

EMERITA SANTOS, IN HER BEHALF AND AS GUARDIAN OF THE PERSONS AND PROPERTY OF THE MINORS BIENVENIDO, APOLONIO1 MANUEL, JUANA AND NORBERTA, SURNAMED AZORES Y SANTOS, PETITIONER, V...

G. R. No. 45463. March 18, 1937

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This is a petition for a writ of certiorari to have this court declare null and void the order issued by the respondent judge of the Court of First Instance of Laguna on January 26, 1937, dismissing the petition docketed therein as case No. 3101. Said petition had been filed by the petitioner Emerita Santos, in her behalf and as guardian of the minor acknowledged natural children of the deceased Nicolas Azores, for the purpose of applying for the probate of the will, Exhibit A, which she claims to be the expression of the last will and testament of said Nicolas Azores, who died in the municipality of San Pablo, Laguna, on January 5, 1937.

Two days after the petition in question had been docketed, the petitioner filed a motion praying for the appointment of a special administrator and commissioners on appraisal, of the properties of the deceased Nicolas Azores. At the hearing of said motion which took place on January 13th, the herein respondents Jose, Sinforosa and Antonio Azores, legitimate children of said deceased, opposed the court's taking action thereon on the ground that it had not acquired jurisdiction over the case, the allegations made in the petition being insufficient to confer jurisdiction upon said court, because the petitioner did not allege that she had the custody of the will and, therefore, was not entitled to present it for probate; and furthermore because the will that should be probated is the original and not a copy thereof, as the one presented by the petitioner. Before the court decided the incident relative to its lack of jurisdiction, the petitioner, on January 16th, filed an amended petition with an affidavit, adding to the original application the following paragraph:

"That four typewritten copies of said will Exhibit A, all identically containing each and every provision thereof, were made, which were at once signed and subscribed by the testator and the instrumental witnesses, and that after the will had been made, the testator Nicolas Azores designated nobody in particular as 'custodian' thereof but instead he directed his nephew, Attorney Manuel Azores Concordia, to deliver a copy to the petitioner Emerita Santos, to keep the other copy in his (Manuel Azores Concordia's) possession, and to deliver the other two copies to his son Jose. Azores, with instructions to the effect that if the herein petitioner Emerita Santos or his son Jose Azores failed to present said will for probate, he (Manuel Azores Concordia) should take charge of presenting it to the court for said purpose, as stated more particularly in the affidavit Exhibit B. The copy Exhibit A belonged to the petitioner."

In said amended petition, the petitioner prayed that Jose Azores and Manuel Azores Concordia be required to present immediately, in said case No. 3101, the copies of the will in 'their possession as well as any alleged codicil claimed by them to have been made by the testator.

On January 19th, the court issued an order which reads as follows:

"Considering the petition of Atty. Jesus E. Blanco in representation of petitioner Emerita Santos, for the appointment of a special administrator in this case, and the opposition filed thereto by Atty. Claro M. Recto in representation of the children of the deceased in his first marriage; and considering further the arguments in favor of and against said petition given by the parties, as well as the manifestation in open court made by Atty. Recto that the opponents will present for probate the original last will and testament of the deceased together with the codicil as soon as the novena for the deceased is through; and taking 'into account the period of time that has elapsed since the death of Nicolas Azores;

"Said petition for the appointment of a special administrator is hereby denied; and Jose Azores under whose custody the last will and testament and all other documents having relation thereto are supposed to be, is hereby ordered to deliver said papers to the court within ten (10) days from notice hereof; * * *."

On January 20th, the petitioner filed a motion praying that her amended petition be admitted, that a special administrator -and commissioners on appraisal be appointed and that Jose Azores and Manuel Azores Concordia be required to present in said case the copies of the will and the codicil that they had in their possession. Before this motion was decided, the respondents, on January 21st, that is, 16 days after their father's death, presented the original of the will and codicil made by the deceased Nicolas Azores, with a petition docketed as case No. 3104, praying for the probate of said will and codicil.

On the 23d of said month, the petitioner's motion of January 20th was heard. It was opposed by the respondents Azores on the ground that as the jurisdiction of the court to pass upon the original petition for probate filed by the petitioner is questioned, the amendment thereto could not legally be considered until the previous question is decided by the court. The respondents prayed that said original petition of the petitioner be dismissed on the ground that as the originals of the will and codicil of the deceased Azores had been presented together with a petition for the probate thereof, the petitioner's defective petition was unfounded.

On the 26th of said month, the respondent Judge Modesto Castillo issued the order in question, dismissing the petition filed by the petitioner which gave rise to the proceeding docketed as case No. 3101 of the Court of First Instance of Laguna. The day following the issuance of said order, the petitioner excepted thereto and filed a motion for reconsideration which was denied by the court. The petitioner excepted to the order denying her motion.

