McGee, James L.; McGee, William; Thompson, Margaret W.; Thompson, Alexander; McGee, Polly v. Porter, Josephine, by her next friend Culbertson, James

1851 4th C. Monroe

181/1

(19) Petition to set up a will

Rev Rev: In signing husbands will, widow Polly must also sign as witness

Wills; Slaves; Women

~~Pet~~ Purported will granted Porter freedom upon widows death

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the fourth Judicial Circuit in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the Circuit Court of Monroe County

wherein Josephine Porter, who sued as a pauper by her next friend James Culbertson was plaintiff, and James L McGee, John L McGee, William McGee Margaret W Thompson and Alexander Thompson and Polly McGee were defendants in a petition to ~~an action of~~ establish the will of James McGee deceased manifest error hath intervened, to the great damage of the said defendants as by their complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of ~~Jefferson~~ St Louis, in the county of ~~Cole~~ St Louis, in said State, on the third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, ~~HAMPTON L. BOON~~ William B. Stark, Clerk of our said Supreme Court, at office, in the City of ~~Jefferson~~ St Louis, the thirtieth day of May, in the year of our Lord one thousand eight hundred and ~~forty~~ fifty – with my private seal, there being no seal of Court yet provided

W. B. Stark, Clerk,

Fee $1.50 pd by Gray & Howell

1st

State of Missouri } In the Monroe Circuit Court
County of Monroe ss } September Term 1849

Be it remembered that on the 30th day of March 1848 Josephine Porter who sues by her next friend James Culbertson filed in the office of the Clerk of the Circuit Court within and for Monroe County her Petition to set up the will of James McGee deceased against the defendants James L. McGee John L. McGee William McGee Margaretta W. Thompson Alexander Thompson and Polly McGee which petition is in the words and figures following Viz

To the Circuit Court for the County of Monroe in the State of Missouri your petitioner Josephine Porter a free person of color and an infant under twenty one years of age by her next friend James Culbertson respectfully states that heretofore Towit on the 25th day of February A.D. 1846 James McGee late of the County of Monroe made & published his last Will & testament and still residing in said County afterwards Towit on the day and year last aforesaid departed this life

Petition

The said Will so made and published is in the words & figures following towit & In the name of God Amen I James McGee of the County of Monroe & State of Missouri being of sound mind but of very infirm bodily health do this twenty fifth day of February in the year of our Lord one thousand eight hundred & forty six make and constitute this my last Will & testament. hereby revoking each and every other instrument of the kind that I may at any previous time have made or constituted viz

Bricer

First I give and bequeath my immortal spirit to him who first created it as his of right for the honor & glory of his holy name

Second I give & bequeath my mortal body to the dust

to be decently deposited in the earth to await the resurrection of the just for which I wait in confident hope & expectation through Gods covenant mercy in our Lord Jesus Christ

Third The land on which I lived the same lying on Turkey creek in Monroe county being a tract of one hundred & twenty acres more or less together with all my household & kitchen furniture I direct my executor to sell either at private or public sale as he may deem most for the interest of my heirs the proceeds to be appropriated as far as they may be required for the payment of all just & legal demands against me

Fourth My negro slaves namely Hannah a female slave a mulatto aged about twenty-eight years I will to be free immediately at the time of my decease in case my wife Polly McGee should decease before me but in case she should survive me then in that case she is to be the property of my wife till the time of her decease when the said slave is immediately to have her freedom The children of the said Hannah viz Fuller aged about ten years & Josephine Porter aged about three years & also any child or children that the said Hannah may hereafter have while in a state of slavery all to be free at the same time under the same regulations as is provided in the case of their mother the said Hannah

Fifth It is my desire that the sale of the Land & other property heretofore ordered by me be postponed if it can be done till the decease of my wife Polly McGee & then after the debts are all paid whatever may remain in the hands of the Executor to be equally divided among the heirs of my body

Sixth I will & desire that Samuel L McDonnell of this county & State be the Executor of this my last will & testament to carry it out into full effect according to

its plain import as soon — lawfully can be done after my decease — To all of which I now fully subscribe by affixing my hand & seal to these presents on the day and year first written James McGee (Seal)

signed & sealed in
presence of
Thomas Barnett
Samuel C. McConnell

The original of said last Will & testament as signed & sealed & published by said James McGee and attested by Thomas Barnett and Samuel C McConnell as witnesses thereto is filed and exhibited herewith — and prayed to be considered with this petition

The petitioner states that afterwards to wit on the 2nd day of June in the year 1846 the said last will and testament of James McGee deceased was presented for probate to the county Court of Monroe County and probate thereof was then & there refused by said Court. yet the Plff avers and will prove to this Court that the said James McGee did not die intestate & that the said document which copied at length in this petition and the original whereof is herewith Exhibited W. and is the Lawful true and genuine last will and testament of the said James McGee The petitioner prays that the said document may be established and admitted to probate as the last will and testament of said McGee and to that end — that James L Magee who is the administrator of the Estate of said James McGee decd and that said James L McGee John L Magee William Magee Margaret M. Thompson and Alexander Thompson her husband the said James L. Jno. L Wm and Margaret being children and heirs at Law of said James McGee decd Polly McGee — who is the widow of said decd — be made defendants to this petition by process to be served upon them and as in duty bound this pe—

5th

John S. and Polly McGee and to Alexander & Margaret W. Thompson on the 31st day of March 1848 at Monroe county Missouri

Joel Manpin Shff M.C.

By Daniel M. Dulaney D.S.

I read the within petition & summons to William McGee on the 1st day of April 1848 at Monroe county Mo.

Joel Manpin Shff M.C.

And afterwards to wit on the 21st day of April 1848 it being the fifth day of the April Term 1848 of the Monroe Circuit Court the defendants filed the following plea to wit

Filed

Josephine Porter who sues by her next friend James Culbertson Pltff.

vs

James S. McGee John S. McGee William McGee Margaret W. Thompson Alexander Thompson & Polly McGee Defts

Petition to set up a Will of James McGee Deceased

The said defendants come and defend the demand of the plaintiff

Williams & Howell attys for Defts

Which plea was endorsed "General issue"

Bill of Exceptions

Be it remembered that on the trial of this cause offered in evidence and read to the Jury the following writing as the Will of James McGee deed

Copy of Will See pages 1st and 2nd

The petitioner — as follows

~~Be it remembered that upon the trial of this cause the petitioner offered in evidence and read to the~~

6th

~~Every the following writing as the will of James McIsee died~~ [6]

Petitioner then produced and examined — Samuel C McConnell who testified that he wrote the will read as evidence on the day it bears date at the house of James McIsee — where the Testator died witness stated that about a — month or six weeks before the writing of the will he was at the house in Company with Testator and his wife and that he requested witness to write his will and they the husband and wife requested Witness to fix a day on which he Could be there and write it — but that no time was designated by him or them, on the day the will was wrote the 25th February 1846 — witness was sent for the word was Mr. Magee wanted to see him he and Mrs. McKamey were taken to the house in a Sleigh by Mr. McIsee — soon after arriving at — house witness was told by Testator what he wanted him to do it — was a cold day and after warming — the room was Cleared of every one but — witness, the old man and his — wife before engaging in the business pen and ink and paper was placed on the table by the bed side in which the old man lay I had a Conversation with him in relation to the intention of the instrument and particularly upon two points one was he wished me to be his Executor to which I objected stating that my Condition was such as to preclude the possibility of being so I would not be any persons Executor that I could not attend to it — this point was eventually obviated by the statement that if I refused to act administration with the will

