PHILIPPINE LAW JOURNAL

Vol. XII AUGUST, 1932 No. 2

Is Article 669 of the Civil Code Repealed by Implication by Section 618 of Act No. 190, as Amended?

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I. HISTORICAL BACKGROUND

A. *Laws Prior to the Civil Code*

Joint and mutual wills (testamentos mancomunados y mutuos) were allowed by laws prior to the regime of the Civil Code. The Fuero Real admitted their validity, but solely as between husband and wife after one year has elapsed after their marriage, without having had any children or other forced heirs, but if after having executed one, they should have children, it is not valid "ca no es derecho que los fijos que son fechos por casamiento sean desheredados por esta razón.' (Ley 9ª, tit. 7ª, libro 3°., Fuero Real). The execution of joint will was introduced into practice as an expression of the harmony and confidence between spouses, and for the purpose of avoiding duplicity of acts, "puesto que en uno solo y con las solemnidades a su clase correspondientes, se lograba establecer la legalidad testamentaria para la sucesión de ambos." (Sanchez Roman, Tomo 6°, Vol. 1°., pag. 311).

It is needless to say that these classes of wills must observe all the essential formalities prescribed for the ordinary wills. They are revocable at any time before the death of either of the spouses, but after the death of one of them, the survivor was only authorized to revoke that portion relative to his or her property. The Supreme Court of Spain, in its judgment of June 19, 1866, said: "El sobreviviente no podía alterar la voluntad del difunto, y solo estaba autorizado para revocar la parte relativa a sus bienes, a no ser que contuviera pacto ó convenio que estableciera la irrevocabilidad." Again in its decision of June 24, 1892 it said: "La consignación de dos ultimas voluntades en un mismo documento es un accidente que

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no constituye pacto reciproco ni las quita, por consiguiente, la cualidad esencial de ser variables hasta la muerte por cualquiera de los testadores en la parte que á cada uno interesa establecer la variación.

But whatever advantages which the execution of joint wills offered, they were more apparent than real, inasmuch as they offered a fertile chance for any of the spouses to exercise fraud and undue influence over the will of the other consort and, in not a few cases, hasten his or her death. Thus Sanchez Roman in his Tomo 6°, Vol. 1ª., pág. 311, has this to say:

> "Ofrecia desde este punto de vista aparentes ventajas (referring to the abolition of duplicate execution of wills by the spouses), no siempre conformes con la realidad puesto que en algunos casos se prestaba a la falacia y a la captación de un conyugue ejercida sobre la voluntad del otro y aún estimulada con otorgamientos e instituciones mutuos, que en el conyugue menos sincero de propósitos, no corría otro riesgo, que el de la contingencia de premorir a su consorte, toda vez que es indudable la subsistencia del carácter esencial de la nota de revocabilidad en toda disposición testamentaria, sin que estobara a su aplicación por parte del sobreviviente la circunstancia del conjunto otorgamiento. La observación diaria ha enseñado la frequencia con que en casos semejantes, el conyugue que sobrevive, aún habiendo recibido mercedes ó beneficios de la disposición testamentaria del otro, ha revocado las suyas de carácter mutuo o más o menos compensatorio en la estimación del premuerto aunque se hubieran hecho a favor de otras personas, y siempre que, hechas de un conyugue a otro, la misma premoriencia de uno de ellos las convertía en ineficaces."

It was in response to these anomalies and abuses, and in order to curtail them, that the Partidas declared joint wills executed between husband and wife null and void in order that none of consorts "non aya ocasión de trabajar de muerte del otro por razón de heredarle lo suyo". However, it still reserved this right in favor of persons who were to engage in battle "ó en alguna hacienda." (Ley 35, tit. 11 de la Partida 5ª.) Taking advantage of this exception, which served as a loophole, the practice of making joint wills again became so widespread and rampant and lead to so many glaring and scandalous abuses that the Civil Code abolished the right to execute

joint will entirely and completely. Thus Manresa in Vol. 5 (4th edition) pp. 438 says: "Tan escandalosos abusos, y las repetidas protestas que los mismos arrancaban, no podían pasar desapercibidos a la Comisión redactora del Codigo, y dando satisfacción cumplida a ellas, derogó para en adelante esta clase de testamentos".