It is alleged in the petitioner's petition filed in this court that the respondent judge exceeded his jurisdiction and acted arbitrarily and irregularly in dismissing the petition for probate filed by her in case No. 3101 as well as in ordering the publication of the notice of the hearing of the probate of the will in case No. 3104 instituted by the Azores brothers and sister before the order of January 26, 1937, issued in said case No. 3101 became final. It is claimed that said judge also exceeded his jurisdiction and acted arbitrarily and irregularly in giving preference to the petition for probate filed by the Azores brothers and sister, disregarding the petition filed by the herein petitioner, instead of ordering said respondents Jose Azores et al. to present their copies of the will and alleged codicil in case No. 3101.

First of all, it is advisable to separate in this case the actuaciones of the respondent judge in case No. 3101 from his actuaciones in case No. 3104. This court is of the opinion that the petitioner is not entitled at all to interpose this appeal in connection with case No. 3104 instituted by the legitimate children of the deceased Azores, on the ground that she is not a party thereto and has not asked therein for the reconsideration of the court's order directing the publication of the notice of the hearing of the probate of the will in said case No. 3104.

With respect to case No. 3101, in order to decide the question whether or not the respondent judge exceeded his

jurisdiction in dismissing the petitioner's application, we should first consider who was entitled to apply for the probate of the will of Nicolas Azores. To get to the bottom of this question, it is necessary to ascertain beforehand who was bound by law to apply for the probate of the will.

Section 625 of the Code of Civil Procedure provides that no will shall pass either the real or personal estate, unless it is proved and allowed. For this purpose, section 626 provides that the person who has the custody of a will shall, within thirty days after he knows of the death of the testator, deliver the will into the court which has jurisdiction, or to the executor named in the will, and sections 628 and 629 prescribe coercive means to compel a person having the custody of a will to deliver it to the court having jurisdiction.

The petitioner alleges that the deceased Azores designated nobody as custodian of his will but that he directed his nephew Manuel Azores Concordia to deliver a copy thereof to the petitioner, to preserve the other copy in his (Manuel Azores Concordia's) possession, and to turn over the other two copies to his son Jose Azores, with instructions to the effect that if the petitioner or his Son Jose Azores failed to present said will for probate, he (Manuel Azores Concordia) should take charge of presenting it to the court for said purpose. Granting that the entire paragraph in question were true, with the exception of the conclusion that the testator designated nobody as custodian of his will, the petitioner is silent as to the disposition made by the testator of the original of his will. To whom was the original delivered? It is, of course, evident that there must be an original of the will in question even if four equal copies have been made thereof. Well, one of the two copies of the will turned over to Jose Azores must be the original because the respondents had the original of the will as well as the codicil. The petitioner did not dispute this fact. Taking this into account, we may conclude that it was Jose Azores, the son of the deceased, who had the custody of the will because the original thereof was turned over to him. If in addition to the foregoing it is considered that the respondents Azores also had the original of the codicil, it necessarily follows that, by provision of the testator, it was said respondents who had the custody of his will and of his codicil.

For the sake of argument, however, let us admit that the testator had designated nobody as custodian of his will in distributing the copies thereof and in entrusting his nephew Manuel Azores Concordia, as above-stated, with the presentation of a copy of said will to the court for probate. Even so, it cannot be denied that as the testator had subsequently made his codicil and had entrusted the custody thereof to his legitimate children, his last will, as to the custody of his will and codicil, was clearly modified in the sense of entrusting the custody of both to his legitimate children and not to Manuel Azores Concordia or to the petitioner.

Therefore, as the legitimate children of the deceased had custody of the originals of the will and of the codicil, they alone could, had the right and were bound by law to apply for the probate of their father's last will. Consequently, the respondent judge, in dismissing the application presented by the petitioner, neither exceeded his jurisdiction nor acted arbitrarily or irregularly, but reasonably made use of his sound discretion.

The petitioner contends that instead of dismissing her application, the respondent judge should have compelled the respondents Azores to present the copy of the will and the alleged codicil in case No. 3101. The court could not prudently do so: first, because in said case the petitioner applied for the probate of the will and nothing more; and second, because the petitioner has clearly stated that even if she had had the codicil in her possession, she would not have presented it to the court because said codicil was allegedly "marked", not signed, by the testator about fifteen days before his death, that is, on a date when, according to the medical opinion of Doctors Manuel B. Calupitan and Fortunato Manzanero, he was physically and mentally incapacitated to govern his properties, thereby making it clearly understood that she would oppose the probate of the codicil in question. If such is the petitioner's attitude and intention, were the codicil attached to case No. 3101, there would be the anomaly of her being applicant and at the same time oppositor therein. Who would be the applicant for the probate of the codicil?

Could the court, or rather, would the court have authority to compel the legitimate children of the deceased Azores to appear as applicants in case No. 3101 where they have precisely questioned the jurisdiction of the court?

With respect to the court's jurisdiction, this court finds that it is a fact impliedly admitted by the petitioner, from the time she presented an amended petition for the purpose of curing the deficiencies of her application, that the allegations of said application were insufficient to confer jurisdiction upon the court. As said amendment had not been admitted by the court, the lack of jurisdiction continued to be manifest upon the face of the proceedings.

