

CATALINA BUGNAO, PROPONENT AND APPELLEE, VS. FRANCISCO UBAG ET AL.; CONTESTANTS AND APPELLANTS.*G.R. No. 4445. September 18, 1909*

Ponente: CARSON, J.

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This is an appeal from an order of the Court of First Instance of Oriental Negros, admitting to probate a document purporting to be the last will and testament of Domingo Ubag, deceased. The instrument was propounded by his widow, Catalina Bugnao, the sole beneficiary there-under, and probate was contested by the appellants, who are the brothers and sisters of the deceased, and who would be entitled to share in the distribution of his estate, if probate were denied, as it appears that the deceased left no heirs in the direct ascending or descending line.

Appellants contend that the evidence of record is not sufficient to establish the execution of the alleged will in the manner and form prescribed in section 618 of the Code of Civil Procedure; and that at the time when it is alleged that the will was executed, Ubag was not of sound mind and memory, and was physically and mentally incapable of making a will.

The instrument propounded for probate purports to be the last will and testament of Domingo Ubag, signed by him in the presence of three subscribing and attesting witnesses, and appears upon its face to have been duly executed in accordance with the provisions of the Code of Civil Procedure touching the making of wills.

Two of the subscribing witnesses, Victor J. Bingtoy and Catalino Marino, testified in support of the will, the latter being the justice of the peace of the municipality wherein it was executed; and their testimony was corroborated in all important details by the testimony of the proponent herself, who was present when the will was made. It does not appear from the record why the third subscribing witness was not called; but since counsel for contestants makes no comment upon his absence, we think it may safely be inferred that there was some good and sufficient reason therefore. In passing, however, it may be well to observe that, when because of death, sickness, absence, or for any other reason, it is not practicable to call to the witness stand all the subscribing witnesses to a will offered for probate, the reason for the absence of any of these witnesses should be made to appear of record, and this especially in cases such as the one at bar, wherein there is a contest.

The subscribing witnesses gave full and detailed accounts of the execution of the will and swore that the testator, at the time of its execution, was of sound mind and memory, and in their presence attached his signature thereto as his last will and testament, and that in his presence and in the presence of each other, they as well as the third subscribing witness signed the instrument as attesting witnesses. Despite the searching and exhaustive cross-examination to which they were subjected, counsel for appellants could point to no flaw in their testimony save an alleged contradiction as to a single incident which occurred at or about the time when the will was executed, a contradiction, however, which we think is more apparent than real. One of the witnesses stated that the deceased sat up in bed and signed his name to the will, and that after its execution food was given him by his wife; while the other testified that he was assisted into a sitting position, and was given something to eat before he

signed his name. We think the evidence discloses that his wife aided the sick man to sit up in bed at the time when he signed his name to the instrument, and that he was given nourishment while he was in that position, but it is not quite clear whether this was immediately before or after, or both before and after he attached his signature to the will. To say that the sick man sat up or raised himself up in bed is not necessarily in conflict with the fact that he received assistance in doing so; and it is not at all improbable or impossible that nourishment might have been given to him both before and after signing the will, and that one witness might remember the former occasion and the other witness might recall the latter, although neither witness could recall both. But, however this may have been, we do not think that a slight lapse of memory on the part of one or the other witness, as to the precise details of an unimportant incident, to which his attention may not have been particularly directed, is sufficient to raise a doubt as to the veracity of these witnesses, or as to the truth and accuracy of their recollection of the fact of the execution of the instrument. Of course, a number of contradictions in the testimony of alleged subscribing witnesses to a will as to the circumstances under which it was executed, or even a single contradiction as to a particular incident, where the incident was of such a nature that the attention of any person who was present must have been directed to it, and where the contradictory statements in regard to it are so clear and explicit as to negative the possibility or probability of mistake, might well be sufficient to justify the conclusion that the witnesses could not possibly have been present, together, at the time when it is alleged the will was executed; but the apparent contradictions in the testimony of the witnesses in the case at bar fall far short of raising a doubt as to their veracity, and on the other hand their testimony as a whole gives such a clear, explicit, and detailed account of all that occurred, and is so convincing and altogether satisfactory that we have no doubt that the trial judge who heard them testify properly accepted their testimony as worthy of entire confidence and belief.

