

LAW COMMISSION

(This is a working paper circulated for criticism and information: It is not intended to reflect the views of the Law Commission.)

SHOULD ENGLISH WILLS BE REGISTRABLE?

The Object of this Paper

1. After receiving representations from a solicitor concerning the frequency with which English wills fail to take effect because they do not come to the notice of the testator's personal representatives after his death, the Law Commission made informal enquiries of the Lord Chancellor's Office, the Principal Probate Registry and The Law Society to find out whether the present position should give rise to serious concern. As a result we are satisfied that there has been a fairly steady trickle of complaints – especially from solicitors – in the years since the last war and we assume that some public dissatisfaction existed in earlier decades.
2. We certainly see no reason to suppose that this dissatisfaction will diminish in future and think it likely that sooner or later public opinion will demand that the Law Commission or some other body should study systematically ways of improving the present arrangements in this country. Unfortunately, since this topic does not find a place in our First Programme, to which our resources are now committed, and is not in the nature of an injustice or hardship which cries out for an urgent remedy, it would be wrong to divert resources to an intensive study of it.
3. Subject to this, however, it seems desirable to advance consideration of the subject by others and promote the crystallisation of public opinion with as little delay as possible, if the present position is as unsatisfactory as it is represented to be. There is also the purely practical reason that some way might soon be found of cutting down

the rather costly and time-consuming searches and advertisements (mentioned in para. 12 below) which are now so often necessary after a death. We understand also that the Council of Europe is likely to put in hand the preparation of an International Convention on the Registration of Wills; H.M. Government may well therefore wish to give some consideration to this topic in the near future in order to decide what attitude to adopt to this project. A lesser, but not negligible, reason for reaching a conclusion about this topic before long is that an International Convention is now being prepared by the Rome Institute for the Unification of Private Law concerning a form of will designed to have international validity. If it were thought right that this country should adhere eventually to a Convention of this character, it would be as well to reach a conclusion about any projected changes in this branch of the law of wills before the Convention reaches its final shape.

4. In the circumstances we think that further progress in the consideration of this question can best be promoted by circulating some fairly concrete and detailed proposals for comment and criticism. For the reasons that we have stated above, these cannot be as fully thought out by us as we should like; they are, however, of a fairly detailed character in order to attract attention to the greater and lesser factors involved. The object of this paper then is not to express concluded views, but to point out some of the considerations that appear to be relevant and to invite comments from lawyers and non-lawyers. This is a branch of law reform where lawyers should not attempt to reach conclusions without paying a close regard to the views of the public generally.

The Present Position in England

5. English law and those systems which have followed it are more liberal than most in permitting a testator complete freedom to dispose of his property as he

wishes, subject only to any claims that may be made after his death by his widow or dependent children under the provisions of the Inheritance (Family Provision) Act 1938, as amended; but, although an English will is a document of the greatest importance, the law does little to protect it from the very real dangers, either that it will be invalid for defective execution or that it will be suppressed or simply overlooked after the death.

6. If a testator wishes to make a will without legal advice (usually called a “home-made will”), he will in most cases use a will form* bought from a stationer’s shop. These forms are subject to no kind of official control and in former times some of them left a good deal to be desired. Our information is that recently most of them are satisfactory as far as they go; nevertheless a skeleton form devised to be filled in by any purchaser cannot be so drafted as to cover the needs of individual testators whose circumstances vary widely. Moreover experience shows that testators frequently misunderstand the form itself and make mistakes in the execution of the will which have the effect of invalidating the document entirely (e.g. by failing to get two witnesses together to verify due execution).

7. Most home-made wills, as we have said, are made on will forms, but not all.† In the exceptional cases where the testator employs no legal advice and does not use a form he runs a substantial risk that his will will be invalid for failure to comply with the formal requirements of the law.