Wherefore, this court holds in conclusion that in order that the court may acquire jurisdiction over the case for the probate of a will and for the administration of the properties left by a deceased person, the application must allege, in addition to the residence of the deceased and other indispensable facts or circumstances, that the applicant is the executor named in the will or is the person who had the custody of the will to be probated. The original of said document must be presented or sufficient reasons given to justify the nonpresentation of said original and the acceptance of the copy or duplicate thereof. Inasmuch as these requisites had not been complied with in the application filed by the petitioner, the respondent judge did not exceed his jurisdiction in dismissing the application in question.

The petition is denied, with the costs to the petitioner.

So ordered.

Avancena, C. J., Villa-Real, and Abad Santos, JJ., concur.

CONCURRING

IMPERIAL, J.,

In my opinion, the question to be determined is not who had the custody of the will and was bound to deliver it to the court for probate, but which will, according to law, should be presented for said purpose? Sections 614, 618, 619, 625, 626, 627, 628, 629, and 630 of the Code of Civil Procedure, which treat of the will and the presentation thereof to the court for probate, refer to the original of the will and not to the duplicates or copies which may be made thereof. If the delivery has for its purpose the probate of the will, the question of who is the custodian, holder or possessor thereof is merely secondary, particularly because such capacity, according to law, only gives rise to the duty of presenting it to the court for probate, within the statutory period.

Much importance is given to the custodian of the will because there seems to be an attempt to convey the idea that it is he who should apply for the probate thereof, but the above-cited sections confer no such right upon said custodian. Section 630 expressly provides that it is the court that must appoint hearing for the probate of the will. The proposition can better be illustrated by the case of a custodian who has a will in his possession but has no interest whatsoever in the property of the testator because he is not a creditor and has not been appointed executor thereof. Would there be any doubt that he cannot ask for the probate of the will and that the duty imposed upon him by law ceases from the moment he delivers or presents the will to the court?

It being alleged and admitted that there are four copies of the will, the logical and unavoidable conclusion is that an original exists and that the other three are either duplicates or copies thereof. If my foregoing opinion is correct, as I understand it to be, it is the original that must be presented and consequently, the will presented by the respondents is the one that should be published and probated if it has all the conditions required by law.

I concur in the conclusion that the extraordinary remedy of certiorari does not lie in this case. Inasmuch as the original of the will has been presented together with the codicil, there should be only one testamentary proceeding of the deceased in court and, therefore, the court did not abuse its sound discretion in dismissing the first case arising from the application filed by the petitioner. The jurisdiction of the court in a testamentary proceeding is not separable and divisible into several cases. All proceedings having for their purpose the probate of the will, payment of the debts and other expenses of administration and distribution of the estate among the heirs instituted, should be embodied in only one case, the only exception thereto being an ancillary proceeding. (Fraser vs. Jennison, 106 U. S., 131; People vs. Wayne Cir, Judge, 39 Mich., 198; Glos vs. Glos, 173 N. E., 604; In re Christensen's Estate, 68 P., 112; In re Taggart's Estate, 16 N. Y. S., 514; Austin First Nat. Bank vs. Sharpe, 33 S. W., 676.)

DISSENTING

LAUREL, J.,

I regret that I find myself compelled to dissent from the opinion of my brethren in this case.

At the risk of repetition, I desire to give a more comprehensive statement of the facts for the purposes of this dissent.

Nicolas Azores, a wealthy resident of San Pablo, Laguna, died in the aforesaid municipality on January 5, 1937. His forced heirs were his legitimate children named Jose, Sinforosa, and Antonio Azores, all of legal age and residents of San Pablo, Laguna, and his acknowledged natural children had by Emerita Santos, named Bienvenido, Apolonia, Manuel, Juana, and Roberta Azores y Santos, all minors and also residents of San Pablo, Laguna.

On January 7, 1937, Emerita Santos, as legal guardian of the aforementioned natural children, filed with the Court of First Instance of Laguna a petition for the probate of a document attached thereto and marked Exhibit A, as the last will and testament of Nicolas Azores. She also prayed for the appointment of a special administrator. This petition was registered as case No. 3101 of said court, the petitioner being authorized by the court to litigate as a pauper.

On January 9, 1937, herein petitioner filed a motion for the appointment of Tomas Dizon as special administrator, the appointment of a committee on claims and appraisals, and for the determination of the monthly pension to which her children were entitled, which motion was set for hearing on January 13, 1937.

On January 12, 1937, the petitioner filed the corresponding affidavit in support of her motion for the appointment of a special administrator alleging inter alia that the property of the deceased produced a monthly income of around P5,000; that such produce as well as around P150,000 in cash, and jewelry and evidences of credit, were in the possession of the legitimate children, and were in imminent danger of being lost or abstracted in view of the manifest hostility of said legitimate children to the children of the herein petitioner.

