*United States, Appellants, *v.* Antonio Huertas.

Florida land-claims.

On the 15th of September 1817, the appellee, on his petition to the governor of East Florida for a grant of land for 15,000 acres, for services performed by him, obtained a decree of the governor for the same; the land was described in the petition particularly, and its location designated; in December 1820, an order of survey was obtained for the lands, and they were surveyed; the certificate of survey omitted to state that the lands lay at the place described in the petition; the surveys were executed in April 1821, and full titles to the land were granted in the same month. The order of survey, and the full title granted for the land surveyed, could convey nothing not comprehended in the decree of the 15th of September 1817; that decree was for 15,000 acres of land, lying at the place described in the petition.

The district court decided that the claim was valid, and confirmed it, according to the surveys. This court concurs with the district court so far as respects the validity of the claim, but disapproves of that part of it which confirms the title to the lands described in the surveys made in April 1821; these surveys do not appear to conform to the concession, under which alone the petitioner can claim.

The decree of the district court was affirmed, so far as it declared the claim of the petitioner was valid, and reversed, so far as it confirmed the title to the land in the surveys; the cause was remanded to the district court, with directions to cause a survey to be made of the lands contained in the concession, according to its terms, and to decree the same to the claimant.

Appeal from the Superior Court of East Florida.(*a*)

This case was argued by *Call*, for the United States; and by *Wilde* and *White*, for the appellee.

Marshall, Ch. J., delivered the opinion of the court.—On the 15th of September 1817, Antonio Huertas, an inhabitant of East Florida, petitioned the governor of that province for 15,000 acres of land; on which the following decree was made. "In attention to what this petitioner represents, and whereas *the services he mentions were well known, I grant to him, in the name of his majesty, and of his royal justice, which I administer, the fifteen thousand acres of land which he solicits, in order that he may possess and enjoy them in absolute ownership; and in testimony, &c."

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The land solicited is described in the petition as lying on a stream running west of St. John's river, and emptying itself into it, at the distance of about twelve miles south of the Lake George, and the survey to begin at about four or five miles west of the river St. John, so that the said stream will divide the tract into two parts. In December 1820, an order was obtained for surveying the land in four tracts; one of 2500 acres, another of 1500, a third of 600, and the fourth of 10,400 acres. These surveys were executed in April 1821, and full titles granted in the same month. These several tracts adjoin each other, and appear to lie on the stream required in the petition, and directed by the decree. But the certificate of the surveyor omits to state that the land lies four or five miles west of the river St. John.

The order of survey, and the full title granted for the land surveyed, could convey nothing not comprehended in the decree of the 15th of Sep-

(*a*) This case was decided at January term 1834, but the opinion of the court was not received by the reporter until after the publication of the volume containing the reports of that term.

tember 1817. That decree was for 15,000 acres of land, lying in the place described in the petition.

The district court decided that the claim was valid, and confirmed it to the claimant, "to the extent, and agreeable to the boundaries, as in the grants for the said land, and the plats for the four surveys thereof made, by Don Andrew Burgevin, and dated the 5th day of April 1821, and filed herein, as set forth." This court concurs with the district court, so far as respects the validity of the claim, but disapproves of that part of it which confirms the title to the lands described in the surveys made in April 1821. Those surveys do not appear to this court to conform to the concession made in 1817, under which alone the petitioner can claim.

The decree of the district court is affirmed, so far as it declares the claim of the petitioner to be valid; and is reversed, so far as it confirms his title to the *lands described in the several plats of surveys referred [*173 to in the decree. And the cause is remanded to the district court, with directions to cause a survey to be made of the lands contained in the said concession, according to the terms thereof, and to decree the same to the claimant, so far as he has retained his title thereto.

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*Benjamin J. Tarver, Appellant, *v.* Samuel B. Tarver, Charlotte Tarver and Patience Gibson. [*174

Will.—Probate.

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 recited, "being about to take a long journey, and knowing the uncertainty of life, deemed it advisable to make a will." The will was set out in the bill, and was executed before three witnesses; and devised 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 alleged the probate to be void, prayed that the will might be cancelled, and the estate distributed according to the laws of Alabama.

Held, that this was not a conditional will; the instrument 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.[1]

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[1] In determining upon the effect of a conditional will, the question always is, whether the words clearly express a contingency upon which the instrument is to take effect, that is, whether the arrangement of the testator's affairs is intended to be merely provisional; or whether they may be fairly interpreted as indicating the cause or occasion of making the will; in other words, whether it is an absolute condition, or dependent upon any particular motive operating at the time. In the former class of cases, is embraced that of Ward's Goods, 4 Hagg. 179, when the paper propounded was an unattested letter, containing this expression: "I mention these matters thus particularly, to serve as a memorandum to you, in case it should be the Lord's will to call me hence, by any fatal event, in the voyage or journey before us;" this instrument was rejected, the testator having returned from his journey, and made a subsequent attested will. So, in Parsons *v.* Lanoe, 1 Ves. sen. 190, the condition was, "if I die before my return from my journey to Ireland;" the decedent did die before his return; and Lord Hardwicke held, that the will was entirely contingent upon the event specified. So, in Sinclair *v.* Hone, 6 Ves. 608, the contingency expressed in a codicil was, "in case I die before I join my beloved wife," &c.; the testator joined his wife, before his death, and though