8. In our view the making of a will is a difficult operation inevitably attended by the risk of falling into a number of more or less concealed traps. The advice of a

* We are not concerned here of course with the Statutory Will Forms prescribed by the Lord Chancellor in 1925, consisting as they do simply of a number of provisions which can be incorporated in a will by express reference with or without modifications.

solicitor is almost always of great value and the importance of the decisions which a testator has to make should normally justify the relatively small expense of consulting one. Quite apart from errors in the execution of the will, it is within the experience of all lawyers that the intentions of testators run a substantial risk of being frustrated if they act without legal advice and the provisions of such a will frequently produce results quite unexpected by the man in the street. Nevertheless, although we are very conscious of the risks run by the testators who are not well advised, we apprehend that public opinion would not tolerate any change in the law which would compel testators to have resort to a solicitor. It remains for us to canvass, therefore, what changes can be made in the law which will help to ensure that testators' wishes will not eventually be frustrated because of the omission of some technical requirement or because the last will is not found after their death.

The suppression and overlooking of wills

9. If the will is deposited in the testator's home there is an obvious risk that it will not be found after his death or may be suppressed by an interested person. Even if it is deposited in a solicitors' office there is a real danger that it will not be given effect to. Solicitors are disturbed to find, when they move their offices or merge with other firms, how many clients' wills remain, having been apparently overlooked, not through any negligence on their part, at the time when another firm of solicitors was employed to take out a grant of representation. Some of these may have been revoked by later wills, but it seems certain that many were simply untraced in the first weeks or months following the testator's death and that the estate was disturbed as if he had died interstate or possibly in accordance with the provisions of an earlier will which the testator had revoked.

[†] On the best estimate we now have it appears that nearly a quarter of all wills proved are home-made; of these more than three-quarters are on printed forms. Probably less than one will in the 19 all

10. It is easy to see how this position can arise through no fault of the solicitors if the testator does not conduct his affairs during his last years in a businesslike fashion. Many testators on retirement move to, say, a seaside town or holiday resort without troubling to remove their wills from the keeping of the solicitors when they employed during their working life. Even if they have occasion in their new homes to consult a new firm of solicitors for some purpose, it may not occur to them to ask their previous solicitors to hand over the will or they may be embarrassed to do so: in consequence the will remains with these solicitors and the new firm is not told of its existence or of the name of the firm which holds it. The testator may outlive the few people to whom he has spoken about his will and in his last years he may have become inefficient in the management of his affairs. In such cases it can easily happen that the fact of his death is never made known to his former solicitors and his will is thus overlooked.

11. During the last 15 years the number of grants of representation revoked has averaged about 100 a year. Some of these revocations no doubt followed contentious proceedings in the courts; but the majority would appear to have resulted from the subsequent discovery of a will where the deceased had been thought intestate or of a later will. It seems likely that these are only the tip of the iceberg and that the real number of wills overlooked each year is far greater.

12. Another disadvantage of the present haphazard treatment of wills is that a considerable amount of time (in particular the time of solicitors) is spent in searching for lost wills or possible later wills; money, which must later be found by the estate, has to be spent in advertising for information in the press. A study of any issue of the Law Society's Gazette will illustrate the extent of this problem.

Voluntary Deposit of Wills

told is home-made on other paper.

13. Section 172 of the Supreme Court of Judicature (Consolidation) Act 1925 (substantially re-enacting section 91 of the Court of Probate Act, 1857) provides that – “There shall, under the control and direction of the High Court, be provided safe and convenient depositories for the custody of the wills of living persons, and any person may deposit his will therein on payment of such fees and subject to such regulations as may from time to time be prescribed by the President of the Probate Division”.

Particulars of the procedure for the deposit of the wills of living persons and for the opening of wills after death are set out on pp. 491 – 4 of the 22nd Edition of Tristram & Coote’s Probate Practice. The executors must attend at Somerset House or at a District Probate Registry personally to be sworn to the will, which cannot in any circumstances be delivered out of the custody of the court.

14. Many solicitors are unaware of the existence of this official scheme which is very little used. Before the last war only some twenty or thirty wills were so deposited annually; the number has now fallen to single figures. In cases where the Public Trustee has been appointed a trustee, he frequently holds a will for safekeeping.