At the hearing of the foregoing motion on January 13, 1937, the legitimate children of the deceased entered their special appearance and objected to the jurisdiction of the court on the ground that the petitioner failed to allege that she was the custodian of the will of the deceased. They further contended that the petitioner had no personality to petition for the probate of the will of the deceased because she was not the custodian of said will; that the will presented by her for probate was not the original but only a carbon copy of the same; and that said will did not express the last will and testament of the deceased because a codicil had been executed subsequently

by the testator, and hence said will cannot be probated without the codicil. Counsel further manifested to the court their intention to file the original of the will and the codicil for probate as soon as the novena for deceased shall have been terminated.

On January 16, 1937, the petitioner filed an amended petition for the probate of the will of the deceased substantially reproducing the allegations of her original petition with the additional allegation that the will Exhibit A was executed and signed in quadruplicate and delivered by the deceased to his nephew, Attorney Manuel Azores Concordia, who was instructed to keep one copy for himself and to give one copy to Emerita Santos, and turn over the rest to Jose Azores, with the advertence that in case both Emerita Santos and Jose Azores should fail to present the will for probate, said Attorney Concordia was to present said will for probate, which facts were particularly set forth in the affidavit of Attorney Concordia attached to the amended petition and marked Exhibit B. It was also prayed that a special administrator be appointed after hearing all the heirs, and that Jose Azores and Manuel Azores Concordia be ordered to submit to the court the copies of the will in their possession as well as any codicil which might have been posteriorly executed by the deceased.

On January 19, 1937, the respondent judge denied the petitioner's motion for the appointment of a special administrator and at the same time ordered that Jose Azores, deliver the will and codicil in his possession to the court within a peremptory period of ten days, as follows:

"Considering the petition of Atty. Jesus E. Blanco in representation of petitioner Emerita Santos, for the appointment of a special administrator in this case, and the opposition filed thereto by Atty. Claro M. Recto in representation of the children of the deceased in his first marriage; and considering further the arguments in favor of and against said petition given by the parties, as well as the manifestation in open court made by Atty. Recto that the opponents will present for probate the original last will and testament of the deceased together with the codicil as soon as the novena for the deceased is through; and taking into account the period of time that has elapsed since the death of Nicolas Azores;

"Said petition for the appointment of a special administrator is hereby denied; and Jose Azores, under whose custody the last will and testament and all other documents having relation thereto are supposed to be, is hereby ordered to deliver said papers to the court within ten (10) days from notice hereof; and the clerk of court ordered to send by registered mail copies of this order to the attorneys of both parties and also to Jose Azores for his information and all legal consequences. It is so ordered.

"Santa Cruz, Laguna, January 19, 1937.

(Sgd.) "MODESTO CASTILLO

"Judge"

On January 20, 1937, the petitioner filed another motion asking for the admission of her amended petition for the probate of the will of the deceased, which motion was set for hearing on January 23, 1937.

On January 21, 1937, Jose Azores delivered to the court the original copy of the will and the codicil together with a petition for the probate of the same, subscribed by himself and his legitimate brother and sister, which petition was registered as case No. 3104.

On January 26, 1937, the respondent judge issued the following order dismissing the proceedings in case No. 3101 instituted by the herein petitioner:

"Upon due consideration of the various petitions filed in this case by Atty. Blanco and of the petition of Atty. Recto dated January 21, 1937 wherein it appears that the originals of the last will and testament and of the codicil of the deceased Nicolas Azores have already been presented to this court, together with a petition

signed by Jose Azores, Antonio Azores and Sinforosa Azores de Gomez, praying for the probate of the said last will and codicil; and it appearing further that the aforementioned petition of Atty. Recto was in fact filed on January 21, 1937 under special proceedings No. 3104, entitled In re Testate Estate of the Deceased Nicolas Azores;

"Without passing upon the merits of the various petitions filed by Atty. Blanco and as the court is of the opinion that this case cannot stand alone without the codicil filed thereto, nor can the court oblige the petitioners in special proceedings No. 3104 to abandon their petition duly filed with all the requisites of the law in order to give way to the , petition filed by Emerita Santos, nor can this court allow these two proceedings Nos. 3101 and 3104 to remain pending in the dockets, dealing as they are with the same subject matter; ,

"It is, therefore, ordered, that this case No. 3101 be and is hereby dismissed without prejudice on the part of Atty. Blanco, in representation of Emerita Santos, to file similar petitions in special proceedings No. 3104 as to the appointment of a special administrator, the appointment of commissioners on claims and appraisal, and the payment of allowance to the natural children of the deceased pending the settlement of the estate.

"Let the exception interposed by Atty. Blanco to the order of this court dated January 19, 1937 be made of record; and the petition for the reconsideration of said order not being well founded, it is hereby denied. It is so ordered.

"Santa Cruz, Laguna, January 26, 1937.

(Sgd.) "MODESTO CASTILLO

"Judge"

Simultaneously with the issuance of the foregoing order the respondent judge on January 26, 1937, dictated another order in case No. 3104. setting it for hearing on February 18, 1937 and ordering publication of the corresponding notice of hearing in the Philippines Herald.