II. NATURE OF THE PRESENT LAW

One of the innovations introduced by the present Civil Code with respect to testate succession, is the abolition of the so-called joint wills, "o de hermandad". Article 669 provides: "no podrán testar dos ó más personas mancomunadamente, ó en un mismo instrumento, ya lo hagan en provecho reciproco, ya en beneficio de un tercero". It must be noted that the prohibition was extended so as to include dispositions made in favor of third persons.

Testamento mancomunado (joint will) is that executed by two persons in one single act or instrument, comprising the last will of both respecting the disposition of their property after their death; which acquires the added name of mutuo (mutual) when it contains reciprocal dispositions in favor of each other; but its name as joint will, (testamento mancomunado) is based solely in the simple execution of their last will in one single instrument conjointly, altho there may not be mutual or reciprocal dispositions in favor of one another. (Sanchez Roman Tomo 6°, Vol. 1°, pág. 311).

There is however some controversy as to the extent and reach of this article, whether by virtue of its prohibition reciprocal or mutual dispositions stipulated but executed in separate instruments are included within the prohibition. In this connection, Rogron, in commenting on article 968 of the French Civil Code, recalled of a case in which two persons executed their reciprocal dispositions, one will being written on one face of the sheet, and the other will on the back face of the same sheet, and he cited the decision which adjudged the two wills valid on the ground that each will is separate and independent; which by their independence, could be subjected to revocation by anyone of the testators. Ferreira however, (the eminent Portuguese Commentator) criticizes this decision as fallacious and contrary to the spirit of the law. The general opinion however of commentarists is of the same tenor as the decision cited by Rogron, viewing the prohibition contained in

this article as referring only to testamentary dispositions executed by two or more persons in one single act or conjointly in one single instrument. Thus Sanchez Roman, plainly convinced, subscribes to this same general opinion. He says, "Lo esencial de este Artículo 669, en cuanto revela su verdadero sentido, es la definición o aclaración que el mismo artículo da de no poder testar dos ó más personas mancomunadamente explicando a continuación el valor de este adverbio, al añadir *'en un mismo instrumento'* esto es, que la prohibición es de carácter formal. Se refiere al acto del instrumento para que ni aparezcan bajo cualquier formula unitaria de solemnidad correspondiente a las distintas especies de testamento aquellas disposiciones de última voluntad de dos ó más personas sino que siempre el testamento haya de ser desde el punto de vista del otorgamiento uintario y singular. Es accidental y secundario el contexto de este articulo el final 'ya lo hagan en provecho reciproco, ya en beneficio de un tercero,' lo cual se refiere, en la primera hipotesis, á la idea de los testamentos mutuos o sea a aquellos en que los testadores se instituían recíprocamente. De esto resulta, en una buena interpretación, que si lo prohibido es la forma de testar de mancomún, ó que testan dos personas en un solo instrumento no alcanza esta prohibición a la posibilidad legal, después del Codigo, de dos o más testamentos mutuos ó sea en los que recíprocamente se instituyen o hagan objeto de sus disposiciones de última voluntad los testadores de cada uno; cosa perfectamente licita y no prohibida por el Codigo." (Sanchez Roman, Tomo 6°, Vol. 1°. pág. 333).

It must be borne in mind however, that although mutual wills with reciprocal dispositions are valid, provided they are executed in separate instruments, the principal purpose of the law is to eliminate so far as can be done, the possibility of undue influence, fraud or coercion from being exercised by one of the testators over the other, depriving the latter of the necessary freedom to dispose of his property in accordance with the dictate of his free will. And this purpose could not be carried out effectively by simply requiring the execution of mutual wills, with reciprocal dispositions, in separate instruments. At best, in order to carry in effect this object, it is necessary that each one of the testators execute his will without the presence of the other, in order that his last will with respect to his property may be freely and spontaneously expressed.

The prohibition of joint wills constitutes one of the most important changes introduced in the Civil Code with respect to

testate succession, and it is the result of the fundamental principle involved in the definition of a will in Art. 667 and affirmed in Art. 670 to the effect that will is a strictly personal act which cannot be left to the discretion of a third person. (Manresa, Vol. 5°., 4ª edición, pág. 440-442).

This prohibition is furthermore ratified in Art. 733 which provides that joint wills prohibited by Art. 669, executed by Spaniards in a foreign country, shall not be valid in Spain, even tho authorized by the laws of the country where they may have been executed. (Note: Art. 733, C. C., is no longer in force; See Section 635 of the Code of Civil Procedure).

