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### Death Makes a Difference

Brainerd Currie

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• Concluding a short story in two parts.

# DEATH MAKES A DIFFERENCE

BY BRAINERD CURRIE

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## Synopsis of First Installment

Sheriff Thellusson has put to Professor Viner the problem of an apparent homicide without motive: Mrs. Audley, elderly widow, died apparently as the result of a fall. The time of death, as indicated by a clock dislodged as she fell, was 5:30 P.M.; but other evidence established conclusively that she was alive at 6:00 P.M. Mrs. Audley's brother, wealthy Grant Twisden, had died of natural causes at 6:15 on the same afternoon. Jim Brattle, Twisden's lawyer, reported finding Mrs. Audley's body at 6:30. The sheriff's theory was that Mrs. Audley had been killed after the death of her brother by someone who, wishing it to appear that she had died first, had set the hands of the clock back to 5:30. He could discover no motive for such a crime, however, especially since Mrs. Audley was not a beneficiary under her brother's will. Professor Viner, having read the will and discovered that it left a substantial sum to Mrs. Audley's children for their lives, remainder to her grandchildren, has just informed the sheriff that there was indeed a reason why someone might wish to bring about Mrs. Audley's death, or the appearance of her death, before that of her brother. He proceeds to explain:

## PART TWO

MR. VINER, WHO HAD BEEN REMARKABLY quiet to this point, now took charge of the conversation, speaking with quiet intensity.

"Yes, Thellusson; it is fantastic, and I cannot force myself even to contemplate the implications of the fact; it is a fact, nevertheless, that the will reveals a possible motive for the killing of Matilda Audley. Not for compassing her death *per se*, but for arranging a certain relation between the time of her death and that of her brother; specifically, for bringing about her death, or the appearance of her death, before her brother's. As you well put it, her killer did not desire her death 'as such,' but only

a particular relation between her passing and her brother's. If Matilda was killed it was not because her assailant bore her malice, nor because he coveted what would have been hers had she lived. To put it quite simply, if Matilda survived her brother an important clause of his will was void. If she predeceased him the clause was valid."

"I don't understand. Which clause?"

"Item Seven. Let's first go over the whole will to get the thing in perspective. First, there is a series of specific bequests—to his physician, his servants, his associates. Then comes the all-important Item Seven, in which he leaves what looks like important money . . ."

"It comes to at least a million dollars."

". . . to Matilda's children for life, and after their deaths to her grandchildren. Finally there is the residuary clause, leaving all the property not otherwise disposed of—after taxes, of course—to some foundation for research in psychic phenomena. Now let's go back to Item Seven and look at its exact language:

"Item Seven. All of my stock in Twisden Petroleum and Metallurgical Enterprises, Inc., I bequeath to my executors [that's Brattle, and one of Twisden's business associates, and the Ward Trust Company] in trust to pay the income therefrom to the children of my sister, Matilda Twisden Audley, during their lives, and after their deaths to pay over the principal to their children."

Thellusson's frown deepened. "What's wrong with the clause, and what does Matilda's death have to do with it?"

"Just sit back and relax. This may be a bit hard to take, but I'll make it as painless as possible. I must tell you that a part of the common law of England is a thing called the Rule Against Perpetuities. It is a part of the law of this state, too, and indeed of most states. We don't know a great deal about its purpose and policy, except that in general it is designed to keep owners from controlling the disposition of their property too far into the future. A limit on the power of the dead hand, you might say.

"The rule itself is clear and reasonably simple. It says that no interest—as, for example, the remainder interest to

Matilda's grandchildren—is valid unless it must 'vest'—that is, roughly, become settled and definite—not later than twenty-one years after some life in being at the creation of the interest. In the case of a will, the interest is created upon the death of the testator. Are you with me?"

"I'm not sure."

"Let's test you. For our purposes we can disregard the twenty-one year provision. That is to enable a testator, if he wishes, to postpone a gift until children come of age, but Twisden's will avoids that complication. Consider Item Seven simply as giving a life estate to Jee and Barton, remainder to their children. What is the latest time at which the interests of the children would become definite and certain?"

"I would say upon the deaths of Jee and Barton—or, in Barton's case, within nine months after his death. Because any children they may have obviously must be born, and identifiable, in their lifetimes—or shortly thereafter."

"Exactly. Now suppose the clause said 'to Jee and Barton for life, then to their children for life, remainder to their children?'"

"I suppose the remainder would be void, since the grandchildren of Jee and Barton cannot be identified as a complete group until their parents—Jee's and Barton's children—are either dead or past child-bearing age; and since Jee and Barton may have other children after Twisden's death, the group may not be determinable within the lives of people living when Twisden died."

