taken in condemnation proceedings when the taking will destroy the use to which it is devoted, unless it be found that the constructing road, or the connection sought to be made, is of so great importance to the public as to demand that another public use of less importance shall be set aside for its benefit, and that the new enterprise cannot be accomplished in any other practical way. The first occupier of the ground is entitled to all the advantages derived from the establishment of the public use therein, and no question of convenience nor expense to the company seeking condemnation can be considered unless it be such as to render the performance of the duty enjoined by law practically impossible by any other means which can be used by the constructing company.

BLINN et al. v. McDONALD.

(Supreme Court of Texas. June 20, 1898.)

LIABILITY OF HEIRS AND DEVISEES FOR DEBTS—PLEADING.

1. A petition to subject property in the hands of heirs and devisees to the payment of decedent's debts alleged the qualification of executors, their removal, and the appointment of an administrator. *Held*, that it would be presumed that defendants did not receive the estate until the close of the administration.

2. The liability of heirs and devisees for the debts of decedent should be governed by the law in force at the time they actually receive the property.

3. Under Rev. St. 1895, art. 1869, providing that property received by heirs and devisees shall be liable in their hands to the payment of decedent's debts, a creditor cannot have a personal judgment against such heirs and devisees.

4. A petition to charge heirs and devisees with the debts of decedent, which alleged the receipt by each of property of decedent sufficient to pay the debt, but did not specifically describe the property, was insufficient.

Error to court of civil appeals of First supreme judicial district.

Action by W. J. McDonald against Nannie E. Blinn and others. From a judgment for plaintiff, defendants appealed to the court of civil appeals, which affirmed the judgment (38 S. W. 384), and defendants bring error. Reversed.

Dickson & Moroney, for plaintiffs in error. H. D. McDonald, for defendant in error.

DENMAN, J. This suit was brought by W. J. McDonald against the heirs, devisees, and legatees of B. H. Epperson, in the district court of Marion county, Tex. The petition, as far as it relates to the questions we will discuss, alleged, substantially, that, in 1878, B. H. Epperson died testate, and, his will being duly probated within 12 months thereafter by the county court of Marion county, persons named as executors thereof qualified as such; that prior to 1888 such executors were removed, and an administrator appointed by said court; that on the 16th day of January, 1888, plaintiff obtained in the district court a judgment against such administrator for $1,519.89 and costs, which was ordered to be paid in due course of administration; that said judgment on 25th of January, 1888, having been duly filed against said estate, was allowed, approved, and classified by the county judge, and duly entered upon the claim docket as an established claim in favor of plaintiff against said estate; that at the August term, 1888, of the said county court, said administrator was removed, and at the August term, 1889, said administration was by order of said court closed; that said judgment is wholly due and unpaid; that defendants, as heirs, devisees, and legatees of said B. H. Epperson, "have since his death received as such a large amount of property, to wit, money and lands, which belonged to said B. H. Epperson at the time of his death, the lands being situated in Hardeman, Cottle, Foard, Clay, and many other counties in Texas, all of which property was and is liable for the debts of the said B. H. Epperson, and that such property is of the value of $50,000; that the entire subsisting indebtedness against the said B. H. Epperson's estate, including affiant's claim, does not exceed $5,000, and that the value of the property and assets so received by each one of said Epperson's heirs, devisees, and legatees, who are hereinafter named, and which property and assets said heirs, devisees, and legatees, and each of them, still has on hand in his or her possession, exceeds said sum of $5,000." The petition, after stating other matters not necessary to mention here, closes with a prayer for judgment for the debt against defendants and for general relief. Defendants excepted to the petition on the ground that it did not show what property of the estate of Epperson had come into the custody and possession of each of the defendants. The trial court having overruled this exception, and rendered judgment on the hearing against each of the defendants for the full amount of said claim against the estate, Nannie E. Blinn and some of the other defendants appealed from such judgment to the court of civil appeals, assigning as error the action of the trial court in overruling such exception; and, the court of civil appeals having affirmed the judgment, they have brought the cause to this court upon writ of error, complaining that the court of civil appeals erred in not sustaining said assignment.