A. *Status Of Joint Wills Under The Common Law*

Under the common law, joint and mutual wills have substantially the same definition as that given by the Spanish law. It is with regards however to their validity that these two systems of laws come to the parting of ways, for while the Spanish law expressly prohibits the execution of joint and mutual wills in one single instrument, we shall see that under the Common Law, such is not regarded as invalid.

The terms joint, mutual and reciprocal as applied to wills are often used interchangeably but sometimes are given different meanings by the Courts.

A "joint will' according to the general usage, is a single testamentary instrument which is made the will of two or more persons who join in executing it. "Mutual wills" are those of two or more testators with reciprocal dispositions, each naming the other or others as beneficiary, generally in accordance with an agreement previously entered into, the terms "mutual" and "reciprocal" being used synonymously. Thus two or more separate wills may be mutual or reciprocal and a joint will may or may not be mutual. (See Frazier vs. Patterson (1909) 243 Ill. 80; 90 N. E. 216; Campbell vs. Dunkelberger (1915) 172 Iowa 385; 135 N. W. 56).

The early English decisions however, like the present Spanish laws have refused to give validity to such wills on the ground that such wills are impossible inasmuch as a will cannot be the will of more than one person i. e., it could not be joint. Thus Lord Mansfield is accredited with saying by way of dictum in the case of Earl of Darlington vs. Pulteney, (1 Cowp. 260, 268): "Now, there cannot be a joint will"; and in Hobson vs. Blackburn (1 Add. Ecc. 274), where two sisters and

a brother attempted to make a joint disposition of their property by will, Sir John Nicholl rejected the offer to probate it, on the ground that such an instrument was unknown to the testamentary law of England, although it might be valid as a compact in equity. The later English cases however, have evidently receded from the position taken in the earlier ones.

The general rule now is that the validity of a will is not affected by the fact that it is a joint or mutual one. If it is properly executed and attested, it is entitled to probate regardless of the fact that more than one person has signed it, or that it contains provisions reciprocal with another will.

Thus in Baker vs. Syfritt ((1910) 147 Iowa 49; 125 N. W. 998) it was held: "The subject of joint will and mutual wills has been quite frequently before our courts and while there have been some decisions and more frequent dicta to the effect that such an instrument is unknown to the law, the greater weight of authority and the better reason is with the view that the joint or mutual character does not of itself affect its validity. And that if otherwise valid, it may properly be probated and enforced as the will of the one first dying, or the separate will of both, or as the joint and mutual will of both according to the nature and terms of the provisions embodied therein."

In Gerbrich vs. Freitag ((1905) 213 Ill. 552; 73 N. E. 339) involving a joint and mutual will of a husband and wife, the court said: "Two persons may at the same time execute separate wills disposing of their property, and there is no legal objection to writing the wills in a single instrument if it is such that it may take effect upon the death of one of the parties so far as it relates to the property of that one. The fact that husband and wife devise their property reciprocally to each other by the same instrument or that it is a joint or mutual will, does not deprive it of validity if the will can be given effect on the death of either so far as the property of that one is concerned.

And in March vs. Huyten (50 Tex.. 243) a joint will executed by husband and wife was held valid; and it was further held that the separate acknowledgment of the wife was not necessary to its validity as a will of the wife.

But while joint wills have been generally held valid in practically all the States of the Union where the Common Law

prevails, yet we shall see that in the States where the Civil Law is predominant, joint wills were refused validity by the Courts.

Thus in the case of Erwin vs. Shelby's "Heirs, decided by the Supremae Court of Louisiana (83 So. 835) it was held: "A single instrument purporting to express the last reciprocal wills in nuncupative form, by public act, of husband and wife, is upon its face an absolute nullity, being prohibited by law, in the interest of public order; is not susceptible of ratification; acquires no validity by lapse of time or ex-parte orders; and may be attacked or objected to, whenever offered as a muniment of title."

Here in this case, it was argued by the relator that inasmuch as Erwin and his wife, might have made separate wills, each leaving everything to the other, the objections that they made those dispositions in one reciprocal will, concerns only a question of form and that it was therefore error for the Court of Appeals to hold that the will was an absolute nullity. The Supreme Court said: "It seems to us, however, that it would be as reasonable to contend that as any one who is sui juris may make such a written will as the law authorizes, the question whether he does so or makes a verbal will is one of form, but that doctrine finds no support in either the law or the jurisprudence of this or any country."