Other Legal Systems

15. The most common form of Scots will is a formal document attested by witnesses – rather like an English will. An alternative method is the unwitnessed holograph will, written entirely in the testator’s own hand and signed by him; alternatively it may even be typewritten, provided that the testator writes “adopted as holograph” and signs it. It seems, therefore, that Scottish wills can be made even more informally than English ones.

16. We understand that in New Zealand wills are frequently deposited for safekeeping with the Public Trustee. In British Columbia a registry of wills was set up by Statute in 1945 where particulars about wills are recorded free of charge and on a voluntary basis, and testators make increasing use of these facilities. Our information is that the requirements of the laws of the United States are normally as lax as our own in this respect.

17. In France, too, a testator may make a holograph will provided that it is written entirely and dated and signed in his own hand. Indeed this is the most commonly used form of will and the risk of loss or suppression is frequently avoided by deposit with a notary. Even so there is no machinery for finding out after the testator's death which notary has his will. The position in Germany seems to be broadly similar, save that wills may be deposited in certain courts rather than with notaries.

18. In Denmark home-made wills are permitted, but normally the precaution is taken of signing them before a notary public. If the original will is lost thereafter a transcription of the notary's record will be treated as the original will. Moreover there is a central registry of all wills made before a notary public, so that it is always possible to find out before which notary the will was made and which, if he has made more than one will, is the latest.

19. In the Netherlands registration of wills has been compulsory since 1918. Under Dutch law no will is valid unless it has been deposited with a notary in the presence of witnesses. The notary holds a semi-official position and is subject to very stringent disciplinary rules. The will remains in the notary's custody, whether or not he knows its contents, but he is under a duty to inform the custodian of the central registry of wills that the will has been deposited with him, together with the name and address of the testator and the date of deposit. This information is entered in the

register which is open to inspection “by any interested party”. We understand that in practice no dispute ever arises about the authenticity or date of Dutch wills and the system has won general approval.

Possible Remedies

20. While one cannot pretend that the present position in England is so unsatisfactory as to cry out for a remedy as a matter of urgency, we think that public dissatisfaction is unlikely to die away and public opinion may come sooner or later to accept the need for the setting up of some machinery to ensure that wills are not overlooked, to diminish the chances of their being suppressed and to do away with the time consuming and expensive searches and advertisements which solicitors now have to put in train. This machinery might be of either of two kinds:-

(a) there could be a dispository in which all original wills would be stored or (b) there could be a registry of wills in which certain facts about each will must be recorded within a certain time after it is made. Under the latter scheme it would not be compulsory to deposit the original will in the registry, but the voluntary system, so little used at present, would continue in being, so that a testator could deposit his will there if he wished.

21. There is no reason to think that any voluntary system of deposit or registration would fare better than the existing facilities for deposit, which are almost a dead letter. Moreover, if the system is to be voluntary, there can be no assurance that the latest will registered or deposited would be the last made by the testator and the searches and advertising by solicitors would have to continue. It is, therefore, for consideration whether one of these two schemes should be made compulsory so that all wills and codicils made after an appointed day would depend for their validity on

deposit or, as the case may be, registration within a certain time – say, two months – after the date of execution.

22. The obvious objection to any compulsory requirement that a will should be dependent for its validity on compliance with some such formality as we have just mentioned is that a number of home-made wills might be invalidated. We understand, however, that home-made wills are nearly always made on will forms and steps could be taken to ensure that all will forms on sale should bear an appropriate warning about the need for deposit or registration, as the case might be. There remains the danger that stocks of out-of-date will forms would still be in circulation and might be held in stationers' shops for a number of years. It is not, however, unrealistic to hope that, if the change in the law were given suitable publicity, the risk that home-made wills would continue to be made in an invalid form could be reduced to an acceptable level and that after a very short time the number would be smaller than the number overlooked under the present state of the law.

