

ISIDORO SANTOS, PLAINTIFF AND APPELLANT, VS. LEANDRA MANARANG, ADMINISTRATRIX, DEFENDANT AND APPELLEE.

G.R. No. 8235. March 19, 1914

Ponente: TRENT, J.

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TRENT, J.:

Don Lucas de Ocampo died on November 18, 1906, possessed of certain real and personal property which, by his last will and testament, dated July 26, 1906, he left to his three children. The fourth clause of this will reads as follows:

"I also declare that I have contracted the debts detailed below, and it is my desire that they be religiously paid by my wife and executors in the form and at the time agreed upon with my creditors."

Among the debts mentioned in the list referred to are two in favor of the plaintiff, Isidoro Santos; one due on April 14, 1907, for P5,000, and various others described as falling due at different dates (the dates are not given) amounting to the sum of P2,454. The will was duly probated and a committee was regularly appointed to hear and determine such claims against the estate as might be presented. This committee submitted its report to the court on June 27, 1908. On July 14, 1908, the plaintiff, Isidoro Santos, presented a petition to the court asking that the committee be required to reconvene and pass upon his claims against the estate which were recognized in the will of the testator. This petition was denied by the court, and on November 21, 1910, the plaintiff instituted the present proceedings against the administratrix of the estate to recover the sums mentioned in the will as due him. Relief was denied in the court below, and he now appeals to this court.

In his first assignment of error, the appellant takes exception to the action of the court in denying his petition asking that the committee be reconvened to consider his claim. In support of this alleged error counsel say that it does not appear in the committee's report that the publications required by section 687 of the Code of Civil Procedure had been duly made. With reference to this point the record affirmatively shows that the committee did make the publications required by law. It is further alleged that at the time the appellant presented his petition the court had not approved the report of the committee. If this were necessary we might say that, although the record does not contain a formal approval of the committee's report, such approval must undoubtedly have been made, as will appear from an inspection of the various orders of the court approving the annual accounts of the administratrix, in which claims allowed against the estate by the committee were written off in accordance with its report. This is shown very clearly from the court's order of August 1, 1912, in which the account of the administratrix was approved after reducing the final payments on some of the claims against the estate to agree with the amounts allowed by the committee. It is further alleged that at the time this petition was presented the administration proceedings had not been terminated. This is correct.

In his petition of July 14, 1909, asking that the committee be reconvened to consider his claims, plaintiff states that his failure to present the said claims to the committee was due to his belief that it was unnecessary to do so because of the fact that the testator, in his will, expressly recognized them and directed that they should be paid.

The inference is that had plaintiff's claims not been mentioned in the will he would have presented them to the committee as a matter of course; that plaintiff was led to believe by this express mention of his claims in the will that it would be unnecessary to present them to the committee; and that he did not become aware of the necessity of presenting them to the committee until after the committee had made its final report.

Under these facts and circumstances, did the court err in refusing to reconvene the committee for the purpose of considering plaintiff's claims? The first step toward the solution of this question is to determine whether plaintiff's claims were such as a committee appointed to hear claims against an estate is, by law, authorized to pass upon. Unless it was such a claim plaintiff's argument has no foundation. Section 686 empowers the committee to try and decide claims which survive against executors and administrators, even though they be demandable at a future day "except claims for the possession of or title to real estate." Section 700 provides that all actions commenced against the deceased person for the recovery of money, debt, or damages, pending at the time the committee is appointed, shall be discontinued, and the claims embraced within such actions presented to the committee. Section 703 provides that actions to recover title to or possession of real property, actions to recover damages for injury to person or property, real or personal, and actions to recover the possession of specified articles of personal property, shall survive, and may be commenced and prosecuted against the executor or administrator; "but all other actions commenced against the deceased before his death shall be discontinued and the claims therein involved presented before the committee as herein provided." Section 708 provides that a claim secured by a mortgage or other collateral security may be abandoned and the claim prosecuted before the committee, or the mortgage may be foreclosed or the security be relied upon, and, in the event of a deficiency judgment, the creditor may, after the sale of the mortgage or upon the insufficiency of the security, prove such deficiency before the committee on claims. There are also certain provisions in section 746 et seq., with reference to the presentation of contingent claims to the committee after the expiration of the time allowed for the presentation of claims not contingent. Do plaintiff's claims fall within any of these sections? They are described in the will as debts. There is nothing in the will to indicate that any or all of them are contingent claims, claims for the possession of or title to real property, damages for injury to person or property, real or personal, or for the possession of specified articles of personal property. Nor is it asserted by the plaintiff that they do. The conclusion is that they were claims proper to be considered by the committee.

This being true, the next point to determine is, when and under what circumstances may the committee be recalled to consider belated claims? Section 689 provides:

"The court shall allow such time as the circumstances of the case require for the creditors to present their claims to the committee for examination and allowance; but not, in the first instance, more than twelve months, or less than six months; and the time allowed shall be stated in the commission. The court may extend the time as circumstances require, but not so that the whole time shall exceed eighteen months."

It cannot be questioned that this section supersedes the ordinary limitation of actions provided for in chapter 3 of the Code. It is strictly confined, in its application, to claims against the estates of deceased persons, and has been almost universally adopted as part, of the probate law of the United States. It is commonly termed the statute of nonclaims, and its purpose is to settle the affairs of the estate with dispatch, so that the residue may be delivered to the persons entitled thereto without their being afterwards called upon to respond in actions for claims, which, under the ordinary statute of limitations, have not yet prescribed.

"The object of the law in fixing a definite period within which claims must be presented is to insure the speedy settling of the affairs of a deceased person and the early delivery of the property of the estate into the hands of the persons entitled to receive it." (Estate of De Dios, 24 Phil.Rep., 573.)

Due possibly to the comparative shortness of the period of limitation applying to such claims as compared with

the ordinary statute of limitations, the statute of nonclaims has not the finality of the ordinary statute of limitations. It may be safely said that a saving provision, more or less liberal, is annexed to the statute of nonclaims in every jurisdiction where it is found. In this country its saving clause is found in section 690, which reads as follows:

"On application of a creditor who has failed to present his claim, if made within six months after the time previously limited, or, if a committee fails to give the notice required by this chapter, and such application is made before the final settlement of the estate, the court may, for cause shown, and on such terms as are equitable, renew the commission and allow further time, not exceeding one month, for the committee to examine such claim, in which case it shall personally notify the parties of the time and place of hearing, and as soon as may be make the return of their doings to the court."