McConnell's testimony

annexed would be granted to some one else
the other point was the one you have before you
the liberating of his slaves I urged my ob-
jections to such a course unless they were
sent out of the Country to Africa and gave
him my objections he pondered the point
and was disposed to have it done so -
but his wife opposed it she would not
consent to such an arrangement and
after considerable talking he got back on the
old ground and I wrote the will in ac-
cordance with their views - the reason why
I talked to them on the subject I am Pastor
of the Church of which he was an elder - and
my Church held to the views I urged that
is that slaves should not be liberated unless
provision was made to have them sent to
Africa - his wife was opposed to the views -
given and overruled him in the matter - her
opposition was made by argument there was
no excitement no unkindness no temper
shown or bad feelings he was a man of
~~three~~ few words after the matter was settled
I commenced blocking out the will to see
if it suited their views as near his ideas as
I could this was in making a rough block
when I finally wrote the will I clothed
these ideas in the old mans words near as
I could - that will may be said to be al-
most his language - his instructions were
that the younger Negroes should be free and
certain given ages I think twenty one
years not certain as to time - and I so block-
ed out the Original will in accordance

deed - I spoke aloud he said he did answering me aloud I was asked to witness it - I think saw Barnett when he signed it as a witness - we both signed it as witnesses in the old man's presence I think I spoke to Barnett to sign it in the old man's presence - after finishing the draft of will I walked about Room say some 10 minutes when I walked back to old man he asked me to witness the paper while walking about the old lady was at the table reading the will - I have known the old man since the Year 1838 - on the day the will was wrote he was in a pleasant and agreeable Condition of mind I considered his intellectuality good then - and indeed ever since I have known him - I have Considered him more than ordinarily intelligent particularly on the subject of religion he was at the time Exceedingly debilitated and weak he gave me a book to read on the subject of the millennium he turn'd down the pages at the passages he wished me to read he had some difficulty in finding one of the passages - I did not consider him imbecile in mind but greatly debilitated in body he had taken Cold in the summer before and seemed to decline gradually he was Eighty Years old he died about the third week in April following I think and about two months after the will was wrote - he gave no reasons for his wanting to free his slaves - I was to see him and Conversed with him three times during his last sickness - in December January and February when the

will was written I conversed with him on each occasion - and I never saw any indications of his intellect going away saw - nothing like Como at the time of writing the will he was wide awake he did not - (Know I was in the room until he was told ~~old~~ I was there - then with some difficulty released his hand from the bed clothes which were closely wrapped up and shook hands with me - his hearing and eye-sight were both imperfect - he had to use spectacles - I have never conversed with him upon any other subject much except that of religion - I don't know at this time who is the author of the book he gave me - I am a physician and have been practicing for twenty three years - I did not visit him any more as sick - but always as his pastor - we were old school Presbyterians I was at the house when the will was wrote about four hours - and think that we were engaged in the conversations and writing the same at least two hours of the ~~same~~ time there was no other persons in the room during the time except the old man his wife and myself persons may have casually passed in and out - on the day of writing the will I considered his intellectuality not only good but lucid and bright - I had with him on that day of writing his will a protracted conversation on the subject of the millennium and observed the operation of his mind in a connected train of rea-

sound and feel Justified in the Conclusions I I drew of his State of mind - He took, at length a book and found and marked himself certain passages in the Book to which he particularly directed my attention when I should Examine the book - I observed in that Conversation that he grew weak and would some times pause to rest - but saw nothing like weakness of the intellectual powers I believe he was as sound in his mind as I ever saw him on any other occasion

Thomas M Barnett was then introduced by Petitioner who testified as follows - I was Called upon by old Mrs McIsee to come and witness the will I was in another room at the time - I went into the room where the old man was - and went to his bed side he did not know me - the old lady explained to him who I was and he then shook hands with me - he said nothing to me about the will - she explained to him what I was to do - and he seemed surprised and looked wild rather frantic the old lady had all the Conversation with me about what she wanted me to do - when the will was signed by the old lady she requested me to sign it as a Witness and I did so he Could have seen me sign it - if he had looked - she was some time before she Could make the old man understand what she was at Dr McConnell and Mrs McCamey were in the room - the old lady had bad Eyesight and she took the will

Tho. Barnett Testimony

12th

to ~~the~~ a window and there signed the old mans name to it - he the old man intimated to her to do so to sign the will for him she did it - took it to the window was at the foot of the bed - the room was about twenty feet square the bed stood before the fire rather in the middle of the room he could have seen her at the window if he wanted to I think - when I signed it Dr McConnell was fixing as I thought to go - can't say he was in the room he may have been - was not particularly noticing him I heard him when he was about to sign it - ask the old man if he acknowledged it as his act and Deed and the old man Nodded his head and if spoke in low voice - the old lady Explained to him about it - I think Mrs - McCamy was by The old man did not - Know me until the old Lady explained to him - I saw her sign it - and when she returned to the bed side she Explained to him what She had done he took the pen and dotted over it - again - I am not Certain which ~~the~~ Dr. McConnell or the old lady called on me to witness the will - but think it was the old lady - and it was in presence of the old man - I have Know the old man for Eighteen months or two Years - I live about one mile from his son James where he had lived about one Year - and where he died - I was to see him during his last sickness two or three times the first time I went to see him was som three or

four months before he died - he did not - then Know me - he appeared very weak and low - and I thought - his mind had sunk with his body - He said nothing much to me - the last time I was there the old lady done the talking - when told who I was he Knew me - I never had any Conversation with the old gentleman Mr. McGee Except - to ask me how I was and how my father was - they being both old men during his sickness never had any Conversation with him -

When McConnell asked him if it was his act and Deed he seemed astonished

Mrs McCaney was then introduced by the petitioner who testified as follows -

I have Know the Testator as long as I can recollect - for the last four or 5 Years have been intimate - I was at his house when his will was made I went there with Dr. McConnell in a Sleigh when I got there it was very Cold - went to the bedside of the old man and he Knew me - I was not in the room when the will was wrote - I was Called in when it was done to witness it but I refused to do so being old and not wishing to attend Court - because I prefered some other person to do so - I thought I would have to Come to Town about it on an inconvenient time - and Mr. Barnett was Called in to Witness it - after the will was Completed they had prayers and we went

Mrs McCaney's testimony

home - when I came he knew me - his mind was good as far as I knew - he was in his bed all the time - he offered me his hand when I came - don't recollect whether he asked me how I was - I had no other conversation with him - I saw nothing that was unusual or or strange in his appearance about him - I was not long in the room - did not hear him say any thing - I left the room after prayers and was not in it - till just as we were starting home - the last time I had seen him before, he was in good health I did not see him but once during his sickness - his wife asked him if he - knew me, and he said Yes - and called my name - he did not converse much - he was very weak - but I must say the old man was in his right mind that day the will was made - I never saw him at any time out of his mind but he was very weak I heard the conversation with Dr - McConnell and the old man before leaving - never said he the old man was incapable of making will did say never ought to make their will in health (To the Introduction of Testimony by the Plaintiff to prove the sanity of Testator - other than by the attesting witnesses. Defendant objected but the Court overruled the objection and permitted the witnesses to be examined which opinion of the Court the Defendants excepted and now Except -)

Objection to Testimony

After the introduction of the

attesting Witnesses and before any other witness was Examined the above objection was made - overruled and Excepted to =

Robert Simpson was then produced and sworn for Petitioners who Testified as follows - I have known old man McGee for fifty years but I have visited him but seldom of late years until his sickness I visited him about once a week in his sickness - from the time he was taken down to his bed - don't recollect the exact time, he was in a low debilitated state - and I did not want to disturb him talking to him and dont say much about his mind he always seemed to know me when I went to see him - he was very weak - I married his sister - I always went up to his bed when visiting him and spoke to him and he always knew me - I always on a visit exchanged a few words with him about his feelings and the weather and he always replied intelligently and rationally "I never saw any wildness or strangeness or any thing unusual in his manner - or any sign of obstination or wandering of mind

Simpson's Testimony

John McGee was then sworn for Petitioner who testified as follows - I am a nephew of Testator - have been intimate with him for several years - in the first part of his sickness I was there often - every week and sometimes 3 or 4 times a week; from sickness till death had very little conversation with him - It strikes me he was confined in November

