Correspondence

Wills and the Administration of Estates

TO THE EDITOR:

There are a freshness and sparkle in the report of the symposium on wills and the administration of estates in your April issue which made it a pleasure to read. How many solicitors can be sure that they have never fallen below the standard outlined by Chancellor Boyd in *Murphy* v. *Lamphier*? The learned chancellor dealt rather roughly with the unfortunate solicitor who drew Mrs. Lamphier's will—who had probably acted in good faith—and yet is not the standard one we should all try to attain? I read with profit as well as pleasure the discussion of this and other vexing problems arising in practice conducted with so much learning and wit by the panel of experts.

The Ontario Legal Education Committee, under the skilful and assiduous leadership of Mr. Edson L. Haines, Q.C., has devoted itself to the continuing education of the legal profession. In its work, of which this symposium is an example, the application in practice of legal rules is demonstrated. That is as it should be, because, as we carry on our practices in office and in court, we have to try, to the best of our abilities, to make the rules of law serve the interests of our clients; otherwise, there would be no justification for our existence as a profession practising for profit. Not unnaturally, though, the object of the committee sometimes precludes it from following up questions of great interest.

One of these arises from the panel discussion of joint tenancy. During the generation just past we have seen joint tenancy grow from an occasional to a normal, if not *the* normal method of holding residential land in this part of Ontario, and perhaps the tendency is even more widespread. It is now far from uncommon to have farm property held in joint tenancy. Usually solicitors find that it has been decided upon before they are consulted about a purchase. Husband and wife often come together to consult their solicitor. If a joint tenancy is not expressly asked for, the purchasers usually expect the solicitor to advise it. When one attempts to ex-

plain the different modes of holding land and the incidents of each, the clients usually look blank for a moment, glance at one another and then decide on joint tenancy. *Pace* Mr. Guthrie, how can one advise a husband, in the presence of his wife, to protect himself against a possible divorce or separation? Not infrequently, part of the purchase price has been provided by the wife. In any event, is it wrong that the wife should get something out of the wreck if the marriage goes on the rocks?

Our Canadian belief that the only essential of a happy marriage is that the parties should believe themselves to be in love with each other at the time of the ceremony tends to preclude the sensible attitude towards marriage settlements almost instinctively adopted by Europeans. Outside of Quebec, "community of property" is not by law an incident of marriage. Yet the growth of joint tenancy seems to suggest that we are moving in that direction, and perhaps there is an instinctive, unconscious group wisdom in the movement.

A study of the causes of this phenomenon would be worth while. Presumably, in one sense, the leadership must have come from the legal profession, because the public was apparently unfamiliar with the tenure before the 1920's. Yet there has been no overt professional advocacy of joint tenancy and the desire to hold land under it must have originated with the clients. No doubt it follows on the emancipation of women and perhaps it is also an instinctive reaction against the increase in divorce and the apparent breakup of the institution of the family.

As the members of the panel pointed out, governments have succeeded by their taxing policy in making joint tenancy expensive. A gift tax on gifts between husband and wife, as an adjunct of income tax, seems harsh and unfair, and indeed unnecessary. If the subject matter of the gift is income bearing, the income is taxed as if it continued to be the income of the donor; if the subject matter is not income bearing, the government as a collector of income tax should not be interested in the transfer. As regards succession duties, the case of *Re Hommel*, [1952] O.R. 64, which was mentioned in the panel discussion, has no application to joint tenancy. When there is a disposition by the husband in joint tenancy, the departments treat the transaction as an outright gift to the wife, at the time, of an undivided half interest in the premises. The husband is entitled to enjoy the premises because of his estate as one of the joint tenants and not because of any incident of the estate given to the wife. The problem of *Re Hommel* does not arise in that situation.

The careful solicitor should advise both husband and wife to make a will, particularly if there is a joint tenancy, but not only in that case. I suggest that if the present movement towards joint

tenancy is beneficial, as it appears to be, it should be encouraged by the taxing authorities and not discouraged. Those authorities are, however, inclined to be short sighted and to think only of the present need for revenue, not the long-term, adverse effect of their demands.