If the committee fails to give the notice required, that is a sufficient cause for reconvening it for further consideration of claims which may not have been presented before its final report was submitted to the court. But, as stated above, this is not the case made by the plaintiff, as the committee did give the notice required by law. Where the proper notice has been given the right to have the committee recalled for the consideration of a belated claim appears to rest first upon the condition that it is presented within six months after the time previously limited for the presentation of claims. In the present case the time previously limited was six months from July 23, 1907. This allowed the plaintiff until January 23, 1908, to present his claims to the committee. An extension of this time under section 690 rested in the discretion of the court. (*Estate of De Dios*, supra.) In other words, the court could extend this time and recall the committee for a consideration of the plaintiff's claims against the estate if justice required it, at any time within the six months after January 23, 1908, or until July 23, 1908. Plaintiff's petition was not presented until July 14, 1909. The bar of the statute of nonclaims is as conclusive under these circumstances as the bar of the ordinary statute of limitations would be. It is generally held that claims are not barred as to property not included in the inventory. (*Waughop vs. Bartlett*, 165 111., 124; *Estate of Reyes*, 17 Phil. Rep., 188.) So also, as indicated by this court in the case last cited, fraud would undoubtedly have the same effect. These exceptions to the operation of the statute are, of course, founded upon the highest principles of equity. But what is the plea of the plaintiff in this case? Simply this: That he was laboring under a mistake of law—a mistake which could easily have been corrected had he sought to inform himself; a lack of information as to the law governing the allowance of claims against estates of deceased persons which, by proper diligence, could have been remedied in ample time to present the claims to the committee. Plaintiff finally discovered his mistake and now seeks to assert his rights when they have been lost through his own negligence. *Ignorantia legis neminem excusat*. We conclude that the learned trial court made no error in refusing to reconvene the committee for the purpose of considering plaintiff's claims against the estate.

In his second assignment of error the appellant insists that the court erred in dismissing his petition filed on November 21, 1910/ wherein he asks that the administratrix be compelled to pay over to him the amounts mentioned in the will as debts due him. We concede all that is implied in the maxim, *dicat testor et erit lex*. But the law imposes certain restrictions upon the testator, not only as to the disposition of his estate, but also as to the manner in which he may make such disposition. As stated in *Rood on Wills*, sec. 412: "Some general rules have been irrevocably established by the policy of the law, which cannot be exceeded or transgressed by any intention of the testator, be it ever so clearly expressed."

It may be safely asserted that no respectable authority can be found which holds that the will of the testator may override positive provisions of law and imperative requirements of public policy. (*Page on Wills*, sec; 461.)

"Impossible conditions and those contrary to law and good morals shall be considered as not imposed, * * *"
(Art. 792, Civil Code.)

Conceding for the moment that it was the testator's desire in the present case that the debts listed by him in his will should be paid without referring them to a committee appointed by the court, can such a provision be enforced? May the provisions of the Code of Civil Procedure relating to the settlement of claims against an estate by a committee appointed by the court be superseded by the contents of a will?

It is evident from the brief outline of the sections referred to above that the Code, of Civil Procedure has established a system for the allowance of claims against the estates of decedents. There are at least two restrictions imposed by law upon the power of the testator to dispose of his property, and which pro tanto restrict the maxim that "the will of the testator is law:" (1) His estate is liable for all legal obligations incurred by him; and (2) he can not dispose of or encumber the legal portion due his heirs by force of law.

The former take precedence over the latter. (Sec. 640, Code Civ. Proc.) In case his estate is sufficient they must be paid. (Sec. 734, id.) In case the estate is insolvent they must be paid in the order named in section 735. It is hardly necessary to say that a provision in an insolvent's will that a certain debt be paid would not entitle it to preference over other debts. But, if the express mention of a debt in the will requires the administrator to pay it without reference to the committee, what assurance is there, in the case of an insolvent estate, that it will not take precedence over preferred debts?

If it is unnecessary to present such a claim to the committee, the statute of nonclaims is not applicable. It is not barred until from four to ten years, according¹ to its classification in chapter 3 of the Code of Civil Procedure, establishing limitations upon actions. Under such circumstances, when may the legal portion be determined? If, in the meantime, the estate has been distributed, what security have the distributees against the interruption of their possession? Is the administrator required to pay the amount stipulated in the will regardless of its correctness? And, if not, what authority has he to waive the claim? Section 706 of the Code of Civil Procedure provides that an executor may, with the approval of the court, compound with a debtor of deceased for a debt due the estate. But he is nowhere permitted or directed to deal with a creditor of the estate. On the contrary, he is the advocate of the estate before an impartial committee with quasi-judicial power to determine the amount of the claims against the estate, and, in certain cases, to equitably adjust the amounts due. The administrator, representing the debtor estate, and the creditor appear before this body as parties litigant and, if either is dissatisfied with its decision, an appeal to the court is their remedy. To allow the administrator to examine and approve a claim against the estate would put him in the dual role of a claimant and judge. The law in this jurisdiction has been so framed that this may not occur. The most important restriction, in this jurisdiction, on the disposition of property by will are those provisions of the Civil Code providing for the preservation of the legal portions due to heirs by force of law, and expressly recognized and continued in force by sections 614, 684, and 753 of the Code of Civil Procedure. But if a debt expressly recognized in the will must be paid without its being verified, there is nothing to prevent a partial or total alienation of the legal portion by means of a bequest under the guise of a debt, since all of the latter must be paid before the amount of the legal portion can be determined.

We are aware that in some jurisdictions executors and administrators are, by law, obligated to perform the duties which, in this jurisdiction, are assigned to the committee on claims; that in some other jurisdictions it is the probate court itself that performs these duties; that in some jurisdictions the limitation upon the presentment of claims for allowance is longer and, possibly, in some shorter; and that there is a great divergence in the classification of actions which survive and actions which do not survive the death of the testator. It must be further remembered that there are but few of the United States which provide for heirs by force of law. These differences render useless as authorities in this jurisdiction many of the cases coming from the United States. The restriction imposed upon the testator's power to dispose of his property when there are heirs by force of law is especially important. The rights of these heirs by force of law pass immediately upon the death of the testator.

(Art. 657, Civil Code.) The state intervenes and guarantees their rights by many stringent provisions of law to the extent mentioned in article 818 of the Civil Code. Having undertaken the responsibility to deliver the legal portion of the net assets of the estate to the heirs by force of law, it is idle to talk of substituting for the procedure provided by law for determining the legal portion, some other procedure provided in the will of the testator. The state cannot afford to allow the performance of its obligations to be directed by the will of an individual. There is but one instance in which the settlement of the estate according to the probate procedure provided in the Code of Civil Procedure, may be dispensed with, and it applies only to intestate estates. (Sec. 596, Code Civ. Proc.) A partial exemption from the lawful procedure is also contained in section 644, when the executor or administrator is the sole residuary legatee. Even in such case, and although the testator directs that no bond be given, the executor is required to give a bond for the payment of the debts of the testator. The facts of the present case do not bring it within either of these sections. We conclude that the claims against the estate in the case at bar were enforceable only when the prescribed legal procedure was followed.