On January 30, 1937 the petitioner moved for a reconsideration of the order of the respondent judge of January 26, 1937, in case No. 3101, and the said motion was denied on February 1, 1937. Petitioner also moved for the suspension of the publication ordered in case No. 3104, on the ground that the order dismissing case No. 3101 had not yet become final, but said motion was not acted upon by the respondent judge.

Herein petitioner now comes before this court and asks for the issuance of a writ of certiorari directing the respondent judge to elevate to this court the records of cases Nos. 3101 and 3104 of the Court of First Instance of Laguna, that meanwhile the said court be ordered to refrain from taking further proceedings in case No. 3104 pending the resolution of the present petition, and that thereafter this court declare the order of the respondent judge of January 26, 1937 dismissing case No. 3101, as Well as his order of the same date setting case No. 3104 for hearing on February 18, 1937 and ordering publication of notice of said hearing, null and void because they were issued without or in excess of his jurisdiction, and further requiring the respondent judge to reinstate case No. 3101 and continue taking cognizance of the said case. Petitioner alleges that she has no plain, speedy and adequate remedy at law by appeal or otherwise; she also prays for such other equitable relief to which she might be entitled in the premises.

Herein respondents in their answer reproduce all their arguments advanced in the lower court against giving due course to the petition for probate filed by herein petitioner in case No. 3101. As first special defense, respondents allege that herein petitioner does not posit any question of jurisdiction which would serve as a basis for the issuance of a writ of certiorari; that if the lower court committed an error in dismissing petitioner's petition for probate prematurely presented, the same does not affect the jurisdiction of the lower court; that if the petitioner has the right, and the lower court has the duty, to continue the proceedings in case No. 3101, the remedy available

is the issuance of a writ of mandamus and not that of certiorari prayed for.

As second special defense, respondents allege that as legitimate heirs they are the ones entitled to present the will and codicil of the deceased within thirty days after the latter's death as in fact they exercised such right before the expiration of said period; that before the expiration of said period of thirty days no other person can supplant said respondents who had actual custody of the will and codicil, in their exercise of the right to present the same for probate; that said respondents are willing to concede the right of any other person to compel them to produce said will and codicil before the court only in the eventuality that said respondents refuse or fail to produce such will and codicil within said period of thirty days, which is not the case in the instant proceedings, that the lower court, therefore, committed no error in dismissing case No. 3101 and in giving due course to case No. 3104 for the reason that the jurisdiction of Courts of First Instance in probate proceedings is special and limited and the petitioner in any probate case is bound to comply with all the legal requisites necessary to confer such jurisdiction upon the court, and that such requisites have not been complied with by the petitioner herein: because she has not and as a matter of fact she cannot allege that she is the custodian of the will of the deceased; because the will which must be probated is the original thereof and not a mere copy like that presented by the herein petitioner unless such original copy has been lost or destroyed which has not been alleged by the petitioner; because admitting that the will submitted by the petitioner for probate is a duplicate and not a mere copy the incontrovertible fact still remains that there is a codicil modifying the will which codicil was not presented by the petitioner, and inasmuch as the will and the codicil jointly express the last will and testament of the deceased, the will presented by the petitioner cannot be admitted to probate without the codicil; and because sections 626 and 627 of our Code of Civil Procedure recognize only the custodian of the will or the executor named therein as the only persons entitled to submit the will for probate.

As third special defense, respondents contend that the questions herein submitted by the petitioner are purely academic; that there is no practical difference between continuing the proceedings in case No. 3101 and continuing the proceedings in case No. 3104 and that if the lower court chose the latter procedure it was because the codicil to the will was presented in case No. 3104 which was not done in case No. 3101; and that inasmuch as case No. 3104 has already been given due course by the lower court, the present petition has become a moot case.

The supplementary petition of the petitioner for the issuance of preliminary injunction against the herein respondents ordering them to refrain from further proceedings in case No. 3104, dated February 11, 1937 was denied by order of this court on February 13, 1937.

Upon the merits, this court now denies the petition for certiorari. Its conclusion is expressed as follows: (Paragraph before the last on p. 10.)

"Wherefore, this court holds in conclusion that in order that the court may acquire jurisdiction over the case for the probate of a will and for the administration of the properties left by a deceased person, the application must allege, in addition to the residence of the deceased and other indispensable facts or circumstances, that the applicant is the executor named in the will or is the person who had the custody of the will to be probated. The original of said document must be presented or sufficient reasons given to justify the nonpresentation of said original and the acceptance of the copy or duplicate thereof. Inasmuch as these requisites had not been complied with in the application filed by the petitioner, the respondent judge did not exceed his jurisdiction in dismissing the application in question."

The above conclusion seems sound viewed in the abstract and detached from the pleadings, but considered in the light of the facts and authorities hereinbelow referred to, it is, in my humble opinion, erroneous. It is predicated on what I consider is a wrong premise as to the character of the document presented by the petitioner for probate in the proceedings of the court below.

