (a), please?

MR. HUYCKE: Mr. Chairman, I assume that the question is a generalization. I mean, it mentions a trust company only, but I assume it might refer also to a will drawn by the son or any agent of the testator and handed to the solicitor for approval or for polishing. My answer is that I think the solicitor to whom the will is sent becomes the solicitor for the testator; he is not the solicitor for the trust company or for the person who drew the will. If I were in the position where I received a plan or a draft of a will from a trust company or any other agent, I would like to know, in the first place, that I had been suggested by the testator as his solicitor. Failing that, I should have it understood by the testator that I am acting for him. Having taken that step, I think that, regardless of how competently and thoroughly the will has been considered, it is my duty to discuss it with the testator, just as if I were drawing it in the first place. I ought to satisfy myself that the testator has considered all possible eventualities; I ought to know the objects of his bounty; I ought to know something about his whole estate. I think I have obligations to the testator.

If I were to approve a will sent me without this discussion with the testator, without obtaining his direct instructions, and it later came before the courts, I would not like to be in a position where I had to say, "Yes, I approved the will for the testator but I never saw him". I might be an entire strnager to him. I would not like to find myself in that position.

THE CHAIRMAN: Thank you, Mr. Huycke. Mr. Sheard?

MR. SHEARD: There is always a certain charm about hearing the senior partner of a large firm take a high ethical tone. Personally, I am not prepared to lay down such hard and fast rules as Mr. Huycke is able to set for himself. I think that again the answer depends a great deal on the circumstances. As long as the solicitor is conscious of his responsibilities, it is for him to discharge them in the way he, in his judgment, feels meets the circumstances in which he finds himself.

THE CHAIRMAN: Thank you, Mr. Sheard. Mr. Gow, would you deal with part (b)?

MR. GOW: Our chairman, I have come to the conclusion, is a smooth-running and deep stream. He picked Mr. Guthrie to answer question 9, because Mr. Guthrie has no trust company clients. He does a great deal of work with them, I must say, but he does not actually act for them. Mr. Huycke and I do, but Mr. Huycke was very skilful in his part of the question; he got out of the trust-company innuendo by saying that he assumed the question referred to wills drawn, not only by a trust company, but by any agent of the testator. [Laughter] I do not think I can escape quite so easily. The chairman knows perfectly well that this is going to embarrass me. I can look through the audience and see several estate managers of trust companies who have been kind enough to send me wills for approval and now I am supposed to say that I might have the temerity to recommend that the trust company's name be struck out. [Laughter] Well, I dislike having to bite the hand that feeds me, but just the same there is no doubt where my duty lies. I must follow along and say that I have to inquire into the circumstances and, if I come to the conclusion that the testator has been wrongly advised and that there is no occasion for a corporate executor, I will have to tell the testator so, and then try to make my peace with the trust company. [Laughter]

THE CHAIRMAN: Thank you, Mr. Gow. I am told, with respect to part (c), that some trust companies recommend that insurance policies be changed to make them payable to the trustees, who are then directed to dispose of the moneys as provided by the policies originally. What do you think of that practice, Mr. Guthrie?

MR. GUTHRIE: If the disposal of the insurance money remains the same, I cannot see anything to justify a change being made by the will. When, for example, the proceeds of an insurance policy are to be divided immediately on the testator's death and paid over, I see no reason at all to make them payable to the trustees or executors. But it is quite possible, of course, that a testator may

want to create a life estate in the insurance moneys or deal with them in a succession of life estates, and then the practice mentioned is a useful way of changing the designation or the benefits of the beneficiaries. The only thing is, if one does that, one must make sure that it is done properly by the will, and two further important points should be kept in view: first, be sure that you create a trust of the insurance moneys and do not make them part of the general estate; and, secondly, see that the proceeds do not go outside the class of preferred beneficiaries. If anybody has any doubts about how to do it, I need only refer him to Mr. Sheard's valuable book.

MR. SHEARD: To my *valuable* book? [Laughter]

MR. GUTHRIE: I am quite sure you will find adequate guidance there.

QUESTION 11

How should you advise a client for whom you are drawing a will, who tells you that he has an interest in a partnership?

THE CHAIRMAN: Mr. Bell, would you take that one?

