[G. R. No. 15566, September 14, 1999]

EUTIQUIA AVERA, PETITIONER AND APPELLEE, VS. MARINO GARCIA, AND JUAN RODRIGUEZ, AS GUARDIAN OF THE MINORS CESAR GARCIA AND JOSE GARCIA, OBJECTORS AND APPELLANTS.

D E C I S I O N

STREET, J.:

In proceedings in the court below, instituted by Eutiquia Avera for probate of the will of one Esteban Garcia, contest was made by Marino Garcia and Juan Rodriguez, the latter in the capacity of guardian for the minors Jose Garcia and Cesar Garcia. Upon the date appointed for the hearing, the proponent of the will introduced one of the three attesting witnesses who testified—with details not necessary to be here specified—that the will was executed with all necessary external formalities, and that the testator was at the time in full possession of disposing faculties. Upon the latter point the witness was corroborated by the person who wrote the will at the request of the testator. Two of the attesting witnesses were not introduced, nor was their absence accounted for by the proponent of the will.

When the proponent rested the attorney for the opposition introduced a single witness whose testimony tended to show in, a vague and indecisive manner that at the time the will was made the testator was so debilitated as to be unable to comprehend what he was about.

After the cause had been submitted for determination upon the proof thus presented, the trial judge found that the testator at the time of the making of the will was of sound mind and disposing memory and that the will had been properly executed. He accordingly admitted the will to probate.

From this judgment an appeal was taken in behalf of the persons contesting the will, and the only errors here assigned have reference to the two following points, namely, first, whether a will can be admitted to probate, where opposition is made, upon the proof of a single attesting witness, without producing or accounting for the absence of the other two; and, secondly, whether the will in question is rendered invalid by reason of the fact that the signature of the testator and of the three attesting witnesses are written on the right margin of each page of the will instead of the left margin.

Upon the first point, while it is undoubtedly true that an uncontested will may be proved by the testimony of only one of the three attesting witnesses, nevertheless in Cabang *vs.* Belfinado (34 Phil., 291), this court declared after an elaborate examination of the American and English authorities that when a contest is instituted, all of the attesting witnesses must be examined, if alive and within reach of the process of the court.

In the present case no explanation was made at the trial as to why all three of the attesting witnesses were not produced, but the probable reason is found in the fact

that, although the petition for the probate of this will had been pending from December 21, 1917, until the date set for the hearing, which was April 5, 1919, no formal contest was entered until the very day set for the hearing; and it is probable that the attorney for the proponent, believing in good faith that probate would not be contested, repaired to the court with only one of the three attesting witnesses at hand, and upon finding that the will was contested, incautiously permitted the case to go to proof without asking for a postponement of the trial in order that he might produce all the attesting witnesses.

Although this circumstance may explain why the three witnesses were not produced, it does not in itself supply any basis for changing the rule expounded in the case above referred to; and were it not for a fact now to be mentioned, this court would probably be compelled to reverse this case on the ground that the execution of the will had not been proved by a sufficient number of attesting witnesses.

It appears, however, that this point was not raised by the appellant in the lower court either upon the submission of the cause for determination in that court or upon the occasion of the filing of the motion for a new trial. Accordingly it is insisted for the appellee that this question cannot now be raised for the first time in this court. We believe this point is well taken, and the first assignment of error must be declared not to be well taken. This exact question has been decided by the Supreme Court of California adversely to the contention of the appellant, and we see no reason why the same rule of practice should not be observed by us. (Estate of McCarty, 58 Cal., 335, 337.)

There are at least two reasons why the appellate tribunals are disinclined to permit certain questions to be raised for the first time in the second instance. In the first place it eliminates the judicial criterion of the Court of First Instance upon the point there presented and makes the appellate court in effect a court of first instance with reference to that point, unless the case is remanded for a new trial. In the second place, it permits, if it does not encourage, attorneys to trifle with the administration of justice by concealing from the trial court and from their opponent the actual point upon which reliance is placed, while they are engaged in other discussions more simulated than real. These considerations are, we think, decisive.

In ruling upon the point above presented we do not wish to be understood as laying down any hard and fast rule that would prove an embarrassment to this court in the administration of justice in the future. In one way or another we are constantly here considering aspects of cases and applying doctrines which have escaped the attention of all persons concerned in the litigation below; and this is necessary if this court is to contribute the part due from it in the correct decision of the cases brought before it. What we mean to declare is that when, we believe that substantial justice has been done in the Court of First Instance, and the point relied on for reversal in this court appears to be one which ought properly to have been presented in that court, we will in the exercise of a sound discretion ignore such question upon appeal; and this is the more proper when the question relates a defect which might have been cured in the Court of First Instance if attention had been called to it there. In the present case, if the appellant had raised this question in the lower court, either at the hearing or upon a motion for a new trial, that court would have had the power, and it would have been its duty, considering the tardy institution of the contest, to have granted a new trial in order that all the witnesses to the will might be brought into court. . But instead of thus calling the error to the