If the creditor has only the right, under the law, to subject the property the heir, devisee, or legatee received from his debtor, Epperson, to the payment of his claim, the petition is clearly defective in not setting forth the property received by each, so that it may be by proper decree subjected. The question to be determined, then, is, has the creditor a right to personal judgment against the heir, devisee, or legatee, or has he merely the right, as against him, to reach the

property received by him from the debtor, and subject it to the claim? Under the civil law, the acceptance of the succession by the heirs rendered them liable for the ancestor's debts, and in Louisiana the heir has the right to so qualify his acceptance that he may avoid personal liability by abandoning the effects so received to the ancestor's creditors. Montgomery v. Culton, 18 Tex. 749; Succession of Murray, 41 La. Ann. 1112, 7 South. 126. It is evident that, under such system, it was hazardous for the heir to accept, since the ancestor's debt might absorb, not only the property so received, but also the individual estate of the heir.

Under the common law, the heir took the lands discharged of all debts of the ancestor, except specialties in which he had been specially bound, his liability in such case being on the contract by which the ancestor was authorized to bind him personally to the extent of the value of the lands descended, so long as they remained in his possession; but there was no lien on the land, nor personal liability on his part, after he had conveyed them (Investment Co. v. Smart, 10 Ch. App. 577); and the devisee took the lands free from all debts of the ancestor (Sauer v. Griffin, 67 Mo. 654; 3 Williams, Ex'rs, c. 11), while the executor or administrator took the property to which he was entitled under the law subject to the payment of the decedent's debts. Thus, under the civil law, great injustice might be done the heir by absorbing both the ancestor's and his own property in the payment of the ancestor's debts; and under the common law a like injustice might result to the creditor by allowing the heir to take valuable lands free of debts, where he had not been bound by any specialty, or, even if he had, to evade his liability thereon by a sale of the lands before suit, or by allowing the ancestor to practically defeat even specialty creditors by devising his lands. In order to remedy some of these evils, statutes were enacted in England at an early day imposing upon the devisee a like liability to that resting upon the heir, and making both liable, not only while they retained the property, but for its value in case they sold same. See statute set out in Williams on Executors (volume 3, c. 2). But, under the common law thus amended by statute, the ancestor's debts, even by specialty, were not charged as a lien on the lands, and the heir or devisee could prevent the creditor from subjecting them by transferring to a bona fide purchaser before suit. Spackman v. Timbrell, 8 Eng. Ch. 253.

From this general statement of the condition of the civil and common law modified by English statutes, it may be seen that it was advisable, when our legislature came to enact our probate law in 1848, to make radical departures from both, in order to do equal justice to creditors on the one side, and heirs, devisees, and legatees on the other. Therefore they provided "that when a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; but all of such estate, whether devised or bequeathed or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject in their hands to the payment of the debts of such testator or intestate; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exceptions aforesaid shall still be liable and subject in their hands, to the payment of the debts of the intestate; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, with the exception aforesaid; and it shall be his duty to recover possession of and hold such estate in trust, to be disposed of under the provisions of this act." Act March 20, 1848, p. 277, § 112.

It will be observed that this statute provides (1) that, upon the death of a person, the title to all his property shall immediately vest in the heirs, devisees, and legatees, as the case may be; (2) that it "shall still be liable and subject in their hands to the payment of the debts of" the decedent, thereby fixing a lien upon the same to secure the payment of such debts so long as it remains in their hands, but not imposing any personal liability therefor, and not attempting to follow it into the hands of bona fide purchasers; and (3) that, upon the issuance of letters testamentary, the executor or administrator shall take possession of the property to be administered as provided by law. Other portions of the same act make careful provision for the taking charge of, and administration of, the estate by the executor or administrator, whereby the property is to be (1) applied to the various classes of claims, and (2) the remainder is to be delivered to the heirs, devisees, and legatees. Under the well-settled construction of these provisions, the heirs, devisees, and legatees cannot make such a disposition of any part of the estate during the period in which it is subject to administration that will defeat the subjection thereof to the claims of creditors through such administration (Cooper v. Loughlin, 75 Tex. 524, 13 S. W. 37; Templeton v. Ferguson, 89 Tex. 47, 33 S. W. 329); and the creditors cannot, as a general rule, subject the property to their claims during such period in any other way than through such administration (Graham v. Vining, 1 Tex. 639; Id., 2 Tex. 433; Robertson v. Paul, 16 Tex. 474; Ansley v. Baker, 14 Tex. 607; Cunningham v. Taylor, 20 Tex. 126; Green v. Rugely, 23