McGee

he always recognized me - and would sometimes call me by name the last time I was there was about - a week before he died - I have heard him talk upon religious subjects but don't remember to have heard him on other subjects at any length - he was a man that talked very little he was very weak and feeble and gradually sunk from the time he was first taken down — But I heard conversations of some length with the old man and Dr. McCormick and also with his son John on the subjects of religion both before and after the making of the will never saw any thing strange wildness or unusual in his manner - never saw him out of his right mind at any time - never entertained a doubt of his ability to transact business -

Isaac Coffridge was then sworn for the petitioner who testified as follows — I have known the Testator for eighteen or twenty years we lived close together I saw him but once during his sickness - I think in the first part of it - when I went there - his bed was by the fire - I went to him and shook hands with him - I saw nothing indicating weakness of mind - this was just after my return from the Howard Circuit Court - I heard of his sickness and went over to see him - I talked with him a little he asked me how I was - and how the neighbors were - his remarks rational

I Coffridge

no strange wild or unusual in his appearance - nor any other thing indicating insanity nor ever heard of any such thing till after death this

John Hocker was then sworn for petitioner who testified as follows = I have known old man James McGee since 1830 we lived about one half mile from each other for fifteen years - I saw him in his last sickness - about the first of December I went to Hannibal with some hogs when I returned home I heard of his sickness and went over to see him and to pay him some money that I owed him when I told him my business he said he knew nothing about it - and that I must wait until his son James Come - he asked me about the health of my family and the neighbors Generally - before the old man had his sale before he moved to his sons I had borrowed a pair of stretchers from him - and I wanted to take them back when his sale took place - but he told me to keep them and his son and myself could use them - when I was to see him to pay him the money I owed him - I proposed bringing them from him - and he told me he knew nothing about them I thought it strange that he talked so - when about to leave old man asked me to come and see me and bring his wife - In about ten days I went back to see him again, with his wife - I spoke to him and he knew me had no conversation at that time - sometime

I Hocker

about the 20th or 25th of February following on my way to meeting at Paris and staid all night with him in Company with Mr Smith when I went in his eyes were closed he did not speak - the old man was lying in bed very pale - after we sat talking by the fire - sometime - the old man said something we did not understand - old lady said he said did not wish anybody to think hard of him for not talking as it hurt him - I did think - strange when he talked to me about the money I owed him and the stretchers - he had never talked to me so before - I had never received such answers from him before we had dealt together very frequently - he was very low and feeble indeed I have heard him frequently talk on the subject of setting negroes free - and he always said that he was opposed to setting negroes free and letting them stay among us for he said that ninety nine out of every hundred became worthless were too lazy to work and became a curse to the community and on one occasion I remember he told me - that some abolitionists had been captured in Marion - I think and he said they ought to be made an example of for stealing our negroes - The money which I owed him was for things bought at his sale - I could see a change in him every time I went to see him in his sickness - he was very feeble - when I went in February he looked as he lay on his bed like a dead man - I had no conversation with him then because he was so low I would not have done any

business with him - when well he was a
firm determined and Candid man and
acted on his own judgment - about every thing -
have frequently heard him say when well
that it - would be better for us if we had never
had any slaves among us - but since they
were here they ought to be kept in subjection
or if liberated sent to africa - for when freed
99 out of 100 would not work - he was not a
man to be easily changed in his opinions
from his appearance and great weakness - and
what I heard him say - I am satisfied that in
body and mind he was not in a condition
to make a will or binding Contract - I do
not think he was capable of transacting
business - but I could not say that he was
not in his right mind - had no other
Conversation with the dec'd during his
sickness than I have named

M. O. Warren was then sworn and Examined
for Petitioner and testified as follows -
I visited Testator about three times
during his last sickness - he recognized me
every time he was very weak and low in
spirit - he was a man of very few words -
each man asked him how he was and how
the neighbors were getting - he was always ra-
tional - when he saw him never saw any-
thing weak Strange or unusual in his
appearance.

Joseph Elms was then sworn for petitioners
who testified as follows -
I visited the deceased one or two times in

M. O. Warren

his last sickness - he was very weak he always recognized me - I think his mind was good he was up frequently - he inquired of me about the old neighbors I saw nothing strange about him

Here the Plaintiffs closed further - the Defts then introduced the following E. H. Smith was then introduced and sworn for defendants who testified as follows -

I was acquainted with the deceased about three years before his death - lived about one and a half miles from him visited him some but never talked much with him - except Indiana where they lived and old people there - his habits was a little singular - he would not talk much in company I saw him frequently before his sickness and visited him about once a week during his sickness - except about eight days when I was absent - he took sick in June or July I think but was not confined until December - I never thought him in good mind from December until I moved out of the neighborhood the last of March or first of April he would sometimes hand me his hand and not know me until his wife would have to tell him who I was - then again he would know me and inquire about my family and the neighbors - and sometimes he would ask me about the people where we used to live and one before he would get done talking he would go off of the sub-

ject - and talk of something else that had no Connexion in it - and I knew nothing about this was in December - my absence was in the early part of that month - when I Came ~~home~~ back my visits were oftener two a week than once - sometimes when his wife would tell him who I was he would not then know me - sometimes would not speak to me - but would doze away he rested but tolerable I don't reccollect of his ever asking for any thing even for a drink of water he was generally asked if he wanted any thing and would make signs - never heard him hold a Conversation with any one - during sickness but me he often talked with me when well about his old Indiana acquaintances we had boath lived there and ~~seen~~ knew the same people - he thought a great deal of Genrl Durham and we frequently talked about him and others during his sickness he Commenced talking with me about Genrl Durham which was the Case above Stated - but before he was done he wandered off on another subject that had nothing to do with it - we were particularly acquainted and intimate - which grew out of the fact of our being Early settlers in Indiana - I visited him very often and my attention was particularly called to him on account of my great respect for him he was sometimes worse than others he was sometimes flighty appeared wild and flighty from the time he was taken down - I don't think

I saw any change he appeared to be sinking all the time I saw no acute suffering his mind appeared to sink with his body - they appeared to wear away together I never thought him capable of doing any business from the time he was taken down until I left the neighborhood I have seen him with a book in his hand but did not hear him read - I dont think he was capable of making a will - my reasons and opinions are formed from the fact that he did not know me at times and the conversations about Santa ann when he wandered off of the subject and his flighty and wild appearance and all that I seen of him

Dr. H. Smith was then introduced for the Petitioner who testified — I had a conversation with the testator about the Emancipation of slaves about ten years ago - the time he bought the negro woman Hanna and child - the petitioner in this suit - he then said it would have been better off if we had never had any negroes amongst us but as we had them they ought to be kept in subjection and as slaves unless we sent them out of the country I sold the negroes and he bought them - I was well acquainted with him - when he formed his opinions he was like a certain sheep you have heard of he would neither lead nor drive - he generally set his stakes and went to them - never battled with him

Dr Smith

about much but Politics

Defendants then produced and examined James Bryant who sworn as follows – I was acquainted with the deceased for 18 years lived the greatest part of the time 4 or 5 miles from him I saw him during his sickness the first time about the first of December saw him twice about that time – saw him again in about fifteen days – then I was taken sick and did not see him again until the last of February or first of March saw him again once or twice before he died the first time I was passing by and heard he was sick and stopt to see him – I spoke to him he knew me – he was tolerably sick – he could raise up in bed – we had but little conversation – the next time I saw him which was in a few days after the first visit – he was a good deal worse – he spoke when I spoke to him but don't think he knew me until the wife of James McKee told him who I was – he did not call my name – he was very bad off – I went away and then went back the same evening – he was very restless that evening he remarked just look at that little child dancing in the floor – there was no child in the house – I thought it very strange – he was catching and picking about on the bed clothes his son was not at home – and his wife, old Mrs. McKee requested me to go after him – and I went as far as McKennys that night but could hear nothing of him and went

