

BEATRIZ NERA ET AL., PLAINTIFFS AND APPELLEES, VS. NARCISA RIMANDO, DEFENDANT AND APPELLANT.

G.R. No. L-5971. February 27, 1911

Ponente: CARSON, J.

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CARSON, J.:

The only question raised by the evidence in this case as to the due execution of the instrument propounded as a will in the court below, is whether one of the subscribing witnesses was present in the small room where it was executed at the time when the testator and the other subscribing witnesses attached their signatures; or whether at that time he was outside, some eight or ten feet away, in a large room connecting with the smaller room by a doorway, across which was hung a curtain which made it impossible for one in the outside room to see the testator and the other subscribing witnesses in the act of attaching their signatures to the instrument.

A majority of the members of the court is of opinion that this subscribing witness was in the small room with the testator and the other subscribing witnesses at the time when they attached their signatures to the instrument, and this finding, of course, disposes of the appeal and necessitates the affirmance of the decree admitting the document to probate as the last will and testament of the deceased.

The trial judge does not appear to have considered the determination of this question of fact of vital importance in the determination of this case, as he was of opinion that under the doctrine laid down in the case of *Jaboneta vs. Gustilo* (5 Phil. Rep., 541) the alleged fact that one of the subscribing witnesses was in the outer room when the testator and the other describing witnesses signed the instrument in the inner room, had it been proven, would not be sufficient in itself to invalidate the execution of the will. But we are unanimously of opinion that had this subscribing witness been proven to have been in the outer room at the time when the testator and the other subscribing witnesses attached their signatures to the instrument in the inner room, it would have been invalid as a will, the attaching of those signatures under such circumstances not being done "in the presence" of the witness in the outer room. This because the line of vision from this witness to the testator and the other subscribing witnesses would necessarily have been impeded by the curtain separating the inner room from the outer one "at the moment of inscription of each signature."

In the case just cited, on which the trial court relied, we held that:

"The true test of presence of the testator and the witnesses in the execution of a Will is not whether they actually saw each other sign, but whether they might have seen each other sign, had they chosen to do so, considering their mental and physical condition and position with relation to each other at the moment of inscription of each signature."

But it is especially to be noted that the position of the parties with relation to each other at the moment of the subscription of each signature, must be such that they may see each other sign if they choose to do so. This, of course, does not mean that the testator and the subscribing witnesses may be held to have executed the instrument in the presence of each other if it appears that they would not have been able to see each other sign at that

moment, without changing their relative positions or existing conditions. The evidence in the case relied upon by the trial judge discloses that "at the moment when the witness Javellana signed the document he was actually and physically present and in such position with relation to Jaboneta that he could see everything that took place by merely casting his eyes in the proper direction and without any physical obstruction to prevent his doing so." And the decision merely laid down the doctrine that the question whether the testator and the subscribing witnesses to an alleged will sign the instrument in the presence of each other does not depend upon proof of the fact that their eyes were actually cast upon the paper at the moment of its subscription by each of them, but that at that moment existing conditions and their position with relation to each other were such that by merely casting the eyes in the proper direction they could have seen each other sign. To extend the doctrine further would open the door to the possibility of all manner of fraud, substitution, and the like, and would defeat the purpose for which this particular condition is prescribed in the code as one of the requisites in the execution of a will.

The decree entered by the court below admitting the instrument propounded therein to probate as the last will and testament of Pedro Rimando, deceased, is affirmed with costs of this instance against the appellant.

Arellano, C. J., Mapa, Moreland, and Trent, JJ., concur.

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