STUART RYAN*

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TO THE EDITOR:

Over a recent weekend I had an opportunity to read the panel discussion on wills and the administration of estates which took place at Windsor in January of this year under the chairmanship of Mr. Edson L. Haines, Q.C. As a lawyer practising in the country, I should like to thank through you the members of the bar who so effectively dealt with the sixteen questions on the programme, the chairman of the Legal Education Committee for instigating the experiment, and you for publishing the results in the Canadian Bar Review.

Perhaps you will permit me to add a few comments of agreement and mild disagreement. In my practice I try, whenever possible, to have instructions for a will taken down in shorthand, and I think this should be done when possible, but I appreciate the fact that some clients would be inclined to resent the entire conversation being taken down. When the client is in the office, I make copious notes and then dictate to a stenographer such of them as seem necessary. I agree that a lawyer does not warrant a man's capacity to make a will. However, the doctor, the lawyer and the witnesses to the will are usually the ones who are called as witnesses in any later litigation and therefore, in my opinion, lawyers should be very careful to ascertain that testamentary capacity exists.

The question whether a man buying a house should take title in his own name, in his wife's name or in the names of both jointly causes considerable difficulty, especially with the great number of domestic relations cases which nowadays come before the courts. I have adopted the practice of advising clients who are buying a house to have the deed made to uses. Recently I had a case in which I took a brief for another solicitor. The controversy started when the husband was buying a farm and his wife insisted on a joint tenancy; the husband refused. They are now separated and he cannot sell the farm because she will not bar her dower.

Every solicitor will probably agree with the reasoning of Mr. Gow in dealing with the duty of a solicitor to inquire into the circumstances of a person for whom he is drawing a will. There is another branch of this general subject, however, which might have

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been dealt with: the wisdom of giving a beneficiary a percentage of the deceased's estate instead of making specific legacies with a devise of the remainder. Frequently the residuary beneficiary is the one the testator wanted particularly to favour, but by the time the debts and specific legacies are paid, there is only a small estate left. In Coburg some years ago the testator divided his large estate into five parts and devised one-fifth to one group of persons and the other four-fifths to other groups or individuals. Although the estate turned out to be much more valuable than was anticipated, each of the beneficiaries got what the testator wanted him to have in relation to the others.

Until Mr. Sheard and Mr. Gow addressed our local law society on the question of wills, I had made a practice of having wills executed in duplicate, but since they were here I have seen the error of my ways and now have only one copy executed, which I advise the client to put in his safety deposit box, if he has one, and, if he has none, to leave in my office safe. If the testator takes the will away, we make a memorandum that he has done so on the office copy. Mr. Guthrie refers to making exact copies; we make carbon copies, which I think would stand up in court better than a newly typed copy. Certainly the lawyer who keeps a will in his own vault has a responsibility, but I think he should assume that responsibility rather than have the testator take the will home and put it in his sideboard drawer where any peeping tom can read it.

The problem of whether to appoint a trust company as co-executor is an interesting one. I had one estate in which the testator left a great many shares of common stock in various companies and set up a number of trusts, naming a trust company as executor to handle them. He named his wife as co-executor. The wife, just before the depression of 1930, insisted that the trust company liquidate the common stocks. The trust company refused and it was necessary to threaten an action. The stocks were sold just before the drop in prices. If the wife had not been co-executor, I am satisfied that the estate would have ended up substantially smaller than it did, and might even have been wiped out entirely, because most of the stock had been bought on margin. If a large estate is involved, the wife and one other should be named, and the "one other" in my opinion should be a trust company; in the case of a small estate the wife alone should be sufficient.

I have frequently asked trust companies to have their wills department draw wills for me. Generally speaking, a trust officer who is drawing wills all day long is more competent to draw an involved will than I am. When the will is drawn, I always go over it with the client to make certain that he understands every word in it.

