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"Reason is the Soul of Law"

By ROBERT E. MORE
of the Denver Bar

I

"JOHN NAVE, I think you are the most thorough, and at the same time the cleverest cad I have ever known".

"Is that all, Mr. Ross?" inquired Nave quietly.

"No", answered his accuser. "It has seemed to me only fitting that you, concededly one of the soundest lawyers in Denver, draw for me a new will, revoking the old will in your wife's favor and leaving all my property to Farley. Of course I shall pay you for your services".

"I ceased active practice several years ago, but I will draft the instrument immediately", said Nave, and turning, left the room.

"He is a wonder", mused David Ross, as he watched his visitor's departure. "Clever, ingratiating, entirely unscrupulous, and married to a charming, noble woman". He raised the receiver from a nearby phone. "Please call Mr. Farley Ross' office and ask him to come over".

"Fifteen minutes later David Ross' secretary announced that his son was waiting to see him. "Ask him in", he said shortly.

"Farley", he began abruptly, as soon as his son entered, "I am going to make a new will and leave you everything".

His son smiled; "Don't bother with it. I am able to support myself, and want to be self supporting, so why not favor some one who prefers a less strenuous existence?"

"Because I don't wish to", answered

his father. "Sit down Farley, we have clashed for years, and I think it's about time we came to an understanding".

David Ross selected a cigar with care, then said fiercely, "I've been a fool".

"Yes, Sir".

"The very fact that we are so much alike has kept us apart. Yet I wanted it otherwise. Ever since your mother died, I have craved sympathy, fellowship, understanding. Paradoxical isn't it, for me to be that way?"

Farley was silent.

"That is why I was so easy for Nave", continued David Ross. "He never overplayed his hand. He never lied to me. Don't think I was not in my right mind. That will I made in his wife's name would have stood in any court in the land. All he did was flatter me, agree with me, insinuate himself into my heart, when it was crying for communion. And then he subtly took your part, urging me to think again, before we separated entirely. Damn him! He knew his man. He calculated well. And then one day I told him I was going to make a will in his favor. And he said, 'Don't do it'. And then he finally, reluctantly agreed that I should designate Mary Nave, as residuary legatee. They tell me poor Mary is putty in his hands, that he has already gone through her very considerable fortune. Well, that's over. I know John Nave now. And what is better, I know you, Farley".

They shook hands, stood a moment, embarrassed, then the father was left alone.

II

Though David Ross had no doubts concerning Nave's ability to draft a valid will, he entertained a profound distrust of the latter's willingness so to do under existing circumstances. Indeed, though he would not have admitted it even to himself, secretly he hoped that Nave would attempt some trickery, and he was almost disappointed, a few days later, when Judge Beckler, his old time friend and personal attorney told him that the will which Nave had drawn was not only valid, in every respect, but exceptionally well prepared.

"Shall I supervise its execution?" inquired the attorney.

"I prefer that no one know of your connection with the matter", said Ross, "provided that I run no risk by so doing. Are there any formalities required other than signature by the one making the will, and attestation by two disinterested witnesses?"

"You must be sure first to state that the instrument in question is your will", returned the lawyer.

"Very well, I shall take care of the matter myself", said Ross. "I shall ask Nave to be one of the attesting witnesses":

"It would be better for me to be present"—urged Beckler, but Ross was already leaving the office.

That evening David Ross summoned his household to his private library. They seated themselves in the few chairs in the room and waited somewhat nervously. David Ross ran through some papers, consulting his watch frequently. Then Nave entered, stood by the door a moment, stepped over to an old fashioned tete-a-tete near the door, and sat down beside Helen Bates, who acted as private secretary to Ross.

Ross put down his papers, and tak-

ing up an envelope on his desk withdrew from it the instrument he had previously shown to Judge Beckler.

"I have summoned you to witness the execution of my will", he announced. "This will revokes all prior wills, made by me, and leaves all my property to my son Farley. I shall now sign it".

Ross signed the instrument and then beckoned to Nave. "Mr. Nave, will you now step forward and sign my will as a witness?"

Nave crossed the room briskly, pulled a chair up to the desk, signed his name in the place indicated, carefully blotted it and handed the instrument back to Ross.

"Now, Miss Bates, will you also sign as a witness?" requested Ross. Helen Bates thereupon took the chair relinquished by Nave, signed her name, and handed the will back to Ross. He looked it over, folded it, placed it in his safe, thanked everyone and dismissed the group. Nave helped Helen Bates with her coat, nodded to everyone and left.

III

David Ross died within three months. Farley Ross retained Beckler and Linscott to present the will for probate. John Nave and Helen Bates were subpoenaed to prove the will. Miss Bates was first called to the stand. She related, in substance, the events which happened on the evening the will was executed. She identified the instrument, said that David Ross had requested her to come to the library as a witness, named those who were present, and told of the testator's publication of the will and his subsequent signing of it. She stated that Ross thereupon requested Nave to sign the paper, identified Nave's signature on the instrument in question, said that she herself then signed it, at Ross' request, and, in

answer to a question concerning the state of mind of the deceased, answered positively that he was of sound and disposing mind and memory.