In this case, there was a provision in the Civil Code of Louisiana in its article 1572 that: "...A testament cannot be made by the same act by two or more persons either for the benefit of a third person or under the title of a reciprocal or mutual disposition"—a provision very similar to our Art. 669 of the Civil Code.

III. EFFECT OF THE CASE OF MACROHON vs. SAAVEDRA (51 Phil. 267)

Our law on joint wills has apparently received a rude setback when our local Supreme Court gave validity to a joint will in the case of Macrohon vs. Saavedra, (51 Phil. 267).

Here the spouses Macario Macrohon having no descendants nor ascendants, and Victoriana Saavedra executed on January 2, 1923 a joint last will and testament in one single instrument in accordance with the requisites required by Section 618 of Code of Civil Procedure, as amended by Act 2645. The joint will contained provisions for the disposition of their conjugal

and separate properties in favor of third parties (relatives of both of the spouses) on certain conditions, should one of them or the other die first.

Victoriana Saavedra having died first, the will was presented for probate by the surviving husband, Macario Macrohon, as executor. The will was duly probated by the Court of First Instance of Zamboanga on February 21, 1924. The executor—husband, Macrohon, alloting the lion's share of the properties to his relatives, then submitted a scheme of partition, for the distribution of the properties in accordance with the terms of the joint will aforesaid. To this petition, the relatives of the deceased spouse, Victoriana Saavedra, filed an opposition alleging that some of the conditions imposed in the joint will did not take effect, hence the relatives of the surviving husband are not entitled to the properties. The court of First Instance gave judgment in favor of the opponents. On appeal by the executor, the Supreme Court affirmed the judgment of the Lower Court and held that inasmuch as the conditions imposed in the joint will did not take effect, it was possible for Victoriana Saavedra (the deceased) to have died partly testate and partly intestate, and made the adjudication of the properties accordingly.

It will be noted that the Supreme Court by its decisions thus rendered, gave effect to the provisions of the joint will that has been executed by the spouses, Macrohon and Saavedra, and duly probated—this, in spite of the clear and express prohibition laid down by the provisions of our Civil Code in Article 669 that: "Two or more persons cannot make a will conjointly or in the same instrument either for their reciprocal benefit or for the benefit of a third person."

The only other case decided by the Supreme Court in which the subject of joint wills was touched upon, was the case of Cabigting vs. Samia (35 Phil. 284). In this case however, no express pronouncement was rendered by our Supreme Court on the question of whether or not joint wills made after the Civil Code came into force were valid, because it was not the question at issue. That case referred to a joint will executed on April 12, 1881 by Isidro Espino and his wife Martina Cagiting wherein they mutually named each other as heir, so that upon the death of either spouse, the survivor should inherit the property of the other. This will was protocolized the next day after its execution and in accordance with the law then in force, the

will was duly probated by means of this protocolization. When Espino died in 1882, the will was carried into effect and the surviving wife acquired the ownership of all the property of the deceased. Under the laws then in force, joint wills were still valid. The appellant in this case however questioned the validity of the joint will in view of the prohibition of Art. 669 of the Civil Code. The Court held that (citing the decision of the Supreme Court of Spain of April 9, 1904): "A joint will executed under the legislation in force prior to the enforcement of the Civil Code is valid according to that legislation, and produce all its effects without other limitations than those established in the transitory provisions of said Code."

Rule 12 of the transitory provisions provides that: "Rights to the inheritance of a person who may have died with or without a will, before this code was in force, shall be governed by the prior legislation."

The joint will of Espino and Cabigting was therefore adjudged valid and as has been said, the question of whether joint wills made under the regime of the Civil Code are valid or not, was not touched upon.

What then is the effect of the decision in the case of Macrohon vs. Saavedra (supra) upon the present status of joint wills executed in a single instrument?

In this case, the question as to the invalidity of the joint will was not touched upon by the Supreme Court in its decision. It went ahead with its decision on the assumption that the said joint will was valid. Neither did any of the parties to the case raise any question as to its invalidity. It was not even mentioned in the assignment of errors in the brief of the appellant. So that the question of the invalidity of the will in accordance with the provisions of Article 669 of the Civil Code was passed upon *sub silentio* by the Supreme Court; and a question passed upon *sub silentio* cannot be considered binding on the Court when again another case, with the same question, is brought up before it.

