

Taylor Vs. Savage

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Court : US Supreme Court

Decided On : 1843

Appeal No. : 42 U.S. 282

Appellant : Taylor

Respondent : Savage

Judgement :

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Taylor v. Savage

42 U.S. (1 How.) 282

MOTION FOR LEAVE TO

GIVE APPEAL BOND

SYLLABUS

Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator *de bonis non*

with the will annexed is appointed, all further proceedings, either by execution or appeal, are irregular until the administrator be made a party to the suit.

If an execution be issued before the proper parties are thus made, it is unauthorized and void, and no right of property will pass by a sale under it.

The administrator cannot obtain redress by application to this Court, but must first be made a party in the court below. This may be done at the instance of either side.

After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree if the bond be not filed in time.

It is not clear that a complainant who has appealed from a decree in his favor, in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below.

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MR. CHIEF JUSTICE TANEY delivered the opinion of the Court.

This case is brought before the court by the petition of Vincent M. Benham, administrator *de bonis non* with the will annexed of Samuel Savage.

It appears that a bill was filed by William Taylor and others, in the District Court of the United States for the Northern District of Alabama, against George M. Savage, executor of Samuel Savage, deceased, to which the defendant appeared and answered. Testimony was taken on both sides, and at the final hearing on 28 November, 1842, the court decreed that the complainants recover of the respondent, as executor of Samuel Savage, \$5,212.92 and costs, to be levied of the goods and chattels, lands and tenements of the said Samuel Savage. On the same day, the Orphans' Court of Lauderdale County, in the State of Alabama, having competent jurisdiction for that purpose, removed the said George M. Savage from his executorship and appointed Vincent M. Benham, the petitioner above mentioned, administrator as aforesaid.

Huntsville, where the district court of the United States held its session, and Florence, where the Orphans' Court of Lauderdale

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County was in session, were distant from each other between seventy and eighty miles, and the new administrator, Vincent M. Benham, does not appear to have known of the decree until some days after it was passed. At the time of the decree, Harvey Dillahunty was attending to the suit in chancery as the attorney in fact of George M. Savage, the respondent, and two days afterwards, that is to say on 30 November, 1842, in the name of the respondent, prayed an appeal, and the district court, with the consent of the complainants, passed an order giving the said George M. Savage liberty to file an appeal bond at any time within twenty days from the adjournment of the court. On 2 December, the complainants also appealed, and on the same day gave the usual bond to cover costs, which was duly approved, and the transcript of the record and proceedings had in the cause in the district court have been transmitted to and docketed in this Court in the names of the said William Taylor and others, complainants and appellants, against the said George M. Savage, executor of Samuel Savage, respondent and appellee.

The executor having been removed as aforesaid, no bond was executed by him nor by Vincent M. Benham, the administrator, within the time limited by the court, and therefore an execution was issued by the clerk of the district court against the property of Samuel Savage, by virtue of which the marshal has seized the property of the said deceased, and is about to sell the same in order to satisfy the decree.

In this state of the proceedings, Benham, the administrator, has filed his petition at the present term, setting forth the facts as above mentioned and offering to file a transcript of the proceedings on his part and to give security on his appeal, and praying that his bond may be approved by this Court, and the execution issued by the complainants superseded until the appeal can be heard and decided in this Court. Affidavits have been filed on both sides, but there is no conflict between them in any circumstance deemed material by the court, nor do they vary in any

important particular from the statement contained in the petition.

We are by no means prepared to say that a complainant, after having appealed from a decree in his favor, can be permitted, pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate court in order to obtain a

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decree for a larger sum. But the relief asked for by the petition cannot be granted, because there is no case legally in this Court upon the appeal of either party upon which process can be issued. The decree in the circuit court is against George M. Savage, executor of the last will and testament of Samuel Savage deceased. There was no other party respondent in the district court, and the decree was passed against him in his representative character. Before the appeal was prayed on either side, he had ceased to be the representative of the estate of Samuel Savage, and had no control over it, nor any right to interfere with it by prosecuting or appearing to an appeal or in any other manner. By his removal from the office of executor he was as completely separated from the business of the estate as if he had been dead, and had no right to appear in or be a party in this or any other court to a suit which the law confided to the representative of the deceased. No further proceedings, therefore, could be had on the decree in the district court until Benham, the administrator *de bonis non*, was made a party.

In this view of the subject, it follows

1. That the appeal of the complainants is not regularly before this Court, and the irregularity cannot be cured here unless the administrator voluntarily appears to it. The case may, however, upon the application of the appellants, be remanded to the district court with leave to make the proper parties.
2. The execution issued on the decree was unauthorized and void, and no right of property will pass by a sale under it if one should be made by the marshal.

3. The appeal of Benham, the administrator *de bonis non*, is also irregular, and the case cannot be brought here by him unless he is first made a party in the district court.

But he may be made a party there, either upon his own application or that of the complainants, according to the rules and practice in chancery proceedings. And when this has been done, the administrator may take an appeal, and upon giving bond within the time prescribed by law, all proceedings upon the decree will be stayed in the district court until the decision of this Court shall be had in the premises. And if he fail to give the bond within the limited period, the complainants will then be entitled to process from the district court in order to enforce it. As the

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case now stands, there is no suit here upon which this Court can find any process to set aside the execution improperly issued, and the petition of Benham, the administrator, must be

Dismissed.

ORDER

On consideration of the petition of Vincent M. Benham, filed in this case, and of the arguments of counsel thereupon had, it is now here ordered by this Court that the said petition be and the same is hereby dismissed.