34 Phil. 291

[G.R. No. 8954. March 21, 1916]

DOROTEA CABANG, PETITIONER AND APPELLEE, VS. MARTIN DELFINADO, RESPONDENT AND APPELLANT.

D E C I S I O N

TRENT, J.:

This is an appeal from a judgment of the Court of First Instance of the Province of Pangasinan, probating a document purporting to be the last will and testament of the deceased Celestino Delfinado.

The petition setting forth the necessary facts was filed on the 15th of September, 1911. On the 25th of October of that year Martin Delfinado appeared, through his attorney, and filed an opposition to the allowance of the will, alleging that the will was not signed by the deceased, nor by any other person, in his presence and by his express direction, and that the attestation does not comply with law. After publication, the case was set for hearing at 8 a. m. on November 18, 1911. On the last named date the case proceeded to trial, the petitioner presenting as witnesses the widow Dorotea Cabang, Antonio Flor Mata, and Paciano Romero, the latter being one of the subscribing witnesses. The opposition called only one witness, Martin Delfinado. On the 27th of November, 1911, the petitioner presented a motion asking that the case be reopened for the purpose of receiving the testimony of the other two subscribing witnesses, who were then living in Manila and Nueva Ecija. Opposition to this motion was filed on December 1, 1911. On the 13th of May, 1912, the petitioner filed another motion, setting forth that *due* publication for the legalization of the will had not been made. As a result of this last motion, the court, by an order dated the 29th of December, 1912, directed a republication, setting the date for the hearing on the 7th of January, 1913, and the judgment appealed from was entered on the 25th of that month. The record fails to show a single act on the part of anyone which took place on the date of the last hearing. The decision of the court is based exclusively upon the testimony taken on the 18th of November, 1911. The petitioner had from the 29th of November, 1912,

the date of the order directing a republication and new hearing, until January 7, 1913, the date fixed for the new hearing, within which to present the two absent subscribing witnesses. No reason whatever appears in the record why these witnesses were not present and ho question was raised either in the court below or in this court with reference to the consideration by the trial court of the testimony taken upon the first hearing. So it must be presumed that the petitioner did not desire to present these two witnesses and that she had no objection to the consideration of the testimony already taken.

We will now set forth briefly all the material testimony presented in this case.

Dorotea Cabang, widow of the testator, testified that her deceased husband, Celestino Delfinado, could neither read nor write. The other witnesses testified in substance as follows:

Antonio Flor Mata, justice of the peace of Tayug:

> "The deceased Celestino Delfinado requested me to write a will for him. I complied with his request by dictating the will to a clerk, who wrote it out. The will was then copied on a typewriter from the draft which I dictated, and then read to the testator and interpreted to him in his own dialect. When thus interpreted, the testator stated that it was the same he had dictated to me. Then the typewritten will was presented to him for signature, and he stated that he could not sign it because he did not know how to read or write. He then requested Patricio de Guzman to write his name. De Guzman complied with this request and the testator then put his cross on the will in the presence of the witnesses. All three of the witnesses were present when the testator signed the will and were also present when each of them signed it as a witness. I have known the testator since 1890. I have never heard him read or seen him write. If he could have done either, I certainly would have known it because I was municipal secretary of the town and the electors had to take the oath before me. The testator, in taking the oath, never signed his name, stating that he could not do so. He always made his mark. The testator dictated the will to me word by word and I translated it into Spanish to the best of my knowledge and ability. The testator made the cross with his own hand.

> The fact that he requested one of those present to write his name to the will does appear in the will, but the name of the person requested is not given therein. I know from hearsay and from the testator's own statement that he was a councilman at one time during the Spanish regime. Yes, I was present and saw all three of the witnesses sign the will. I also saw the testator sign the will with his cross. All three of the witnesses were present when the testator thus signed, and the witnesses signed in the presence of each other. The clerk wrote the testator's name in his presence and in the presence of the three witnesses. There was no undue influence brought to bear upon the testator. He dictated and signed the will voluntarily. I know all three of the witnesses and each is of age. This Exhibit A is the will which was executed in the manner above stated. The testator was in his right mind at the time he executed his will."

Paciano Romero, 27 years of age, clerk by profession:

> "I have seen this will before. I know the names signed there. One of them is my own. I know why the names of the three subscribing witnesses and the name of the testator appear on the will. A person came to call me at the instance of the testator. I went to his house. Upon arrival I found the other parties there and the testator asked me to write his will. Mr. Antonio Flor Mata dictated to me in Spanish what the testator told him in Ilocano. After the draft was written and Copied on the typewriter, it was again interpreted to the testator by Mata, and after such interpretation, which took place in the presence of witnesses, the testator stated that he could not read or write and requested a certain person to sign his name to the will. That person wrote the testator's name, after which the testator put his cross there and I then signed the will with the two other witnesses. All of this was in the presence of all of us. The testator executed his will and was in his right mind at the time. Patricio de Guzman is the person who wrote the testator's name on the will. The other two subscribing witnesses are living, one in Manila and the other in Nueva Ecija. Yes, sir, I heard the testator request Patricio de Guzman to sign his name

> to the will and this was done in the presence of the testator and in the presence of the other witnesses."