But we are not disposed to rest our conclusion upon this phase of the case entirely upon legal grounds. On the contrary we are strongly of the opinion that the application of the maxim, "The will of the testator is the law of the case," but strengthens our position so far as the present case is concerned.

"It will ordinarily be presumed in construing a will that the testator is acquainted with the rules of law, and that he intended to comply with them accordingly. If two constructions of a will or a part thereof are possible, and one of these constructions is consistent with the law, and the other is inconsistent, the presumption that the testator intended to comply with the law will compel that construction which is consistent with the law to be adopted." (Page on Wills, sec. 465.)

Aside from this legal presumption, which we believe should apply in the present case as against any construction of the will tending to show an intention of the testator that the ordinary legal method of probating claims should be dispensed with, it must be remembered that the testator knows that the execution of his will in no way affects his control over his property. The dates of his will and of his death may be separated by a period of time more or less appreciable. In the meantime, as the testator well knows, he may acquire or dispose of property, pay or assume additional debts, etc. In the absence of anything to the contrary, it is only proper to presume that the testator, in his will, is treating of his estate at the time and in the condition it is in at his death. Especially is this true of his debts. Debts may accrue and be paid in whole or in part between the time the will is made and the death of the testator. To allow a debt mentioned in the will in the amount expressed therein on the ground that such was the desire of the testator, when, in fact, the debt had been wholly or partly paid, would be not only unjust to the residuary heirs, but a reflection upon the good sense of the testator himself. Take the present case for example. It would be absurd to say that the testator knew what the amount of his just debts would be at a future and uncertain date. A mere comparison of the list of creditors of the testator and the amounts due them as described in his will, with the same list and the amounts allowed by the committee on claims, shows that the testator had creditors at the time of his death not mentioned in the will at all. In other instances the amounts due these creditors were either greater or less than the amounts mentioned as due them in the will. In fact, of those debts listed in the will, not a single one was allowed by the committee in the amount named in the will. This shows that the testator either failed to list in his will all his creditors and that, as to those he did include, he set down an erroneous amount opposite their names; or else, which is the only reasonable view of the matter, he overlooked some debts or contracted new ones after the will was made and that as to others he did include he made partial payments on some and incurred additional indebtedness as to others.

While the testator expresses the desire that his debts be paid, he also expressly leaves the residue of his estate, in equal parts, to his children. Is it to be presumed that he desired to overpay some of his creditors notwithstanding his express instructions that his own children should enjoy the net assets of his estate after the debts were paid?

Again, is the net statement of the amount due some of his creditors and the omission altogether of some of his other creditors compatible with his honorable and commendable desire, so clearly expressed in his will, that all his debts be punctually paid? We cannot conceive that such conflicting ideas were present in the testator's mind when he made his will.

Again, suppose the testator erroneously charged himself with a debt which he was under no legal or even moral obligation to pay. The present case suggests, if it does not actually present, such a state of affairs. Among the assets of the estate mentioned in the will is a parcel of land valued at P6,500; while in the inventory of the administratrix the right to repurchase this land from one Isidoro Santos is listed as an asset. Counsel for the administratrix alleges that he is prepared to prove that this is the identical plaintiff in the case at bar; that the testator erroneously claimed the fee of this land in his last will and stated Santos' rights in the same as a mere debt due him of P5,000; that, in reality, the only asset of the testator in regard to this land was the value of the right to repurchase, while the ownership of the land, subject only to that right of redemption, belonged to Santos; that the right to repurchase this land expired in 1907, after the testator's death. Assuming, without in the least asserting, that such are the underlying facts of this case, the unjust consequences of holding that a debt expressly mentioned in the will may be recovered without being presented to the committee on claims, is at once apparent. In this supposed case, plaintiff needed only wait until the time for redemption of the land had expired, when he would have acquired an absolute title to the land, and could also have exacted the redemption price. Upon such a state of facts, the one item of P5,000 would be a mere fictitious debt, and as the total net value of the estate was less than P15,000, the legal portion of the testator's children would be consumed in part in the payment of this item. Such a case cannot occur if the prescribed procedure is followed of requiring that such claims be visaed by the committee on claims.

"The direction in the will for the executor to pay all just debts does not mean that he shall pay them without probate. There is nothing in the will to indicate that the testator intended that his estate should be administered in any other than the regular way under the statute, which requires 'all demands against the estates of deceased persons,' 'all such demands as may be exhibited,' etc. The statute provides the very means for ascertaining whether the claims against the estate are just debts." (Kaufman vs. Redwine, 97 Ark., 546.)

See also Collamore vs. Wilder (19 Kan., 67); O'Neil vs. Freeman (45 N. J. L., 208).

The petition of the plaintiff filed on November 21, 1910, wherein he asks that the administratrix be compelled to pay over to him the amounts mentioned in the will as debts due him appears to be nothing more nor less than a complaint instituting an action against the administratrix for the recovery of the sum of money. Obviously, the plaintiff is not seeking possession of or title to real property or specific articles of personal property.

"When a committee is appointed as herein provided, no action or suit shall be commenced or prosecuted against the executor or administrator upon a claim against the estate to recover a debt due from the estate; but actions to recover the seizing and possession of real estate and personal chattels claimed by the estate may be commenced against him." (Sec. 699, Code Civ. Proc.)

The sum of money prayed for in the complaint must be due the plaintiff either as a debt or a legacy. If it is a debt, the action was erroneously instituted against the administratrix. Is it a legacy?

Plaintiff's argument at this point becomes obviously inconsistent. Under his first assignment of error he alleges that the committee on claims should have been reconvened to pass upon his claim against the estate. It is clear that this committee has nothing to do with legacies. It is true that a debt may be left as a legacy, either to the debtor (in which case it virtually amounts to a release), or to a third person. But this case can only arise when the debt is an asset of the estate. It would be absurd to speak of a testator's leaving a bare legacy of his own debt. (Arts. 866, 878, Civil Code.)

The creation of a legacy depends upon the will of the testator, is an act of pure beneficence, has no binding force until his death, and may be avoided in whole or in part by the mere whim of the testator, prior to that time. A debt arises from an obligation recognized by law (art. 1089, Civil Code) and once established, can only be extinguished in a lawful manner. (Art. 1156, id.) Debts are demandable and must be paid in legal tender. Legacies may, and often do, consist of specific articles of personal property and must be satisfied accordingly. In order to collect as a legacy the sum mentioned in the will as due him, the plaintiff must show that it is in fact a legacy and not a debt. As he has already attempted to show that this sum represents a debt, it is an anomaly to urge now it is a legacy.

