

3 Phil. 558

[G.R. No. 1072. March 30, 1904]

**MANUEL ABELLO, PLAINTIFF AND APPELLANT, VS. PAZ KOCK DE MONASTERIO,
DEFENDANT AND APPELLEE.**

D E C I S I O N

TORRES, J.:

Manuel Abello y Bayot, as executor of the testamentary estate of Josef a Montilla y Janson, deceased, in his own name and on behalf of Petronila Montilla and Juana Montilla, also executrices of the said estate, on the 2d of January, 1902, filed in the Court of First Instance of Occidental Negros the will of the said Josefa Montilla, in order that after the designation of the time and place and notice to the parties in interest, the same might be admitted to probate in accordance with the prevailing laws and declared to be the last will of the testator. The will appears on page 3 of the printed transcript of the proceedings brought before this court by virtue of the appeal.

Notice of the day set for the probate of the will was published for three consecutive weeks in the newspaper El Tiempo, published in Iloilo, as being the paper of greatest circulation in the Island of Negros. Attorney P. Q. Rothrock, on behalf of Señora Paz Kock de Monasterio, on the day set for the hearing, the 13th of May, 1902, filed a petition praying that the said will be declared null and void, and that the petitioner be appointed administratrix of the property left by Josefa Montilla y Janson, deceased, and for such other and further relief as the court might find conformable to law and equity.

The court below, in view of the will and of the result of the testimony of the president and municipal secretary of the town of

Pulupandon, and of the three witnesses who were present at the execution of the said will, rendered a decision on August 8, 1902, refusing to allow the will presented, and which purports to have been executed by Josefa Montilla March 1, 1899, upon the ground that the said will was not duly executed in accordance with the laws in force in the Philippine Islands, and more especially in accordance with the laws of the Island of Negros.

The will in question was executed under the regime of the Civil Code and the Notarial Law, and with respect to its forms and essential requisites the present Code of Civil Procedure is not applicable. That code became operative October 1, 1901, whereas the will was executed March 1, 1899.

This being so, and taking into consideration the fact that the will in question was opposed not upon the ground that it was a forgery, but upon the ground that it was a nullity by reason of the defects attributed to it, it appears that the court below held in the decision appealed that the instrument presented by Senor Manuel Abello as the will of Dona Josefa Montilla contains all the requisites established by the Civil Code for the validity and enforceability of open wills, and that it was executed before an officer who at that time exercised the functions of a notary, and that therefore the document was of the character of a public instrument under the law. However, notwithstanding this conclusion, which was entirely in conformity with the law and the result of the evidence, the judge held that the said document was without legal value as an open will of Josefa Montilla, deceased, because it was not protocolized within the twenty-four hours prescribed by article 7 of the Notarial Law, or within the thirty days' time fixed by General Orders, No. 210, issued by the president of the Island of

Negros, November 17, 1898, a special law promulgated by the government at that time in control in that island in substitution of the Government of Spain. Consequently if the instrument or document in question had been physically attached to the protocol and had been sent by the local president, before whom it was executed, to a notary public or to a delegate of justice of the government of the Province of

Negros, it would have the character of an open will of Josefa Montilla, deceased.

The fact is that these proceedings were instituted, not for the protocolization, but for the probate of the will in accordance with the Code of Civil Procedure, for the purpose of enforcing the wishes of the testatrix, which appear clearly and authentically in the will, which has not been impugned as a forgery. According to the laws in force in these Islands before the promulgation of the present Code of Civil Procedure, the *gobernadorcillos* of towns more than two leagues away from the head town of the province were authorized to act as notaries public. The power to exercise this authority had been vested in the *gobernadorcillos* as well as in the *alcaldes mayores* of the provinces from a very remote period, and their power to exercise the same was recognized by a resolution of the Audiencia of Manila dated August 31, 1860, approved by royal order dated January 18, 1865.

When the title of the local headmen of the towns was changed to municipal captain by royal order of July 17, 1894, these officers were also given notarial authority. Subsequently, the revolutionary government, and more especially the government of the Island of Negros, in General Orders, No. 210, above cited, recognized similar authority on the part of the municipal presidents of pueblos.