Nave thereupon took the stand. Linscott asked him his name and residence, and then said:

"I hand you an instrument marked proponent's Exhibit A, and ask you if that is your signature?"

"It is".

"When did you sign that instrument?"

"On the day designated therein".

"Relate the events that preceded your signing".

"David Ross phoned me that afternoon and requested me to come to his house at seven and witness his will. I had drawn the will a few days before. I arrived a few minutes late and found them waiting for me. As soon as I entered the room David Ross took the instrument from an envelope, stated that it was his last will and testament and told us, I believe, what its general provisions were"—

"Was he of sound mind, in your opinion?"

"Unquestionably".

"What did the deceased do next?"

"He signed the will".

"You saw him do that?"

"I did".

"Is this signature appearing on Exhibit A the signature of the deceased?"

"It is".

"What did the deceased then do?"

"He asked me to witness the will".

"What did you do?"

"I was sitting at the other end of the room, I walked forward, drew up a chair and signed my name, as it appears on Exhibit A".

"And then?"

"David Ross asked Miss Bates to witness the will".

"And did she sign?"

"I don't know".

"What is that?"

"I don't know".

"Isn't this the signature of Helen Bates?"

"I don't know, I have never seen her sign her name".

"But you saw her sign after you did?"

"Pardon me, but I didn't. Miss Bates had been sitting beside me. As she stepped towards the table where Ross was seated, I walked back and left the room before she sat down at Mr. Ross' desk. I do not know what she did after she sat down".

At this moment, Judge Blackford, the probate judge, broke in, "Mr. Nave, let me get this straight. You say you signed your name and then left the room before Miss Bates reached the desk?"

"Yes sir".

"Why did you do that?"

"In order that the will might not be valid".

"Do you mean to say that you intentionally absented yourself so that the will would be a nullity?"

"Precisely".

"Why did you do that?"

"I suggest, with deference, that the question might be said to be improper, but I am willing to answer. David Ross previously made a will in my wife's favor. I desired to prevent him from revoking that will".

Judge Blackford trembled with anger. "Sir, you have the effrontery to confess publicly that you perpetrated this fraud upon the deceased and his beneficiaries?"

"Again I respectfully suggest that your Honor's question goes beyond

the occasion. I understand there is nothing before this court but the question of the validity of the will now being tendered for probate. I will be glad to answer any questions upon that subject".

Judge Blackford waved Nave away. "Miss Bates, take the stand again. Please state whether or not Mr. Nave was in the room when you signed the will?" Helen Bates was troubled.

"I can't say, Judge Blackford. Mr. Nave and I were sitting near the door. I remember that when Mr. Ross asked me to step forward, Mr. Nave had already started back. I supposed he was returning to his seat?"

"Never mind what you supposed. What did you see?"

"Mr. Nave passed me, I walked forward, pulled up the chair, which Mr. Nave had pushed some distance from the desk, signed my name and handed the paper to Mr. Ross".

"What did you do then?" "I stepped back, spoke to Mr. Farley a moment and then left the room with him".

"Where was Mr. Nave then?"

"I can't say, I don't remember".

"Do you remember seeing him again that evening?"

"Yes, I remember he helped me with my coat, in the hall".

"And that is your only recollection?"

Helen Bates was silent a moment. Then she said slowly, "I cannot remember seeing Mr. Nave between the time he passed me in the library and the moment he helped me with my coat".

"And that was in the hall?"

"Yes sir".

"You say Mr. Farley Ross was present?"

"Yes sir".

"That is all. Mr. Ross, please take the stand".

Farley Ross walked forward slowly and after being sworn, sat down. Judge Blackford continued the examination.

"Mr. Ross, do you know what Mr. Nave did after he signed the will?"

Farley glanced at Nave, who was sitting at counsel's table, with a slight sneer on his face. "I do, your Honor. I did not think of it at the time, I did not know it made any difference. But Nave did leave the room, just as he said. He closed the door and was out of sight until we passed into the living room, and from there into the hall, to get our coats. What does it mean, Judge Blackford? Is the will bad? And if it is, is there no other way of righting this wrong?"

"Your lawyer will advise you as to your rights in other respects. As to this proceeding, I am forced to refuse the will probate. Mr. Nave—". But Nave had left the court room.

Farley Ross turned to his attorney

"Mr. Linscott, has the court thrown out the will?"

"Yes, Mr. Ross, but don't worry. We shall either defeat that earlier will, or impose a trust upon Mrs. Nave for your benefit. In any event you can sue Nave in deceit. Come to the office to-morrow".

IV

"Mr. Farley Ross to see you".

"Ask him in".

Linscott pushed back his telephone and turning to his partner said, "It is Ross, can you remain".

"Surely", answered his older associate".

As Farley Ross entered, Linscott said, "You know Judge Beckler, do you not Farley? For eight years now he has furnished us with ready answers to difficult legal propositions. I turned him loose on your case this

morning and he was just going to tell me the law when you were announced”.

“I have heard of Judge Beckler frequently”, said Ross, “but we haven’t met before”. “What are your conclusions?”