As well observed in another portion of the majority opinion (p. 6), the law governing the institution of probate proceedings in this jurisdiction is found in our Code of Civil Procedure (secs. 625 to 630). It is clear from the provisions of this Code that an obligation is imposed on the custodian of the will, within thirty days after he knows of the death of the testator, to deliver the will into the court which has jurisdiction, or to the executor named in the will (sec. 626, Code of Civil Procedure). The executor named in the will is also charged with the duty to present such will to the court which has jurisdiction, unless the will has otherwise been returned to said court, within thirty days after he knows of the death of the testator, or within thirty days after he knows that he is named executor, if he obtained such knowledge after knowing of the death of the testator, and within such period to signify to the court his acceptance of the trust or make known in writing his refusal to accept it (sec. 627, Code of Civil Procedure). For neglect of such duties without satisfactory excuse, the person so defaulting is liable to a fine not exceeding one thousand dollars (sec. 628, Code of Civil Procedure); moreover, the custodian of the will is further subject to commitment in prison in close confinement until he delivers the will, in case he neglects to deliver the same to the court having jurisdiction, after notice by the court so to do (sec. 629, Code of Civil Procedure).

It behooves us to inquire, therefore, whether the petitioner was bound to produce the will of the deceased in her possession as required by section 626 of the Code of Civil Procedure aforementioned. This brings us to the question as to whether the will Exhibit A in case No. 3101 is the will required by said section 626 to be delivered to the court having jurisdiction. In 22 Corpus Juris, p. 1024, sec. 1314, we find the following rule:

"Several Copies Produced at Same Time.—Where several copies of a writing are made at the same time by the same mechanical operation, each is regarded as an original and is admissible as such. The most usual application of this rule is found in the case of carbon copies, which are usually admitted as duplicate originals, but a distinction has been drawn with respect to instruments requiring signature, such as contracts, it being considered that where several carbon copies are made, all the copies are originals until signed, and when one is signed the other become copies with the signature missing."

It is to be observed that the will submitted by the petitioner, although apparently a carbon copy only, is signed by the testator and the attesting witnesses as required by law, and is therefore as much an original document as the first copy. So long as the duplicate original of the will presented by the petitioner fulfills the requisites prescribed by section 618 of the Code of Civil Procedure as amended by section 1 of Act No. 2645, therefore, it is perfectly admissible to probate, unless of course it has been revoked. The majority of the court hold the contrary. Apparently, it accepts the citations offered from 68 C. J., sec. 615, p. 886 which says:

"Copies or Duplicates.—Except in the case of lost wills and wills already probated in another jurisdiction, and of a will of a resident made in a foreign jurisdiction and which cannot be produced in the local court, probate of a copy or duplicate of a will, as a general rule, is neither necessary nor permissible, unless the other is produced or its absence satisfactorily explained. But it has been held that two holographic wills, of even date and identical provisions, having the same subscribing witnesses, and one marked 'duplicate', should both be admitted to probate."

Examining the cases cited in support of the foregoing rule, however, we find their ratio decidendi to be that where a will is executed in duplicate, only one of the duplicates need be probated, but that the other must be produced in court, that it may be seen whether there has been any revocation, as a revocation of one part is a revocation of both, and whether each completely contains the will of the testator. (Crossman vs. Crossman, 95 N. Y., 145, 150; Roche vs. Nason, 185 N. Y., 128; 77 N. E., 1007, 1008; In re Field's Will, 178 N. Y. S., 778; In re Schofield's Will, 129 N. Y. S., 190, 193.) Upon the other hand, and as Professor Wigmore observes in his unprecedented treatise on Evidence, " 'original' is a relative term only" and that "in order to state the rule, then, in terms which

will indicate in the rule itself what documents are included in its scope, it must be noted that the production required is the production of the document whose contents are to be proved in the state of the issues." (Vol. II, 2d ed., par. 1232, p. 830.)

That the petitioner had custody of the will submitted by her for probate is presumed from her physical possession of the same which made possible its introduction in court. Moreover, the amended petition filed by the petitioner on January 16, 1937, in case No. 3101 incorporates the affidavit of Attorney Manuel Azores Concordia who apparently prepared the will in question, stating that Nicolas Azores executed and signed his will in quadruplicate and instead of designating a particular person to keep said will, said Nicolas Azores instructed the affiant to deliver one copy to herein petitioner, to keep one copy for himself and turn over the rest of the copies to Jose Azores, and in the event that herein petitioner or Jose Azores should fail to present said will for probate after the testator's death, said affiant was to institute the proper proceedings for such probate. The amended petition further prays for the issuance of an order directing Manuel Azores Concordia and Jose Azores to deliver to the court the copies of the will and the alleged codicil in their possession.

