

Tarver Vs. Tarver

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Court : US Supreme Court

Decided On : 1835

Appeal No. : 34 U.S. 174

Appellant : Tarver

Respondent : Tarver

Judgement :

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Tarver v. Tarver

34 U.S. (9 Pet.) 174

APPEAL FROM THE DISTRICT COURT OF THE UNITED

STATES FOR THE SOUTHERN DISTRICT OF ALABAMA

SYLLABUS

Alabama. A bill was filed by the heirs at law of R.T., stating, that R.T., being then a citizen of Georgia, in the year 1819, made a conditional will, in which he recites, "being about to take a long journey, and knowing the uncertainty of life, he

deemed it advisable to make a will." The will was set out in the bill, and was executed before three witnesses; and devises all his real and personal estate to his brother, B.T., after making a small provision for his sister and her son. R.T. performed the journey, and returned

safe. After the decease in Alabama of R.T., his brother, B.T., carried the supposed will to the County Court in Dallas County, Alabama, to which the intestate and his brother had removed, and where they had purchased and held jointly considerable real and personal estate, and upon proof of the handwriting of two of the subscribing witnesses who were dead, the other witness living in the State of Georgia, the will was admitted to probate. The bill alleges the probate to be void, prays that the will may be cancelled and the estate distributed according to the laws of Alabama.

Held: that this was, not a conditional will. The instrument's taking effect as a will is not made to depend upon the event of the return or not of the testator from his journey. There is therefore no color for annulling the will that it was conditional.

In the case of [Armstrong v. Lear](#), 12 Wheat. 175, 6 Cond. 500, it was said by this Court that no other evidence of there being a will can be received by the court than such as would be sufficient in all other cases where titles are derived under a will, and nothing but the probate or letters of administration with the will annexed are legal evidence in all questions respecting personalty. But the rule there laid down does not apply to this case. Here, the complainant set up the will as the source of his title, and was bound to prove it, which must be done by the probate, which must be set forth in the bill. In this case, the complainant had set forth a copy of the instrument in his bill, alleging it was conditional, and therefore not valid. The defendant was under no obligation to produce any probate. Everything, by the complainant's own showing, was before the court.

An original bill will not be sustained on the allegation that the probate of the will is void. If any error was committed by the court of Dallas County in admitting the will to probate, it should have been corrected by an appeal to the next term of the Supreme Court, in chancery or in the District of Washington, to the superior court

of that district, according to the law of Alabama.

The appellees, citizens of the State of Georgia, filed their bill in the District Court of the United States for the Southern District

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of Alabama against the appellant, Mason Gilliam, and John Gilliam, her son, stating that they and the defendants were the heirs at law of Richard Tarver, who died in the year 1827; that the deceased in 1819 made a will, which they assert to be a conditional will and which they exhibit, which they also state was not considered as a will by Richard Tarver at the time of his death. That the principal devisee in that will, Benjamin Tarver, one of the defendants, has proved the will in Dallas County by proving the handwriting of two of the subscribing witnesses, who were dead, the other being out of the state, and that the probate thereof is void; that the said Benjamin has taken possession of all the deceased's lands and effects, and they pray an account of the real and personal estate of the testator, and the time at which it was acquired, and "that the will may be cancelled, and the property of the deceased be distributed according to the laws of Alabama."

The copy of the will and of the probate annexed to the will were as follows.

"Will. In the name of God, amen! Being about to travel a considerable distance and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament. It is my will that my brother Benjamin J. Tarver should have all my estate, both real and personal, except a competent maintenance for my sister Gilliam and her son John Gilliam, and further he should give the said John Gilliam a liberal education, and then carry him through the study of law or physic, as he may think best, and at the age of twenty-one give him, the said John Gilliam, twenty-five hundred dollars in money or property."

"Given under my hand this 3 May, 1819."

"RICHARD TARVER [L.S.]"

"Test: W. Lyman, William Booker, William H. Carter"

"Witnesses: D. C. Patterson, William F. Hay"

"Probate of will. Orphan's Court, November term, 1827. State of Alabama, Dallas County. Personally appeared before me, James Suffold, judge of the county and orphan's court in the county aforesaid, Joseph Scott, who being duly sworn, saith that he knows the hand writing of William Booker

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and David C. Patterson, who signed their names as witnesses to the within will, that he has seen them write; that he believes the signatures appearing thereto was their, and each of their proper acts and signatures; that to his certain knowledge, both Booker and David C. Patterson are now dead."

