6 Phil. 223

[G.R. No. 2308. April 30, 1906]

NIEVES ARAUJO ET AL., PLAINTIFFS AND APPELLANTS, VS. GREGORIA CELIS, DEFENDANT AND APPELLEE.

D E C I S I O N

MAPA, J.:

Rosario Darwin Araujo inherited from her mother, Asuncion Araujo y Belen, the hacienda known as Pangpang and other property. She subsequently married Jose Araujo y Celis, the defendant's son, and died on the 22d day of January, 1888 leaving no descendants or ascendants, but only collateral relatives, of whom the plaintiffs in this case claim to be the nearest. They consequently alleged they should succeed to the estate of the said Rosario Darwin Araujo, and asked that the property inherited by her from her mother be delivered to them as the heirs of the said Rosario. The property in question, according to the complaint,, is now held by the defendant, who took possession of the same after the death of her son, Jose Araujo, the husband of the said Rosario, who died a year after the death of his wife—that is to say, in 1889.

The defendant admits that the property in question belonged privately and exclusively to the wife, Rosario Darwin, but claims that) Rosario died leaving a will in which she bequeathed all of her property to her husband, Jose Araujo, and that the latter having died without a will she, the defendant, succeeded, under the law to all of his property, rights, and actions, thereby lawfully acquiring all the property that had formerly belonged to her daughter-in-law, Rosario.

The court below entered judgment in favor of the defendant. The plaintiffs excepted to the judgment, made a motion for a new trial on the ground that the same was plainly an3 manifestly against the weight of the evidence, and brought the case to this court by bill of exceptions. As the court below properly found, the only important and decisive question an this case is whether or not Rosario Darwin executed a legal and valid will in the form and

manner alleged by the defendant. If so, the defendant's right to the property would be unquestionable. If not so, the contrary would necessarily be the result.

This point as to the will, however, was not as clearly established as it should have been. The defendant introduced no will in evidence, but offered secondary parol evidence as to its contents under the claim that the original will had been lost. The court allowed this evidence over the objection of the plaintiffs, and this is one of the errors assigned by them on this appeal. We are of the opinion that the plaintiffs' objection to the admission of such evidence was well taken and that it should therefore have been sustained.

The loss of the alleged original will has not been sufficiently established. The principal witness, Calixto Delgado, who testified as to this point, stated that he had acted as *procurador* for the defendant in this case about the year 1889 in an action brought against her by one Jose" Araujo in the justice's court of Pototan involving the hacienda of Pangpang, and that is such *procurador* or solicitor there came into his possession a copy of the will of Rosario Darwin, duly recorded and probated, which was introduced in evidence in that action. He further testified *that he never saw the original of that will because the same was retained by the notary.* He was asked, *"What was it that you saw?"* He answered, *"A copy of the original."* He was also asked whether it was a certified copy of the or not, and instead of a direct answer he avoided the question, saying: *"After I had had it in my possession for three dmjs, I turned it over to my attorney mud he presented it to the court with a letter wnd a note attached."* This answer, as will be seen, is not responsive to the question, and leaves the point, a very important one, as to whether the copy in question was a simple or certified copy, in doubt.

This was all the more important as the witness further testified that ihe will, a copy of which he saw and had in his possession, was signed by two witnesses., only. A will signed by two witnesses only could not under any circumstances be valid under the law in force at the time referred to by the witness, and legally speaking such will could not then have been probated or recorded.

As to the loss or disappearance of the copy of the will above referred to, it is claimed that the insurgents in 1899 burned all the papers and archives of the court of Pototan. There is nothing to show that at the time these records Were burned by the insurgents there existed in the court-house of Pototan the copy of the will referred to. The witness who testified to such copy having been filed in that court refers to a time some ten years prior to the fire—that is to say, to the year 1889. This is not in itself sufficient to show that the copy of

the will in question was burned at that time. Moreover, if that will was duly recorded as alleged, the registry of the notary who authorized the same would show this. It is true that the same witness testified that the notary's records were also kept at the court-house in the same place where the court records were kept, and that all the papers therein were burned together with the notarial records. This statement of the witness requires, we think, more conclusive evidence to support it. The testimony of this witness in this respect is plainly and manifestly contrary to what would have ordinarily been the case in view of the provisions of article 60 of the provisional rules for the organization and government of notaries public in the Philippines, approved by the royal decree of the 11th of April, 1890, which provided that: "*Notaries shall keep the protocols and books in the same building where they live, in their custody, and shall be responsible therefor.*" As provided in this section the records and books should have been kept by the notary at his own house, where he lives, and not at the court building as testified to by the witness. The testimony of Valentin Poral, another witness for the defendant, supports this View to a certain extent. He testified *that the records of the notary's office map have been at the notary's house.*

As to the nature of the copy of the will in question and the alleged loss of the same, the testimony of the witness Poral is no more conclusive than that of the other witness. We, therefore, deem it unnecessary to refer to it, and what has been said before in regard thereto is equally applicable to the testimony of this witness.

These were the only witnesses presented by the defendant upon this point. Their testimony is absolutely insufficient to establish in a satisfactory manner the loss of the alleged will of Rosario Darwin, and the court below should not have, therefore, allowed the secondary evidence introduced by her as to the contents of the will, particularly in view of the fact that, as it appears from the record, there had been pending since 1889 an action to declare this very will null and void. The undue allowance of such evidence by the court was a violation of the provision of section 321 of the Code of Civil Procedure.

We accordingly set aside the judgment appealed from, and it is ordered that the case be remanded to the court below for a new trial without special condemnation as to the costs of both instances. After the expiration of twenty days from the date hereof let judgment be entered in accordance herewith and ten days thereafter the record in this case be remanded to the Court of First Instance from whence it came for proper action. So ordered.

Arellano, C. J., Torres, Carson, and *Willard, JJ.,* concur.

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