Martin Delfinado, a contestant:

> "I am a son by the first marriage of the testator. I do not know whether my father made a will or not. This is the first time I have ever seen Exhibit A. My father could read, write, and sign his name. I know his signature."

The following agreement appears in the record:

> "At this juncture, it was admitted by the counsel for both sides that the document, which is marked 'Contestant's Exhibit No. 1,' and which is1 now offered in evidence, was signed by the deceased Celestino Delfinado."

Exhibit No. 1 was admitted without objection. The last clause in the will reads:

> "In testimony whereof I place a cross between my name and surname as I am unable to sign. Tayug, this 31st day of August, 1909.
>
> "CELESTINO (x) DELFINADO.
>
> "Signed in the presence of:
>
> "A. ABAYA,
>
> "PABLO DEL ROSARIO,
>
> "PACIANO ROMERO."

The principal question raised by this appeal is whether the court erred in admitting the will to probate without having two of the subscribing witnesses called, although they were living

within the jurisdiction of the court, or for not requiring any showing why they were not produced.

The Code of Civil Procedure provides that no will shall be valid to pass any estate, real or personal, unless it be in writing and signed by the testator or by the testator's name and attested and subscribed by three or more credible witnesses (sec. 618). Any person of sound mind and of the age of eighteen or more, and not blind, deaf, or dumb, and able to read and write, may be a witness to the execution of a will (sec. 620). If the witnesses attesting the will are competent at the time of attesting, their becoming subsequently incompetent shall not prevent the allowance of the will (sec. 621). If a will be attested by only three witnesses, to one of whom or to whose wife or husband, or parent, or child, a beneficial devise, legacy, or interest is given by such will, the devise or legacy is void (sec. 622). If no person appears to contest the allowance of a will at the times appointed, the court may grant allowance thereof on the testimony of one of the subscribing witnesses only (sec. 631). The will may be allowed, notwithstanding the fact that one or more of the subscribing witnesses do not remember the fact of having attested it, provided the court is satisfied that the will was duly executed and attested (sec. 632). If none of the subscribing witnesses reside in the Philippine Islands at the time of the death of the testator, the court may admit the testimony of other witnesses to prove the sanity of the testator and the due execution of the will, although the subscribing witnesses are living. In case one or more of the subscribing witnesses has deceased, the sanity of the testator and the due execution of the will may also be proven in the manner herein provided (sec. 633).

It will be seen by comparison that the provisions above mentioned have been taken substantially from similar provisions in the law of the State of Vermont. The requisites set out in section 618 are the same as those in section 2349 of the Vermont Statutes of 1894. The same provision as that made in section 621 for subsequent incompetency of the subscribing witnesses occurs in section 2352 of the same compilation of the Laws of Vermont. Section 622, making a legacy to a subscribing witness void is almost word for word the same as section 2353 of the Vermont Statutes. There is no practical difference between section 631, providing proof by one witness in noncontested cases, and section 2362 of the Vermont Statutes. Section 633 differs only in adding death to the common provision in section 2363 of the Vermont Statutes excusing the calling of attesting witnesses and admitting proof of their handwriting, if none live within the jurisdiction of the court.

Our code provides, as we have indicated, that noncontested wills may be admitted to probate upon the testimony of one of the subscribing witnesses, but is silent as to the

manner in which they shall be proved when contested. Provisions are also made for supplying the testimony of the three subscribing witnesses when they cannot be called. The provisions of the Vermont Statutes are essentially the same. We may, therefore, call to our aid the decisions of the supreme court of that State and the law upon which those decisions rest in determining the intention of the Philippine Legislature in enacting the provisions of Act No. 190, above referred to.

The ancient common law rule concerning the proof of instruments having attesting witnesses was that the instrument must be proved by those witnesses. Later common law courts changed the rule so that one attesting witness was sufficient to prove the proper execution of the instrument. This applied to wills only as they were used in evidence in a suit other than the probate of the will. The chancery courts uniformly maintained the rule that all the subscribing witnesses required by the law for the valid execution of a will, must be called and examined on probate or a showing made that they were not required under the exceptions allowed. The exceptions were that the witnesses were dead, beyond the jurisdiction of the court or insane. (Wigmore on Evidence, vol. 2, secs. 1287 to 1319.)