"The fact that a statute has been accepted for many years in cases where its validity was not raised or passed on, does not prevent a Court from later passing on its validity where that question is properly raised and presented." (McGuirr vs. Hamilton, 30 Phil. 563).

Again, Chief Justice Marshall in answering the contention that the Supreme Court of the U. S. has in a previous case exercised its appellate jurisdiction in a criminal case and hence

it has not the power to review the final judgment of the Circuit Court of the District of Columbia in a criminal case (which was made in that case as to the jurisdiction. It passed *sub silentio* and the Court does not consider itself bound by that case." (U. S. vs. More, 3 Cranch 159, 172 (1805)).

We can safely conclude therefore, that inasmuch as the question of the invalidity of the will in the case of Macrohon vs. Saavedra (supra) was never raised nor considered by the Supreme Court, that case did not bind the Court from again considering a similar question that might be raised in the future, so that if a proper case is brought before the Supreme Court, it is free to decide it, having regard to the provisions of Article 669 of the Civil Code.

Our next point of inquiry therefore is to determine whether said Article 669 of the Civil Code has been impliedly repealed by section 618 of the Code of Civil Procedure, as amended by Act 3645, referring to the requisites for the execution of wills.

IV. ORIGIN OF THE FORMALITIES IN MAKING WILLS

A. *Formalities Before the Statute of Frauds*

(1) ROMAN FORM.—Before writing became common, ceremonies were used to impress important acts on the memory and furnish proof of deliberation and fixed purpose. Thus a symbolic sale was the form a will took among the early Romans.

(2) ORIGINAL ENGLISH LAW.—But in the early English law no solemnity seems to have been required to make any will. All that had to be established was the testamentary intention, and that might be made known by the testator as he would communicate any other desire. All wills might therefore be made and proved by word of mouth only. When lands came to be conveyed to uses to be named in the feoffor's will, that will might be oral; and lands that could be devised at common law under name of local custom, but in fact where the old law had not been displaced by the feudal doctrines, might be devised orally. (Swinburne Wills, Part 1, Section 11).

The first statute of wills (30 Henry VIII, C. L.) was intended to make lands devisable, and provided that they might be devised in writing, leaving the law as to wills of personality, unchanged. This statute was held to be satisfied by an un-

signed writing, not containing the name of the testator, in the handwriting of another, and not itself intended to be final; as when a testator dictated his will to his scriber, who took down rough notes to be drawn up in due form, and submitted to the testator, and the testator died before the formal draft was made.

B. *Why The Statute of Frauds Was Enacted*

Finally, a case arose in which the opportunities for fraud under the law as it then stood was strongly impressed on the bench and bar. A young woman had married a rich old man, and afterwards behaved very indiscretly; and after he was dead she set up an alleged oral will said to have been made in extremis, giving her the whole estate, and revoking a written will made three years before by which, £3000 were given to charitable uses. The oral will was proved by nine witnesses, and was allowed by the prerogative court; but on appeal to the delegates a trial was held in the court of King's bench, and a most shocking conspiracy was discovered. It appeared that most of the witnesses for the oral will had committed perjury in giving their testimony, and the widow was guilty of subordination of perjury. (Cole vs. Mordaunt, stated in a note in 4 Ves. 196, Abbott pp. 344). On this occasion, Chancellor Noltingham is said to have declared that "he hoped to see one day a law that no will should ever be revoked but by writing". The following year 1677, the celebrated Statute of Frauds (29 Car. II, c.3) was enacted, it is said, as a result of this case.

All of the present requirements as to formalities arise from this statute and others made in amendment of it, from which the statutes in most of the states are largely copied, with some minor alterations.

Section 5 of the Statute of Frauds, reads: "And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June, (1677) all devises and bequests of any lands or tenements, devisable either by force of the statute of wills or by this statute, or by force of the custom of Kent or the custom of any borough or any other particular custom, shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses or else they shall be utterly and of none effect."

V. HAS SECTION 618 OF THE CODE OF CIVIL PROCEDURE, AS AMENDED BY ACT 2645, IMPLIEDLY REPEALED ARTICLE 669 OF THE CIVIL CODE?

Article 669 of the Civil Code and Section 618 of the Code of Civil Procedure respectively read as follows:

> "Two or more persons can not make a will conjointly or in the same instrument, either for their reciprocal benefit or for the benefit of a third person." (Art. 669, Civil Code).