23. Wills made before the appointed day would, of course, continue to be valid* and would not be affected by the change in the law. For this reason the usefulness of the new machinery would be small at the start; with the passage of time more wills would be readily discovered from the registry and the work of solicitors and others in finding wills after the testator's death would be simplified.

Registration or Deposit?

24. Whichever system might finally be adopted should be self-financing from fee income. Though the cost of a system of compulsory deposit would be somewhat

* If, however, a codicil is executed after the appointed day, the will and earlier codicils would have to be registered with it.

higher than the cost of a system of compulsory registration, we do not think that the fees in either case would be more than nominal.

25. To adopt the system of compulsory deposit of wills would be to do away with the risk of their suppression after the testator's death by an interested party. It might also be argued that there would be a saving of a storage space in solicitors' offices, but we attach little importance to this consideration since most solicitors will wish to keep a copy of the will in any event. One must bear in mind the danger that the depository containing original wills might be destroyed by enemy action in war, by fire, etc.

26. One can argue on the other hand with more force that the introduction of compulsory registration of wills and codicils (which must be treated for this purpose as independent wills) would be more satisfactory than compulsory deposit for the following reasons:-

(a) It will be somewhat cheaper to run and will require fewer staff and less storage space. Any system of compulsory deposit of wills must include an index, which will amount in practice to very much the same thing as the registry kept under the proposal that we prefer.

(b) Many testators wish to keep their wills where they can refer to them.

(c) Compulsory deposit of an original will would make it impossible for the testator to revoke it by destruction and might make it more difficult for him to revoke it by making a new one on his death bed if there was little time.

Accordingly our argument leads us to be more attracted to a scheme of registration than one of deposit. We envisage that this would provide that a will should be invalid unless registered within a prescribed time limit, say, two months.

Wills made by Foreigners, etc.

27. It would be wrong to withhold recognition of the validity of a will made by a testator which complies with the requirements of another system of law with which he is connected by some such factor as habitual residence or nationality. Acceptance of the validity of these wills would unfortunately mean that, when a testator died after the appointed day leaving no will or no very recent will but had been connected with some country having a different legal system (perhaps by reason of long residence or of the possession of property there), it would continue to be necessary, as it is now, to search for an unregistered will complying with that other legal system and therefore valid under Section 1 of the Wills Act, 1963. Accordingly it appears that for the purpose of that section the requirement that a will should be registered should be treated as a provision of the internal law of England and Wales. It would normally be unsafe, therefore, in the case of wills made by testators having connections with countries other than England and Wales to assume that no will valid under some foreign system was in existence and to rely simply on a search of the registry to discover the last will. The process might well become shorter than it is now because a search of the registry would show at least whether a valid English will executed after the appointed day existed in these cases. It would also of course be of use where application is made to the court here for the resealing of a foreign probate.

28. On the 4th May 1966 a number of legal members of the Consultative Assembly of the Council of Europe presented a "motion for a recommendation" to the Assembly drawing attention to the need for a national or international registration system for wills which would make it possible to discover whether a deceased person had made a will and, if so, where and when. In view of the increased mobility of labour in Europe since the inception of the Common Market and the growing number of persons making their wills in a foreign country, the problem is becoming ever more important.

They recommended accordingly that the Committee of Ministers should be asked to instruct the European Committee on Legal Cooperation to investigate the desirability of establishing a registration system of wills. It cannot be expected that an international convention for the registration of wills can be prepared quickly. If it does come into being, however, it might reasonably be hoped that it would go a long way to enable the last will or wills of testators connected with more than one country to be traced easily.

Time Limits

29. It would be essential that registration should be applied for within some two months of the making of the will and that the registration of any will sought after this time should be refused. In that case the testator's only course would be to re-execute the document. Clearly special provision would have to be made by the law for wills made shortly before death and it might be laid down that any will made within, say, two months preceding the death should be accepted on payment of the appropriate fee for registration at any time within, say, two months thereafter or prior to the grant of representation of the testator's estate, whichever is the later. To allow a longer period of grace than some two months would unduly delay the issue of probate in ordinary cases. A provision such as that just suggested would, in any event, have the general tendency prevent the issue of the grant until the two months had elapsed from the date of death. In exceptional cases, however, it would be necessary for the Probate Registry to grant probate of a will sooner if it was satisfied on the production of sufficient evidence that a document was indeed the testator's last will.