"JOSEPH SCOTT"

"Sworn to, and subscribed before me, this 12 November, 1827."

"JAMES SUFFOLD"

"13 November, H. VANDYKE, Clerk, recorded"

The answers of the defendant in the district court declare that Richard Tarver made his last will and testament, as stated in the complainant's bill, but deny that there was a condition annexed thereto. The defendant states that the testator and himself lived together and employed their capital together and for their joint benefit, with an express agreement that the survivor should have the whole, which was the joint property of both. At the time the testator executed the will referred to in the bill of the complainant, he executed a will substantially similar in all respects to that executed by Richard Tarver. The answers assert that the probate of the will is in full form and was regular, and that there is no sufficient cause shown in the bill for the exercise of equitable powers by the court.

The district court gave a decree in favor of the complainants on the ground that the will of Richard Tarver had not been admitted to probate by the proper orphan's court, and of course that it did not appear to the court that he made a will. And also that this proceeding was instituted to set aside the will of Richard Tarver, and no title which the respondent might have to the property of Richard Tarver can be set up in the case except such as may be derived from the will. The defendants appealed to this Court.

MR. JUSTICE THOMPSON delivered the opinion of the Court.

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The pleadings are very inartificially drawn, and do not probably present the case in such a manner as to enable the Court to dispose of all the questions intended to be brought under consideration.

The bill sets out that Richard Tarver, late of the County of Dallas and State of Alabama, departed this life in that county in the year 1827, leaving at the time of his death a large real and personal estate and leaving three sisters and the defendant, Benjamin Tarver, his sole heirs at law. That the said Richard Tarver, in the year 1819, being a citizen of Georgia and possessed of a large estate in lands, made a conditional will in which he recites that being about to take a long journey, and knowing the uncertainty of life, he deemed it advisable to make a will, and thereby declared that he left all his estate, real and personal, to his brother Benjamin Tarver. And making some small provision for his sister Mason Gilliam and her son John, all which will more fully appear by a copy of the supposed will attached to the bill, and which is prayed to be considered as a part thereof. The bill alleges that the said Richard Tarver performed the journey and returned safe. Some statements are then made with respect to the property of the deceased, and the bill alleges that he and the defendant, Benjamin J. Tarver, lived together, and employed their capital of every description jointly. That Benjamin, on the decease of his brother, took possession of all his estate. That the said supposed will purports to be attested by sundry persons as witnesses, the survivor of whom

resides in the State of Georgia. That the said Benjamin carried the supposed will before the County Court of Dallas County, and upon the proof of the handwriting of two of the subscribing witnesses, who are dead, the other still living in the State of Georgia, the will was admitted to probate, and the bill alleges that such probate is void. The bill then prays that the will may be cancelled and the estate distributed according to the laws of Alabama, and that the defendant may set forth the full amount of the property of the said Richard, not only what he had at the time of his death, but what he had at the date of the supposed will, describing the property at each of these times particularly. An amended bill was afterwards filed stating that the defendant was attempting to set up said will and charging that it was conditional in its inception

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and that the condition on which it was to take effect has not happened.

Several answers were filed in consequence of exceptions taken and allowed by the court. These answers contain much matter not responsive to the bill and which was not properly before the court. But it is denied that there was any condition annexed to the will other than is shown by the will itself. The defendant admits that he procured the will to be proved and admitted to record in the Orphan's Court of Dallas County. And alleges that the probate of said will remains in full force, not revoked or in any manner set aside, and which he is informed and believes is in all respects legal. And prays the benefit of the answers as a demurrer to the bill. The court decreed a distribution of the estate among the legal representatives of the deceased, and the cause comes here for review.

The questions put in issue by the pleadings are:

1. Whether Richard Tarver, at his decease, left the will in question as a valid and operative will.
2. Whether such will was duly admitted to record in Dallas County.