“Sit down, Farley, and I shall tell you”.

Linscott reached for a scratch pad. “This morning I went to see Mrs. John Nave. I hoped that we might induce her to do the right thing, withhold her will and simply permit the property to go to you as an intestate estate. It seems, however, that she never knew until yesterday, that your father had made a will in her favor. The instrument is now in the possession of the Union Trust Company, and she says, in her quiet, resigned way that she will do just as John wishes. So that is that. Then I had a talk with Helen Bates and the members of your father’s household. Miss Bates, as you know, has a New England conscience. She insists upon telling the truth, as we of course want her to do. That, however, had the practical result of demonstrating at once that the Nave will is not subject to attack. In addition to observing the relations which existed between your father and Nave, she overheard a conversation you had with your father when he himself admitted that there had been nothing even approaching fraud or undue influence, in connection with that first will. That would not be competent evidence, probably, but it demonstrates the real facts clearly. It was simply a case of hurt pride on your father’s part, and when we add to that the fact that Mary Nave didn’t even know the will had been executed, it is hopeless to try to set it aside. The servants in your father’s house all confirm that view. So even if fraud or undue influence played any part in the execu-

tion of that will—and I am convinced there was only moral, not legal overreaching—we cannot show it”.

“Then that means Nave gets the property?” asked Farley. “Don’t misunderstand me. My father’s wishes are absolutely controlling upon me. Ordinarily it would be impossible for me to contest any disposition he might make of his property. But after Nave made that statement in court, I determined to fight him to the end. Everybody knows he will get the property in the end. Father once told me that Mary Nave was merely a timid, pliable fool.”

“No”, answered Linscott, “Neither John nor Mary Nave will ever get that property. A court of equity will impose a trust upon the beneficiary for your benefit, because of Nave’s acknowledged fraud”.

“But Linscott”, put in Judge Beckler. “How can equity impose a trust upon *Mrs. Nave*, who is innocent, because of her husband’s fraud? If Nave had been named in the will, there is no question about it. But Mrs. Nave has her separate property rights. You say the will in her favor was valid. I think it was. Now how can she be affected by a subsequent fraud of someone else, done without her connivance, or even her knowledge?”

“The clever crook”, exploded the younger lawyer. “That is why he had her named when David Ross wanted to designate Nave as residuary legatee. Well, we still have fraud and deceit. I guess that is our only remedy”.

“There is fraud, unquestionably”, mused Beckler. “But have you any damage?”

“Of course you have”, said Linscott testily. “Had it not been for Nave’s leaving the room, Farley would have had the entire estate. Damage! can you show me more damage?”

"Yes, we know Mr. Ross has been damaged in fact", went on the judge, "but I have an indistinct recollection of a case that was somewhat similar, and according to it, as Ross, senior, could have changed his will at any time, there was not actual damage, but only a possibility of injury".

"Rot", said Linscott.

"Let me take a moment", urged his partner. "I can run it down in an instant". As he left the room Linscott smiled affectionately. "Keen as a razor, but over technical. But the law is built on reason. He has a 17th Century mind and sometimes fails to see the woods because of the trees". A few minutes later Judge Beckler reentered. "Here it is, *Hutchins v. Hutchins*; it is squarely in point".

Warde Linscott snatched the book and hastily ran through the opinion. "It's in point, Judge, but did you notice the court—7 Hill 104—1845. An early, inferior New York court".

He turned to Ross, "We shall brief the question, Farley, and I shall call you as soon as your complaint is ready. Good-bye, and don't worry".

V

Five days later Farley Ross received a letter from Beckler and Linscott, which in part was as follows:

"We have run down all the cases and regret to state that the case Judge Beckler referred to has been repeatedly affirmed, and has not only been followed in all other jurisdictions where that question has arisen, but has been applied by analogy to other situations. The reason for the rule is that fraud without damage is not actionable, and depriving one of a mere possibility is not damage. You see even if a will is made through fraud, that gives the person who otherwise would have taken the property no actual rights. The testator may change it the next day. And even though your father wanted

to make a will in your favor, and was prevented from so doing by fraud, he might have subsequently changed his mind. We shall, of course, appeal from Judge Blackford's decision, but can hold out no substantial hope of success.

"In any event, Nave will be disbarred. That may be a somewhat hollow victory, in view of the fact that he no longer is engaged in active practice".

JUDGE CHARLES D. HAYT

Judge Hayt, a former member of the Judiciary and a veteran member of the Bar of this State and of this Association, passed away during the past month.

James A. Marsh, President of this Association, appointed the following honorary pallbearers for his funeral:

Albert A. Reed
William A. Hill
S. Harrison White
James H. Teller
Addison J. Fowler
Harvey Riddell
Edward L. Oakes
W. W. Garwood
Richard Peete

(GENERAL) WILLIAM H. DICKSON

"General" William H. Dickson, formerly Attorney General of the State of Colorado, and a member of this Association, passed away during the past month.

President Marsh appointed a committee composed of Judge George W. Allen, Judge Henry J. Hersey and G. Dexter Blount to attend his funeral on behalf of the Association.