"Very good. Now let's come back to the clause as it actually is. Life estate to Matilda's children, remainder to their children. What about it?"

"The remainder is good, isn't it? Jee and Barton were living when Twisden died; their children must be a definite, identifiable group upon their deaths, or soon thereafter. So the remainder is settled within the time limit—that is, upon the expiration of two lives in being at the testator's death."

"It would be valid if the assumption we have been making were in accord with the facts; but it is not. We have been speaking as if Item Seven referred to Jee and Barton by name. Check it again and you will recall that it does not do that, but only refers to 'the children' of Matilda."

"What's the difference? Jee and Barton *are* the children, and the only children, of Matilda, aren't they?" The sheriff's tone was almost belligerent.

### A Motive Supplied

"Now you really must relax and be patient. We are almost through. The rest is not difficult to understand—only to believe. The law says that 'children' in a context such as this means not just the children that Twisden knew—those living at his death—but also any that may be born thereafter. Just a minute! Furthermore, the law assumes that Matilda, if she is living at Twisden's death, may remarry, and may have another child, and . . ."

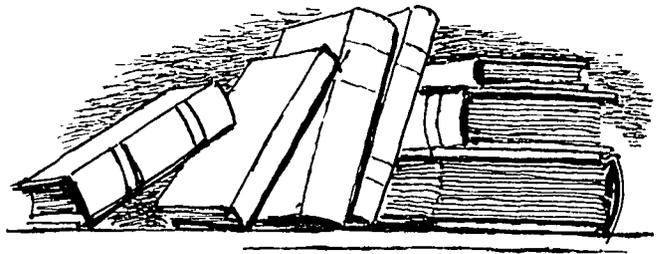
"That is the silliest thing I ever heard of!" the sheriff exploded, losing patience at last. "I tell you, she was 72 years old! It was impossible for her to have another child!"

"I couldn't agree more, Thellusson. Common knowledge

and medical experience tell us as much. But the law, in its wisdom, has it otherwise. According to the law, 'the possibility of issue is never extinct'—while life lasts, that is."

"But the chances—assuming there is a possibility, the odds must be a billion to one against a child's being born to a woman in her circumstances."

"The law is not concerned with the probabilities, but with the possibility. The interest *must* vest, if at all, within the period. If there is a possibility that it may not do so, the interest is void. Now, look: Matilda, assuming her to be alive when Twisden dies, may remarry and have a child. That child will qualify as one of the life tenants, which is all right, since all of Matilda's children must be born within her lifetime, and she is, by hypothesis, alive at Twisden's death. But this child of Matilda's old age may



in turn have a child, who will qualify as a remainderman—as a grandchild of Matilda. But *his* (or her) remainder interest will not vest within the period permitted by the Rule—since his parent was not alive when Twisden died."

The sheriff massaged his temples. "It's all so fantastic and arbitrary," he complained, "that it's difficult to digest. Will you just sum it up for me briefly?"

"All right. If Matilda is dead when Twisden dies, Item Seven is perfectly valid, since the interests it creates must vest within the time allowed. If Matilda is alive when Twisden dies, then the remainder interest to her grandchildren is void, since it may not vest within the lifetime of some person alive at Twisden's death."

"Void as to all the grandchildren?"

"Every one. The rule is that where there is a gift to a class—such as Mrs. Audley's grandchildren—the gift is totally void if the interest of any member of the class may vest beyond the period of perpetuities."

"Even if Matilda dies ten minutes after Twisden, so that any fool can know that this silly miracle child can never be born?"

"Even so. The law judges the validity of the will as of the time of the testator's death."

"And what becomes of the stock?"

"The income will go to Jee and Barton for life, the life estates being valid enough. But, the remainder being void, the principal, after their deaths, will be treated as property not specifically disposed of. It will pass under the residuary clause."

"You mean it will go to that psychic research foundation?"

"Exactly."

The sheriff let it all sink in. Finally, rousing himself, he said musingly: "The question then is, who would know of this possibility, and who would be sufficiently interested in

preventing it to—to see to it that Mrs. Audley was dead when Twisden died. Or to make it appear that she was.”

“Yes,” said Mr. Viner in a tired voice. “I think I shall retract to some extent my remarks about keeping my distance from the raw facts of life. I should like to go with you to see Jim Brattle. After all, he was one of my students.”

