

IN THE MATTER OF THE PROBATION OF THE WILL OF JOSE RIOSA. MARCELINO CASAS, APPLICANT AND APPELLANT.

G.R. No. 14074. November 07, 1918

Ponente: MALCOLM, J.

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MALCOLM, J.:

The issue which this appeal presents is whether in the Philippine Islands the law existing on the date of the execution of a will, or the law existing at the death of the testator, controls.

Jose Riosa died on April 17, 1917. He left a will made in the month of January, 1908, in which he disposed of an estate valued at more than P35,000. The will was duly executed in accordance with the law then in force, namely, section 618 of the Code of Civil Procedure. The will was not executed in accordance with Act No. 2645, amendatory of said section 618, prescribing certain additional formalities for the signing and attestation of wills, in force on and after July 1, 1916. In other words, the will was in writing, signed by the testator, and attested and subscribed by three credible witnesses in the presence of the testator and of each other; but was not signed by the testator and the witnesses on the left, margin of each and every page, nor were the pages numbered correlatively by letters, nor did the attestation state these facts. The new law, therefore, went into effect after the making of the will and before the death of the testator, without the testator having left a will that conforms to the new requirements.

Section 618 of the Code of Civil Procedure reads:

"No will, except as provided in the preceding section, shall be valid to pass any estate, real or personal, nor charge or affect the same, unless it be in writing and signed by the testator, or by the testator's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The attestation shall state the fact that the testator signed the will, or caused it to be signed by some other person, at his that they attested and subscribed it in his presence and in the presence of each other. But the absence of such form of attestation shall not render the will invalid if it is proven that the will was in fact signed and attested as in this section provided."

Act No. 2645 has amended section 618 of the Code of Civil Procedure so as to make said section read as follows:

"Sec. 618. Requisites of will.—No will, except as provided in the preceding section, shall be valid to pass any estate, real or personal, nor charge or affect the same, unless it be written in the language or dialect known by the testator and signed by him, or by the testator's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The testator or the person requested by him to write his name and the instrumental witnesses of the will, shall also sign, as aforesaid, each and every page thereof, on the left margin, and said pages shall be numbered correlatively in letters placed on the upper part of each sheet. The attestation shall state the number of sheets or pages used, upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name, under his express direction, in the presence of three witnesses, and the latter witnessed and signed the will and all pages thereof in the presence of

the testator and of each other."

This court has heretofore held in a decision handed down by the Chief Justice, as to a will made after the date Act No. 2645 went into effect, that it must comply with the provisions of this law. (*Caraig vs. Tatlonghari*, R. G. No. 12558, dated March 23, 1918 [not published].) The court has further held in a decision handed down by Justice Torres, as to a will executed by a testator whose death took place prior to the operative date of Act No. 2645, that the amendatory act is inapplicable. (*Bona vs. Briones*, [1918], 38 Phil., 276.) The instant appeal presents an entirely different question. The will was executed prior to the enactment of Act No. 2645 and the death occurred after the enactment of this law.

There is a clear cleavage of authority among the cases and the text-writers, as to the effect of a change in the statutes prescribing the formalities necessary to be observed in the execution of a will, when such change is made intermediate to the execution of a will and the death of a testator. (See generally 40 Cyc, 1076, and any textbook on Wills, and *Lane's Appeal from Probate* [1889], 57 Conn., 182.) The rule laid down by the courts in many jurisdictions is that the statutes in force at the testator's death are controlling, and that a will not executed in conformity with such statutes is invalid, although its execution was sufficient at the time it was made. The reasons assigned for applying the later statute are the following: "As until the death of the testator the paper executed by him, expressing his wishes, is not a will, but a mere inchoate act which may or may not be a will, the law in force at the testator's death applies and controls the proof of the will." (*Sutton vs. Chenault* [1855], 18 Ga., 1.) Were we to accept the foregoing proposition and the reasons assigned for it, it would logically result that the will of Jose Riosa would have to be held invalid.

The rule prevailing in many other jurisdictions is that the validity of the execution of a will must be tested by the statutes in force at the time of its execution and that statutes subsequently enacted have no retrospective effect. This doctrine is believed to be supported by the weight of authority. It was the old English view; in *Downs (or Downing) vs. Townsend* (Ambler, 280), Lord Hardwicke is reported to have said that "the general rule as to testaments is, that the time of the testament, and not the testator's death, is regarded." It is also the modern view, including among other decisions one of the Supreme Court of Vermont from which State many of the sections of the Code of Civil Procedure of the Philippine Islands relating to wills are taken. "(*Giddings vs. Turgeon* [1886], 58 Vt., 103.)