Was it the intention of the testator to leave the plaintiff a legacy of P7,454? We have already touched upon this question. Plaintiff's claim is described by the testator as a debt. It must be presumed that he used this expression in its ordinary and common acceptance; that is, a legal liability existing in favor of the plaintiff at the time the will was made, and demandable and payable in legal tender. Had the testator desired to leave a legacy to the plaintiff, he would have done so in appropriate language instead of including it in a statement of what he owed the plaintiff, the decedent's purpose in listing his debts in his will is set forth in the fourth clause of the will, quoted above. There is nothing contained in that clause which indicates, even remotely, a desire to pay his creditors more than was legally due them.

"A construction leading to a legal, just and sensible result is presumed to be correct, as against one leading to an illegal, unnatural, or absurd effect." (Rood on Wills, sec. 426.)

The testator, in so many words, left the total net assets of his estate, without reservation of any kind, to his children per capita. There is no indication that he desired to leave anything by way of legacy to any other person. These considerations clearly refute the suggestion that the testator intended to leave plaintiff anything by way of a legacy. His claim against the estate having been a simple debt, the present action was improperly instituted against the administratrix. (Sec. 699, Code Civ. Proc.)

But it is said that the plaintiff's claims should be considered as partaking of the nature of a legacy and disposed of accordingly. If this be correct then the plaintiff would receive nothing until after all the debts had been paid and the heirs by force of law had received their shares. From any point of view the inevitable result is that there must be a hearing sometime before some tribunal to determine the correctness of the debts recognized in the wills of deceased persons. This hearing, in the first instance, can not be had before the court because the law does not authorize it. Such debtors must present their claims to the committee, otherwise their claims will be forever barred.

For the foregoing reasons the orders appealed from are affirmed, with costs against the appellant.

Torres, Carson, and Araullo, JJ., concur.

DISSENTING

MORELAND, J.

The decision of the court in this case produces, in my humble opinion, a serious miscarriage of justice. It causes the appellant to lose more than P7,000, a debt against the respondent estate, which debt, but a few months before his death, was specifically recognized by the testator in his will as a debt due and owing to petitioner and which he, in said will, ordered and directed his executor to pay "religiously."

If I could find justification for such a decision either in the proceedings as they are unfolded by the record or in

the law as laid down in the Code of Civil Procedure, I would, of course, acquiesce. Far from finding such justification, I am met, so far as my judgment can discern, with facts of record which demonstrate conclusively that the decision is erroneous in fact.

The opinion seeks to demonstrate that a creditor, whose claim is recognized by the highest possible authority, the debtor himself, in the most solemn instrument known to the law, his last will and testament, as legal, just and valid, must lose that claim because the validity thereof has not been established by a committee. And this in spite of the fact that, upon the record of the case, no one interested in the estate disputes the claim or challenges its validity. Take this proposition in connection with the fact that the committee to hear claims has not been discharged, that the estate has not been finally closed but is still pending settlement, and that, therefore, there exists not a single reason, in equity or justice, why the claimant should not be permitted to present his claim, if that is necessary, and we have before us a situation which indicates how far the decision has gone.

It should be carefully observed that the petitioner Isidoro Santos, was defeated in this litigation upon the ground, and the sole ground, that he did not present his claim to the committee, in pursuance of a notice to creditors published under an order dated July 23, 1907, and that he, therefore, lost the right to enforce the claim; that the notice having been published from July 25, 1907, to August 16, 1907, petitioner's application on July 14, 1909, for the extension of time for the presentation of claims to the old committee or the appointment of a new committee for that purpose, was too late and was properly denied, and that his motion made November 21, 1909, praying that the executor be compelled to carry out the wishes of the testator and pay the claim, was also properly denied.

In my judgment the decision is erroneous from whatever point viewed:

1. Even if it be assumed that the notice to creditor should have been published in accordance with the order of July 23, 1907, the record is entirely lacking in legal evidence to establish the publication which the law requires under that order. That being so the claim is not barred.
2. I contend, and the record shows, that the notice should not have been published in accordance with the order of July 23, 1907, but in pursuance of the order of January 8, 1908, which was an order for a new publication, and, being a later order, necessarily vacated and annulled the order of July 23, 1907, and all proceedings thereunder relative to the matters included in said order of January 8, 1908; that publication was concededly never made under and in pursuance of that order and that, for that reason, the petitioner's claim is not barred.
3. The claim was not one that must be submitted to a committee, being recognized as a legal and valid debt by the will and the testator having ordered his executor to pay it. The motion made to require the executor to pay the claim should have been heard by the court.

The facts of this case, as shown by the record, are:

Don Lucas de Ocampo made a will July 26, 1906. He died November 18, 1906. The will specifically named Isidoro Santos, the petitioner, a creditor of the testator, set out the specific amount due him, named an executor, and directed him to pay the claim "religiously."

The will was probated July 15, 1907, and Leandra Manarang, the widow, appointed temporary administratrix. Her administration was terminated on July 23, 1907, and Cosme Naval, the person named in the will as executor, was, on that date, duly appointed executor. On the same day Pedro Abad Santos and Marcos Tancuaco were named the committee of appraisal and to hear claims presented against the estate, the court making the following order:

"There having been heard the petition presented by Senor Cosme Naval, praying that he be appointed executor of the above named estate as provided in the will of the deceased Lucas de Ocampo; and also praying the appointment of a committee of appraisal consisting of Senores Pedro Abad Santos and Marcos Tancuaco:

"It is ordered that the said Cosme Naval may be and he hereby is appointed executor of the will of Lucas de Ocampo, deceased, the clerk being authorized to issue in favor of said Cosme Naval letters testamentary, the petitioner being first required to take the oath prescribed by law and to file a bond in the sum of P500 Philippine currency, with two sureties satisfactory to the court.

"It is also ordered that the special letters of administration issued temporarily in favor of the widow of the deceased, Leandra Manarang, remain without effect from this day.

"It is further ordered that Señores Pedro Abad Santos and Marcos Tancuaco be and they hereby are appointed the committee of appraisal and claims of this estate."

On the 28th of September, 1907, Naval was removed from office and Leandra Manarang named in his place. On December 3, same year, Pedro Abad Santos resigned from the committee to become the attorney for the estate and Donato Iturralde was appointed in his stead.

Following these changes both in the office of executor and in that of the committee, on January 8, 1908, the court made an order which, in itself, is, in my judgment, a complete refutation of the decision in this case and demonstrates that a contrary judgment should have been rendered.