James Bryant

back that night - when I got back laid in the
night - he was easier - don't know of his saying
any thing that night - except he frequently
asked if the drovers had come - he called
his son and sound one who had gone with
him to hunt - drovers - I saw him again
in some 10 or 15 days - but did not have
much to say to him - he did not talk
any - I was not there long - saw nothing strange
on that occasion - last February he was very
low and weak and his voice seemed
to fail him very much - he did not
know me until told who I was - then
he only nodded his head - did not speak
I saw him several times after but he
~~did not~~ never seemed to know me after de-
cember - until he was told who I was
and then he would only nod his head
his wife was generally in the room with him
I never thought him capable of doing business
from the time he was first taken down
never saw him read - the night he was so
bad he asked for a book and would hold
up his hand without any book in it -
and appear to be reading - I think his
wife and his son's wife was in the room
when he spoke about the child dancing
his son's wife spoke of it - don't know
whether the old lady heard it or not -
she was hard of hearing - no person spoke
to him about the child dancing
I think his son's wife told the old lady
and she was very uneasy and

wanted me to go for James L McCleo - the old lady asked me to go - I don't think I said anything about the circumstances at McKinneys - I only saw a Negro there and inquired for James - do not think any one who was so old and had so long and as low as he was could be able to make a will or doing business - dont remember to have told any what I would testify - I do not think from what I saw that he was capable of making a will - he married my sister

James Noonan was then introduced and sworn for Defendants who testified as follows - I came to Missouri in the year 1835 - and I have resided ever since - lived within four miles of him until the last year of his life when he lived at his sons joining my farm - the houses 1/2 mile apart - our acquaintance was like other neighbors - he was a man of few words - never talked much with him - after he came to his sons we conversed moderately together - more on religious subjects than others - sometimes on politics but not much - he was taken bed fast about the first of December - I visited him once a week on an average after that - sometimes twice - sometimes 3 times a week - he wore away gradually - I thought with old age - when he was first taken and I would go to see him - he would ask me to come back and see him - about the first of February he began to get very bad - and was very weak and low - after that when I would go - sometimes he would not know me till told who I was - at other times he would

Noonan

about the middle of February I went one morning he appeared very bad - I went up to him and spoke - he reached me his hand but said he did not know me - James McCue's wife told him who I was - then he said I ought to have known you - I took a chair and sat down by his bed - took hold of his hand and was feeling his pulse - it was very weak - he looked up - there was a window near the West end of the bed - the sun was shining and reflected on the west side of the wall - he asked me who those men were - who were reading up there - I observed to him it was the sun shining - and he turned over and laid quietly I was there from that time until his death he just wore away - from what I saw of him and his condition - and the circumstances I have stated - I did not think him capable of transacting business or making a will - he sometimes seemed rational and at other times not - I saw him after 15th Feby - and when he was rational

Mrs Noonan was sworn for defendants and testified as follows - I was acquainted with the deceased a while before he died - from the time he moved to his son's until he died - saw him often in his sickness - he would sometimes know me and at other times he would not - until told who I was - he was very weak during all his sickness - he was a man of few words. I saw him at one time when his son Wm McCue was in the house and he did not know him

and asked what man that was - pointing to him - ~~then~~ she, Mrs - Qas Mage told him it - was his son - he then recognized him - this was about the middle of his sickness - he appeared to be very weak and feeble and did not notice any thing much - I never heard him Complain of pain or suffering - I was there about once a week - sometimes oftener - I never saw him better - he always appeared weaker in body and mind - I do not think he was Capable of doing business or making a will - I on one occasion after witness Mr Qas Magee and Mrs Q S Magee had been talking at the fire the old man asked Mr - Magee to go - Mrs - Magees security to pay rolls - heard him asking the old lady about paying for the rolls and asked Dame's wife about security - I don't think he Knew what he was talking about - this was about the last of March or first of April - It was after the time of his not Knowing his son - Culbertson Called on me to Know what I would testify - When he said this turned over and rested - no one Spoke to him on the subject - She never had any Conversation with the old man at any time - more than how do you do —

Mrs Brown

Mrs Bryant was then sworn for Defendants and testified as follows — I had some acquaintance with Testator for 10 or 12 years before he moved to his son's - but was never at his house - about one mile from me - I was there during his last sickness - often saw him from his first Confinement until his death - was there near about every week - have

set up with him several times - I generally when I went spoke to him - sometimes he knew me and then again he did not - until I would tell him who I was - he would then recollect me - I was there on one night in January - when he appeared to be talking or reading to himself - he had no book but would hold up his hand as if he had one - I could not hear what he said - I asked if he was asleep and they said no - he was in the habit of talking so - never heard him read that I recollect - I saw him again on another day - when he did not know his Grandson the son of Wm McIlsee - about 15 or 16 years old - he lived at the place with this grandson before he came to James to live - I don't now remember any other fact - Can't tell the proportion of times he did not know me - from about Christmas until he died when helped he could set up - he appeared to wear away - had a cough, complained of shortness of breath I would not have been willing for him to do business for me - from his appearant low state of health. his from all I seen of him - his wife was Generally in the room with him - dont remember to have ever conversed with him, more than to speak to him of his Condition -

Mrs Poyard

Defendant then introduced and Examined - Ephraim Smith - who testified as follows - The Testator was my own uncle - I was well acquainted with him for twenty years - most of the time

lived in 5 miles of him - saw him frequently and frequently in his last sickness - at least half dozen times saw him after his bad spell in December - I had been away with a drove of hogs when he was first taken I did not have any conversation with him because there was company there the first time - I was not there again until January - I was there in February with Hooker - when we went in I spoke to him and he did not know me until James McGees wife told him who I was - then he knew me and spoke of my not thinking hard of his not talking - he was very low and weak - I stayed all night - dont recollect any conversation - he was a very firm man - dont know of his ever advising with any person about his business cannot say what was his capacity not having conversed with him but judging from his age and health deemed him incompetent - he asked James wife - what little child that was dancing between him and the window - she told him there was none there - there was no child there - I looked to see - and there was none - Hooker was not with me when this took place - when he was with me we came on to meeting together - the situation of his health - his old age - and the circumstances I have stated - induced me to believe him incompetent to do any kind of business - Mrs - James McGee and myself talked about his seeing a child - she said he had asked her similar questions before that time - Dr. McGee never asked me what I knew about it - I told him to-day about the child - his wife was present —

I dont

Jacob Bruce was then introduced and sworn for Defendant — as follows — I was acquainted with Testator for 12 years — not very intimate except the last four years — I saw but once in his last sickness, about one week after the will was made — when I went there I did not think him capable of doing any kind of business — would not have trusted any in his hands — I went in the morning and stayed until evening taking time to ride two miles — during the time he was helped up two or three times — his son waited on him — I took him some apples — he did not notice them at all — when I first went — I shook his hand, he did not appear to know me — or to notice me —

Bruce

Levi Cader was next sworn for Defendant — and testified as follows — I was not much acquainted with him until he moved to his sons 3/4 of a mile from me I used to go over and see him every day or two after he was taken down — until I left — about the first of March except three weeks about Christmas when I was absent — when I got back he was very low indeed — I saw that he was failing — on one night — when I was there he laid with his eyes shut — it was so when I first went — he roused up in the night — and said in a low voice, he wished he glad if they would keep the door shut — that they kept opening the door so — I went to him and asked if he wanted anything — he said he did not — the door was shut — and had not been opened for some considerable time before he spoke

Cader

I was late in the night and they had all gone to bed - this was some time about the middle of February - I then went on to see him - I think the next evening I went in to see him he did not pay any attention to me Mrs. McLeod asked him if he knew me - and called my name - and he then shook hands with me - he was very low - afterwards when I went, he was so bad and low - I always enquired of the family - he was entering all the time - I was not well enough acquainted with the nature of the - mans mind when in health to form any opinion on the subject - —