It was not necessary for the petitioner to allege the fact that she had custody of the will submitted by her for probate in order to confer jurisdiction upon the probate court to consider her petition, for the delivery of the will to the court is the operative act which confers upon the probate court the jurisdiction to conduct a hearing on the allowance of said will (sec. 630, Code of Civil Procedure), the only restriction being that the will shall be delivered and probed in the Court of First Instance in the province in which the testator resided at the time of his death (sec. 6,00, Code of Civil Procedure) which fact was sufficiently alleged in the petition for probate registered as case No. 3101 of the Court of First Instance of Laguna and which fact is no less emphasized in the conclusion of the majority opinion (p. 10, decision).

It is to be observed that while the law imposes the duty of presenting the will of a deceased person for probate primarily upon the executor named therein and also upon the custodian of the will, there is nothing in our law which prohibits the heirs, or legatees of the deceased or any other interested person, from themselves filing a petition for the probate of his will. As a matter of fact it is immaterial as far as practice is concerned, by whom a will is presented for probate (68 C. J., sec. 605, p. 879), the only restriction being "that before any person may intervene in proceedings had in the Courts of First Instance for the probate of a will, he should be required to show an interest in the will or in the property affected thereby either as executor or otherwise; and that strangers should not be permitted, over the objection of the real parties in interest, to embarrass the proceedings by meddling or intruding themselves in matters with which they have no concern." (Paras vs. Narciso, 35 Phil., 244, 246.) And no one can gainsay that herein petitioner as legal guardian and in behalf of the acknowledged natural children of the deceased, had sufficient interest to intervene in proceedings for the probate of the will of the deceased, apart from her duty to so present the duplicate original of said will in her possession for probate.

It is to be further observed that to present a will for probate is one thing, and proving said will is another thing. By order of the court dated January 19, 1937, Jose Azores actually delivered to the court the "original" of the will and the codicil in his possession. A codicil, as I understand it, is necessarily a modification, qualification, addition or supplement to an existing last will or testament. It does not supersede the will as an after-made will but, logically and legally, is a part of it to be considered with it as one instrument and cannot, as a rule, be authenticated independently of the will. The codicil should therefore follow the principal instrument. But independently of the question of whether a will can be proved without the codicil, the delivery of said codicil has given the lower court sufficient jurisdiction to allow or disallow the same in connection with the probate of the will as petitioned in case No. 3101.

That the lower court acquired jurisdiction over the estate of the deceased Nicolas Azores is fully demonstrated by

its order of January 19, 1937 denying petitioner's motion for the appointment of a special administrator and ordering Jose Azores to deliver his copy of the will to the court with the codicil alleged to have been made by the deceased subsequent to the execution of the will. An order to produce a will before the court under section 629 of the Code of Civil Procedure can not be made by the court *motu proprio* except in the exercise of its jurisdiction over the administration of the estate of deceased persons (*U. S. vs. Chiu Guimco*, 36 Phil, 917, 921), and inasmuch as, on January 19, 1937, when the order under discussion was issued, the only petition for the probate of the will of Nicolas Azores and the administration of his estate before the court was filed by herein petitioner in case No. 3101, the logical inference is that said order was issued by the lower court in the exercise of its probate jurisdiction in case No. 3101.

The lower court having acquired and exercised jurisdiction over case No. 3101, has it exceeded its jurisdiction in ordering the dismissal of said case in order to give way to the hearing of another petition for the probate of the said will (Case No. 3104) which was filed only on January 21, 1937 or two weeks after the institution of proceedings in case No. 3101? The respondent judge reasons out that he cannot compel the legitimate children to abandon their petition for probate registered as case No. 3104. And, apparently, to So justice to them, the respondent judge had to do an injustice to herein petitioner and to compel her to abandon her petition for probate registered as case No. 3101. We find no warrant in law for such an irregular procedure.

This court has held in the case of *Dais vs. Court of First Instance of Capiz* (51 Phil, 396, 401) that an answer in a cadastral proceeding, which partakes of the nature of a complaint in an ordinary action, can only be dismissed by a failure to prosecute, by default, by abandonment, or by defects provided by law as grounds for a demurrer (sees. 100 and 127, Code of Civil Procedure) ; and therefore a motion for dismissal that is not based on any of said grounds does not confer jurisdiction on the court to dismiss the complaint, and if it does so, it exceeds its powers. This court also held in the aforesaid case:

"In ordering the dismissal of the answers presented by the judicial administrator of the intestate estate of Serapion Dais, in the name of the latter's heirs, notwithstanding their opposition and for a cause not provided by law as a ground for dismissal, the respondent court did really exceed its jurisdiction; because it is not enough that a court have jurisdiction over the subject matter in litigation and the parties, but it is necessary that it have authority in and over each and every one of the essential particulars of the case.