Of the numerous decisions of divergent tendencies, the opinion by the learned Justice Sharswood (*Taylor vs. Mitchell* [1868], 57 Pa. St., 209) is regarded to be the best considered. In this opinion is found the following:

"Retrospective laws generally if not universally work injustice, and ought to be so construed only when the mandate of the legislature is imperative. When a testator makes a will, formally executed according to the requirements of the law existing at the time of its execution, it would unjustly disappoint his lawful right of disposition to apply to it a rule subsequently enacted, though before his death.

"While it is true that every one is presumed to know the law, the maxim in fact is inapplicable to such a case; for he would have an equal right to presume that no new law would affect his past act, and rest satisfied in security on that presumption. * * * It is true, that every will is ambulatory until the death of the testator, and the disposition made by it does not actually take effect until then. General words apply to the property of which the testator dies possessed, and he retains the power of revocation as long as he lives. The act of bequeathing or devising, however, takes place when the will is executed, though to go into effect at a future time."

A third view, somewhat larger in conception than the preceding one, finding support in the States of Alabama and New York, is that statutes relating to the execution of wills, when they increase the necessary formalities, should be construed so as not to impair the validity of a will already made and, when they lessen the formalities required, should be construed so as to aid wills defectively executed according to the law in force At the time of their

making. (Hoffman vs. Hoffman, [1855], 26 Ala., 535; Price vs. Brown, 1 Bradf., Surr. N. Y., 252.)

This court is given the opportunity to choose between the three rules above described. Our selection, under such circumstances, should naturally depend more on reason than on technicality. Above all, we cannot lose sight of the fact that the testator has provided in detail for the disposition of his property and that his desires should be respected by the courts. Justice is a powerful pleader for the second and third rules on the subject.

The plausible reasoning of the authorities which back the first proposition is, we think, fallacious. The act of bequeathing or devising is something more than inchoate or ambulatory. In reality, it becomes a completed act when the will is executed and attested according to the law, although it does not take effect on the property until a future time.

It is, of course, a general rule of statutory construction, as this court has said, that "all statutes are to be construed as having only a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect." (Montilla vs. Corporacion de PP. Agustinos [1913], 24 Phil., 220. See also Chew Heong vs. U. S. [1884], 112 U. S., 536; U. S. vs. American Sugar Ref. Co. [1906], 202 U. S., 563.) Statute law, as found in the Civil Code, is corroborative; article 3 thereof provides that "laws shall not have a retroactive effect, unless therein otherwise prescribed." The language of Act No. 2645 gives no indication of retrospective effect. Such, likewise, has been the, uniform tendency of the Supreme Court of the Philippine Islands on cases having special application to testamentary succession. (Abello vs. Kock de Monasterio [1904], 3 Phil., 558; Timbol vs. Manalo [1906], 6 Phil., 254; Bonn vs. Briones, supra; In the Matter of the Probation of the Will of Bibiana Diquiña [1918], R. G. No. 13176,[1] concerning the language of the Will. See also section 617, Code of Civil Procedure.)

The strongest argument against our accepting the first two rules comes out of section 634 of the Code of Civil Procedure which, in negative terms, provides that a will shall be disallowed in either of five cases, the first being "if not executed and attested as in this Act provided." Act No. 2645 has, of course, become part and parcel of the Code of Civil Procedure. The will in question is admittedly not executed and attested as provided by the Code of Civil Procedure as amended. Nevertheless, it is proper to observe that the general principle in the law of wills inserts itself even within the provisions of said section 634. Our statute announces a positive rule for the transference of property which must be complied with as a completed act at the time of the execution, so far as the act of the testator is concerned, as to all testaments made subsequent to the enactment of Act No. 2645, but is not effective as to testaments made antecedent to that date.

To answer the question with which we began this decision, we adopt as our own the second rule, particularly as established by the Supreme Court of Pennsylvania. The will of Jose Riosa is valid.

The order of the Court of First Instance for the Province of Albay of December 29, 1917, disallowing the will of Jose Riosa, is reversed, and the record shall be returned to the lower court with direction to admit the said will to probate, without special findings as to costs. So ordered.

Arellano, C. J., Torres, Johnson, Street, Avanceña, and Fisher, JJ., concur.

[1] Decided October 26, 1918, still unpublished.

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