MR. BELL: Yes, Mr. Chairman. When the matter of partnership comes up in the drafting of a will you must stop and ask for the partnership agreement. Sometimes you will find it makes no reference to the death of a partner or, if it does, the terms are not consistent with the instructions you have for the will. In either of those cases you may suggest a supplement to the partnership agreement that will fit in with the ideas of the testator, particularly when he has a large interest in the partnership. We know that there are quite a number of things to be thought of, because the death of a principal partner often leaves the surviving partner in a precarious position. It often means that the survivor must purchase the deceased's interest in the firm and, unless easy terms are allowed, the business goes on the rocks. So that in practice you will find that when you have a partnership to deal with in drawing a will you must consider both the will and the partnership agreement. Of course we all know that under section 33 of the Partnership Act the death of a partner dissolves the partnership as regards all the partners, unless the partnership agreement provides otherwise.

THE CHAIRMAN: Mr. Huycke, I wonder if you would tell us some of the things that should be looked into by a lawyer when the partnership business is continued by arrangement of the parties after the death of one of them.

MR. HUYCKE: The firm may survive the death under the partner-

ship agreement and the deceased partner may hold fifty per cent, seventy-five per cent, or even more of the capital. In that case, if provision is made in the will to withdraw within a year all the deceased's capital from the business, it might ruin the business, probably it would, and there ought to be definite provision in the will authorizing the executors to withdraw the estate's assets gradually.

There should also be provision in the will authorizing the estate to continue the business; it might be a retail or other business where an interruption would be ruinous. If the business as a business is to be continued, as the partnership agreement may well provide—for example, the agreement may provide for a son to carry on the deceased's interest—the will should also provide for it; otherwise the executors would be called upon to get in the estate within the usual period of one year.

It is necessary, further, to consider whether or not an insurance scheme has been worked out by the partners. Insurance may have been taken out by the firm or taken out by the individual partners.

All these facts have to be ascertained by the solicitor before he can intelligently prepare a will for a testator who is a member of a partnership. The important thing is to determine all the facts surrounding the relationships existing among the various members of the firm. It is of the utmost importance to leave no stone unturned in investigating the partnership agreement, the financial statements of the partnership, even the family situation of the various partners. Only when all the facts have been obtained and discussed with the testator, can an appropriate will be drawn to carry out his intentions.

THE CHAIRMAN: Thank you. May we now go on to the next question, which is quite a difficult one?

QUESTION 12

What is the basis for the valuation of a minority interest in a private company for succession duty purposes?

Mr. Gow, would you take that one?

MR. GOW: Gentlemen, you must observe that the question is really very narrow. It is, "What is the basis for the valuation of a *minority* interest in a private company for succession duty purposes?" The person who drafted the question apparently did not intend that I should try to give a dissertation on the valuation of interests in private companies generally, including majority interests, but I do want to make one or two general observations.

First, valuation for succession duty purposes should always be regarded as a matter requiring care and attention, because the succession duties people have long memories—most departments have—and they will bring up on a later occasion a valuation previously made where only a few shares were concerned. So that, even if large holdings are not involved, I think valuation should be handled carefully.

Now, because you may not have had much experience yourself, it is a mistake to assume that the department is equally ignorant. Mr. Ovens, who is the Chief Valuator of the Succession Duties Branch of the Department of National Revenue, in an address which I will refer to in a minute, said that his branch had over two hundred cases a month involving the valuation of private company interests, so that it is something that comes up quite frequently.

The Branch have various ways of approaching valuation, and I cannot do better than to refer you now to Mr. Ovens' address, which he gave at the annual meeting of the Canadian Bar Association in Toronto on September 13th, 1951. Perhaps Mr. Haines can do something about this: I had kept my copy ever since, from which I had some special copies prepared for the use of this panel, and now Mr. Haines has mine. It is called "The Valuation of Private Companies for Succession Duties and Similar Purposes". It is a very frank explanation by the head of the responsible branch of the way in which they proceed to value these interests. He points out that there are four methods. They may use one exclusively, but almost invariably they look at the other three. I think it may be in your interest, when you get to Ottawa, to try to make them look at all four, to see just what bearing they all have.

One is book value, which is not a very reliable basis, because book values nearly always require adjustment. Another is adjusted or revised book value, which is better, but that method is to determine what value the shares would have had on a break-up or winding-up. The third one is the earnings value, which is the branch's favourite. They review the earnings of the company over a period of years and capitalize them by multiplying by a given factor, say, from five to twelve, which they consider fair having regard to the particular company, the nature of its operations, the margin of profit it ordinarily makes, the steadiness of its business, and so forth. The fourth method is the yield value, the dividends value, which is a kind of last resort.