Article 7 of the Notarial Law of February 15, 1889, says: "Notwithstanding the provisions of article 1, the *gobernadorcillos* of towns more than 22 kilometers (four leagues) from the provincial capital shall be empowered to legalize public instruments, which they shall forward within the period of twenty-four hours from the time of their execution to the provincial notary for protocolization." This article was amended by a special law of the provincial government of Negros, applicable to this case, by which the period for the transmission and protocolization of public instruments authorized by the local president, an officer who substituted the former *gobernadorcillos*, was extended to thirty days. Neither the Notarial Law nor its regulations of April 11, 1890, nor the general order cited of the

government of the Island of Negros have established any penalty for the failure to comply with the requisite of protocolization, nor do they declare that an instrument of a public character executed before an officer invested with notarial power shall be void or unenforceable if not protocolized. Such a declaration would be indispensable with respect to wills, and is of great importance at the present time in which the probate of the will in question is sought in accordance with the Code of Civil Procedure, the provisions of which are to be liberally interpreted.

Article 7 of the Notarial Law in question can not be regarded as repealed by implication by article 694 of the Civil Code—which provides that an open will shall be executed before a notary public and three witnesses—upon the ground that the Civil Code is a law of subsequent date, it having gone into effect December 7, 1889, while the Notarial Law went into effect July 1 of the same year, because the Civil Code, instead of repealing any article or any part whatever of the Notarial Law, recognizes and presupposes its existence as a special law in several of its articles. This may be seen from an examination of articles 1216 and 1217, which declare that public documents are those authorized by a notary public or public employee, such as a *gobernadorcillo* or municipal captain or municipal president. The Civil Code furthermore provides that documents which are prepared by notaries public shall be governed by the notarial legislation.

Furthermore, the regulations for the application of the Notarial Law, promulgated the 19th of June, 1890, a date long subsequent to that of the code, make provision in articles 93 and 94 thereof for duties to be performed by notaries and *gobernadorcillos*.

The Mortgage Law went into effect in these Islands the 1st day of December, 1889, a date prior to that upon which the Civil Code took effect, but nevertheless the Civil Code, although a subsequent law of general character, has not repealed the Mortgage Law, which was a special enactment. This was so expressly declared by the general direction of the colonial office, in approving a circular of the chief justice of the *Audiencia*

of Cebu, and in dismissing the appeal taken by the registrar of property of that island, that officer having announced in the Bulletin of Cebu that henceforth contracts executed before the *gobernadorcillos* would be inadmissible, which announcement the chief justice of Cebu declared to be erroneous and in violation of article 7 of the Notarial Law, which had not been repealed by the Mortgage Law. The same reason applies for holding that article 7 of the Notarial Law has not been repealed by the Civil Code, which was promulgated a few days after the Notarial Law, and this was so expressly held in the royal order referred to of July 17, 1894, since which time the Notarial Law and its regulations have been in force, until their recent repeal.

It is therefore unquestionable that the document exhibited as the will of Dona Josefa Montilla is a public instrument executed in accordance with the law, and which only needed to be protocolized, and, the protocolization not having been made in time, its probate is now prayed for in accordance with the Code of Civil Procedure. There being no provision of law in opposition to this petition, and the said will having been executed with greater solemnities than these required in section 618 of the said code, and it appearing from the record that the municipal president, his secretary, and the three witnesses to the will affirmed its contents and other facts connected with its execution, there is no legal reason or motive opposed to the probate of the said will, as it does not fall within any of the provisions of section 634 thereof, but is covered by sections 618, 625, 634, 638, and 639.

For the reasons stated, we are of the opinion that the judgment appealed must be reversed, and that as the instrument presented purports to be the last will of Josefa Montilla y Janson, deceased, the judge should admit the same to probate and take such action thereon as may be necessary in accordance with the provisions of the Code of Civil Procedure. No costs will be allowed. Judgment will be entered in accordance with this opinion twenty days from the date of the filing thereof and the case remanded to the court below for further proceedings in conformity therewith. So ordered.

Arellano, C. J., Willard, Cooper, Mapa, Johnson, and McDonough, JJ., concur.

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