

## MURPHY v. MARTIN.

4-2958

Opinion delivered May 8, 1933.

WILLS—SUBSCRIPTION.—Where undisputed evidence showed that a will written by testator's son was read to the testator and signed by him in the presence of witnesses by writing his initials which was his usual signature, and also by signing his mark, the court should have assumed in instructions that the will was duly executed, and submission of such issue to the jury was misleading.

Appeal from Sharp Circuit Court, Northern District; *John L. Bledsoe*, Judge; reversed.

*David L. King*, for appellant.

*Sidney Kelly* and *W. P. Smith*, for appellee.

HUMPHREY, J. The purported last will and testament of S. P. Murphy, deceased, was filed in vacation with the clerk of the probate court of Sharp County, Southern District, and by him examined, approved, and admitted to probate on the 5th day of May, 1930. At the succeeding regular term of the probate court, appellees entered a contest, making averments as follows:

"1st. That the paper writing alleged to be the last will and testament of S. P. Murphy, deceased, is not in form as required by law; therefore is not subject to probate.

"2d. That said S. P. Murphy was not possessed of testamentary capacity at the time of the alleged execution of said paper writing purported to be his last will and testament.

"3d. That said purported will is not in the handwriting of said S. P. Murphy."

An answer was filed by appellants denying the first two allegations contained in appellees' contest.

On the trial of the cause, the probate court admitted the will to probate, from which judgment an appeal was duly prosecuted to the circuit court of said county, Southern District, where a change of venue was prayed and granted to the Northern District thereof.

The cause was there tried *de novo* and sent to a jury upon the pleadings, testimony adduced, and instructions of the court, resulting in a verdict and consequent judg-

ment that the instrument in controversy was an invalid will, from which is this appeal.

The undisputed testimony showed that the will was written by Verdus Murphy, a son of S. P. Murphy, and signed by the testator writing his initials "S. P.," which was the usual way of signing his name; that he also signed the will by mark, which signature was witnessed by Cleo Massey and Theodore Eason; that the will was read to S. P. Murphy, after which he signed same in the manner set out above in the presence of the witnesses aforesaid and that they, at his request, signed same as witnesses in his presence and in the presence of each other.

In view of this undisputed testimony, the court should have assumed, in instructing the jury, that the will was in due form and executed in the manner prescribed by law. Instead of doing so, he submitted that issue to the jury in instruction No. 4, over the objection and exception of appellants. Instruction No. 4 is as follows:

"You are instructed that in this case the contestees contend that S. P. Murphy did subscribe the will in question by fixing thereto the initials, "S. P.," and they contend that the initials were used by him as a usual and customary signature, and, if you should believe from the evidence that the initials, "S. P.," were the usual and customary signature of S. P. Murphy, and that he thus subscribed the paper in question, using the said initials "S. P." for his signature, then and in that event the will would have been properly subscribed. You are instructed that the other part of the purported subscription, the part S. P. Murphy written by another party to the will, is to be considered by you as no part of the subscription to the will for the reason that it does not comply with the law as to what constitutes a subscription to a will, and you are therefore to consider only the initials "S. P.," alleged to have been fixed to the will, in arriving at a conclusion as to whether the will has been subscribed."

The submission of this issue to the jury was calculated to confuse and mislead them. The sole issue which should have been submitted to the jury under the disputed testimony was the testamentary capacity of the

testator at the time he executed the will. The testimony was in conflict on that issue.

On account of the error indicated, the judgment is reversed, and the cause is remanded for a new trial.

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WYLIE *v.* RURAL SPECIAL SCHOOL DISTRICT No. 9.

4-3005

Opinion delivered May 8, 1933.

SCHOOLS AND SCHOOL DISTRICTS—BUILDING FUND.—Where the building fund of a school district was on deposit in a solvent bank, there was no reason why it should bear any proportion of the loss to other funds of the district deposited in other banks which proved to be insolvent.

Appeal from Dallas Chancery Court; *J. Y. Stevens*, Chancellor; affirmed.

*T. D. Wynne*, *S. F. Morton* and *J. T. Richardson*, for appellant.

*Paul G. Matlock* and *John L. McClellan*, for appellee.

MCHANEY, J. October 10, 1930, appellee school district, having complied with act 119, Acts of 1927, p. 358, entitled "An act creating a revolving loan fund to aid needy school districts in repairing, erecting and equipping necessary school buildings, and for other purposes," borrowed \$10,000 from said fund through the State Board of Education. This amount was remitted to appellee by draft in its favor which was deposited with Ed Hawkins, then treasurer of Dallas County, who credited same to appellee on his books as "building fund," and he deposited said sum, to the best of his recollection, to his credit as county treasurer, in the Bank of Fordyce. He also had on deposit in said bank other county and school funds. On November 17, 1930, Hawkins as county treasurer had deposits in Bank of Carthage, First State Bank of Stuttgart, Merchants' & Planters' Bank & Trust Company, Pine Bluff, Merchants' & Planters' Bank, Sparkman, Bank of Fordyce, and the First National Bank of Fordyce. On said date all of said banks closed their

doors with the exception of Merchants' & Planters' of Sparkman and the First National of Fordyce, and were taken over by the Bank Commissioner for liquidation. The treasurer had on deposit in all banks the sum of \$64,941.39, and in insolvent banks \$44,980.85, consisting of county and school district funds. None of said banks were authorized depositories, but were such as selected by the treasurer. He therefore sustained a loss of approximately 70 per cent. of all funds.

Appellee school district had let a contract to construct a new school building with the funds so borrowed, and from time to time, both before and after the bank failures, drew its warrants on its "building fund" to its credit in the county treasury to pay for the construction of said school building, and all of said warrants were honored by the treasurer and checks were drawn on open banks in payment of said warrants, all of which were paid. Appellant succeeded Hawkins as county treasurer in January, 1931, and she thus honored one or more warrants on appellee's "building fund" in said month. Appellee at all times had to its credit on the books of the treasurer a sum in excess of all warrants drawn on its "building fund."

Sometime in the spring of 1931, the State Auditorial Department made an audit of the treasurer's books and reached the conclusion that the loss of school district and county funds occasioned by the failure of banks should be prorated among the different agencies. The result of this would be that appellee had been overpaid by reason of such warrants drawn on its "building fund" and honored, after the bank failures in the sum of \$5,136.25, and appellant was directed to charge back to appellee said sum. This suit was brought by appellee to enjoin appellant from so doing. The court granted the relief prayed, hence this appeal.

Several interesting questions are discussed by learned counsel on both sides, but we think it necessary to discuss only one of them in this opinion. Was there in fact any overdraft against appellee? We think not. While the record fails to show affirmatively that the Bank of Fordyce, the bank in which the \$10,000 "building fund"

was deposited, was reorganized or reopened and paid its depositors in full, it inferentially shows such to be the fact. The total loss above mentioned was sustained in three banks, one in Pine Bluff, one in Stuttgart and one in Carthage. No loss was therefore sustained in the Bank of Fordyce, although appellee's "building fund" borrowed as aforesaid, was there deposited to the best recollection of Mr. Hawkins. If so, then there has been no loss of appellee's "building fund" sustained, and consequently no overdraft. The evidence supports the chancellor's finding, and the decree must be affirmed.

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