With regard to Mr. Guthrie's statement about changing insur-

ance from preferred beneficiaries and making it payable to the corporate trustee, I believe that it should never be done. The only reason a trust company would want the insurance made payable to it is the increased fees which would result from including the proceeds when calculating the value of the estate.

Mr. Huycke strikes a necessary note when he says in answer to question 14 that no lawyer and no law firm can serve two masters. Even if there is no discernible conflict between the executor and any heir, I still insist that two separate lawyers should represent two separate interests. Any other practice should be condemned not only in the administration of estates but in all other transactions as well. I am in the throes of a dispute now where one solicitor had acted for two partners in drawing a partnership agreement. He tried to be fair between them, but if each had had his own lawyer there would have been no dispute. Further, I have run into a number of real estate transactions where one lawyer acted for both the buyer and seller and trouble resulted. Unfortunately, the lawyers in Northumberland and Durham Counties do not agree with my condemnation of the practice and I understand that in Lincoln County also the same lawyer commonly acts for both the buyer and seller of property. There will come a day when they will have trouble.

I am not entirely in agreement with what I understand are the views of Mr. Gow on this question. The solicitor for an executor is bound to help the court, as is the solicitor for any other litigant, but his duty is to help the court so that his side will if possible win the controversy. If this were not so, an advocate would not be necessary, and we should save ourselves much time reading law.

J. C. M. GERMAN*

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Provincial Control of Federal Elections

TO THE EDITOR:

In the course of the present federal elections a constitutional question has emerged in Quebec which affects the fundamental rights of Canadian citizens throughout Canada. I should be grateful for the opportunity of bringing it to the attention of the legal profession through your correspondence columns.

The Municipal Code (art. 413, para. 11) and the Cities and Towns Act of Quebec (sec. 429, para. 15a), as both were amended in 1947, authorize municipalities either to adopt by-laws prohibiting the distribution of "circulars, advertisements, prospectus or other similar printed matters" on the streets, roads, public places,

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and in private dwellings, or to control such distribution through the issuance of a permit for which a fee may be exacted. A large number of municipalities have made use of these enabling powers. Some of the important cities have similar provisions in their special charters, and Quebec by by-law 184, and Montreal by by-law 270, section 18 (as amended by by-law 2077 in November 1952), have imposed a strict police control over literature distribution. It has become standard practice to delegate to the chief of police of the municipality the authority to issue or to refuse to issue the necessary permit, or to recommend what action should be taken. Thus the free circulation of these forms of printed material, even possibly within private homes, is dependent on police approval.

The original purpose of these by-laws appears to have been to restrict the activities of Jehovah's Witnesses and Communists. Whether such administrative control over the proselytizing activities of a religious group exceeds the powers of a province is now under consideration by the Supreme Court of Canada in the case of *Saumur* v. *The City of Quebec*. I am concerned here with another aspect of the problem, namely the political effects of such by-laws when applied during federal elections.

Hitherto this question does not appear to have been raised. I have no knowledge of the enforcement of the by-laws against national political parties until this year. Recently, however, they have been so applied, and for the first time in Canadian history it appears that the normal conduct of a national political campaign is being made dependent on the will of local authorities. On July 14th Deputy Police Director T. O. Leggett informed the Montreal City Executive that (as reported in the Montreal Gazette on July 15th) the police had "no objection" to the distribution of circulars announcing a public meeting for Mr. M. J. Coldwell, National Leader of the Co-operative Commonwealth Federation, since "the organisation is not recognised as being of a subversive nature". According to the newspaper report, Deputy Director Leggett was acting on the advice of Captain L. Champagne, head of the anti-subversive squad, who informed him that the CCF does not "represent *at present* any communistic affiliation". These remarks, particularly the words I have italicized, have the true McCarthy flavour. A short while previously eleven Social Crediters were charged with distributing printed material without a permit. The Canadian Press reported on June 23rd that the Labour-Progressive candidate had been arrested in Hull on a similar charge. Thus three political parties have already been subjected to municipal censorship of their literature. If the other parties are not, it is because they use licensed distributing agencies—or else that the law is not applied equally to them.