Eli Bogart was next sworn for defendant who testified as follows - formed an acquaintance with Testator in 1820 - saw him three times while he was sick in January or February - It was about sugar making time - the first time - I went about middle of January - I went up to him - Mrs. McLeod said he did not know me - She told him who I was and he held out his hand - the next time about ~~the~~ first of Feby. I went in as usual and spoke to him - he did not know me until she told him - again, about a week afterwards I went again - and he did not know me, till she told who I was - In our first acquaintance we were as intimate as brothers we were among the first of the settlers in this County - we have helped each other many times - raise logs - and other work - I would not say when I saw him he was capable of doing any kind of business - he knew me as well as he did one of his own sons - and

Eli Bogart

when I saw him in his sickness he did not know me — he had before always known me — But did not know he was saint him out of his mind —

Defendant then read in evidence the deposition of Hugh Smith — as follows —

Hugh Smith of lawful age being produced sworn and examined on the part of the defendants deposeth and saith — that he was well acquainted with James McKee for twenty days years prior within a few days of his death — and frequently saw him during his sickness This Deponent further states that he does not think that the said James McKee was in a Condition at the time he made his will to make a will On the day he made his will deponent states that he was at his residence that the said McKee did not know him although he had been acquainted with him for the last twenty years and he frequently found him in this Condition after Conversing with him for some time the said McKee did not know him the deponent but would ask some of the family who deponent was after they would tell him he would then enquire the health of the deponent — and ask how he was — and say that he did not know him This deponent further states that he did not know others that he was well acquainted with before his last sickness — on the day the said McKee made his will, I was present — he was very low and was not able to get in or out of the bed

Hugh Smith's Deposition

without assistance - he had an unnatural appearance out - of his eyes - I this deponent Mrs - McCanny Mr - McConnell and Thomas Barnett were present the day he made his will — Question by Defendant -

State what you have heard the said McKee say in relation to freeing negroes previous to his last sickness - answer -

I have heard him talking on the subject - of freeing negroes - and he was opposed to freeing negroes unless they was sent out - of this County to a free State - and further this Deponent Saith not -

Hugh Smith

This being all the evidence introduced for the petitioners or for the Defendants - the Petitioners moved the Court - to give to the Jury the following Instructions Viz: -

1st. That - if they find from the evidence in the Cause that James McKee deceased either signed the papers produced in evidence as his will himself or by some one by his direction & in his presence and that the same was attested by Samuel McConnell and Thomas M. Barnett subscribing their names as witnesses in his presence and that said James McKee was at the time of signing and attesting said will - of sound and disposing mind they will find for the Plff. -

2. That - the signing of the Testator may be proved by evidence of his having acknowledged the same —

3 The fact of the attestation being in the presence of the Testator need not appear on the face of the will but may be proved by other evidence

4 The Law presumes every man sane until the Contrary appears and when insanity is alleged the burden of proving it rests on him who alleges it

5 That if the Jury find from the evidence that the Testators wife signed his name by his direction to the will and that the paper was then shewed to the Testator and examined by him and approved by him and was then acknowledged by the Testator to the subscribing witnesses as his act and deed the will is not void because it was not stated on the paper who signed it and by whose direction and attested by that person

6 A man or woman has a right by fair argument and persuasion to induce another to make his will or change the same, and to give him his property and it is no objection to the will if the Testator was of sound mind

7 The Plff moves the Court to instruct the Jury that altho the attesting witnesses or one of them may doubt the sanity of the Testator It is Competent to prove the sanity by other testimony

8 That if they find the paper purporting to be the will of James McKee was produced by him to the attesting witnesses before they attested

it with his name affixed to it and by him acknowledged to be his act and deed this will be regarded by them as a circumstance from which they may infer that he had himself signed said deed —

To the giving of which instructions the defendants objected but the Court overruled the objection and gave the instructions to which opinion of the Court the defendants excepted and now except —

The defendants then moved the Court to give the jury the following seven instructions

1 Unless the Jury find from the evidence that the deceased James Nelson at the time of the making and publishing the paper purporting to be his will, now in dispute was of sound mind they will find for the defendants —

2 That if said deceased at the time of the making and publishing said paper in dispute purporting to be his last will was in a state of mind capable of being unduly influenced by his wife or others, and that in making or publishing said paper he was so unduly influenced in regard to the provisions of said instrument or any of them they will find for the defendants —

Defendants Instruction

3 That if the Jury find from the evidence that said deceased was at any time during his last sickness and before making & publishing paper of unsound mind they will find for the defendants unless it is satisfactorily made to appear to them

that he was of sound mind at the time of making and publishing said instrument - and this latter proof rests on the plaintiff

4 That if in the opinion of the Jury the evidence as to the soundness and unsoundness of the mind of said deceased at the time of his making and publishing said paper should be equally balanced they will find for the defendants

5 That if said paper was not signed by said James McIsee or by some other person by his direction and in his presence they will find for the Defendants —

6 That if the Jury find from the evidence in this case that said paper purporting to be the will of said James McIsee was signed for him by another person they will find for the defendants - unless they further find that the person so signing the ~~same~~ name of the said James McIsee, ~~[illegible]~~ subscribed his or her name as a witness to said paper purporting to be a will and also stating that he or she subscribed the said James McIsee's name at his request —

7 Unless the jury believe from the evidence that the writing offered as the will of James McIsee - was signed by him as his last - will and testament or that he had it signed by some other person by his direction and in his presence - and that such person signing by his direction subscribed his or her own name as a witness to the said writing - stating that he or she subscribed the testator's name

at his Testators request -- said writing is not duly signed and attested as a will according to the law of this State - (but the will is not thereby void, but voidable only) -

The Court gave to the Jury the three first instructions - and the seventh instruction without objection from Pltff - and refused to give to the Jury the fourth fifth and sixth instructions as offered by Defendants but the Court qualified the seventh instruction by the addition of the following words "but the will is not thereby void but voidable only" and then gave said sixth instruction to the jury - to which refusal of the Court to give said three instructions and to the qualifying giving of said seventh instruction the defendants excepted and now excepts - and thereupon the Jury retired and returned the following verdict -

~~We the Jury find for the Plaintiff~~
~~D C W McKenney~~

We the Jury find the paper produced in evidence and specified in the issue framed in this Case to be the last will and testament of James McKee deceased

Verdict

D C W McKenney

Whereupon the Defendants filed the following motion and grounds - and prayed the Court for a new trial - as follows

The Said defendants by their attorneys - move the Court to set aside the finding and verdict of the Jury rendered in

the above Styled Case - and grant a new trial for the following reasons -

1 The Court gave wrong and illegal instructions to the jury at the instance of Petitioner -

2 The Court permitted the Petitioner to give illegal evidence to the Jury

3 The Court refused proper instructions to the jury asked at the instance of defendants

4 The jury decided against Law

5 The Jury decided against the evidence in the Cause - and the weight of evidence

6 The Jury decided against law and the evidence in the Cause

7 The jury found against the instructions of the Court -

Which motion being heard was by the Court overruled - to which opinion of the Court in overruling of said motion - defendants excepted and now except - and pray the Court to sign and seal this their bill of Exceptions which is accordingly done

A Deese judge
4th Judl Cut Mo. (Seal)

Motion for New trial

Among the Record and proceedings had in the Monroe Circuit Court at the Sept Term 1849 to wit on the 20th day of Sept 1849 The following is found to wit

Josephine Porter who sues as a Poor person by her next friend James Culbertson Pltff

vs

James L McGee ~~William~~ John S McGee
William McGee Margaret W Thompson
Alexander Thompson & Polly McGee Defts