That order, dated, as I have said, on January 8, 1908, and promulgated on that day, reads as follows:

"Whereas, the Hon. Julio Llorente, in decree dated December 3, 1907, appointed Señor Donato Iturralde, a resident of this city, to the office of committee of appraisal in the above-entitled proceeding:

"Therefore, and in compliance with the above-mentioned decree, Senor Donato Iturralde, a resident of this city, is appointed a member of the committee of appraisal and to hear the claims that may be presented against the property of this estate, which committee within thirty days from the date of said decree shall deliver a copy of the inventory to this court and another to the administratrix Senora Leandra Manarang, and within sixty days shall post \$ notice at the main door of this courthouse and in three public places in the municipality where the property of the said deceased is located, in which shall be stated the dates and places when and where the meetings of the committee will be held and notifying the creditors that they should present their claims within six months counting from the date of said notice; said notice, furthermore, to be published during three consecutive weeks in the newspaper 'El Imparcial,' having general circulation in this province.

"Given today, the 8th of January, 1908, by order of the Hon. Julio Llorente, Judge of the Fourth Judicial District and of this Province of Pampanga."

On July 14, 1908, the committee filed a report, the only report in the record, in which appears the following statement :

"The undersigned, committee of appraisal and claims against the above estate, presents to the court the following list of all the claims presented against the said estate since the 25th of July, 1907, on which date the first publication to creditors was made."

The publication under which the committee was reporting was begun under the order of July 23, 1907, which was vacated and annulled by the order of January 8, 1908, which, by reason of the changes in the offices of executor and committee, ordered a new and different notice to creditors.

On July 14, 1909, petitioner herein made an application to the court to reopen the sessions of the committee and permit him to present the claim mentioned in the will. This was denied November 27, 1909, the court simply saying:

"This cause having been heard and the parties having presented their arguments, the motion is denied by reason of the lapse of time."

On November 21, 1910, the petitioner moved the court that, the testator having recognized and legalized the debt in his will and having ordered his executor to pay the same to the petitioner, said executor be ordered and directed to pay said claim to the petitioner pursuant to the testator's directions. This motion was denied April 26, 1911, upon the same ground as the other motion.

The appeal is from both of these orders and brings up so much of the record as is pertinent to these questions.

The court has held on this appeal:

1. That the motion last mentioned is an action. The opinion says: "The petition of the plaintiff filed on November 21, 1910, * * * appears to be nothing more or less than a complaint instituting an action against the administratrix for the recovery of the sum of money." After discussing this phase of the case the court concludes: "His claim against the estate having been a simple debt, the present action was improperly instituted against the administratrix (sec. 699, Code Civ. Proc.)." This is one of the grounds of the decision.
2. That the recognition of the debt in the will and the direction of the testator to pay the same have no significance in law.
3. That, notwithstanding this recognition and direction, the claim should have been presented to the committee appointed to hear and determine claims against the estate.
4. That the claim was not presented to the committee.
5. That all of the formalities required by law relative to the notice to the creditors to present their claims were fully observed, the court saying that "the record affirmatively shows that the committee did make the publications required by law."
6. That the court below did not err in denying the motion to extend the time of the old committee or appoint a new one to the end that the claim in question might be presented.
7. That the court did not err in denying the motion to compel the executor to pay the claim in pursuance of the direction contained in the will.

Laying aside for a moment those holdings of the court which declare that the claim is one which must be presented to and passed upon by a committee, I am compelled to differ from every other proposition and statement of fact appearing in the decision pertinent to the issue involved, except the single one that the claim was not presented to a committee. That it was not presented is conceded; indeed, the fact that it was not is the whole cause of this proceeding.

I am compelled to believe that the statement of the decision that "the record affirmatively shows that the committee did make the publications required by law," is not quite in accordance with the record as I read it.

The opinion does not refer me to any evidence of record which supports its statement. Where is this evidence, where is this record which "affirmatively shows?" I have been unable to find it. Here is all of the evidence, if it may be called evidence, which I am able to find in the record relative to the publication of the notices to creditors:

(a) An affidavit of the publisher of "El Imparcial" setting out that the notice to creditors attached to the affidavit and signed by Pedro Abad Santos (who, before the completion of the publication, resigned) and Marcos Tancuaco, dated July 23, 1907, was published "three weeks from the 25th of July to the 16th of August, 1907."

The notice referred to is as follows:

"The undersigned committee of appraisal hereby notifies the creditors of Lucas de Ocampo, deceased, and all

other persons who have claims against the estate of said deceased, to present the same with vouchers within six months from the date of this notice to the committee, every Monday, between 4 and 5 o'clock p. m., at the dwelling house of Pedro A. Santos, Sagasta Street, San Fernando, Pampanga. Dated San Fernando, Pampanga, P. I., July 23, 1907. Signed: Pedro Abad Santos, committee. Marcos Tancuaco, committee."

The defectiveness of the affidavit is apparent. It does not show whether the newspaper was daily, weekly, bi-weekly or monthly, or the day of the week or month on which published. It does not show that the notice was published three weeks successively, that is, once each week for three successive weeks, as required by law and the order of the court. So ambiguous is it that it might mean that the notice was published once, namely, three weeks from July 25. Passing, however, these defects, I note that the notice to creditors requires them to present their claims at the dwelling house of Pedro Abad Santos. It should be noted, as before stated, that this commissioner resigned before the expiration of the six months, thus making it necessary for creditors to present their claims and their proofs thereof to one who was not a member of the committee and to a man who, immediately on his resignation, became the attorney of the estate. This will become important when we later discuss the significance of the fact that the court, as already seen, on January 8, 1908, made a new order requiring that a new notice be given to creditors, to be published thereafter, thereby revoking the order of July 23, 1907, and annulling the notice to creditors above set out and then in course of publication.

(b) The remaining item of evidence which it is claimed tends to show that the notice to creditors was duly published is the reference made by the commissioners in their report to the court, above quoted, in which they say, referring to July 25, 1907, "on which date the first publication to creditors was made."

This reference cannot be called evidence of publication, although the court accepts it as such. At most it refers and is limited, in terms, to the first publication. It has not the slightest reference to the other publications, if any.

This, (a) and (b), is all the evidence in the whole record relative to the publication of the notice to creditors. Admitting it all to be true and giving it all the weight possible, does it establish "affirmatively that the committee did make the publications required by law?" I am of the opinion not. The law requires, in addition to the publication in the newspapers, that "the committee * * * shall post a notice in four public places in the province stating the times and places of their meetings, and the time limited for creditors to present their claims * * *" and give such other notice as the court directs.

Where is there in the record evidence showing that this was done? Nowhere. As I read the record, there is not a syllable of such evidence in all the case.

I, therefore, am forced to the conclusion that the declaration of the court that "the record affirmatively shows that the committee did make the publications required by law" is without sufficient evidence to support it.

After a thorough reading of the record, I am reluctantly forced to a further conclusion, namely, that instead of there being evidence in the case showing the publication required by law, there is evidence showing the precise contrary.