This rule of the chancery courts has been adopted as the common law in several of the States. In Alabama in 1839 there was no statute in reference to the proof of wills. The court adopted in that year the chancery rule and in the opinion deciding Bowling *vs.* Bowling (8 Ala., 538) is shown the derivation of the rule.

"In England, the statute of 29 Charles II, is substantially the same as ours, and there it has always been held, that one witness who could swear to the execution of the will by the testator, and that he subscribed the will, and also proved its attestation by the other subscribing witnesses, is sufficient proof of the due execution of the will, in a court of common law. (Longford *vs.* Eyre, 1 P. Will., 741; see the authorities collected in 3 C. & H. of Phil, on Ev., 1349.) The same rule obtains in chancery, where the direct object of the bill, is not to establish the will, but it is offered as an instrument of evidence. (Concannon *vs.* Cruise, 2 Molloy, 332.) When however the bill is filed for probate of the will, or when an issue is directed out of chancery, to ascertain whether the will was duly executed, all the witnesses, if alive and within the jurisdiction of the court, must be produced, or their absence accounted for. If the witness is dead, out of the kingdom, insane, or has become incompetent to testify, his handwriting may be proved. (See Powell *vs.* Cleaver, 2 Bro. C. C, 504; Carrington *vs.* Payne, 5 Vessey, 411; Burnett *vs.* Taylor, 9 Id., 381.)"

Some States did not adopt this rule. In some of these States proof by all the attesting

witnesses is required by legislative provision. New York, Illinois, and California have such statutes. These are exceptional. The great body of States have not passed any direct Act requiring wills to be proved by the subscribing witnesses. The provisions generally provide when the proponent is excused from calling the attesting witnesses. Usually they are the same as the excuses allowed by the common law as stated in Bowling *vs.* Bowling, *supra*. Vermont, whose legislation is typical in this regard and closely resembles our own, as has been shown, applies the same rule, for the same reasons as does Alabama without such legislation. (Thornton *vs.* Thornton, 39 Vt., 122.) In that case the court says:

> "Our statute requires wills to be attested by three wit nesses, but is silent as to the manner in which they shall be proved when contested. When not contested the statute provides, that they may in the discretion of the judge be admitted to probate upon the testimony of one of the subscribing witnesses. (G. S. p. 379, sec. 18.) This provision would indicate that more were to be required in other cases. In an English common law court, when, as in an action of ejectment, the issue was made upon the validity of a will, the devisee was obliged to call but one of the attesting witnesses, if that one testified to a sufficient execution. (1 Phil. Ev. [Cowen & Hill's Ed.], 496, 501; Ansty *vs.* Dowsing, 2 Str., 1254; Jackson ex dem. Le Grange *vs.* Le Grange, 19 Johns, 386.) In the ecclesiastical courts, it was necessary that all should be produced by the devisee, if in his power; but he was not required to examine all himself. (The Lochlibo, 1 Eng. Law & Eq. 645-7.)
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> "It is urged that one or the other of these rules should prevail here. But, it is to be remembered, that at common law a will is proved merely for the purpose of the case on trial, and may be again put in issue; and in the ecclesiastical courts it was proved with reference to the distribution of none but personal estate. (2 Bouvier's Bac. Ab., 730.) The only method by which until recently a will, when it related to real as well as personal estate, could be established in England, was by a bill in chancery; and in such cases, says Lord Camden (Hindson *vs.* Kersey, 4 Burn. Ecc. Law, 91) it was the 'invariable practice' to require the three witnesses to be examined. * * * We think, if our statute requires any aid for its interpretation from the English practice, in determining how many subscribing witnesses should be called to prove a will, we should look to that English court in which alone wills were, as in our probate court, established; and to the rule of that court in establishing wills, instead of regarding the rule at law or in the ecclesiastical courts, or even in the recent English court of probate. So far as we

> are informed, the production and examination of all the witnesses have been always required and thought necessary in this state. (See opinion of Isham, J., in Dean *vs.* Dean, 27 Vt., 749.) We are of opinion that the court was correct in ruling that the proponent must examine all the attesting witnesses."

In Bootle *vs.* Blundell (19 Vesey, Jr., 500, 502-509), cited in Thornton *vs.* Thornton, *supra*, the Lord Chancellor (Eldon) said:

> "The subscribing witnesses are the witnesses of this court and not of either party, as erroneously considered. If [he says] the object is to establish a will, this court does not give the devisee the opportunity of carrying it before a jury until all the three witnesses have been examined, and will have them all examined, considering them as its witnesses without entering into the dispute frequently occurring in a court of law, whether the person called is the witness of the one party or the other. * * * the court, as it will know the whole truth, expects that all the witnesses shall be examined on the one side or the other."