Petition to set up the will of James McGee deceased

Now at this day Comes the said Plaintiff by her Attorney as well by her next friend and the said Defendants by their Attorney and by James L McGee one of the Defendants and say they are ready for trial Whereupon Came a Jury to wit - William Tribbe Thomas Henson George H Duckworth John C W McKenney - John Banton Michael Trumbo Stephen Morrison Charles W Browning Andrew J Caplinger Ambrose Cutcher Charles Benton and Edmund Mattox - who were tried elected and sworn well and truly to try the issue joined between the said Plaintiff and the said Defendants - and the evidence in the Cause in part being Concluded and the Court being about to adjourn said Jurors were adjourned until tomorrow morning 9 O'clock -

And afterwards on the 21st day of September 1849 the following is found To wit -

And now here the Jury returned into Court - for further proceedings with the Cause and the testimony being all submitted and the arguments of the Counsel on both sides being heard in full the Cause was submitted to the Jury who returned to their room to Consider of their verdict - ~~and~~ in the Case and after being out and Considering of their verdict - they the Jury returned into the Court - and rendered by their foreman the following verdict - we the Jury on oath do find that the paper named in the Plaintiffs petition and in the is-

ness framed in this Cause as purporting to be the last will and Testament of James McKee deceased - and by the Plaintiff alleged to be the last will and Testament of James McKee deceased and which is in the words and figures following to wit - In the name of God Amen - I James McKee of the County of Monroe and State of Missouri being of sound mind but of very infirm bodily health - do this twenty fifth day of February in the year of our Lord one thousand Eight hundred and forty six make and Constitute this my last will and Testament hereby revoking each and every other instrument of the kind that I may at any previous date have made or constituted viz - First I give and bequeath my immortal Spirit - to Him who first Created it - as his of right for the honor and glory of His holy name - Second - I give and bequeath my mortal body to the dust to be safely and decently deposited in the Earth to await the resurrection of the Just - for which I wait in Confident hope and expectation through God's Commanded mercy in our Lord Jesus Christ - Third - the land on which I live - the same lying on Sinking Creek in Monroe County being a tract of one hundred and twenty acres more or less - together with all my household and kitchen furniture I direct my Executor to sell either at private or public sale as he may deem most for the interest of my heirs - the proceeds to be appropriated as far as they may be required for the payment of all just and le-

gal demands against me Fourth - my negro slave big Hannah a female slave a mulatto - aged about twenty eight years - I will to be free immediately at the time of my decease - in Case my wife Polly W McIver should decease before me - but - in the Case she should survive me then in that Case she is to be the property of my wife till the time of her decease - when the said slave is immediately to have her freedom The children of the said Hannah big Fuller aged about ten years - and Josephine Porter aged about - three years - and also any child or children that the said Hannah may hereafter have - while in a state of slavery all to be free at the same time and under the same regulation as is provided in the Case of their mother the said Hannah Fifth - it - is my desire that the sale of land and other property hereafter ordered by me be postponed if it - Can be done till the decease of my wife Polly W McIver - and then after the debts are all paid - whatever may remain in the hands of the Executor to be equally divided among the heirs of my body - Sixth - I will and desire that Samuel C McDowell of this County and State be the Executor of this my last will and Testament to Carry it - out - into full effect according to its plain import as soon as it lawfully Can be done after my decease To all of which I now fully subscribe by affixing my hand and seal to these presents on the day and year first - written

James McIver (Seal)

Signed and sealed in presence of -
Thomas M Barnett James McC
Samuel C McConnell
As the last will and Testament of James McGee deceased - thereupon it is Considered, ordered, and adjudged by the Court that the instrument aforesaid in form and Substance aforesaid - is the last will and Testament of the said James McGee deceased - and probate thereof is fully granted and had - and it is directed that this order be certified to the County Court of Monroe County together with the said Original will - that the same may be recorded in the proper office - and such other proceedings may be had then as the law may direct - It is further ordered that the Plaintiff recover of the Defendants her Costs in this behalf Expended for which She may have her writ of Execution

State of Missouri
County of Monroe Sct } I John G Caldwell Clerk of the Circuit Court Within and for Monroe County do hereby Certify that the foregoing forty one pages and Eighteen Lines Contain a full true and perfect Transcript of the Record and proceedings had in the Cause of Josephine Porter Who sues by her next friend James Culbertson against James L McGee & others together with all the evidence and other matters called for in the Bill of exceptions filed in this Case as the same appears of Record ~~in my~~ office now remaining in my office

Witness John G Caldwell Clerk of the Monroe Circuit Court at office in Paris at the County aforesaid on the 27th day of June 1850
Jno G Caldwell Clerk

Index

Petition	Page	1 to 3
Copy of Will		1
Summons		4
Plea & Issue		5
S McConnels	Testimony	6 to 11
Thos Barnets	do	11 " 13
Mrs McAmey	do	13 " 14
Objections to Pltff	evidence	14
R Simpsons	Testimony	15
J McGee	do	15
J Cappage	do	16
J Hocker	do	17
M C Warrens	do	19
Defendants	Witnesses	
E H Smith	Testimony	20
J H Smith	do	22
Jas Bryant	do	23
James Noonan	do	25
Mrs Noonan	do	26
Mrs Bryant	do	27
E Smith	do	28
J Bruce	do	30
L Cater	do	30
E Bogarth	do	31
Hugh Smiths	do	32
Plaintiffs Instruction		33 to 34
Defendants Instructions		35 to 37
Verdict		37
Motion for New trial		38
Judgment of Court		39 to 42

Josephine Porter by
James Culbertson
vs
James L McIsee & others

Petition to set-up will of James McIsee ~~deceased~~

John G Caldwell Clerk	Costs in Suit	16.05
Making Transcript 11760 words $1176	Certificate & Seal 50	12.26
Joel Maupin Sheriff		6.00
Delaney Sheriff		29.05
Richard Say Shff Polk Co		.50
James Noonan	Deft	3.75
Delila Noonan	Deft	3.75
Jacob Bruce	Deft	4.20
John Hocker	Deft	4.15
Isaac Coppedge	Plff	3.85
Hugh Smith	Deft	23.00
Ephraim Smith	Deft	4.35
James I McIsee	Plff	1.35
James Bryant	Deft	3.90
E H Thomas	Deft	2.20
Thomas M Barnett	Plff & Deft	3.95
Samuel C McConnell	Plff	4.30
Mrs. McAnney	Plff	3.00
Mary Bryant	Deft	3.90
Joseph Helm	Plff	2.50
Median C Warren	Plff	2.60
Ephraim H Smith	Deft	4.40
Robert Simpson	Plff	1.60
John McIsee	Plff	1.35

(36)

Levi Oates Plff & Deft 2.00
James H Smith Plff 1.85

19 Oct. T. 1850 18
James L. McGee
& others, P.E.
vs
Josephine Porter by
her next friend
James Leulberton

Filed 3. Sept 1850
W. B. Starke Clk

James L McGee & others
vs
Thos Monroe Co

Josephine Porter by her next friend James Culbertson

} On Error - In Sup Court - St Louis Mo

This was a proceeding commenced under our statute in the Monroe Circuit Court by the plaintiff below by her next friend James Culbertson to establish the paper set out in her petition as the last will of James McGee deceased - Which paper had been produced to the County Court of said County for probate as such, and rejected

On a trial in the Circuit Court the jury returned a Verdict declaring said ~~said~~ writing to be the last will and testament of said deceased - The defendants then filed their motion to set aside said Verdict and for a new trial which was overruled by the Court - and judgment given establishing said paper writing as the last will of said James McGee deceased; and the defendants in the court below have brought said Cause to this Court by writ of Error -

Plaintiffs in error make the following points

1st On the issue as to the soundness of the mind of said James McGee to entitle him to make a valid will the weight of evidence was with the defendants below (See evidence contained in Bill of exceptions)