### *A Strange Confession*

James Brattle rose behind his desk to receive his visitors. “For once, Professor Viner, I can’t sincerely say that I am glad to see you. The fact that you are here with the sheriff means that my blunder has been exposed and my deception discovered. I’m sorry. Except for two bad breaks, I would have gotten away with it. The first was Leake’s turning up with that damned six o’clock telephone call. After that, of course, the sheriff was certain to hang on like a bloodhound, but he might never have found the motive. Most lawyers, even, could have pored over that will indefinitely without realizing how I had blundered in drafting it. The second bad break was the sheriff’s consulting you. I’m sure that you required only a glance at the will to realize that Item Seven created what you used to call a ‘fertile octogenarian’ situation.”

“The expression was not original with me.” Mr. Viner said no more, but stared intently at Brattle, vividly expressing wonderment, concern, and interest in what was to follow.

The sheriff was brusquely vocal. “Maybe you’d better explain yourself, Brattle.”

“Of course. I drew the will, and Twisden executed it, just under a year ago. Four months later, when Twisden was hospitalized, I got the will out and reviewed it. It was then that I realized, with a shock, that I had fallen into that miserable booby-trap for draftsmen. Twisden might die at any time, and if Miss Matilda survived him, as she seemed likely to do, the remainder to her grandchildren would be void—solely because of my stupidity. If I had only designated Jee and Barton as the life tenants, instead of talking about Miss Matilda’s children! But it was too late.

“I went so far as to prepare a new will, with Item Seven properly drawn, and took it to the hospital; but when I intimated that perhaps Twisden might sign it in a lucid interval the doctors looked at me so suspiciously that I had to back down. He was paralyzed, his brain had been affected, and he was hardly conscious. Obviously he lacked capacity to make a will. Still less could I have him revoke the existing will, or destroy it, so that he would die intestate, with all his property going to Miss Matilda as his heir. There was nothing to do but brood about it, and brood I did.

“The brooding became intense after Twisden died at six-fifteen that afternoon. Driving to Miss Matilda’s, I cursed myself for a blundering fool. I had tried to talk Twisden out of making a bequest to that foundation for psychic research, but he had been sold a bill of goods. That was not too bad; but to have the foundation get not only the residuary estate but the grandchildren’s inheritance too—because of my incompetence—that was intolerable.”

Sheriff Thellusson was obviously trying to control his emotions. With elaborate restraint, he said slowly: “I can understand that you were profoundly disturbed, Brattle, because of the injustice of the situation and your part in bringing it about. What I can’t understand is how that or any other provocation could drive you to such a callously brutal attack on a helpless . . .”

Brattle whirled on him in fury. “Good God, Thellusson! I’ve always respected you, but if you have the effrontery to suppose for an instant that I would have laid a hand on Miss Matilda, you’ve lost your mind!”

Viner intervened mildly. “Don’t blame the sheriff, Jim. What you have been saying has sounded very much like a confession. I don’t wonder the sheriff mistook your meaning.”

“You couldn’t have thought me capable of that, could you, Mr. Viner?”

“I could not, and did not. Rather than speculate on what happened, however, I preferred to hear your own account. I am still waiting, with an open mind. I have the advantage of the sheriff, who has not known you so long nor so well. But what you have been saying sounds, on the surface, quite incriminating.”



“I’m sorry, Thellusson. I was confessing, but not, certainly, to murder. Let’s just get the facts clear without more delay. I reached Miss Matilda’s house about 6:25 and went directly in, as usual. She was sitting in the living room. I think she must have known why I had come, but I didn’t have a chance to tell her about Twisden. She sprang to her feet—whether because of concern over the news I was bearing, or because of her usual enthusiastic way of greeting a friend, I don’t know. Then she faltered, in obvious distress, and grasped for the mantel. I could not reach her in time. She fell heavily, pulling the clock with her.”

Brattle looked steadily at Thellusson. “I loved Miss Matilda,” he said simply. “I assure you that at that moment my only thought was for her welfare. I could find no sign of life, but I called Dr. Gray immediately. She must be saved if possible.

“While I was dialing his number I noticed the hands of the clock, pointing to 6:26. The whole situation then dawned upon me. I devoutly hoped that Miss Matilda was alive and that Gray could save her. On the other hand, if she was dead, as I feared, it was unbearably ironical that

the end had come just a dozen minutes too late to save her grandchildren's inheritance from my bungling. Why should her death be in vain? As I spoke to Gray's secretary, I turned the clock back to five-thirty."

They were silent for a moment. Then Thellusson, momentarily identifying himself with the protagonist, reflected: "You took a big risk, and even if the faked evidence had not been discovered it would have been inconclusive. You remember Dr. Gray said at the time that she might not have died instantly, but might have been alive until just a few minutes before he examined her at six-thirty-five."

