

EUTQUIA AVERA, PETITIONER AND APPELLEE, VS. MARINO GARCIA, AND JUAN RODRIGUEZ, AS GUARDIAN OF THE MINORS CESAR GARCIA AND JOSE GARCIA, OBJECTORS AND APPELLANTS.*G. R. No. 15566. September 14, 1921*

Ponente: STREET, J.

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In proceedings in the court below, instituted by Eutiquia Avera for probate of the will of one Esteban Garcia, contest was made by Marino Garcia and Juan Rodriguez, the latter in the capacity of guardian for the minors Jose Garcia and Cesar Garcia. Upon the date appointed for the hearing, the proponent of the will introduced one of the three attesting witnesses who testified—with details not necessary to be here specified—that the will was executed with all necessary external formalities, and that the testator was at the time in full possession of disposing faculties. Upon the latter point the witness was corroborated by the person who wrote the will at the request of the testator. Two of the attesting witnesses were not introduced, nor was their absence accounted for by the proponent of the will.

When the proponent rested the attorney for the opposition introduced a single witness whose testimony tended to show in, a vague and indecisive manner that at the time the will was made the testator was so debilitated as to be unable to comprehend what he was about.

After the cause had been submitted for determination upon the proof thus presented, the trial judge found that the testator at the time of the making of the will was of sound mind and disposing memory and that the will had been properly executed. He accordingly admitted the will to probate.

From this judgment an appeal was taken in behalf of the persons contesting the will, and the only errors here assigned have reference to the two following points, namely, first, whether a will can be admitted to probate, where opposition is made, upon the proof of a single attesting witness, without producing or accounting for the absence of the other two; and, secondly, whether the will in question is rendered invalid by reason of the fact that the signature of the testator and of the three attesting witnesses are written on the right margin of each page of the will instead of the left margin.

Upon the first point, while it is undoubtedly true that an uncontested will may be proved by the testimony of only one of the three attesting witnesses, nevertheless in *Cabang vs. Belfinado* (34 Phil., 291), this court declared after an elaborate examination of the American and English authorities that when a contest is instituted, all of the attesting witnesses must be examined, if alive and within reach of the process of the court.

In the present case no explanation was made at the trial as to why all three of the attesting witnesses were not produced, but the probable reason is found in the fact that, although the petition for the probate of this will had been pending from December 21, 1917, until the date set for the hearing, which was April 5, 1919, no formal contest was entered until the very day set for the hearing; and it is probable that the attorney for the proponent, believing in good faith that probate would not be contested, repaired to the court with only one of the three

attesting witnesses at hand, and upon finding that the will was contested, incautiously permitted the case to go to proof without asking for a postponement of the trial in order that he might produce all the attesting witnesses.

Although this circumstance may explain why the three witnesses were not produced, it does not in itself supply any basis for changing the rule expounded in the case above referred to; and were it not for a fact now to be mentioned, this court would probably be compelled to reverse this case on the ground that the execution of the will had not been proved by a sufficient number of attesting witnesses.

It appears, however, that this point was not raised by the appellant in the lower court either upon the submission of the cause for determination in that court or upon the occasion of the filing of the motion for a new trial. Accordingly it is insisted for the appellee that this question cannot now be raised for the first time in this court. We believe this point is well taken, and the first assignment of error must be declared not to be well taken. This exact question has been decided by the Supreme Court of California adversely to the contention of the appellant, and we see no reason why the same rule of practice should not be observed by us. (*Estate of McCarty*, 58 Cal., 335, 337.)

There are at least two reasons why the appellate tribunals are disinclined to permit certain questions to be raised for the first time in the second instance. In the first place it eliminates the judicial criterion of the Court of First Instance upon the point there presented and makes the appellate court in effect a court of first instance with reference to that point, unless the case is remanded for a new trial. In the second place, it permits, if it does not encourage, attorneys to trifle with the administration of justice by concealing from the trial court and from their opponent the actual point upon which reliance is placed, while they are engaged in other discussions more simulated than real. These considerations are, we think, decisive.