> "No will, except as provided in the preceding section, shall be valid to pass any estate, real or personal, nor charge or affect the same, unless it be written in the language or dialect known by the testator and signed by him, or by the testator's name written by some other person in his presence, and by his express direction, and attested and subscribed by three or more credible witnesses in the presence of the testator and of each other. The testator or the person requested by him to write his name and the instrumental witnesses of the will, shall also sign, as aforesaid, each and every page thereof, on the left margin, and said pages shall be numbered correlatively in letters placed on the upper part of each sheet. The attestation shall state the number of sheets or pages used, upon which the will is written, and the fact that the testator signed the will and every page thereof, or caused some other person to write his name under his express direction, in the presence of three witnesses, and the latter witnessed and signed the will and pages thereof in the presence of the testator and of each other". (Section 618, Code of Civil Procedure).

It can be seen from these legal provisions that Section 618 of the Code of Civil Procedure, refers exclusively to the requisites or formalities in the making or execution of wills. All wills must now conform to the requisites prescribed in this section, otherwise they shall have no effect. So that there is only one form of will recognized by our law at present, and that is the form prescribed by Section 618 of the Code of Civil Procedure. Those forms of wills enumerated in Book III, Title III Chapter I, Section II to VIII of the Civil Code, have been covered by Section 618 of the C. C. P. (supra), and they are therefore no longer in force.

The legal disposition contained in Section 618 of the C. C. P., it must be observed, is written in the negative sense and provides, that, "No will ..... shall be valid ..... unless .....". In other words, changed into the affirmative sense it means that *any will, made in accordance with the provisions of that section shall be valid.* Moreover, section 634 of the same Code of Civil Procedure provides that: "The will shall be disallowed in either of the following cases: (1) If not executed and attested as in this Act provided". So that if a will is executed and attested, as in this Act provided, it shall be allowed, provided the other grounds mentioned for disallowing a will enumerated in said section 634, are not present. It is interesting to note that there is a similar provision in the Civil Code, Article 687, reading: "Any will, in the execution of which the formalities respectively established by this chapter have not been observed, shall be void"—though, it is obvious that this article is no longer in force because the formalities regarding the execution of wills, as provided in the Civil Code, are no longer to be observed, having been supplanted by those provided in Section 618 of the Code of Civil Procedure aforesaid,

Suppose a joint will is executed in accordance with all the requisites, mentioned in Section 618 of the C. C. P., shall we consider *such joint will valid,* because it has conformed with all the requisites required by law as to its form, or is it null and void because of the express prohibition of Article 669 of the Code of Civil Procedure? In other words, has section 618 of the C. C. P. repealed by implication Article 669 of the Civil Code? If it has, then the *joint will* is valid, but if it has not, then it is void.

"Before a statute can be held *to have* repealed a prior statute by implication, it must appear, first, that the *two statutes touch the same subject matter,* and second that the *latter statute is repugnant to the earlier.*" (Calderon vs. Provincial del Santisimo Rosario, 28 Phil. 164). "An implied repeal rests only on the presumption to repeal. The presumption arises when the new and old law are incompatible." (Cia. Gral. de Tabacos vs. Collector of Customs, 46 Phil. 8).

Tested by these principles laid down by our Supreme Court, our next inquiry is to determine whether both Article 669 of the Civil Code, and Section 618 of the C. C. P. touch the same

subject-matter. If they do not, then there is no need to determine whether they are repugnant and inconsistent with each other.

In the short history of the origin of the Statute of Frauds regarding the formalities in the execution of wills (treated elsewhere in this thesis), and from which section 618 of the C. C. P. is derived, we noted that it refers only to the *formalities of execution.* Its *subject matter* is therefore, merely, the *form of wills.* It does not refer to the *"fondo"* or *substance* of the will. On the other hand, we shall hereafter see that Article 669 prohibiting the execution of joint wills refers not merely to the *form* but also to the *"fondo"* or *substance* of the will.