The contestants put upon the stand four witnesses for the purpose of proving that at the time and on the occasion when the subscribing witnesses testified that the will was executed, these witnesses were not in the house with the testator, and that the alleged testator was at that time in such physical and mental condition that it was impossible for him to have made a will. Two of these witnesses, upon cross-examination, admitted that they were not in the house at or between the hours of four and six in the afternoon of the day on which the will is alleged to have been made, this being the time at which the witnesses in support of the will testified that it was executed. Of the other two witnesses, one is a contestant of the will, Macario Ubag, a brother of the testator, and the other, Canuto Sinoy, his close relative. These witnesses swore that they were in the house of the deceased, where he was lying ill, at or about the time when it is alleged that the will was executed, and that at that time the alleged subscribing witnesses were not in the house, and the alleged testator was so sick that he was unable to speak, to understand, or to make himself understood, and that he was wholly incapacitated to make a will. But the testimony of Macario Ubag is in our opinion wholly unworthy of credence. In addition to his manifest interest in the result of the investigation, it clearly discloses a fixed and settled purpose to overthrow the will at all costs, and to that end an utter disregard of the truth, and a readiness to swear to any fact which he imagined would aid in securing his object. An admittedly genuine and authentic signature of the deceased was introduced in evidence for comparison with the signature attached to the will, but this witness in his anxiety to deny the genuineness of the signature of his brother to the will, promptly and positively swore that the admittedly genuine signature was not his brother's signature, and only corrected his erroneous statement in response to a somewhat suggestive question by his attorney which evidently gave him to understand that his former answer was likely to prejudice his own cause. On cross-examination, he was forced to admit that because his brother and his brother's wife (in whose favor the will was made) were Aglipayanos, he and his other brothers and sister had not visited them for many months prior to the one particular occasion as to which he testified; and he admitted further, that, although he lived near at hand, at no time thereafter did he or any of the other members of his family visit their dying brother, and that they did not even attend his funeral. If the testimony of this witness could be accepted as true, it would be a remarkable coincidence indeed, that the subscribing witnesses to the alleged will should have falsely pretended to have joined in its

execution on the very day, and at the precise hour, when this interested witness happened to pay his only visit to his brother during his last illness, so that the testimony of this witness would furnish conclusive evidence in support of the allegations of the contestants that the alleged will was not executed at the time and place or in the manner and form alleged by the subscribing witnesses. We do not think that the testimony of this witness nor any of the other witnesses for the contestants is sufficient to raise even a doubt as to the truth of the testimony of the subscribing witnesses as to the fact of the execution of the will, or as to the manner and form in which it was executed.

In the course of the proceedings, an admittedly genuine signature of the deceased was introduced in evidence, and upon a comparison of this signature with the signature attached to the instrument in question, we are wholly of the opinion of the trial judge, who held in this connection as follows:

"No expert evidence has been adduced with regard to these two signatures, and the presiding judge of this court does not claim to possess any special expert knowledge in the matter of signatures; nevertheless, the court has compared these two signatures, and does not find that any material difference exists between the same. It is true that the signature which appears in the document offered for authentication discloses that at the time of writing the subscriber was more deliberate in his movements, but two facts must be acknowledged: First, that the testator was seriously ill, and the other fact, that for some reason which is not stated the testator was unable to see, and was a person who was not in the habit of signing his name every day.

"These facts should sufficiently explain whatever difference may exist between the two signatures, but the court finds that the principal strokes in the two signatures are identical."

That the testator was mentally capable of making the will is in our opinion fully established by the testimony of the subscribing witnesses who swore positively that, at the time of its execution, he was of sound mind and memory. It is true that their testimony discloses the fact that he was at that time extremely ill, in an advanced stage of tuberculosis complicated with severe intermittent attacks of asthma; that he was too sick to rise unaided from his bed; that he needed assistance even to raise himself to a sitting position; and that during the paroxysms of asthma to which he was subject he could not speak; but all this evidence of physical weakness in no wise establishes his mental incapacity or a lack of testamentary capacity, and indeed the evidence of the subscribing witnesses as to the aid furnished them by the testator in preparing the will, and his clear recollection of the boundaries and physical description of the various parcels of land set out therein, taken together with the fact that he was able to give to the person who wrote the will clear and explicit instructions as to his desires touching the disposition of his property, is strong evidence of his testamentary capacity.