30. It is a difficult question whether the courts should be given power in any circumstances to extend the time for registration of a will made shortly before death where a grant of representation had already been issued in ignorance of its existence.

It would probably be wrong to confer on the court any but the most restricted power to extend the time in these unusual circumstances; otherwise it would be placed in an invidious position and the rights of the beneficiaries and personal representatives would continue to be in doubt – with all the undesirable consequences that might be expected from such uncertainty. The power to extend time should, therefore, be only such as might be prescribed from time to time by rule and would be limited to cases where application for registration had become impossible through no fault of the testator, e.g., because he became mentally disordered or comatose for more than two months before death or, perhaps, because of fraud or a breakdown in communications.

31. Registration of a will made before the appointed day would presumably be permitted on a voluntary basis* and on payment of a fee, but whether any and, if so, what time limit should be imposed is a question that would require further consideration.

Negligence by solicitors or by the Probate Registry

32. Frequently testators would leave it to their solicitors to apply for the registration of their wills. If the changes that we have discussed above were carried out and a solicitor neglected to register a will with the result that it was invalidated, it seems right that any beneficiary who suffered financial loss as a result should have a right of action against him. In our view it is doubtful whether any right of action would exist under the law as it now stands, since it could be argued that the duty of solicitors is owed only to their clients and not to the beneficiaries under their wills. It would only be just that legislation should confer this right of action on those who would have benefited.

* and required if a codicil to it is registered, thereafter

33. There might well be advantage and a saving of expense and trouble, however, in providing that in these circumstances a solicitor should be entitled, as an officer of the court, to produce the will for registration at any time between the testator's death and the issue of a grant of representation. He could then escape liability for negligence on swearing an affidavit at his own expense to the effect that the testator had instructed him to secure registration of the will but that by an oversight he had failed to do so. The solicitor would also have to pay any costs incurred by other parties as a result of his negligence.

34. It is also a possibility that the registry might make a mistake in recording the information to be registered or in carrying out a search of the register after the testator's death. Since in our view the income from small fees should be quite sufficient to pay for compulsory registration, we suggest that an Indemnity Fund might well be built up out of the income as soon as the small outlay of public funds that would be required initially had been recouped by the Exchequer. Thereafter the Fund would be available to make good losses suffered by reason of mistakes made by the registry.

Contents of Register

35. There must be sufficient information recorded to enable the registry staff to compile a satisfactory index and to enable them to identify a testator with a common name from brief particulars supplied to them after his death. The following would be needed:

- (a) Full name, marital status, occupation, address and specimen signature (for the time being) of the testator/testatrix;
- (b) Date of birth;

- (c) National Insurance Number (if the testatrix were a married woman without a number, then the husband's number should be recorded; in any exceptional cases where there is no number, this fact should be noted, since it may in itself assist in identification);
- (d) Date of will or codicil;
- (e) Date of registration;
- (f) Names, occupations and addresses of executors;
- (g) Name, occupation and address of the person filing the information.

36. The registration should also record the fact if the will itself has been deposited in the registry in accordance with s. 172, together with any other unchecked information supplied from time to time about changes of address, names, solicitors, etc, or about foreign wills made by the testator.

Secrecy

37. The feature of the Dutch system described in paragraph 19 above, under which any registration is open to inspection by an interested party, would not be acceptable to public opinion in this country. The register would have to be secret and all searches conducted by registry staff. It seems likely that applications for searches would normally be made by post. During the testator's life he should be the only person entitled to have a search made against his own name; he might wish to do this for the purpose of ensuring that the registration had been duly made. The only exception to this general rule would arise where the testator's affairs are under administration by the Court of Protection because he is incapable by reason of mental disorder of managing his own. For the purposes of Part VIII of the Mental Health Act, 1959, the nominated Judge should have power to order a search of the register.