It is a little remarkable that the final decree in the cause does not touch either of these questions put in issue by the pleadings, but proceeds at once on the report of the master to make distribution of the estate among the heirs at law of the deceased. The judge in his opinion does notice these questions, but does not decide whether the will was conditional and had become inoperative by reason that the contingency on which it was to take effect had not happened, but puts his decision upon the ground that the defendant was bound to establish the will, and that this could be done in no other way than by the production of a valid probate. He observes that this proceeding is instituted to set aside the will of Richard Tarver, and no title which the respondent may have to the property of his deceased brother can be set up in this suit except such as may be derived from the will. That if the complainants had even admitted the existence of the will of Richard Tarver, yet it would be indispensable to the title set up by the respondents through that will to show that it had been duly admitted to probate by the proper orphan's court. The judge then goes into an examination whether the will

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had been duly admitted to probate, and coming to the conclusion that it had not, he declares that it does not therefore appear to this court that Richard Tarver made any will. He seems to rest his opinion upon the decision of this Court in the case of [Armstrong v. Lear](#), 12 Wheat. 175, where it is said that we cannot receive any other evidence of there being a will than such as would be sufficient in all other cases where titles are derived under a will, and nothing but the probate or letters of administration with the will annexed are legal evidence of the will in all questions respecting personalty. But the rule as there laid down does not apply to this case. There, the complainant set up the will as the source of his title and was bound to prove it, which must be done, said the Court, by the probate, which must be set forth in the bill. But in the present case the inquiry was whether the instrument in question was a valid will or not, and the complainant had set out a copy of that instrument for the purpose of showing that it was not a valid subsisting will because it appeared upon the face of it to be conditional, and then to show that such condition or contingency had never happened. The defendant was not

the actor seeking to enforce any right under the will. And he could be under no obligation to produce any probate. The complainant having set out the will, everything by his own showing was before the court that was necessary to present the question which was to be decided. There was no evidence impeaching this will except what appears on the face of it and is rested entirely on the introductory part of it. It begins in this manner.

"Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament,"

&c.;

And it is contended that the condition upon which the instrument was to take effect as a will was his dying on the journey and not returning home again. But such is a very strained construction of the instrument, and by no means warranted. It is no condition, but only assigning the reason why he made his will at that time. But the instrument's taking effect as a will is not made at all to depend upon the event of his return or not from his journey. There is no color, therefore, for annulling this will on the ground that it was conditional.

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And the bill cannot be sustained on the allegation that the probate is void. An original bill will not lie for this purpose. If any error was committed in admitting the will to probate, it should have been corrected by appeal. This is provided for by the law of Alabama, which makes the county court in each county an orphan's court for taking the probate of wills, &c.;, and declares that if any person shall be aggrieved by a definitive sentence or judgment or final decree of the said orphan's court, he may appeal therefrom to the next term of the supreme court in chancery, or in the district of Washington, to the superior court of that district. The law also provides that any person interested in such will may, within five years from the time of the first probate thereof, file a bill in chancery to contest the validity of the same, and the court of chancery may thereupon direct an issue or issues in fact, to

be tried by a jury, as in other cases. But that after the expiration of five years, the original probate of any will shall be conclusive and binding upon all parties concerned, with the usual savings to infants, *femes covert*, &c.;, Toulmin's Dig. 887. We think nothing has been shown to impeach or invalidate this will, and that the bill cannot be sustained for the purpose of avoiding the probate. That should have been done, if at all, by an appeal according to the provisions of the law of Alabama. We do not enter at all into an inquiry as to the operation of this will with respect to the property that will pass by it, nor touching the right by survivorship, as set up by the defendant in the court below. These questions are not properly before us upon the pleadings in the cause or presented in such a manner as to enable us satisfactorily to dispose of those questions. We think, therefore, that the decree of the court below must be reversed, and the bill dismissed without prejudice, so as not to preclude the appellees from asserting their right to any part of the property, if any such there be, which does not pass under the will of Richard Tarver.

The decree of the district court is accordingly reversed and the bill dismissed without prejudice.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

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Southern District of Alabama and was argued by counsel, on consideration whereof it is ordered and decreed by this Court that the decree of the said district court in this cause be and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said district court with directions to that court to dismiss the bill of the complainants without prejudice.