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Where There's a Will There's a Way

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Many members of the bar are aware that there is an all too prevalent custom for people with comparatively small estates to obtain the services of a notary public in preparing their wills. Undoubtedly many of us have had personal experience and many gray hairs as a result of trying to figure out what these wills mean and also trying to see that the property of the decedent finally reaches those whom the decedent intended should have it. In a recent case the Supreme Court of Colorado was presented with a problem involving a will which was drawn by a notary public. The comments of the court are significant, not so much for what they did say, but rather for what the court neglected to say.

It is rather interesting to trace through two or three recent cases concerning the attitude of the Supreme Court toward the drafting of wills.

In *People, ex rel. v. Denver Clearing House Banks*[1] the court held that the drafting of wills by banks and trust companies constitutes the practice of law and that such actions by such institutions were not proper. The court said:

> "We think the drawing of wills, as a practice, is the practice of law, and this for three reasons: First, because of the profound legal knowledge necessary for one who makes a practice of this work; second, because all these instruments, before they become effective, must be filed in and administered by a court; and third, because what we consider the weight of authority so holds."

The court was then presented, in *People, ex rel. v. Jersin,*[2] with a problem of a notary public who admitted drafting a will for a friend and the court was requested to hold the said notary in contempt for practicing law without a license. The court held the notary was not in contempt and the test of whether or not he was practicing law in drawing this will was whether or not he made a practice of drafting wills. It seems clear in reading the decision that the reason the court refused to punish the notary for contempt was that the notary did not make it a practice to draft wills because the court found that he had only prepared one will. This test is an extremely interesting one and it may be said to parallel the proverbial holding in the case of a vicious dog that every dog is entitled to at least one bite. Let it not be said that our canine

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[1]99 Colo. 50, 59 P. (2d) 468 (1936).
[2]101 Colo. 406, 74 P. (2d) 668 (1937).

friends enjoy more privileges than are accorded others. It is, therefore, the law of our land that every notary is entitled to at least one will.

In the third case, *In re Maikka's Estate*,[3] the court noted these facts in connection with the drafting of a will:

> "Hawkins, the scrivener, and one of the subscribing witnesses, though not a lawyer, had been a member of the Colorado General Assembly. He was a notary public in the town of Paonia, and, as is frequently the case, assisted citizens of the community in drawing legal papers, and filling out printed forms a supply of which he kept on hand."

The word "frequently" in this decision deserves special attention. If this particular notary public "frequently . . . assisted citizens of the community in drawing legal papers . . ." we begin to become suspiciously close to the practice of law as defined by the court in the *Denver Banks* case. If the court meant only that notaries public in general frequently assisted citizens of the community in drawing legal papers (presumably including wills) then it is difficult to see why notaries public in general who do that kind of work are not practicing law.

This is not a mere abstract question, nor is it only a matter of academic interest. One need only read further in the opinion of the *Maikka* case to see what kind of legal advice notaries public give their clients. In this case the testatrix wished to make a will leaving all the property to her daughter. She did not want to leave her sons anything. The legal advice given by the notary public was as follows:

> "I told her it would not make a legal will—that she had to mention the boys—leave them something * * * I told her she would have to will them at least a dollar. And she said: 'Well, put it in that way.' * * * She said she wanted to leave it all to her daughter. * * *.
>
> Q. "And you drew the will that way? A. Yes, sir. * * *"

Any lawyer will readily observe that this is not the law in Colorado and it is not clear from the case whether the litigation was a direct result of having the will drawn by a notary public who in the nature of things cannot have that "profound legal knowledge" which the Supreme Court said was necessary for one who made a practice of drawing wills.

The unfortunate thing is that the Supreme Court did not see fit to comment upon the fact that the will was drawn by a notary nor did it see fit to condemn the practice as a practice, nor did it see fit to point

[3] 126 P. (2d) 855 (Colo., 1942).

out that the legal advice given by that particular notary was not correct nor accurate.

It seems reasonably certain that any notary public who might read the decision would come to certain conclusions:

1. Other notaries "frequently" draft legal papers (presumably including wills).
2. The Supreme Court of Colorado does not discourage nor condemn the practice.
3. The advice given in the case last cited as to the method of disinheriting children was sound and proper since the Supreme Court did not indicate that the statement of law by the notary was erroneous.

We all realize that notaries need no encouragement in the practice of drafting legal papers and it is deeply regretted that when such situations do reach the Supreme Court that the court does not discourage the practice or at least call attention to the fact that such acts by persons not qualified inevitably result in legal advice which is not accurate and, therefore, inevitably result in unnecessary litigation.

American Bar Association to Cooperate with War Manpower Commission

The American Bar Association committee on coordination and direction of war effort, under the chairmanship of George M. Morris, has worked out a program for cooperating with the War Manpower Commission and the United States Employment Service in meeting vital manpower requirements of the war effort. Briefly the program embraces four general activities: (1) "Referral services" are to be established to refer to competent attorneys the legal problems of workers transferred from one community to another. (2) Arrangements are being made to provide adequate legal talent to communities created or greatly enlarged by war industries or activities. (3) Comprehensive plans have been inaugurated for assisting the United States Employment Service in training and placing lawyers desirous of entering directly into war production and related industries. (4) And the association is cooperating with the National Roster of Scientific and Specialized Personnel in plans for registering all lawyers, thus providing a pool for placements in professional and technical work where personnel shortages exist.

Much of the work in the development of the program will be carried on by the state and local bar associations.