38. Once the registry had been satisfied by the production of a death certificate or otherwise that the testator was dead, it would be open to anyone on payment of the appropriate fee to have a search made of the register against the name of the deceased.

District Probate Registries

39. The granting of probate before 1857 was a function of the ecclesiastical courts. For historical reasons, therefore, the District Probate Registries are still, to some extent, sited in cathedral towns, which may not always be the most convenient places for the public. It is for further consideration whether any offices other than Probate Registries should be empowered to accept information for registration. There would be one central register to which information would have to be sent to be recorded from the place where registration was applied for. Although registrations might be applied for locally, there could only be one central register in which registrations would be entered and searches made. Applications for grants of representation after the testator's death would continue to be made to Probate Registries or, in the case of small estates, to an officer of customs and excise.

Wills of soldiers, sailors, airmen and seamen

40. Special privileges are conferred by the law on the wills of soldiers, sailors, airmen and marines "in actual military service" and of mariners and seamen at sea. There could be no question of taking away or reducing these important and ancient privileges. It would be a matter for discussion with the service authorities how the proposals described in this paper could be adjusted to meet their special needs. It would also be necessary to discuss with the Ministry of Defence (Navy Department) whether the depository of the wills of seamen and marines maintained under the custody of the Inspector of Seamen's Wills might be integrated conveniently to any extent into any national system of registration.

Fees

As we have remarked above, it appears that the fees necessary to finance compulsory registration of wills would be small. The actual cost cannot be worked out before a definite scheme has been evolved in detail. One might expect that a fee should be charged at the time when a will or codicil is registered and that a further charge should be made for any search of the registry, whether at the instance of the testator during his life or by anyone else after his death. It is possible that the introduction of a scheme of compulsory registration would stimulate greater use of the existing facilities for voluntary deposit of wills in the Principal Probate Registry. Whether this were to happen or not, it would be better that the fees charged for deposit should be fixed independently of those chargeable under the compulsory scheme so that each scheme paid for itself. We suppose that the register kept at Kidbrooke pursuant to the Land Charges Act 1925 might provide useful information about the best method of keeping the register of wills, its cost and the level of fees to be charged.

ATTESTATION.

42. Finally we wish to invite comments on another matter which is not an integral part of the proposal outlined above but is a question of the validity of wills and of some importance. S. 9 of the Wills Act 1837 requires that a will, to be valid, must be signed “by the testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator”. It appears that these rather rigid requirements concerning attestation may be something of a trap for testators and that the testator’s signature is not infrequently written or acknowledged before each attesting witness separately. This defect is known when probate is

applied for, would cause it to be refused, but it escapes notice in practice when the will bears a formal attestation clause. This appears in wills drawn by solicitors which are accordingly proved without the need for affidavits of due execution. Although this normally appears in will forms, it is sometimes necessary in practice for affidavits of due execution to be sworn because the testator has failed to fill in the clause correctly.

43. Few wills in fact are rejected by the Probate Registry but the commonest cause of refusal of probate is the failure of witnesses to attest in the presence of each other. During the year beginning 28th September 1961 approximately 9,600 wills were submitted to the Personal Application Department of the Principal Probate Registry at Somerset House. Probate was refused in only 52 cases, in 31 of which the only defect in the execution was that the will had been produced by the testator to each attesting witness separately. In five other cases the witnesses were not “present at the same time” but the will was invalid for other reasons as well.

44. In view of the fact that a number of home-made wills are invalidated each year for non-compliance with this requirement and the probability that many more would be if the true situation were known, it seems right to consider whether the requirements of s. 9 about attesting witnesses could safely be relaxed by amending legislation.