"Yes, that disturbed me when he said it, and I admit I had not thought the thing through to that extent. But I wasn't really worried. Imagine a lawsuit in which the question whether this stock should go to Miss Matilda's grandchildren or to the foundation turned on the time of her death. Do you think any court would accept the possibility that she remained alive for more than forty-five minutes after the apparent time of her stroke, and so disinherit the grandchildren?"

Professor Viner stirred. "It troubles me, Jim, that you seem to have no consciousness of having done wrong. You tampered with the evidence in a case of death that was likely to become a matter for police investigation. You caused the sheriff's office, in fact, to spend a good deal of time and energy to unravel a mystery which was of your creation. Thus, perhaps, you were guilty of obstructing justice. If the matter had reached the stage of a coroner's inquest you might have committed perjury. Knowing how the courts would distribute the estate of Mr. Twisden in the light of the true facts, you undertook to change the appearance of the facts, and thus to alter the course of distribution. That you did not do these things from selfish motives may be an argument in mitigation, but it does not excuse your conduct. Yet you express no regret; on the contrary, you speak of the fact that you might have 'gotten away with it' except for a couple of 'bad breaks.'"

Sobered and chastened by this reproach, Brattle nevertheless replied: "But the rule that a widow of 72 is presumed capable of having children, in spite of all common sense and medical science, is a stupid, vicious, and absurd rule. How can I have respect for such a rule? Why should I be penitent about trying to circumvent it—especially when Miss Matilda died a few minutes after Twisden, so that she could not, even on the basis of the fantastic presumption, possibly produce another child to affect the distribution of the estate?"

"Do you consider it your prerogative, then, to take the law into your own hands? To nullify, if you can, the rules that seem to you irrational, or unwise, or unjust, or inconvenient?"

"Generally, no. . . ." Brattle's shoulders sagged, and he sighed deeply. "Let me withdraw that. You have me whipped, Professor. Not 'generally, no.' Substitute 'categorically, no.' The way to fight the stupid and unjust aspects of the law is to attack them in the courts and in the legislature; not to circumvent them by deception and dime-novel theatrics. I would have said that I learned that from you in law school; apparently I did not. I have learned it now. And, if I may say so without detracting

from the sincerity of my penitence, I have learned it the hard way, since my attempt to circumvent the rule by deception failed. The grandchildren's inheritance is lost."

"It may not be too late, Jim, to try to achieve justice in the direct, honest way."

"What do you mean?"

"It is undoubtedly true that, as the law now stands in this state, the remainder to the grandchildren is void. But, as you may remember, our courts are not deaf to reason. They have been known to refuse to follow an old rule when its irrationality or injustice or obsolescence has been made clear by vigorous advocacy."

"By God, you're right! I might very well get the remainder held valid in spite of the stupid old presumption! That would be one for the books!"

"Failing that, you might get the residuary bequest to the foundation held invalid. If so, the residue, which is substantial, would pass to Twisden's heirs—that is, of course, to Mrs. Audley, and through her to her children."

"How can I attack the validity of any part of the will? I am one of the executors."

"You could resign, couldn't you? You could devote yourself single-mindedly to protecting the interests of Mrs. Audley's family?"

"I would like that. But on what grounds could the residuary clause be attacked?"

"Offhand, I don't know. But I gather you feel that the promoters of the foundation imposed upon Mr. Twisden. That should do as a starter, and as an ethical basis for urging technical objections. Maybe the mortmain statute will prevent the foundation from taking. You could look it up. If you can create a substantial doubt as to the validity of the residuary bequest you may at least reach a settlement whereby the foundation will relinquish its claim to the grandchildren's inheritance in exchange for being allowed to keep the residuary bequest. That would carry out Mr. Twisden's wishes to the letter, exactly as if your Item Seven were valid."

Brattle grasped the professor's hand warmly. "Mr. Viner, you have no idea what you have done for me. I'm a new man. I'm going to resign as executor and fight this case with all I've got—that is, if I am still around to practice law. And now, if you and the sheriff will excuse me, I think I'll go and give myself up."

Sheriff Thellusson looked up. "You're going to the state's attorney?"

Brattle smiled. "No, not that. Mr. Viner has just reminded me that I made a lot of unnecessary work for your office. I needn't do the same for the state's attorney. No jury in this county would convict me of obstructing justice for what I did. Nor do I feel guilty of any crime against the people of this state. What I have been guilty of is unprofessional conduct—conduct unworthy of a member of the bar. I want to square that—to make a clean breast of it, and take the penalty. Then—unless the penalty is permanent disbarment—I want to fight this case and win it. I'm going to see Judge Nottingham. He's chairman of the bar association's committee on professional ethics."

As Brattle went out, Sheriff Thellusson noticed for the first time that Mr. Viner had neglected to bring with him the notes he had taken in his office.