"In the case of *Larrobis vs. Wislizenus and Smith, Bell & Co.* (42 Phil., 401), this court laid down the doctrine that the erroneous exercise of interlocutory powers is irregular and justifies the institution of certiorari proceedings." (*Italics mine.*)

"And on page 104 of volume 11 of *Corpus Juris*, the following rule may be found:

"* * * But it has been held that 'any departure from the recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure which has the effect to deprive one of a constitutional right is as much an excess of jurisdiction as where, there is an inceptive lack of power.'" (51 Phil., 396,402) (*Italics mine.*)

In granting the remedy of certiorari in the case of *Conde vs. Judge of First Instance and Fiscal of Tayabas* (45 Phil.,173), this court also held:

"* * * Without attempting to deny the facts, the contention of the law officer of the government is, that the trial judge had jurisdiction of the proceedings, and consequently said jurisdiction should not be interfered with. What was said by this court in the case of *Herrera vs. Barretto and Joaquin* ([1913], 25 Phil., 245), to the effect that the appellate court will not issue a writ of certiorari unless it clearly appears that the court to which it was directed acted without or in excess of jurisdiction, is a good rule. In one sense, it is correct to say that the Court of, First Instance of Tayabas had jurisdiction of this case. In another sense, it is likewise correct to say that the

writ of certiorari and prohibition will issue when necessary to the accomplishment of justice in the particular case. There is here more than mere error in procedure. There is an abuse of discretion in the application of the law. The discretion vested in the fiscal and trial judge is not an arbitrary power and must be exercised wisely and impartially, in accordance with the law. Errors in the proceedings prejudicial to defendant's substantial rights which would, if the case were to proceed and appeal were to be taken, constitute ground for reversal, exist in this case." (45 Phil, 173, 177.) (Italics mine.)

Moreover, in the case of *Salvador Campos y Cia vs. Del Rosario* (41 Phil., 45), this court clearly enunciated the office of the writ of certiorari as correcting an irregular exercise by a court of its authority or jurisdiction in a particular case, as follows:

"Section 220 of Act No. 190 provides, in certiorari proceedings, that the court shall hear the parties and determine whether the inferior tribunal, board, or officer has regularly pursued its authority; and if it (the court) finds that said inferior tribunal, board, or officer has not regularly pursued its authority, it shall thereupon give final judgment, either affirming, or annulling, or modifying the proceedings below, as the law requires. Said section, applying to certiorari proceedings, directs the superior court, when an inferior court, board, or officer has not regularly followed the law, to annul the proceedings and direct the inferior tribunal, etc., etc., to follow the law.

"The doctrine has been frequently announced that although a court may have unquestioned jurisdiction over the principal cause of action, it may nevertheless act irregularly or in excess of its jurisdiction during the course of the proceedings in granting an auxiliary remedy. In such a case the party aggrieved may prosecute a proceeding by the writ of certiorari in the Supreme Court (*Herrera vs. Barretto and Joaquin*, 25 Phil., 245; *Leung Ben m. O'Brien*, 38 Phil., 182.)" (41 Phil, 45, 48.) (Italics mine.) While certiorari as an extraordinary legal remedy is therefore generally restricted to the correction of excess and defects of jurisdiction, it has been extended to the correction of abuse of discretion in appropriate cases.

In the case at bar, the lower court had jurisdiction over the subject matter, and the persons in case No. 3101; in fact, and as already observed hereinabove, it did exercise that jurisdiction by issuing the order of January 19, 1937 by requiring the production of the copy of the will and the codicil alleged to be in the possession of Jose Azores. Having exercised that jurisdiction and proceeded to take cognizance of the case, the dismissal thereof must be based on some legal ground. The subsequent filing of another petition in case No. 3104 on the allegation that the applicant therein had the "original," which in reality is but one of the quadruplicates and the codicil, is not a legal ground for the dismissal of the case. This seems very clear to me.

From another angle, it is reasonable to presume that the petitioner has incurred some expenses in connection with the preparation of her petition, for which she has engaged the services of counsel, and the hardship which the petitioner had to suffer to protect the interests of her minor children is made more apparent when we consider that the petitioner was allowed by the lower court to litigate as a pauper. Time and again we have spoken of social justice! Needless to say, all the trouble undergone by her will be set to naught, at least in so far as the prosecution of the case originally filed by her is concerned, if the order of the lower court dismissing her petition in case No. 3101, is allowed to stand. Why permit this result? Why make a technical and irrelevant distinction between expediente No. 3101 and 3104 (pp. 5-6, decision) for the purposes of the remedy sought in this case? Why refer to the immaterial objection of the petitioner being applicant and oppositor in case No. 3104 (p. 9, decision) and overlook the irregularity and substantial injustice to the petitioner? Moreover, if the petitioner is compelled to abandon her petition in case No. 3101, she will play a secondary role in the probate of the will of the deceased, which would not be the case if case No. 3101 is continued for in the latter case she has the role of principal actor. And this is of no mean practical importance in the prosecution of her case. And, apart from the material damage, does she not—as anybody else would in her place—suffer a moral injury which is incapable of pecuniary estimation,

that of undeserved humiliation consequent upon the dismissal of her case without any valid legal ground? To say the least, strong reasons of public policy demand that the administration of justice should be a matter of legal right and conscientious application of legal principles.

In view of the foregoing, I am of the opinion that the writ of certiorari should be granted.

DIAZ J.:

I concur in the preceding dissenting opinion of Justice Laurel

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