Tex. 539). Thus, under the broad scope and just intendment of said section 112, when read in connection with the provisions above referred to, the title to the property vests immediately in the heir, devisee, or legatee, and he may at once accept and take possession thereof as such, without subjecting himself to the liability imposed by the civil law of paying the debts of the ancestor, or to the liability of an executor de son tort under the common law (Ansley v. Baker, supra); but the property comes into his hands charged with the statutory lien in favor of the creditors of the decedent, and he must yield such possession to the duly-appointed executor or administrator, who is the statutory trustee, to hold and dispose of the same among creditors, heirs, etc., as they may be entitled under the law; and all persons dealing with the heir, devisee, or legatee are charged with notice of the fact that such trustee may, within a given time, be appointed, and of his powers and duties, and therefore cannot, during such time, be bona fide purchasers, or acquire any rights from or under them which will prevent the execution of such trust (Cooper v. Loughlin, 75 Tex. 524, 13 S. W. 37). There is nothing in the language of the provisions above referred to indicating a legislative intent either to relieve the property that may be returned to the heir, devisee, or legatee by such trustee from the statutory lien aforesaid as to debts that may still be unsatisfied, or to charge such heir, devisee, or legatee personally therewith. But there is an intent on the face of the statute above quoted that the property in the hands of the heir, devisee, or legatee, and not any longer subject to be taken by the statutory trustee, may be passed free of such lien to a bona fide purchaser; for the statute does not undertake to extend the lien any longer than the property is "in their hands." In legal contemplation, it would still be "in their hands" if the transfer were fraudulent in law, but would not be if transferred to a bona fide purchaser. The wisdom of the statute in not extending the lien any longer is apparent, for it would unduly cloud titles to allow the obligations of the ancestor, which might not accrue for years, as in cases of breach of warranty, to follow the property into the hands of bona fide purchasers from the heirs, devisees, and legatees. The heir, devisee, or legatee would doubtless be liable to the creditor for the injury done him in defeating his lien by thus disposing of the security. Boothe v. Fiest, 80 Tex. 141, 15 S. W. 799; Zapp v. Johnson, 87 Tex. 641, 30 S. W. 861. From what we have said, it results that, if said section 112 of the act of 1848 is to govern this case, the demurrer should have been sustained. This brings us to note some other provisions of said act, and the course of legislation since as well as some of the decisions of this court. Said act of 1848 (page 265) also contained the following:

"Sec. 87. That at any time after the first term of the court, after the expiration of twelve months from the original grant of letters testamentary or of administration, the heirs, devisees or legatees of the estate, or any of them, may, by their complaint in writing, filed in the county court, cause the executor or administrator, and the heirs, devisees or legatees of the estate, to be cited to appear at a regular term of the court, and show cause why a partition and distribution should not be made among the heirs, devisees or legatees of the residue of the estate, if any there be after retaining in the hands of the executor or administrator a sufficient portion thereof to pay all debts of every kind against the estate, that have been allowed and approved, or established by suit, or that have been rejected by the executor or administrator, or not approved by the chief justice, and may yet be established. And if it shall appear to the chief justice, after the service of such citation, that there is any such residue of the estate, he shall order it to be so partitioned and distributed.

"Sec. 88. That no claim for money against his testator or intestate shall be allowed by an executor or administrator, nor shall any suit be instituted against him on any such claim after an order for partition and distribution has been made as provided for in the previous section of this act; but the holder of any such claim not barred by the laws of limitation, shall have his action thereon against the heirs, devisees or legatees of the estate; but they shall not be bound beyond the value of the property they may receive in such partition and distribution."