2nd The Court below committed error in permitting persons, other than the attesting witnesses - to testify as to their opinions of the testators capacity at the time to make a will (See 2nd Greenleaf on evidence page 577 - section 691 Title "wills" and authorities there cited - 7 Mo Reports 589 Withington et al vs Withington et al -

3rd Said writing was not signed by the said James McGee, but his name was signed by his wife, to said instrument, who was not and could not be, an attesting witness thereto See 5th section of statute of Wills which requires every person who shall sign the testators name to any will to subscribe his own name as a witness to such will and state that he subscribed the testators name at his request - Said paper was not therefore properly attested as the will of said deceased and is therefore void - See evidence of Thomas M Barnett one of attesting witnesses to this fact

4 The County Court having rejected said paper when produced to said Court for probate as the will of James McGee dec'd, the presumption did not exist on the trial in the Circuit Court that said deceased was of sound mind when he made said writing; and therefore the instruction of the court that on said trial the law raised that presumption was erroneous, also the same instruction that the burden of proving unsoundness devolved on defendants was wrong

5th "The Court erred in giving the fifth Instruction for plaintiff and in refusing the converse of that Instruction as offered by defendants See 5th Section Act Concerning "Wills"

6th "The Court erred in refusing the 4th 6th & 7th Instructions offered by defendants, and committed manifest error in refusing the 5th Instruction offered by defendants - "That if said paper was not signed by said James McGee or by some other person by his direction and in his presence the jury should find for the defendants"

7th The Court having given wrong Instructions for the plaintiff and refused proper Instructions for the defendants should have set aside the verdict of the jury and granted a new trial

Howell Attorney
for Plffs in error

James L McGee
& others
vs In Error
Josephine Porter by
her next friend
Jas Culbertson

Plaintiffs Brief

Howell
atty

Filed 25th Octo. 1850
W. B. Starke Clerk

McGee & others vs Porter by her next friend.

This was a proceeding in the Circuit Court of Monroe County, in order to have a certain instrument of writing, established as the last Will of James McGee — The County Court had previously to the commencement of this proceeding, refused to admit the same to probate —

The Testimony appearing on the recording is conflicting and unsatisfactory in relation to the Sanity of the Testator at the time of making the supposed Will — We are not disposed, however to find fault with the verdict of the jury — The fact of the sound mind and capacity of mind of the said James McGee was fairly submitted by instructions to the jury, and their verdict will not be disturbed by this Court —

The main question

in this case, arises from the manner in which the will was executed.

The testimony of the subscribing witness Barnett, clearly shews that the name of the testator was written by his wife - that Mrs. McGee signed her husband's name to the will, and then carried it to him and that he dotted over his name - The witness says that Mrs McGee signed his husband's name at his request or intimation to do -

The record shews nothing more than a mere subscription of the name - no mark - no dot - the testator's name is written as if he had written it himself.

Upon this evidence, the court was asked to instruct the jury as follows - "6. That if the jury find from the evidence in this case, that said paper purporting to be the will of said James McGee, was signed for him by

another person, they will find for the defendants, unless, they further find that the person so signing the name of the said James McGee, subscribed his or her name, as a witness, to said paper purporting to be a will, and also state that he or she, subscribed the said James McGee's name, at his request"

7. Unless the jury believe from the evidence that the writing offered as the will of James McGee, was signed by him, as his last will and testament, or that he had it signed by some other person by his direction and in his presence, and that such person signing by his direction, subscribed his or her own name as a witness to the said writing, stating that he or she subscribed the testator's name at his testator's request said writing is not duly signed and attested as a will according to the law of this State" — These words following were added by the Court - "But the will is not thereby void, but voidable only" —

The 5th Sec. of the Statute concerning Wills, declares that "Every person who shall sign the testator's name

to any Will by his direction, shall subscribe his own name as a witness to such Will and state, that he subscribed the Testator's name at his request" — These instructions the Court refused to give as set forth. It gave the 4th Instruction, with the addition thereto as above — It was under this Statute that the above instructions were asked —

It becomes necessary therefore for this Court to state our opinion in regard to this Statute —

We consider this section of the Act concerning Wills as Mandatory: not merely directory: and that the failure of the person who subscribes the testator's name by his direction to any such Will to subscribe his own name thereto as a witness, stating that he subscribed the testator's name at his request, is a fatal defect in the execution of the Will —

Under this view of the law, then the Court below erred in refusing to give the instructions above

set forth — The seventh instruction should have been given without the addition thereto by the Court, which addition renders the instruction unintelligible — We know nothing about "voidable wills" —

The judgment below is reversed and the cause remanded for further proceedings not inconsistent with this opinion

J. F. Rylander

We concur

W. B. Napton
James H. Birch.

72

McGee v Porter

Opinion of the Court. Ryland judge

Filed 16th April 1851.
W. B. Stanton clk

James L McGee
& others
Against
Josephene Porter
by her next friend
James Culberson

Supreme Court
of Missouri
at St Louis
October Term
1850

Plaintiffs in error James L McGee and others by their attorneys assign & specify the following errors in the record of this cause

1st The Court below permitted the plaintiff in said court, defendant in this, to introduce improper and incompetent evidence to the jury

2nd The Court below gave to the jury on motion of plaintiff in said Court - defendant in this - wrong Instructions

3rd The Court below refused proper Instructions to the jury, asked by defendants in said Court - plaintiffs in this

4th The Court below refused to sustain the motion of the defendants in said Court - the plaintiffs in this, to set aside the Verdict of the jury and grant a new trial - but overruled said motion

Young & Howell
Attys for
Plffs in error

James L McGee
& others
vs } In Error
Josephine Porter
by her next friend
James Culbertson

Assignment of Errors

Filed 25th Oct 1860
W. B. Starks Clk

Josephine Porter by next friend James Culbertson ads Deft

Error

James L McGee Plaintiff

In Supreme Court

Octo. T. 1850

Statement

on the 25th Feby 1846 James McGee made and published a paper purporting to be a will, among other things therein contained emancipating his slaves.

Record p 2

June 2. 1846 the supposed will was presented to the county Court of Monroe County for probate and rejected

pag 3.

Mar 30. 1848 the deft in error instituted the suit in this case (petition under the statute of 1845) to establish the ~~[illegible]~~ paper rejected by the County Court as the will of James McGee,

April 1848 the deft? the heirs and adm and heirs of James McGee deceased appeared & filed the statutory plea in bar page 5

The plaintiff in the court below introduced the following evidence,

1 – Doctor Samuel McConnell, testified that the deceased was entirely rational and capable of making his will that he had known him a long time and never saw him brighter or more intelligent than when he made his will, p 6 & 10 inclusive

2 Barnet the subscribing witness stated that he saw Mrs McGee sign the will for her husband and that then the testator took the paper and dotted over the signature with the pen,

This witness said the testator was "frantic" "seemed surprised" &c, but he was in the room only a moment or two to sign the will as a witness, never had held a conversation with the testator and expressed no opinion as to the capacity to make a will had no chance as appears from his testimony to know a judge p 11 & 12

3. Mr McAmy – was with the testator the day he made the will, was not long in the room, testator recognized her, had no conversation with him, but he was in his right mind never saw him out of his mind, heard his conversation with McConnel,

Here the defts objected to the intro-

duction of evidence as to the sanity of the testator from any other than the subscribing witnesses to the will, This the Court overruled and the deft excepted. p 13. 14th

Robert Simpson – was the brother-in-law of the testator, visited him frequently during last illness. never saw any evidence of want of rationality p 15.

John McGee, was the nephew of the deceased had frequently and good opportunities of knowing the condition of the mind of testator and never saw any thing like want of capacity p 15. & 16

Isaac Coppidge had known testator 18 years lived near together – always found him rational – never heard of any insanity till after death – p 16.

John Hocker had some conversation with the testator, which seems very rational to me but he thought not see his testimony p 18. 19. Hocker says the testator was not in a condition to make a will, but would not say "he was not in his right mind."