In ruling upon the point above presented we do not wish to be understood as laying down any hard and fast rule that would prove an embarrassment to this court in the administration of justice in the future. In one way or another we are constantly here considering aspects of cases and applying doctrines which have escaped the attention of all persons concerned in the litigation below; and this is necessary if this court is to contribute the part due from it in the correct decision of the cases brought before it. What we mean to declare is that when, we believe that substantial justice has been done in the Court of First Instance, and the point relied on for reversal in this court appears to be one which ought properly to have been presented in that court, we will in the exercise of a sound discretion ignore such question upon appeal; and this is the more proper when the question relates a defect which might have been cured in the Court of First Instance if attention had been called to it there. In the present case, if the appellant had raised this question in the lower court, either at the hearing or upon a motion for a new trial, that court would have had the power, and it would have been its duty, considering the tardy institution of the contest, to have granted a new trial in order that all the witnesses to the will might be brought into court. . But instead of thus calling the error to the attention of the court and his adversary, the point is first raised by the appellant in this court. We hold that this is too late.

Properly understood, the case of *Cabang vs. Delfinado*, *supra*, contains nothing inconsistent with the ruling we now make, for it appears from the opinion in that case that the proponent of the will had obtained an order for a republication and new trial for the avowed purpose of presenting the two additional attesting witnesses who had not been previously examined, but nevertheless subsequently failed without any apparent reason to take their testimony. Both parties in that case were therefore fully apprised that the question of the number of witnesses necessary to prove the will was in issue in the lower court,

The second point involved in this case is whether, under section 618 of the Code of Civil Procedure, as amended by Act No. 2645, it is essential to the validity of a will in this jurisdiction that the names of the testator and the

instrumental witnesses should be written on the left margin of each page, as required in said Act, and not upon the right margin, as in the will now before us; and upon this we are of the opinion that the will in question is valid. It is true that the statute says that the testator and the instrumental witnesses shall sign their names on the left margin of each and every page; and it is undeniable that the general doctrine is to the effect that all statutory requirements as to the execution of wills must be fully complied with. The same doctrine is also deducible from cases heretofore decided by this court.

Still some details at times creep into legislative enactments which are so trivial that it would be absurd to suppose that the Legislature could have attached any decisive importance to them. The provision to the effect that the signatures of the testator and witnesses shall be written on the left margin of each page—rather than on the right margin—seems to be of this character. So far as concerns the authentication of the will, and of every part thereof, it can make no possible difference whether the names appear on the left or on the right margin, provided they are on one or the other. In *Caraig vs. Tatlonghari* (R. G. No. 12558, decided March 23, 1918, not reported), this court declared a will void which was totally lacking in the signatures required to be written on its several pages; and in the case of *Re estate of Saguinsin* (41 Phil., 875), a will was likewise declared void which contained the necessary signatures on the margin of each leaf (folio), but not in the margin of each page containing written matter.

The instrument now before us contains the necessary signatures on every page, and the only point of deviation from the requirement of the statute is that these signatures appear in the right margin instead of the left. By the mode of signing here adopted every page and provision of the will is authenticated and guarded from possible alteration in exactly the same degree that it would have been protected by being signed in the left margin; and the resources of casuistry could be exhausted without discovering the slightest difference between the consequences of affixing the signatures in one margin or the other.

The same could not be said of a case like that of *Estate of Saguinsin*, *supra*, where only the leaves, or alternate pages, were signed and not each written page; for as observed in that case by our late lamented Chief Justice, it was possible that in the will as there originally executed by the testatrix only the alternative pages had been used, leaving blanks on the reverse sides, which conceivably might have been filled in subsequently.

The controlling considerations on the point now before us were well stated in *Re will of Abangan* (40 Phil., 476, 479), where the court, speaking through Mr. Justice Avancena, in a case where the signatures were placed at the bottom of the page and not in the margin, said:

"The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guarantee their truth and authenticity. Therefore the laws on this subject should be interpreted in such a way as to attain these primordial ends. But, on the other hand, also one must not lose sight of the fact that it is not the object of the law to restrain and curtail the exercise of the right to make a will. So when an interpretation already given assures such ends, any other interpretation whatsoever, that adds nothing but demands more requisites entirely unnecessary, useless and frustrative of the testator's last will, must be disregarded."

In the case before us, where ingenuity could not suggest any possible prejudice to any person, as attendant upon the actual deviation from the letter of the law, such deviation must be considered too trivial to invalidate the instrument.

It results that the legal errors assigned are not sustainable, and the judgment appealed from will be affirmed. It is so ordered, with costs against the appellants.

Johnson, Araullo, Avancena, and Villamor, JJ., concur.

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