The question spoke of "minority interests". I would just like

to read one of the passages in Mr. Ovens' address; I think it is in line with Mr. T. J. Hall's ideas in the Ontario department too. Mr. Ovens says, and incidentally he deals also with the converse case of the majority interest:

> Where the controlling interest in a private company is being valued, it is appropriate to take the factor giving the highest evaluation. For instance, if revised book value, prepared and calculated with liquidation in mind, is $150 a share, and the earnings valuation is $95, the $150 valuation, or the greater part thereof, may be chosen despite the fact that the shareholders have no intention of winding up the company or distributing surplus funds immediately. The principle is, does power to liquidate the company lie in the holding being valued, or does it carry the power to force distribution of excess capital? If so, it is taken into consideration. . . . True, minority interests are valued largely with reference to dividends, or rather to the prospect of future dividends. If no dividends have been paid in the past, it does not mean that no value can be attached to the minority holding. The valuation rests on whether or not there is evidence to show that the company's earnings or prospects are good enough to warrant the company commencing dividend payments at some future time. A purchaser usually buys a minority interest with the expectation of dividends in mind; but do not forget that he also often has in mind the expectation of capital appreciation or speculative gains. . . . Family minority interests are not treated as are true outside minority interests. Family minority interests are generally treated as part of the family controlling interest unless the contrary can definitely be proven.

Just one word in conclusion. I think that this matter of private-company valuation is very definitely a lawyer's business. All the trust companies have men who specialize in this work, and some of them are very good indeed; in fact, some of them are so good that, quite frankly, there may seem to be no room for a lawyer in the picture. But, nevertheless, I always want to be present at any discussions and, unless I have great confidence in the man, I want to have control of the conversation, because I am an advocate, as you are advocates, and this sort of thing is a job for advocacy. If your man is not experienced and you find you have to get statistical information from him, tell him to keep quiet until he is spoken to. When you have decided that the best tactics are to walk off in complete disgust with the department, he can spoil your case for you just by an unnecessary smile or wink of an eye. You get as far as the door and he says, "Well, look, it's too bad to stop now. Don't you think we might be able to get together on this?", and all your clever tactics are wasted.

THE CHAIRMAN: Thank you, Mr. Gow. The article to which you refer is one of the finest I have seen on the subject of valua-

tion and, while we may try to publish it, I wonder whether there is anything in this suggestion: if enough people write to Mr. Ovens asking for copies, it may be that Her Majesty's Government will provide copies at their own expense. Would you mind giving the audience again the address to which they might write, Mr. Gow?

MR. GOW: Mr. George Ovens, Chief Valuator, Succession Duties Branch, Department of National Revenue, 444 Sussex Street, Ottawa.

MR. HUYCKE: In dealing with the Dominion and provincial succession duties departments, Mr. Chairman, it is essential that you go well prepared because the departments have all the ammunition you have, and more. There is always an argument when you want to base the valuation on earnings over a particular period, three years, or five years, or seven years. If the five-year basis is more favourable to the department, they will argue for five years; if seven is more favourable to you, or three, you have to have ammunition to support your proposition. They have much more information than the ordinary lawyer has and it is essential that you have your arguments well prepared before you approach them; otherwise you will get nowhere.

THE CHAIRMAN: Thank you. Mr. Sheard, would you like to add something?

MR. SHEARD: I would like to express my agreement with Mr. Gow, particularly when he referred to the matter of advocacy. The accountants have been very skilful in convincing the public that tax questions are better handled by them, especially when they involve contact with departments of government. In my experience that is a complete delusion. The accountants, either in income tax or succession duty matters, usually end up as advocates for the departmental view; and if clients could be convinced that where advocacy is involved their lawyers are the proper people to handle the case, I think a great deal of business that is now by-passing the profession would be restored to its proper place. [Applause]

QUESTION 13

A practice is said to have grown up that, after an audit, many law firms do not bother serving beneficiaries who were not represented on the audit. Is it necessary to serve every beneficiary with a copy of the order?

THE CHAIRMAN: Mr. Guthrie, would you express your view on that?

MR. GUTHRIE: I think that in this province the answer to that question depends on the construction to be placed on section 72 of the Ontario Surrogate Courts Act. You will remember that section 72 provides that, where the surrogate court judge has approved the accounts filed by the executor, the approval is binding on any person who was notified of the proceedings taken before him. The point is, Does that mean notice of the proceedings that are intended to be taken, that is, the appointment for the audit, or does it mean notice of the proceedings that *have* been taken, which in effect is the judge's order?