In Verdun, a suburb of Montreal, a fee of $2.00 is exacted for

the approval by the police of each separate piece of election literature, and the licence to post a candidate's picture costs $5.25. In larger constituencies, which may include a dozen or more local municipalities, a special licence may be required for literature distribution in every separate jurisdiction. The resulting total cost in fees would be considerable for each volunteer worker who wishes to aid his party by distributing notices of meetings and election programmes.

It seems strange today to be having to argue the case for freedom of electioneering in Canada. Yet we have no such freedom so long as this kind of press censorship is vested, as it is in many places in Quebec, in the local authorities. The democratic process involves much more than the right to nominate candidates and to vote for them; it also involves the right in every citizen to be informed by the spoken and printed word about party policies and plans, about his government's record of achievements and failures, and about all those matters of public importance whose discussion is essential if he is to make a considered choice. It is as unconstitutional for any province or municipality to curtail these rights as it would be for them to impose their own qualifications upon the federal candidates themselves, beyond those laid down in the federal Elections Act. A candidate necessarily implies an electorate; to restrict the one is to restrict the other. To require police approval of circulars calling a meeting is, in effect, to require police approval for the meeting itself, and to make the working of our national parliamentary institutions dependent on the tolerance of provincial and municipal governments. This would destroy the parliamentary process in Canada as we have hitherto enjoyed it.

If authority be needed for any such self-evident propositions, it is to be found in the words of Duff C.J. and Cannon J. in the *Alberta Press* case, [1938] S.C.R. 100. The then Chief Justice stated (p. 133) that the B.N.A. Act

> contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

Mr. Justice Cannon said (p. 146) that every inhabitant of Alberta — and hence of any province — is also a citizen of the Dominion, and

> the province cannot interfere with his status as a Canadian citizen and

his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern.

I am confident that the Quebec statutes and municipal by-laws are ultra vires in their application to national elections and national political parties, whatever may be their applicability in provincial politics. I should hope that they will all be repealed and the control of subversive elements in this country left where it belongs, namely, to the Criminal Code and to its enforcement by federal and provincial authorities in the regular courts.

F. R. SCOTT*

Books Received

The mention of a book in the following list does not preclude a detailed review in a later issue.

Beyond This Place. A novel by A. J. CRONIN. Toronto: McClelland and Stewart, Limited. 1953. Pp. 316. ($3.95)

The Changing Law. By THE RIGHT HONOURABLE SIR ALFRED DENNING. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1953. Pp. viii, 122. ($2.00 net)

Communism versus International Law: Today's Clash of Ideals. By ANN VAN WYNEN THOMAS. Foreword by ROBERT G. STOREY, President, American Bar Association. Dallas: Southern Methodist University Press. 1953. Pp. xiv, 145. ($3.75 U.S.)

Credits and Collections in Canada. New and revised edition. Sponsored by The Canadian Credit Institute, Credit Granters' Association of Canada, The Canadian Credit Men's Trust Association Limited and Associated Credit Bureaus of Canada. Toronto: The Ryerson Press. 1953. Pp. xvi, 418. ($5.50)

Fool's Haven. A novel by C. C. CAWLEY. Boston: House of Edinboro. 1953. Pp. 210. ($2.75 U.S.)

Frederic William Maitland: 1850-1906. A memorial address by HENRY ARTHUR HOLLOND. Selden Society Annual Lecture 18th March 1953. London: Bernard Quaritch. 1953. Pp. 23. (4s net to non-members of the Selden Society)

The Indian Year Book of International Affairs 1952. Published under the auspices of the Indian Study Group of International Affairs, University of Madras, Madras. 1952. Pp. xii, 316. (Rs. 10)

The Law of Wills Including Intestacy and Administration of Assets: An Introduction to the Rules of Law, Equity and Construction relating to Testamentary Dispositions. By S. J. BAILEY, M.A., LL.M. Fourth edition. London: Sir Isaac Pitman & Sons, Ltd. Toronto: The Carswell Company, Limited. 1953. Pp. xlix, 305. (No price given)

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