45. Before the Wills Act 1837, different kinds of wills were subject to different formalities; e.g. a will disposing of personal estate required no witnesses and a mere letter could amount to a valid will, whereas the Statute of Frauds 1677 required wills of real estate to be attested by at least three credible witnesses in the presence of the testator. Since the passing of the Wills Act the fact that all wills (other than privileged wills) require attestation by two witnesses has become well-known and it is

rare that any will is invalidated for lack of a second witness; indeed it is interesting to observe that in all of the 52 cases where probate was refused in 1961/2 an attempt was made to secure two witnesses. This being so it appears that trouble does not arise in practice from the requirement that there should be two witnesses but from the requirement that they should be present at the same time. In recent years the formalities attending the execution of certain deeds (e.g. share transfers) have been waived but there is surely something to be said for retaining the rather formal character of will-making to impress on testators its great importance and to encourage them to exercise care.

46. The Statute of Frauds did not require that the three witnesses should be present at the same time and early decisions of the courts upheld wills where the testator's signature was made or acknowledged in the presence of the witnesses separately. The lack of this safeguard was deplored by a number of eminent judges. In the case of Ellis v. Smith (1752) 1 Ves. Jun. 9; 30 E.R. 205, a strong court consisting of Hardwicke, L.C., Sir John Strange, M. R., Willes, C. H., and Parker, C. B., reluctantly decided that a will subscribed by three witnesses separatim was good. "The case of witnesses attesting at different times has so many authorities that it may be considered as settled; yet I think it a dangerous determination and destructive of those barriers the statute erected against perjury and fraud" – per Strange, M. R. at p. 14 "I think the cases admitting the attestation at three different times have gone too far; for, as I have known one man swear that he did not see the testator sign and the other two swear that he signed it before the three; so might one man swear that, when he attested the will, the testator was of insane mind, another that he was sane etc., and an inlet is made for great frauds and impositions. But when they attest it simul et semel they are a check on each other and prevent such frauds" – per Willes, C. J. Lord

Hardwicke thought that fraud has been made easier by this line of cases. The reforms made by the Wills Act 1837 were based in this respect on the General Report of the Ecclesiastical Commission 1832 and in particular on the Fourth Report of the Real Property Commissioners 1833. The latter recommended that every will should be attested by two witnesses. They supposed that, if two witnesses were required, the difficulty of engaging an accomplice, the need to reward him, the danger of blackmail, etc., afforded a real protection against forgery and that that protection would be less if the witnesses were able to attest the will at different times. The dangers that the Commissioners had principally in mind were forgery, fraud and duress, but it is interesting to see that Lord Brougham, who had been in parliament when the Wills Bill was debated, said in 1845 in Casement v. Fulton (5 Moo.P.C.C.130; 13 E.R. 439 P.C.) that the requirement that the will should be signed in the presence of two or more witnesses present at the same time was “a most wholesome addition” to the law; “for, if one witness may be present one day and another a different day, perhaps at an interval of years, how can we say that both attest the same fact, that important fact for which their presence is required – the capacity of the testator? He might be sane one day and insane another; and thus his capacity would only be attested by a single witness because his two different conditions would only have one witness each”. It appears however that Lord Brougham did not always consider that testamentary capacity was the only important issue which the witnesses might be required to testify to; apparently in the previous year in Panton v. Williams (8 The Jurist 585 at p. 587) he said that the use of attestation is to cast round the chair or the bed of the person making his will or codicils a protection against fraud.

47. The question then on which the Law Commission would like to invite comments is whether in modern conditions the two attesting witnesses should still be

required to be present at the same time. Can this safeguard be dispensed with in modern conditions? Does not some risk of fraud, duress etc., still attend the making of home-made wills – which are precisely those wills which now run a risk of being refused probate? Ought the court to be given some power to grant probate of a will which is not witnessed in accordance with s. 9 of the 1837 Act, provided that its authenticity is beyond doubt? Article 25 of the Israeli Succession Law which came into operation in November 1965, authorises the courts to grant probate of a will in spite of any defect with regard inter alia to the signature of the testator or of the witnesses if it has no doubt of the genuineness of the will.

Lacon House

19 July 1966