Let us remember that the first order of the court directing the committee to publish notice to creditors was issued July 23, 1907. It is conceded that publication in a newspaper of some sort was started under that order. But, the court, evidently becoming satisfied that, under all the circumstances, the publication under that order would not be sufficient to give creditors fair notice, on January 8, 1908, and before the publication under the first order, if there was ever started in reality a publication under that order, was completed, made a second order of publication. The reason for this order was evidently that, during the six months succeeding the date of the notice which it is claimed was published under the first order, three persons held the office of executor, the complexion of the committee itself was changed, and the member of the committee at whose house the notice required the claims

and vouchers to be presented resigned from the committee and became the attorney for the estate. Pedro Abad Santos having ceased to be a member of the committee and having become attorney for the estate, and the notice to the creditors requiring that claims With their vouchers be presented at his house, there was no longer a proper place designated where creditors could present their claims. Furthermore, the continual change in the executorship already noted may have resulted in grave prejudice to the estate if the estate were to be held responsible for all claims presented during the time those changes were taking place, it being the duty of the executor, under the law, to be present at the hearing on claims and defend the estate against those which he deemed unjust, and the frequent change in the office, thereby bringing in persons unfamiliar with what had gone before, certainly not tending to efficiency.

All these facts, taken in connection with the defectiveness of the affidavit of the publication of the notice, and the fact that there was no posting of the notices as required by law, that the notice itself was defective in that it required the claims to be presented within six months from the date of the notice instead of the date of the last publication thereof, as the law, properly interpreted, requires, all these facts, I say, undoubtedly led the court to believe that the previous proceedings relative to claims should be annulled and that a new order of publication should be made. Accordingly, on January 8, 1908, as aforesaid, an order was made and entered as above set forth, requiring a new publication by a new committee. This order had the effect, of course, of vacating and annulling the previous order covering the same subject matter.

It is undisputed that no publication has ever been made or even attempted under this order of January 8, 1908. The only publication referred to in the record or in the opinion in this case is that under the order of July 23, 1907. No one contends that any other publication has ever been made or attempted.

That this order of January 8, 1908, was considered the governing order in the case and that it was an annulment of all prior proceedings and orders relative to the same subject matter, is clear. If notice had been given as provided by that order, the six months' term, according to the order, would have expired some time in July, 1908. This, of course, was clearly understood by the court, and we find the court, ever anxious to have the estate settled as quickly as possible under the law, making the following order on the the 2d day of April, 1908:

"It is hereby ordered that the administratrix present her inventory before the 1st day of May and the committee its report within the time provided by law, and that the administratrix present her account before the 1st day of August, 1908."

This order demonstrates conclusively that the court believed that the committee was giving the notice to creditors as provided by the order of January 8, 1908, and not that of July 23, 1907; for, if the notice was to be given under the latter and the publication began July 25, 1907, then the time within which the committee was to report expired in January, 1908 (see opinion), long before the order of April 2, 1908, was issued (Code Civ. Proc, sec. 693) and the requirement therein that the committee report "within the time provided by law" was idle. The court evidently believed that notice was being published under the order of January 8, 1908, that the six months' period would expire in July, that the committee could therefore report to the administratrix the number and amounts of the claims presented and allowed, and that she could, therefore, render her account before the 1st day of August, as in the order of April 2 required. This order is strictly inconsistent from every point of view with the idea that the order of July 23, 1907, was in force and that publication of the notice to creditors was proceeding thereunder.

I, therefore, say that the record demonstrates not only that the declaration of the court that "the record affirmatively shows that the committee did make the publications required by law" is without sufficient foundation in fact, but also that the contrary is true, namely, that no publication was ever made under the only order under which it could be legally made.

I contend, furthermore, that this proceeding is not an action against an executor to recover a debt against the estate of his testator. The decision of the court that it is an action and not being one of those which, under the Code, can be brought against an executor and must be dismissed for that reason is, in my judgment, erroneous. I do not understand how a motion to compel an executor to comply with the directions in a will can be called an action to recover a debt in the sense that such motion is prohibited by law.

Dealing with the second branch of the case, wherein the court holds that the debt should have been presented to a committee;

The proposition that a debt which is recognized by the highest possible authority, the debtor himself, in the most solemn instrument known to the law and the one whose provisions are the most sacredly carried out by the courts, his last will and testament, which debt the testator, in his will, expressly ordered his executor to pay to the creditor by name, must be presented to the committee for them to determine whether it is a valid claim and whether it ought to be paid, is a proposition which appeals neither to my reason nor my sense of justice. There is no statute expressly requiring such presentation. There is none which by necessary implication requires it. To bring such a debt within the law requiring presentation to the committee, interpretation and construction must be invoked to such an extent as to shock if not violate the ordinary canons applicable thereto. This is particularly true when such interpretation and construction are resorted to to deprive a creditor of a claim, the validity and justice of which is not only undisputed but unquestioned.

There is no provision of the Code of Civil Procedure expressly requiring the presentation of any claim to a committee. Provision is made for the appointment of a committee which is authorized to hear certain classes of claims but nowhere is there an express provision requiring a creditor to present his claim. There is, to be sure, a section which provides (sec. 695) that if a creditor fails to present his claim, if it is a certain kind of claim, within the time provided in the law, it will be barred. It is, therefore, gathered by implication that every creditor having a certain kind of claim must present it; but there is no provision expressly requiring it. Moreover, it must be carefully noted that only certain claims need to be presented to the committee and that only certain claims are barred provided they are not exhibited. Section 686 confers upon the committee whatever jurisdiction it may have with respect to the hearing of claims, apart from those upon which actions were begun against decedent in his lifetime. It provides that "they may try and decide upon claims, which by law survive against executors or administrators, except claims for the possession of or title to real estate;" and under section 695 only those claims are barred which are "proper to be allowed by the committee."

We see then that the committee is authorized to take jurisdiction over those claims only which survive against an executor or administrator. The code does not define or declare "what claims survive against executors or administrators." It refers to certain actions which, having been commenced by the deceased in his lifetime, may be continued after his death by his executor or administrator. It nowhere tells us "what claims survive against executors or administrators," or what claims are "proper to be allowed by the committee." We are unable to say, therefore, from the context of the Code itself what the authors thereof meant by the use of the phrases "claims which survive against executors or administrators" and which are "proper to be allowed by the committee." All that is clear is that it was the intention of the law to restrict the jurisdiction of the committee and keep it within certain limitations, and to that end used these limitative expressions. It should be noted, however, that these limitations refer to claims and have no reference to actions begun against the deceased before his death. The distinction made in the Code between claims and actions begun against the decedent during his lifetime, and the respective provisions referring to those two subjects, is entirely lost sight of in the decision of the court. This being so, the following reasoning found in the decision, based upon the failure to distinguish between claims and actions begun against deceased in his lifetime, involves a conclusion in no sense related to the premises from

which it is deduced:

"Do plaintiff's Claims fall within any of these sections? They are described in the will as debts. There is nothing in the will to indicate that any or all of them are contingent claims, claims for the possession of or title to real property damages for injury to person or property, real or personal, or for the possession of specified articles of personal property. Nor is it asserted by the plaintiff that they do. The conclusion is that they were claims proper to be considered by the committee."