My own view is that it is not strictly necessary to serve the order on beneficiaries who were not present or represented on the audit. Nevertheless, there may be some doubt, and I must say that my practice is always to serve all beneficiaries with the order. You remember that the surrogate court rule on service, which is 64(2), provides that "The order shall be served upon such persons as attended or were represented at the passing of the accounts by prepaid registered mail or in such other manner as the judge may direct". I do not know whether that rule advances us much, because it is merely a provision as to how the persons who were represented may be served; it says nothing about anyone else. As I say, rightly or wrongly, I have always thought it wise to put a provision in the order directing service in some particular way on persons who were not present, usually by prepaid registered mail.

THE CHAIRMAN: Thank you, Mr. Guthrie. Does anyone disagree with that? May we go on with the next question?

QUESTION 14

In an application to construe a will, is it proper for one member of a legal firm to appear for the executor and another member of the same firm to appear for one of the beneficiaries?

Would you mind starting, Mr. Huycke?

MR. HUYCKE: Legally speaking, I suppose there is no question of propriety or impropriety. If the courts are the arbiters of propriety, they have, to my knowledge, never yet held that the course is improper.

To my mind, no man and no firm can serve two masters and, if there is the slightest possibility of conflict, in my view the practice would be improper. I do not think it is desirable to have one member of the firm acting for the executors and another member of the same firm acting for one or more of the beneficiaries, be-

cause the member of the firm acting for the executors may have discussed the matter with his partner, who is acting for beneficiaries, and if he has he can hardly be impartial.

If the course is to be adopted, if a member of a firm is to appear on a motion acting for the executors, when another member is acting for some of the beneficiaries, the minimum required of him is to see that the questions are put before the court in an absolutely impartial and disinterested fashion. It is important to phrase the questions fairly and I think it is the duty of that member of the firm who is acting for the executors to submit to the solicitors for all the beneficiaries the form of questions and to settle it by agreement with all the solicitors for all the beneficiaries, so that there can be no suspicion of partiality. And I think that, when the member acting for the executors in such a situation presents the case, he should merely submit the facts and read the questions, without anticipating the arguments. Having submitted the questions which have been settled by agreement with all the counsel involved, he should sit down without saying anything more and let the court decide. Otherwise, I think the practice can and ought to be condemned.

THE CHAIRMAN: Thank you, Mr. Huycke. What do you think, Mr. Gow? Do you agree with that?

MR. GOW: I would like to go back a bit. When a problem like this comes up, as often as not it is something the solicitor who is handling the administration has foreseen. He then decides that he must consult the beneficiaries and raise the problem. In his advance canvass the solicitor should ensure that all doubtful points are raised. I think that it is also part of his duty, and perhaps the duty of the court as much as the solicitor's, to ensure that someone argues all points of view before the court. In practice, in a great many motions for construction the thing is taped—if one may be permitted to use the expression in this connection—before the motion is set down. The solicitor is not a barrister. You will have noticed from the Chancery Court Reports that in many English cases only one firm of solicitors appears, although there may be half a dozen counsel. Of course, all these counsel are completely disassociated from the solicitor.

It often happens that the beneficiaries are children, some of them adults and some of them infants, and if the official guardian is appearing for the infants, and there has been no agitation on behalf of any of the adult children to be represented separately, I see no reason at all why counsel from the executor's firm should

not appear for the adult children, and perhaps do no more than endorse the view of the official guardian and submit their rights to the court.

But I do agree, Mr. Huycke, that the executor is bound to help the court in every way he can; he should set out the position to the court fairly and fully and explain the problems, take no stand and show no bias, and if at the conclusion of the argument of all the other counsel he thinks that anything has been left out, it is his duty to tell the court. Then he is being the friend of the court, which I think he must be.

THE CHAIRMAN: Thank you. What do you think, Mr. Guthrie?

MR. GUTHRIE: Without going into it at too great length, because time is getting on, I take a stronger view against the practice than Mr. Gow. I think it is wrong. It may lead to all kinds of difficulties, and if I were a judge I should certainly frown upon it.

THE CHAIRMAN: Thank you. Mr. Sheard?

