

IN RE WILL OF TAN DIUCO, DECEASED. MAMERTA BASE, PETITIONER AND APPELLANT.

G.R. No. 20475. March 19, 1924

Ponente: ARAULLO, C. J.

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ARAULLO, C. J.:

On March 3, 1921, Mamerta Base instituted this proceeding in the Court of First Instance of Leyte for the probate of the will, Exhibit A, executed, according to her, by the Chinaman Tan Diuco, a resident of the municipality of Malitbog of said province, who died on December 8, 1920. That court denied the probate of the will on November 2, 1922, and the petitioner brought the case on appeal to this court, alleging that the lower court erred in holding that said will was not signed by three instrumental witnesses and in not allowing it to probate.

After a hearing on the petition, the Court of First Instance entered the order appealed from, in which it is found that said will was executed with all the solemnities prescribed by Act No. 2645, except that it was not signed by three instrumental witnesses beside the signature of the testator and before the attestation clause, and this fact is the ground upon which the petition was denied.

The document in question, Exhibit A, appears to have been signed by Simplicio Sala by order of the testator, whose name is before the said signature, by reason of the latter's incapacity on account of his weakness and the trembling of his hand, the testator also stating that he directed said Simplicio Sala to sign it in his name and in the presence of three witnesses who also signed with him at the bottom of said document, and on the left margin of each of its three pages correlatively numbered in letters by Sala in the name of the testator Tan Diuco and by the witnesses therein mentioned, named Pablo Maturan, Ladislao Fenomeno, and Enrique Penaredondo. After the signature of the testator, Tan Diuco by Simplicio Sala, the following-paragraph appears:

"We, the undersigned witnesses to the foregoing will, do hereby state that the testator signed this will and each of its sheets in the presence of all and each of us, and we and each of us likewise did sign this will and all of its sheets in the presence of the testator and each of us, witnesses.

"Tan Diuco

By "Simplicio Sala

"Ladislao Fenomeno

"Pablo Maturan

"Enrique Penaredondo"

Section 618 of the Code of Civil Procedure, as amended by Act No. 2645, provides, indeed, among the necessary requirements before a will can be probated, that it be attested and signed by three or more credible witnesses in the presence of the testator and of each other. And said section, as amended, further provides as follows:

" * * * 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."

Instrumental witness, as defined by Escriche in his *Diccionario Razonado de Legislation y Jurisprudencia*, volume 4, page 1115, is one who takes part in the execution of an instrument or writing.

At present and under the laws now in force, particularly Act No. 2645 amendatory to said section 618 of the Code of Civil Procedure, when a will is to be executed, the testator draws' or writes it personally or through another person and signs it also personally, or if he is physically incapacitated, as in the instant case, through another person who may or may not be the one who prepared or wrote the will, that is, the document constituting the testator's last will and testament. The will having thus been prepared and before it is signed by the testator or the person acting in his stead, or the one directed by him to sign it in his name, in which case the name of the testator is written before that of the signer, as above stated, in order that said document may have the character of a valid will, the testator gathers three or more credible witnesses and tells them that the contents of said document is his will, without informing them of its contents, and then the testator, or the person directed by him to do so, signs it in the presence of the testator and of each other, and the testator or the person acting in his stead, as well as the three witnesses sign on the left margin of each page or sheet, which must be numbered correlatively in letters on the upper part of the page. These witnesses are the witnesses referred to in the aforesaid law as instrumental witnesses, for the simple reason that they took part in the execution of an instrument or document known as will, their participation being limited to the acts aforementioned.

In dealing with attestation, said section 618 of the Code of Civil Procedure, as amended by Act No. 2645, does not say that said witnesses must be different from those who signed the attestation clause, for in the first part of said section, after speaking of the signature of the testator or the person signing in his place, it adds, "and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other," from which it clearly follows that the same witnesses who signed on the left margin of each page of the document presented by the testator to them as his will, must be the ones who should sign the attestation clause, inasmuch as they alone can certify the facts to be stated in said clause, for having taken a direct part therein, as they saw the testator sign the will, or the person requested by him to sign all the sheets of the will, that is, the document constituting his last will and testament, and affirm that it was signed under his express direction in the presence of said witnesses and that all the sheets thereof had also been signed by them in the presence of said testator and of each of them, as stated in the attestation clause of the will of the deceased Tan Diuco, with the other details appropriate in said clause.

Besides, as may be seen, the said three witnesses who signed the attestation clause, did so also on the left margin and beside the signature of the testator or of Simplicio Sala who signed by order of the latter, and if account is taken of the fact that these witnesses are "instrumental" witnesses, as above demonstrated, and they have made reference to their own signatures, as well as that of the testator and of the person who signed by the latter's order

below the attestation clause, it is evident that in the instant case, it is merely a matter of technicality devoid of any importance as to the probate of the will that said witnesses are called instrumental witnesses, as if they were different from those who have to sign the attestation clause, for all of them are but the same witnesses; and, as this court held in the case of *Abangan vs. Abangan* (40 Phil., 476), "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 frustative of the testator's last will, must be disregarded;" which doctrine must be applied in this case, in view of the facts herein mentioned and what has been above demonstrated.

For all of the foregoing, the order appealed from is reversed, and the document, Exhibit A, presented by the proponent as the last will and testament of the deceased Tan Diuco is admitted to probate, without special finding as to costs of both instances. So ordered.

Johnson, Street, Malcolm, Avancena, Villamor, Johns, and Romualdez, JJ., concur.

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