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

In Armstrong *v.* Lear, 12 Wheat. 175, 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.[2]

Appeal from the District Court for the Southern District of Alabama. The appellees, citizens of the state of Georgia, filed their bill in the district *175] court of the United States for the southern *district 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 asserted to be a conditional will, and which they exhibited;

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the codicil had been admitted to probate in the ecclesiastical court, it was held by the master of the rolls to be contingent, and to be defeated by a failure of the condition. In Porter's Goods, 2 L. R., P. D., 22, the testator used the following language: "Being obliged to leave England, to join my regiment in China, I leave this paper, containing my wishes—should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of, at that time, or anything appertaining to me hereafter, to be divided," &c.; the deceased returned to England from China, and his will was held to be merely conditional, dependent upon his death in China. So, in Robinson's Goods, 2 L. R., P. D., 16, a master mariner, whilst on a voyage, wrote with his own hand a will, commencing, "this is the last will and testament of me, that in case anything should happen to me, during the remainder of the voyage from hence to Sicily and back to London, then I give and bequeath," &c., and it was held, that the dispositions of the will were dependent on the event referred to in the beginning of it, and that it had therefore, only a contingent operation. So, a mariner's will commencing, "instructions to be followed if I die at sea, or abroad," is only conditional. Lindsay *v.* Lindsay, 2 L. R., P. D., 457. And where a person executed his will in England; then went to India, and whilst there, executed a second will, containing this clause: "I write this, as my last will and testament, in case of a sudden or accidental death befalling me in India;" he returned and died in England; and it was held, that the will was contingent on his dying in India, and as that event had not occurred, the instrument was inoperative. Jobson *v.* Ross, 42 L. T., P., 459. So also, where one, in contemplation of a journey, thus began an informal testamentary paper: "my wish, desire and intention *now* is, that if I should not return (which I will, no preventing Providence), what I own shall be divided in follows;" it was held, by the supreme court of Pennsylvania, Gibson, Ch. J., that upon his return and subsequent death, the instrument ought not to be admitted to probate. Instances of cases falling within the other class, where the words may be interpreted, as indicating the cause or occasion of making the will, and not applying to the disposition of the property, may be found in those of Barton *v.* Collingwood, 3 Hagg. 176; Forbes *v.* Gordon, 3 Phillim. 625; Strauss *v.* Schmidt, 3 Moore P. C. 223; Mayd's Goods, 6 L. R., P. D., 17; Ex parte Lindsay, 2 Bradf. 204; Thompson *v.* Connor, 3 Ibid. 366; French *v.* French, 14 W. Va. 458. A conditional will must be admitted to probate, unless the intention be very clear, that it is to be inoperative, in the event which has happened. Ex parte Lindsay, and Thompson *v.* Connor, *ut supra*; Sinclair *v.* Hone, 6 Ves. 607. In such case, the probate is not conclusive. See also, on the subject of conditional wills, Morrell *v.* Dickey, 1 Johns. Ch. 153; Hugo's Goods, 2 L. R., P. D., 73; Graham's Goods, Ibid. 385.

[2] See Ellis *v.* Davis, 109 U. S. 485, 503.

which they also stated, 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, had 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 was void; that the said Benjamin had taken possession of all the deceased's lands and effects; and they prayed 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 though 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 3d May 1819.

RICHARD TARVER. [L. S.]"

Test:—W. Lyman, William Booker, William H. Carter.
Witnesses: D. C. Patterson, William F. Hay.

Probate of will. "Orphans' court, November term 1827. State of Alabama, Dallas county. Personally appeared before me, James Suffold, judge of the county and orphans' court, in the county aforesaid, Joseph Scott, who being duly sworn, saith, that he knows the handwriting of William Booker *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. [*176

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

JAMES SUFFOLD.

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

The answers of the defendant in the district court, declared, that Richard Tarver made his last will and testament, as stated in the complainant's bill, but denied that there was a condition annexed thereto. The defendant stated, 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 asserted, that the probate of the will was in full form, and was regular, and that there was 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 orphans' 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, could be set up in the case, except such as might be derived from the will. The defendants appealed to this court.

The case was argued by *Key*, for the appellants; and by *Gamble* and *Wilde*, for the appellees.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on appeal from the district court of the United States for the southern
*177] district of Alabama. *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 witnessess, 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
*178] its inception; *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 orphans' court of Dallas county; and alleges, that the probate of said will remains in full force, not revoked, nor 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 questions 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, upon 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 orphans' court. The judge then goes into an examination, whether the will *had been duly admitted to probate, and coming to the conclusion that it had not, he declares, that it does not, [*179 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, say 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 its face 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.

*180] *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 orphans' 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 orphans' 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 or 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, nor 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.

*181] This cause came on to be heard, on the transcript of the record from the district court of the United States for the *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.