That there is no necessary relation between these two subjects is apparent. That an action for "money, debt, or damages" begun against the decedent in his lifetime must, under section 700, be discontinued upon his death "and the claim embraced in such action may be presented to the committee, who shall allow the party prevailing the costs of such action to the time of its discontinuance," does not necessarily mean that such claim, if no action had been begun upon it, is one which must be exhibited to the committee. Whether an action begun against the decedent in his lifetime survives or does not survive, has no necessary relation with the necessity of presenting a claim to the committee. Would it be logical to argue that because an action begun against the deceased did not survive, the claim upon which it is based cannot, therefore, be presented to the committee, or that because an action begun against the deceased in his lifetime did survive, that, therefore, the claim upon which it was based could and must be presented to the committee? Assuredly not.

No general requirement that all claims must be presented to the committee appearing in the Code, and it affirmatively appearing that there was an intention to restrict the power of the committee in the hearing of claims, it necessarily follows that the conclusion reached by the court that all claims must be exhibited to the committee is a pure inference and one not at all warranted by the provisions of the Code or by the rules of interpretation and construction. To me it is a conclusion absolutely necessary from the language of sections 686 and 695 that not all claims need to be exhibited. By express language these sections restrict the committee to the hearing of such claims as survive against executors and administrators and only those are barred which are proper to be presented to the committee.

The answer to the question, does the claim at bar survive against executors or administrators, brings us to an exposition of the various fundamental errors made by the court in holding that the debt in question is one which must be presented to the committee. One of them is involved in the declaration that the debt in question is a claim within the meaning of the law. In cases such as this it is proper and necessary to make a distinction between a claim and a debt. A debt is a claim which has been favorably passed upon by the highest authority to which it can in law be submitted and has been declared to be a debt. A claim, on the other hand, is a debt in embryo. It is mere evidence of a debt and must pass through the process prescribed by law before it develops into what is properly called a debt. The debt in the case at bar never was a claim. By the act of the testator himself, it was raised to the dignity of a debt and it remains such and must be acted upon as such by the courts as well as by all others. It was by the testator selected from the mass of his obligations, which are correctly called claims, and treated to a process which developed it into a thing called a "debt" over which no committee has jurisdiction and with the due course of which it has no authority to interfere.

The second fundamental error, following naturally from the first, is found in the declaration of the court that the debt in question is a claim which survives against the executor or administrator and must, therefore, be exhibited to the committee. This error involves, in my humble opinion, a misunderstanding of the nature of a will and of the obligation which a direction in a will imposes upon all persons executing it. A will is the testator speaking after death. Its provisions have substantially the same force and effect in the probate court as if the testator stood before the court in full life making the declarations by word of mouth as they appear in the will. That was the special purpose of the law in the creation of the instrument known as the last will and testament. Men wished to speak

after they were dead and the law, by the creation of that instrument, permitted them to do so. It is upon this theory and around this purpose that there has grown that body of the law which uniformly and universally declares that the words of the testator spoken in his will shall be sacredly attended by his executor and enforced by the court. It has been declared a fundamental maxim, the first greatest rule, the sovereign guide, the pole-star, in giving effect to a will, that the intention of the testator as expressed in the will shall be fully and punctually observed. If by the use of clear and unambiguous language he has made his meaning clear and certain, his will explains itself, and all that the court can do is to give it effect. All doubts must be resolved in favor of the testator's having meant just what he said. His purpose may seem unjust, unnatural or absurd to us; yet, to refuse to execute it is to destroy it. As Chief Justice Marshall said; "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail." (3 Peters, 346.)

The intention of the testator is said in a recent Virginia case to be "the life and soul of a will" and if this intention is clear it must govern with absolute sway. A will is not like a promissory note or a judgment or any other instrument which acknowledges or incorporates an obligation. Those instruments are mere evidences of the debt. A will is not, primarily, evidence of anything; it is the thing itself. It is not so much the evidence of what the testator did or intended to do; it is the testator himself. The court has failed in this case to distinguish between a will and a promissory note, or a mortgage, so far as their legal effects are concerned, and the statement which I made early in this opinion, that the court has given no legal significance whatever to the fact that the instrument in which this debt was acknowledged and in which it was ordered paid was a last will and testament, is literally true. It has given the testamentary directions of the testator no more force, effect or significance than it gives to the words of a promissory note or a mortgage.

The third fundamental error into which the decision has fallen is that it misconceives the duties of an executor and of a court relative to the provisions of a will. It is, of course, axiomatic that it is the duty of the executor, under the direction of the court, to carry out punctually and with the utmost care every provision of the will. That is why he is named "executor." He is an "executor" of a will because he "executes" the will. When he refuses or neglects to perform that function he ceases to be an executor and becomes a perverter or a destroyer. Section 640 provides that the estate of a decedent shall be disposed of according to his will and the bond to be given by an executor, prescribed in section 643, must contain a clause in which the executor agrees, and his bondsmen assure, that he will administer "according to the will of the testator" the estate which comes into his hands.

Under the provisions of this will it is as much the duty of the executor to pay the debt here in litigation as it is to pay a legacy bequeathed by that will or to carry out a devise found therein. Of course, as we shall see later, if it appear to the executor that the debt in suit was paid, in whole or in part, by the testator after he made his will, then, of course, he should refuse to pay the debt, in whole or in part, as the case may be. In such case his refusal to pay will not be a refusal to carry out the will, but will be grounded in the fact that the testator himself executed it prior to his demise. The proposition remains that the will must be executed; and the only excuse the executor can give for a refusal to execute it is that it has already been executed.

It is nowhere claimed in this case, and it cannot be, for no proceeding has reached far enough to involve the fact, that this debt has been paid, and nowhere in the record has its validity or binding force upon the estate been challenged or even disputed. That being the case, upon the facts, as they stand before us, there is no excuse which the executor or the court can now offer why the debt in suit has not been paid.

The fourth fundamental error into which the court has fallen in its decision is that it submits to the jurisdiction of a committee to hear claims the question of whether or not the provisions of a will are to be executed. This, although, it seems to me, is strange upon its face, is precisely what the court has, in effect, done in its decision;

for, if a debt expressly acknowledged in the will and specifically ordered paid therein, must be submitted to a committee, it means that they may, in the exercise of their judgment, refuse its payment. This, in its turn, means that the provision of the will in relation thereto is annulled. By this process the Committee may, therefore, annul an express and mandatory provision of a will which is as binding as a provision giving a legacy or making a devise. It is to the probate court, and to it alone, that the law confides the power to annul and set aside provisions in wills. The executor himself may not do so. And the court itself may do so only after the very clearest demonstration that the provision violates a positive provision of law or is against the public policy of the state. In spite of this, it is the decision of this court that a committee of two or more persons, none of whom is a lawyer, none of whom may be even a business man, all of whom may be ignorant and inexperienced, may sit in an informal way, and with all the imperfections inherent in such a tribunal and the practice which governs its deliberations, may revoke a mandatory provision in the most solemn instrument known to the law. The bare statement of such a proposition is, it seems to me, its clearest refutation.