In Denny *vs.* Pinney (60 Vt., 524), wherein one of the attesting witnesses was not within the jurisdiction of the court and wherein it was insisted that the proponent should have taken the deposition of that witness, the court said:

> "It was not incumbent upon the proponent to produce the attesting witness Bartlett in court. He was beyond reach of process. The English practice adopted by this court requires the proponent only to proceed and examine such of the attesting witnesses as are within reach of process. (Thornton *vs.* Thornton, 39 Vt., 122.) He must be within reach of process, and legally obtainable at the trial."

In Chase *vs.* Lincoln (3 Mass., 236), decided in 1807, it was said:

> "The court observed that the legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the

> three witnesses, to be given to the jury. They must therefore all be produced, if living, and under the power of the court. If it be impossible to procure any one of them, the court will proceed without him *ex necessitate rei*. But no such impossibility appears in this case. For anything that appears, the absent witness might, with due diligence, have been found and summoned. The not producing of him may lead to a presumption that his testimony, if produced, would be unfavorable to the probate of the will. At any rate, the rule is too important and too explicit to be dispensed with on light grounds."

In Sears *vs.* Dillingham (12 Mass., 358), decided in 1815, the court states:

> "It was argued, however, that no will can be proved, unless all the subscribing witnesses, who are alive and within the control of the court, are produced to testify. This, as a general rule, is undoubtedly well settled both here and in England. But there are obvious exceptions, as necessary to be regarded as the rule itself. The case of witnesses having become infamous instantly occurs, as one of the exceptions. They may be alive and within the control of the court, and yet their testimony cannot be had, and the will may be proved without it."

Section 33 of chapter 190 of the statutes of Massachusetts, enacted in 1817, and carried forward as section 2 of chapter 136 of the Revised Statutes of 1902, provides:

> "If it appears to the probate court, by the consent in writing of the heirs, or by other satisfactory evidence, that no person interested in the estate of a person deceased intends to object to the probate of an instrument purporting to be the will of such deceased person, the court may grant probate thereof upon the testimony of one only of the subscribing witnesses; and the affidavit of such witness, taken before the register of probate, may be received as evidence."

In Brown *vs.* Wood (17 Mass., 68), decided in 1820, the court said:

> "It is not now a question, whether the will ought to be proved upon the testimony of two of the witnesses, without accounting for the absence of the third. The law is settled that it cannot be so done."

An examination of the subsequent adjudicated cases and the statutes fails to disclose any modification of this rule in the State of Massachusetts. In Evans *vs.* Evans (18 Miss., 402), the court, following the rule adopted in Massachusetts, said:

> "The sole question presented by the appellant's counsel in this case is resolved into the inquiry whether a will can be admitted to probate upon the testimony of but one of the attesting witnesses to such will.
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> "We are inclined to hold that no will can be proved, unless all the subscribing witnesses, alive and within the control of the process of the court, are produced to testify."

The rule that no will shall be valid to pass any estate, real or personal, unless "attested and subscribed by three or more credible witnesses," is a matter of substantive law and an element of the will's validity. The rule that the attesting witnesses must be called to prove a will for probate is one of preference made so by statute. This rule of evidence is not to be confused with rules of quantity. There have been several reasons given for this rule of preference for the attesting witnesses, one reason being that the party opposing the claim of proper execution of the wilt has a right to the benefit of cross-examining the attesting witnesses as to fraud, duress, or other matters of defense. The law places these witnesses "around the testator to ascertain and judge of his capacity" for the purpose of preventing frauds. The soundness of the rule is well illustrated in the case under consideration. Here the attesting clause was omitted and the testator signed by mark. The petitioner produced only one of the attesting witnesses. Had there not been a contest, this would have probably been sufficient under section 631. While there is no testimony in the record to the effect that the testator could neither read nor write, there is conclusive evidence that he could sign his name. This fact is established by the production of Exhibit 1, which all agree the testator did sign. The testator's signature to the document shows that he could write, at least his name, in a plain, clear manner, indicating a fairly good knowledge of writing. Had the proponent shown that the other two subscribing witnesses were not within the jurisdiction of the court and could not, therefore, be called, the due execution of the will would still be very doubtful. Believing, as we do, that it was the intention of the Legislature that the subscribing witnesses must be called or good and sufficient reason shown why they could not be had, and being supported by the authorities above cited and quoted, we must conclude that the proponent did not comply with the provisions of the law in the

presentation of her case.

For the foregoing reasons, the judgment appealed from is reversed, without costs in this instance. So ordered.

Torres, Moreland, and *Araullo, JJ.,* concur.

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