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[G.R. No. 1641. January 19, 1906]

GERMAN JABONETA, PLAINTIFF AND APPELLANT, VS. RICARDO GUSTILO ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

CARSON, J.:

In these proceedings probate was denied the last will and testament of Macario Jaboneta, deceased, because the loAver court was of the opinion from the evidence adduced at the hearing that Julio Javellana, one of the witnesses, did not attach his signature thereto in the presence of Isabelo Jena, another of the witnesses, as required by the provisions of section 618 of the Code of Civil Procedure.

The following is a copy of the evidence which appears of record on this particular point, being a part of the testimony of the said Isabelo Jena:

> "Q. Who first signed the will?—A. I signed it first, and afterwards Aniceto and the others.
>
> "Q. Who were those others to whom you have just referred?—A. After the witness Aniceto signed the will I left the house, because I was in a hurry, and at the moment when I was leaving I saw Julio Javellana with the pen in his hand in position ready to sign (*en actitud de firmar*). I believe he signed, because he was at the table. * * *
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> "Q. State positively whether Julio Javellana did or did not sign as a witness to the will.—A. I can't say certainly, because as I was leaving the house I saw Julio Javellana with the pen in his hand, in position ready to sign. I believe he signed.
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> "Q. Why do you believe Julio Javellana signed?—A. Because he had the pen in his

hand, which was resting on the paper, though I did not actually see him sign.

"Q. Explain this contradictory statement.—A. After I signed I asked permission to leave, because I was in a hurry, and while I was leaving Julio had already taken the pen in his hand, as it appeared, for the purpose of signing, and when I was near the door I happened to turn my face and I saw that he had his hand with the pen resting on the will, moving it as if for the purpose of signing.

"Q. State positively whether Julio moved his hand with the pen as if for the purpose of signing, or whether he was signing.—A. I believe he was signing." The truth and accuracy of the testimony of this witness does not seem to have been questioned by any of the parties to the proceedings, but the court, nevertheless, found the following facts:

"On the 26th day of December, 1901, Macario Jaboneta executed under the following circumstances the document in question, which has been presented for probate as his will:

"Being in the house of Arcadio Jarandilla, in Jaro, in this province, he ordered that the document in question be written, and calling Julio Javellana, Aniceto Jalbuena, and Isabelo Jena as witnesses, executed the said document as his will. They were all together, and were in the room where Jaboneta was, and were present when he signed the document, Isabelo Jena signing afterwards as a witness, at his request, and in his presence and in the presence of the other two witnesses. Aniceto Jalbuena then signed as a witness in the presence of the testator, and in the presence of the other two persons who signed as witnesses. At that moment Isabelo Jena, being in a hurry to leave, took his hat and left the room. As he was leaving the house Julio Javellana took the pen in his hand and put himself in position to sign the will as a witness, but did not sign in the presence of Isabelo Jena; but nevertheless, after Jena had left the room the said Julio Javellana signed as a witness in the presence of the testator and of the witness Aniceto Jalbuena."

We can not agree with so much of the above finding of facts as holds that the signature of Javellana was not signed in the presence of Jena, in compliance with the provisions of section 618 of the Code of Civil Procedure. The fact that Jena was still in the room when he saw Javellana moving his hand and pen in the act of affixing his signature to the will, taken

together with the testimony of the remaining witnesses, which shows that Javellana did in fact there and then sign his name to the will, convinces us that the signature was affixed in the presence of Jena. The fact that he was in the act of leaving, and that his back was turned while a portion of the name of the witness was being written, is of no importance. He, with the other witnesses and the testator, had assembled for the purpose of executing the testament, and were together in the same room for that purpose, and at the moment when the witness Javellana signed the document he was actually and physically present and in such position with relation to Javellana that he could see everything which took place by merely casting his eyes in the proper direction, and without any physical obstruction to prevent his doing so, therefore we are of opinion that the document was in fact signed before he finally left the room.

> "The purpose of a statutory requirement that the witness sign in the presence of the testator is said to be that the testator may have ocular evidence of the identity of the instrument subscribed by the witness and himself, and the generally accepted tests of presence are vision and mental apprehension. (Hee Am. & Eng. Enc. of Law, vol. 30, p. 599, and cases there, cited.)"

In the matter of Bedell (2 Connoly (N. Y.), 328) it was held that it is sufficient if the witnesses are together for the purpose of witnessing the execution of the will, and in a position to actually see the testator write, if they choose to do so; and there are many cases which lay down the rule that the true test of vision is not whether the testator actually saw the witness sign, but whether he might have seen him sign, considering his mental and physical condition and position at the time of the subscription. (Spoonemore *vs*. Cables, 66 Mo., 579.)

The principles on which these cases rest and the tests of presence as between the testator and the witnesses are equally applicable in determining whether the witnesses signed the instrument in the presence of each other, as required by the statute, and applying them to the facts proven in these proceedings we are of opinion that the statutory requisites as to the execution of the instrument were complied with, and that the lower court erred in denying probate to the will on the ground stated in the ruling appealed from.

We are of opinion from the evidence of record that the instrument propounded in these proceedings was satisfactorily proven to be the last will and testament of Macario Jaboneta, deceased, and that it should therefore be admitted to probate.

The judgment of the trial court is reversed, without especial condemnation of costs, and after twenty days the record will be returned to the court from whence it came, where the proper orders will be entered in conformance herewith. So ordered.

Arellano C. J., Torres, Mapa, and *Johnson, JJ.,* concur.

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