The fifth fundamental error into which the court has fallen follows naturally. As we have said, the decision gives no significance to the fact that the debt at bar appears acknowledged and legalized, in a last will and testament and that the testator therein solemnly ordered and directed his executor to pay it. Instead, the decision remands the creditor to the committee in exactly the same condition as any other creditor. He goes there with the burden of proof on him, with the necessity of establishing affirmatively and by a fair preponderance of the evidence the existence of the claim, the consideration therefor, and the fact that it has not been paid. There are laid upon him the restrictions and limitations imposed by section 383 of the Code of Civil Procedure, which stop his mouth as a witness under certain conditions. He is there with every burden, with every restriction upon him under which another creditor labors who has not a scrap of written evidence to support his claim. It is no adequate reply to say that he can put the will in evidence. He could do that with any other evidence that he might have. Moreover, that reply is a full admission of all that I have maintained, that the will is given no significance or value, as such, but is reduced to the mere function of being 'evidence to be passed upon by the committee. Furthermore, it is incumbent upon him to prove that the claim has not been paid and this is the very point which may be the thing most difficult to establish; and it is in relation to this that the restrictions and limitations imposed by the section referred to produce their greatest effect. This certainly cannot be law. It cannot be that a creditor whose debt is recognized as is the one at bar occupies a position no different from that of a creditor whose debt is not so recognized. To contend the contrary, it seems to me, flies in the face not only of law and justice, but of common sense as well.

The fact that a debt is mentioned in the will as one not satisfied has, at least, the effect of changing the burden of proof from the creditor to the the estate. Instead of the creditor being required to establish the validity of the claim and the fact of nonpayment; it is incumbent upon the estate to show payment affirmatively. At the very least, recognition by the testator in his will should be given that much significance. The court does not even concede this. The provision before us, while not a provision for a legacy, has nevertheless the same force and effect; and as a legatee is not bound to show affirmatively his right to the legacy and as it is the duty of the executor to seek out the legatee and pay him the legacy, so it is not the duty of the creditor in this case to show affirmatively his right to the payment of the debt, but it is the duty of the executor, knowing nothing to the contrary, to seek out the creditor and pay him as the testator has ordered him to do. If he knows anything to the contrary the burden is on him to demonstrate it.

These considerations naturally lead us to the point so strongly urged in the decision, and which I regard, for the purpose urged, without force, that the debt may have been paid between the time of the making of the will and the death of the testator; and that, therefore, it ought not to be paid by the executor until the question of payment is properly determined. No one is disputing that proposition. But its admission does not at all mean that, to determine whether the Claim has been paid or not, it must be presented to the committee. If it is the duty of the

court, through the executor, to see that the will is conscientiously executed, what more natural, if not absolutely necessary, than to submit to the court whether the provision recognizing a debt and ordering its payment should be carried out. What argument can be adduced, which does not fly squarely in the face of reason, to establish the proposition that a court has no business to determine whether a particular provision of a will shall be carried out or not, when its supreme duty is to require the punctual and precise execution of the whole will? How can it be maintained that, whether or not a particular provision in a will shall be carried out must be submitted not to the court, which has exclusive jurisdiction of the whole will, but to a committee of two or more ignorant and inexperienced persons? If it is the duty of the court to see that the will is executed as a whole, then there must go with that duty the power to determine whether a particular provision ordering the payment of a specific debt shall be executed or not. But the determination of this question is the determination of the question of payment. Why take from the court, which is the sole body that has the power to determine whether provisions in wills shall be carried out, the determination of whether a debt recognized in a particular provision has or has not been paid and turn it over to a committee such as I have described?

It is thus seen that the proposition given so great weight in the decision, namely, that the debt should be submitted to the committee in order to determine whether it has been paid, is without point or force. The court could make that determination far better than a committee. The practice leading to the determination by a court as to whether or not a given provision in a will shall be carried out is very simple, much simpler than is the proceeding before a committee. The executor finding that the will orders him to pay a certain debt and having no knowledge of his own that such debt has already been paid, presents his final account to the court, in which he asserts that he is going to pay the debt in accordance with the provisions of the will. Notice is given to all parties interested in the estate. They appear. If they or any of them know of any reason why that provision of the will should not be carried out, they may manifest it. Upon that manifestation a hearing will be had and the court will determine whether or not the provision of the will has already been executed, in whole or in part, and upon that determination he will rest a judgment in which he will order the executor to carry out the provision of the will by the payment of the debt or he will declare that the provision has already been carried out by payment. What simpler than this and what more conducive to justice? Who can say that the submission of the same question to a committee is better than the submission to a court? It might as well be urged that the legalization of the will itself were better left to a committee than to a court; for, if whether or not the provisions of a will are to be carried out must be left to a committee, then whether it is a will at all or not may as well be left to the same authority.

The attempt of the court to meet the proposition that the will of the testator is the law of the case does not satisfy my judgment. It is claimed that the will of the testator is not the law of the case where it is in direct violation of a provision of law; and that the Code of Civil Procedure requiring that all claims shall be presented to the committee, the testator has no right to except a particular debt or any debt from the operation of the Code.

In the first place, the Code of Civil Procedure does not require that all claims shall be presented to the committee. It expressly limits the claims which must be exhibited. ^t In the second place, the claim that there is anything contradictory between the will of the testator in this particular case and the provisions of the Code of Civil Procedure is, in my judgment, rather fanciful than real. What is the purpose of requiring the exhibition of a claim to a committee? Simply to save the estate from being defrauded. There is absolutely no other reason which is behind the law requiring such a presentation. Is it claimed that a debtor may not pay a claim during his lifetime? If not, and the will is but the testator speaking after death, may he not pay a debt in that manner? If the man who is the estate solemnly acknowledges a debt and offers to pay it, who shall say that the estate is defrauded if the debt be paid? And if the estate is not defrauded, neither the spirit nor the letter of the law which has for its object the protection of the estate has been violated or evaded, but has, on the contrary, been fully observed.

I do not discuss or express an opinion relative to the proposition that the statute of nonclaims runs against a provision of a will, or suggest the results which may follow such a doctrine.

The judgment should be reversed and the probate court ordered to hear petitioner's motion of the 21st of November and decide it upon the merits.

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