Warren, another neighbor always found the testator in his right mind, never said any thing to the contrary.

Josephus Elmes, said the testator in his last illness several times always found his mind good, p 19

Here the plaintiff rested

The defts introduced the following
E. H. Smith, never that testator was in his right mind from his illness till his death p 20.

J. H Smith – knew nothing & said nothing – material p 22

James Bryant, never that testator was capable of doing business from the time he was taken ill till his death, saw him when he appeared fearfully dreaming, probably – saw him bowing up his hands and reading as in a book, no book being in his hand – &c. [No doubt the testator was praying Glover) p 23. 4.

Noonan – saw him frequently he was sometimes rational sometimes not –

Mr. Noonan, about the same effect – page 24.

Mr. Bryant was in the house sitting up one night and saw the old man reading &c as in a book &c. asked him if he was asleep, he said no — she testified that he failed to know some persons coming into the room, never conversed with him — (nor did any of the 4 or 5 last witnesses)

E Smith — could not say what his capacity was never having talked with him,

many other witnesses Jacob Bruce Levi Caden Eli Bozarth and Hugh Smith none of whom held any conversations or very slight testified to his condition when half awake in a dark room, and gave their opinions to his incapacity to make a will, But not one of them had a tithe of the opportunity to judge of his capacity as Dr. McConnel at the time he made the will,

(This was all the evidence)

The plaintiffs below moved the court to instruct the Jury that if James McGee either signed the paper produced in evidence as his will himself, by some one else

in his presence & by his direction and the same was attested by Barnet & McBarnel as subscribing witnesses in his presence and the testator was at the time of signing and attesting said will of sound and disposing mind they will find for the plff

2 That the signing by the testator may be proved by evidence of his having acknowledging the same

3 The fact of the attestation being in the presence of the testator need not appear on the face of the will but may be proved by other evidence

4 The Lord presumes every one sane till contrary appears

5 If testator wife signed the ~~paper~~ will by his direction and the same was then shown to testator and approved by him and was acknowledged by the testator to the subscribing witnesses as his act and deed the will is not void because these facts are not stated on the paper,

6 a man or woman has the right by fair argument & persuasion to induce another to make his will or change the same

and gave him or her his property and this is of no objection to the will of the testator was of sound mind

7 That tho an attesting witness may deny the sanity of testator it is competent to prove the sanity of the testator by other testimony

8 If the will was produced by testator to the witnesses already signed and acknowledged by him as his act & deed, they may infer therefore he signed the same himself

Defts excepted to these instructions but court gave them.

They then moved Court to instruct-
1st unless McGee was of sound mind at the making the will they will find for defts-
2nd If at that time testator was in state of mind capable of being unduly influenced by his wife and was unduly influenced they will find for defts.
3 If at any time before making the will the testator was of unsound mind, they will find for defts unless it is made to appear to them he was of sound mind at making his will,
4 If the evidence as to soundness or unsoundness of mind be equally ballanced they will find for the defts
5. If said paper was not signed by the testator

or some one by his direction and in his presence they will find for defts.

6 If the said paper &c was signed for him by another they will find for defts unless the person so signing subscribed his name as a witness thereto stating that he so signed the name at testators request

7. That ~~[illegible]~~ unless the will was made as in the case last named, ~~[illegible]~~ and the facts ~~[illegible]~~ stated on the face of the paper the said will is not duly authenticated according to law! (but the will is not void but voidable only)

The court gave the three first instructions moved by the defts without objections, refused to give the 4th 5th & 6th instructions and qualified the 7th by ~~[illegible]~~ appending the words in brackets.

The defts excepted, to giving pleffs ~~[illegible]~~ instructions and refusal to give defts, The Jury found for the plaintiff.

The defts moved for new trial, overruled, ~~[illegible]~~ —

The defts brot a writ of error,

Points & authorities by Glover & Campbell — for the defendants in error.

1st The weight of testimony supports the verdict of the Jury; Dr McBonnell's opinion was entitled to more weight than that of any other witness as having had better opportunity to form an opinion and his evidence is entirely satisfactory to the point of the competency of the testator to dispose of his property at the time the will was made 5. Har. & John 480.

2nd The presumption of law is that the testator was of sound mind and capable of making a will and the burthen of showing the contrary devolved on the defendants 2 Starkie Ev top p 929. 10 N Hamp 514. 8 Watts 66. 2 B Mon 74.9.

(3) There was no evidence of any derangement or insanity or imbecility of mind in the testator at any time, the facts deposed to by which this is attempted to be shown by witnesses who never lived with the testator and who observed him when sleeping or only partially awake are entitled to no consideration, particularly when no one of these witnesses even expressed the opinion of his insanity till after the controversy arose

4th There was not a particle of proof of undue influence on the part of the wife of the testator or any other person over him at any time prior to, at or subsequent to the publication of the will,

5 It is not undue influence nor is it evidence of undue influence that one has procured a will to be made in his favor by fair argument or persuasion 2 Starkie Ev 1 vol p 932 Note (1)

6 That in this case the will must be considered as executed by the testator in person, as the testimony is he took the pen and retraced by "rolling over the signature the characters of his name written by his wife besides his acknowledgement of the signature by the testator proved by all the witnesses was proof to be weighed by the jury as proving the execution to have been made by the testator in person 5 B. mon. 311. 2 mon. 83.

7 That if the said will was not signed personally by the testator, but by his wife at his request the will is not void because that fact was not stated on the face of the will, this does not avoid the will, the statute not declaring such should be the effect, it is only directory. The question however does not arise in the case, and the Jury no doubt found the signing by the testator

8 The subscribing witnesses were not the ones competent in law to testify to the sanity of the testator It is proper to produce the subscribing witnesses, all of them but their testimony is not conclusive on the question of sanity or insanity 3. Mass 236. 8 Mass 371 2 Starkie Evd p 932 note (1) 9 Gerger 329 – The case in 7 Mo R 589 is not in conflict with this doctrine The remarks of the Judge there when understood with reference to the subject-matter, show that it was only meant that two witnesses must at least be made as ~~such~~ subscribing witnesses.

9 The 5th instruction moved by the defts was already given for the plaintiffs

10. The 7th instruction moved by defts was improper because it assumes unless the signature was made for the testator by a third person &c, the same would be invalid. The defts received more by that instruction than they were entitled to.

11. The court court can not in this case review because the evidence did not sustain the verdict 6 Mo R 177.

Josephine Porter by
next friend Deft-

ads [illegible] Error

James S. McGee & others, Plaintiffs

[12]

Josephine Porter a person of color under the age of twenty one years suing by her next friend James Culbertson plaintiffs

vs

James L McGee administrator of the estate of James McGee dec'd & James L McGee John L McGee William McGee Margaret N Thompson Alexander Thompson & Polly McGee defendants —

In the Monroe circuit court in the State of Missouri —

Proceeding on Petition to establish last will of James McGee deceased —

To James Culbertson next friend of sue Josephine Porter in above styled suit —

You are hereby notified that we the defendants in said cause have sued out of the Supreme Court of said State of Missouri a writ of ~~[illegible]~~ Error directed to the judge of the fourth judicial circuit requiring ~~[illegible]~~ commanding him to send up to said Supreme Court the record and proceedings in said above styled cause which said Writ is returnable to said Supreme Court at the City of St Louis in the county of St Louis & State aforesaid — the next term of which court will be begun and held in said City on the third monday in October next

August 1st 1850

James L McGee
John L McGee
William McGee
Margaret N Thompson
Alexander Thompson
& Polly McGee
By their attorney
Mm J Stowell

James L McGee
& others

ats

Josaphine Porter by
her next friend
Jas Culbertson

"

Notice to said
Jas Culbertson

I waive notice of this writ
Clover for Pltff

The only question in this case, is the construction of the 5th section of the Statute - concerning the signing of the name of the Testator by a person, his wife for instance, who has not signed her name as an witness &c -