MR. SHEARD: I agree with Mr. Guthrie. I confess it pains me to see a nice estate being divided up exclusively among the members of the same firm. [Laughter]

QUESTION 15

A doctor has treated a man for ten years before his death and is familiar with his mental health during this period. The man has made a will cutting off certain persons who believe they should have been the objects of his bounty. These persons employ a solicitor to obtain the facts and advise them whether they should oppose an application for probate on the ground of lack of testamentary capacity. The solicitor approaches the doctor to obtain his evidence and the doctor asks him whether he should make complete disclosure. Should he give his evidence only to the personal representative or to all those who may be interested on an intestacy?

THE CHAIRMAN: Mr. Sheard, would you deal with that, please?

MR. SHEARD: I think that the reticence of doctors in matters of this kind is to be deprecated. It seems to me to derive in part from a feeling of obligation towards the deceased, but of course a fundamental principle of the law of wills is that no one has any obligation towards the testator. The testator is dead and, so far as anyone has been able to discover, he takes no interest in the proceedings at all. [Laughter] The doctor's only obligations are owed to the living, and I should think that he owed an obligation towards

all interested persons—I do not include in that the reporters of the Toronto Daily Star—I mean towards everyone who has a legitimate interest in the estate. [Laughter] How are they going to know whether they should take proceedings over the will unless they know what information the doctor has to give them? His evidence may well be decisive, and if he keeps them in the dark, they may undertake proceedings that have no chance of success and unnecessary inconvenience and costs may be incurred. So I feel the doctor should give the information to all those who may be legitimately interested under the terms of the will or on an intestacy.

THE CHAIRMAN: Thank you, Mr. Sheard. Now the last question.

QUESTION 16

A testator wants to attach to a bequest conditions respecting either the time or manner of its enjoyment, Can this be done and, if so, how?

Mr. Gow?

MR. GOW: It is necessary, of course, to distinguish between conditions the law will enforce and unenforceable conditions. You are all familiar with the conditions the law will not enforce: illustrations are conditions which are void for repugnancy, where the testator gives with one hand and takes away with the other; conditions which are void for uncertainty, which cannot be carried out; and conditions which are contrary to public policy, such as restraints on marriage.

Then there are the enforceable conditions. One of the most common is a postponement of enjoyment of principal or capital until attainment of a certain age. Here, as in all enforceable conditions, you have to provide for a gift-over. Defeasance on remarriage or so-called spendthrift clauses are also conditions which are enforceable. Another illustration is a condition against marriage to someone of a certain religion or a condition requiring the beneficiary to become a member of a certain church, both of which are a solicitor's bugbear.

A good many of these conditions are certainly highly undesirable, but if you have a bully for a client you sometimes have to put them in. I am not saying that the first one, the postponement of enjoyment until a certain age, is necessarily unwise, but I think some of the others are. The essential thing to remember with all of them is that you must have a gift-over in the event of a breach

of the condition or failure to observe or comply with the condition. And there should be a trustee to give effect to the gift-over, to attend to the mechanics and pass the property over.

THE CHAIRMAN: Thank you, Mr. Gow. Mr. Sheard?

MR. SHEARD: I agree with Mr. Gow that the omission of the gift over is probably the most fruitful source of litigation in condition cases. I have had at least three of those cases in the last few months. The comment I always make on this subject is on no account to suggest to a testator the reduction of his wife's benefits in the event of her remarriage. What will happen is that he will take the will home and show it to her; no matter how generous it is towards her, she will start to joke him about it and he will say, for peace in the family, "Of course, that was not my idea; it was suggested to me by lawyer so and so". It is hard enough to keep clients without antagonizing their wives. If he insists on putting it in, you will have to put it in, but never recommend it yourself. I think they are bad things anyway, but that is not my point for the moment.

MR. BELL: There is just one point I should like to mention. I saw a will the other day in which the gift-over was omitted, but there was a gift of income to a charitable organization until the son became twenty-five, which would seem to meet the problem as effectively as making provision for a contingent gift-over.

THE CHAIRMAN: Thank you.

MR. T. D'ARCY LEONARD, Q.C.: This meeting is about to break up and I do not think it should do so without someone saying what is in the minds of all of us, to express our thanks to you, sir, as chairman, and the members of your panel. You have not only added greatly to our knowledge, no matter how much we already thought we knew, but you have done it with much pleasure to us all.

Charles W. H. Harris, B. A.

Barrister at Law & Queens Counsel
BORN DEC. 14. 1805.
DIED MAY 9. 1867.

For many years leader of the Bar
on the Western Circuit and altho
devoted to his profession he was
a consistent Christian and an arde-
nt lover of his Church.

(*From a tombstone in King's County, N.S.*)