Manresa enunciated several rules regarding the nullity of wills on page 526-527, Vol. 5 of his Commentaries (4th edition) as follows:

> "Las disposiciones de este capitulo se refiere unas al fondo y otras a la forma y por lo tanto, el testamento puede ser nulo en cuanto al fondo ó en cuanto a la forma, segun se refieren a uno u otro concepto las prescripciones que hubieran sido infringidas en su otorgamiento."
>
> Con arreglo a ellas, sera nulo el testamento en cuanto a la *forma*:
>
> (1°) Si fuera *mancomunado.*"

On the other hand, the same author commenting on Article 733 of the Civil Code, regarding joint wills executed by Spaniards in a foreign country (supra), expresses the opinion that joint wills affects not only the form but also its *"fondo"* or *substance.* He says:

> "Esta regla responde a los dos partes que existen siempre en todo testamento: una que se refiere a la ritualidad o al procedimiento, y otra a la sustancialidad ó a la esencia de la disposición testamentaria. Es decir, que en todo testamento hay una parte interna y otra externa; la primera afecta a su contenido, o sea a las ordinaciones de las voluntades del testador; y la segunda se refiere a las formalidades para el otorgamiento de la ultima voluntad.
>
> En su virtud, prohibido por el art. 669, como contrario a la esencia y naturaleza de la disposición testamentaria, el testamento de mancomun, no puede este subsistir ni tener validez alguna en España, ... porque *evidentemente afecta a la sustancial o a las condiciones intrinsicas del tes-*

tamento, al limitar la libre disposición del testador y la facultad del mismo para ordenar ampliamente su voluntad.

Segun expusimos al comentar el art. 669, algunos entienden que la conjunción de voluntades propias del testamento de mancomun es solo una cuestión de forma, y como tal, sujeta al estatuto formal .....

Pero ya hemos dicho que la *especialidad del testamento de mancomun no afecta solo a la forma,* ni estriba unicamente en la union de las voluntades de los dos otorgantes por el mero hecho de su conjunción sino en las limitaciones que por virtud de ella sufre la potestad de los testadores, en cuanto a la libre disposición de sus bienes; y *mermando los derechos y las facultades de los mismos, es indudable que afecta al fondo del testamento. .....*"

According to the above quoted opinion of Manresa, a joint or mutual will affects not merely the *form* but also the *substance* of the will. On the other hand, section 618 of the C. C. P. refers exclusively to the form and manner of executing a will. This, being the case, therefore, there is no conflict between article 669 of the Civil Code and section 618 of the Code of Civil Procedure, because they do not touch the same subject matter.

Furthermore, we have already stated that section 618 of the Code of Civil Procedure only repealed the provisions contained in Book III, Title III, Chapter I, Sections II to VIII of the Civil Code, referring to the form of wills i. e., from Article 676 to 721 inclusive. As can be noted article 669 of the Civil Code is not included in any of the sections referred to above as having been repealed.

"Repeals of statutes by implication are not favored. There is a presumption of knowledge by legislators of existing law. In passing a statute, the legislature did not intend to interfere with or abrogate any former law on the same matter unless repugnant and irreconcilable, or unless the later embraces the subject matter of the earlier." (Smith Bell & Co. vs. Estate of Maronilla, 41 Phil. 557).

CONCLUSION

Having shown that there exists no conflict between the two codal provisions, we may logically infer that any joint or mutual will executed after the Civil Code took effect, is invalid because of the express prohibition in Article 699 of the Civil Code.

Although it is true that the tendency of modern jurisprudence, especially that of the United States and England, is to incline towards the validity of joint wills, it is no less true that in those States of the American Union where this rule prevails, there exists either a positive statute declaring such wills valid, or else there is no legislation prohibiting the execution of such joint wills.

The writer holds the view that in a jurisdiction like ours, where there is an express prohibition against the execution of joint wills, the generally accepted doctrine in the United States in favor of their validity, cannot be resorted to.

Neither is the case of Macrohon vs. Saavedra (supra) analized elsewhere in this thesis, an authority for the validation of joint wills in this jurisdiction, for as has already been stated, in that case, the question of the validity or invalidity of the joint will therein involved, was neither raised by the parties in the Lower Court nor in the Supreme Court, and the latter passed upon that question *sub silentio*. Hence it could not be said that that case is a binding one on the question of the validity or invalidity of joint wills.

The conclusion which the writer desires to submit therefore, is, that there being no conflict or inconsistency between Article 669 of the Civil Code and Section 618 of the Code of Civil Procedure, the former still subsists, and is in full force and effect; that any joint will which might be executed at present, shall have no validity although it may conform with all the formal requisites prescribed by the latter, the *apparent* decision in the case of Macrohon vs. Saavedra to the contrary, notwithstanding.