Counsel for appellant suggests that the fact that the alleged will leaves all the property of the testator to his widow, and wholly fails to make any provision for his brothers or sisters, indicates a lack of testamentary capacity and undue influence; and because of the inherent improbability that a man would make so unnatural and unreasonable a will, they contend that this fact indirectly corroborates their contention that the deceased never did in fact execute the will. But when it is considered that the deceased at the time of his death had no heirs in the ascending or descending line; that a bitter family quarrel had long separated him from his brothers and sisters, who declined to have any relations with the testator because he and his wife were adherents of the Aglipayano Church; and that this quarrel was so bitter that none of his brothers or sisters, although some of them lived in the vicinity, were present at the time of his death or attended his funeral; we think the fact that the deceased desired to leave and did leave all of his property to his widow and made no provision for his brothers and sisters, who themselves were grown men and women, by no means tends to disclose either an unsound mind or the presence of undue influence on the part of his wife, or in any wise corroborates contestants' allegation that the will never was executed.

It has been said that "the difficulty of stating standards or tests by which to determine the degree of mental capacity of a particular person has been everywhere recognized, and grows out of the inherent impossibility of measuring mental capacity, or its impairment by disease or other causes" (Greene vs. Greene, 145 Ill., 264, 276); and that "it is probable that no court has ever attempted to lay down any definite rule in respect to the exact amount of mental capacity requisite for the making of a valid will, without appreciating the difficulty of the undertaking" (Trish vs. Newell, 62 Ill., 196, 203).

Between the highest degree of soundness of mind and memory which unquestionably carries with it full testamentary capacity, and that degree of mental aberration generally known as insanity or idiocy, there are numberless degrees of mental capacity or incapacity, and while on one hand it has been held that "mere weakness of mind, or partial imbecility from disease of body, or from age, will not render a person incapable of making a will, a weak or feeble minded person may make a valid will, provided he has understanding and memory sufficient to enable him to know what he is about, and how or to whom he is disposing of his property" (Lodge vs. Lodge, 2 Houst. (Del.), 418); that, "To constitute a sound and disposing mind, it is not necessary that the mind should be unbroken or unimpaired, unshattered by disease or otherwise" (Sloan vs. Maxwell, 3 N. J. Eq., 563); that "It has not been understood that a testator must possess these qualities (of sound and disposing mind and memory) in the highest degree. * * * Few indeed would be the wills confirmed, if this is correct. Pain, sickness, debility of body, from age or infirmity, would, according to its violence or duration, in a greater or less degree, break in upon, weaken, or derange the mind, but the derangement must be such as deprives him of the rational faculties common to man" (Den. vs. Vancleve, 5 N. J. L., 680); and, that "Sound mind does not mean a perfectly balanced mind. The question of soundness is one of degree" (Boughton vs. Knight, L. R., 3 P. & D., 64; 42 L. J. P., 25); on the other hand, it has been held that "testamentary incapacity does not necessarily require that a person shall actually be insane or of an unsound mind. Weakness of intellect, whether it arises from extreme old age, from disease, or great bodily infirmities or suffering, or from all these combined, may render the testator incapable of making a valid will, providing such weakness really disqualifies her from knowing or appreciating the nature, effects, or consequences of the act she is engaged in" (Manatt vs. Scott, 106 Iowa, 203; 68 Am. St. Rep., 293, 302).

But for the purposes of this decision it is not necessary for us to attempt to lay down a definition of testamentary capacity which will cover all possible cases which may present themselves, because, as will be seen from what has already been said, the testator was, at the time of making the instrument under consideration, endowed with all the elements of mental capacity set out in the following definition of testamentary capacity which has been frequently announced in courts of last resort in England and the United States; and while in some cases testamentary capacity has been held to exist in the absence of proof of some of these elements, there can be no question that, in the absence of proof of very exceptional circumstances, proof of the existence of all these elements is sufficient to establish the existence of testamentary capacity.

"Testamentary capacity is the capacity to comprehend the nature of the transaction in which the testator is engaged at the time, to recollect the property to be disposed of and the persons who would naturally be supposed to have claims upon the testator, and to comprehend the manner in which the instrument will distribute his property among the objects of his bounty."

(Cf. large array of cases cited in support of this definition in the Encyclopedia of Law, vol. 23, p. 71, second edition.)

In our opinion, the evidence of record establishes in a strikingly conclusive manner the execution of the instrument propounded as the last will and testament of the deceased; that it was made in strict conformity with the requisites prescribed by law; and that, at the time of its execution, the deceased was of sound mind and

memory, and executed the instrument of his own free will and accord.

The order probating the will should be and is hereby affirmed, with the costs of this instance against the appellants.

Arellano, C. J., Torres, Johnson, and Moreland, JJ., concur.

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