It will be observed that said section 87 provides for a return to the heirs, devisees, or legatees of what may be left of the estate after the statutory trustee shall have executed his trust, or so nearly so that it may be reasonably foreseen how much it will be necessary for him to retain to pay certain unsatisfied claims, and that under our views above announced, in the absence of any other provision, it would come to them charged with the original lien for all such claims against the estate as had not been satisfied by such trustee. Said section 88, however, goes further, and imposes upon the heirs, devisees, and legatees a personal liability to the extent of the value of the property received, and, under the equity of this statute, they have been held personally liable for a claim duly acknowledged and approved, but unpaid, at the time the estate was closed, and the heir, as in the case before us, received the property from the administrator without any order of distribution. Montgomery v. Nash, 23 Tex. 157, explained in Green v. Rugely, Id. 539; Ansley v. Baker, 14 Tex. 607. In Ansley v. Baker, supra, it is intimated that the creditor has no cause of action on the debt of the ancestor against the heir in possession where

there has been no administration, and the attention of the legislature is called to the probable propriety of an amendment; and in Green v. Rugely, supra, it is intimated that, under said section 112, "a right of action is given to creditors against heirs and distributees to the extent of the property which may come to their hands and be held by them in the absence of administration," but whether the right of action referred to was to foreclose the lien or to take out letters testamentary, and then recover the possession of the estate from them, or whether the reference was to the right to a personal judgment similar to the one given in said section 88, is not stated. The general probate act of 1870 (Gen. Laws 1870, pp. 141–199) was in many respects different from that of 1848, and said section 112 of the latter was entirely omitted; but said section 88, in so far as it imposed a personal liability upon the heir, devisee, or legatee, was substantially incorporated into section 287 of the new act; and in Act 1873, p. 110, § 4, the personal liability of the heir, where no administration has been taken out within four years, is limited to the value of the property held by him. We only refer to these acts to show that in all of them the personal liability of the heir was the creature of the statute. The general probate act approved August 9, 1876, which has been brought into our present Revised Statutes, was in many respects a return to said act of 1848, many of the sections of the first act being copied into the last. Among those so re-enacted are said sections 87, 88, 112. When the Revised Statutes were enacted in 1879, said sections 87 and 112 were incorporated therein, but said section 88, upon which we have seen the personal liability of the heir, devisee, or legatee rested, was not, nor has any similar provision been since, enacted. The re-enactment of the first two, and the omission of the third, shows a clear intent that section 112, which is now article 1869, Rev. St. 1895, should fix the rights of creditors, heirs, devisees, and legatees. The petition in this case alleging that there were qualified executors until they were removed, and an administrator appointed, we think the presumption should obtain that the heirs, devisees, and legatees of Epperson did not receive any of the estate until after the administration was closed, as alleged, in 1889. Yancy v. Batte, 48 Tex. 59. We are also of opinion that their liability should be governed by the law in force at the time they actually received the property; and since said section 112 of the act of 1848, now article 1869, Rev. St. 1895, was then in force, as above intimated, the demurrer should have been sustained. For the error in overruling it the judgment against plaintiffs in error will be reversed, and the cause remanded.

We are aware that our statutes contain provisions imposing personal liability under certain circumstances, as where the due course of administration is interrupted, and the property taken from the hands of the legal trustee in the manner provided by statute (Rev. St. 1879, c. 14; Thomas v. Bonnie, 66 Tex. 635, 2 S. W. 724); but we do not think such special provisions have any bearing upon this case. Being of opinion that such of plaintiffs in error's assignments as raise questions that will probably arise on another trial were correctly disposed of by the court of civil appeals, we deem it unnecessary to discuss them.

We believe a careful examination of all the decisions of this court, in which it has been held that the creditor had a right to a personal judgment against the heir, will show that they were governed by the acts above referred to as being in force prior to the 1st day of September, 1879, when the Revised Statutes took effect, and are therefore not in conflict with the conclusion we have reached in this case, with the probable exception of the case of Mayes v. Jones, 62 Tex. 365. The petition alleged that Mrs. Mayes died about the —— day of December, 1879, but there was nothing else in the record to show when she died, or when the heirs received the property, and therefore the case was probably governed by the Revised Statutes. No brief was filed for defendant in error, and the court evidently overlooked the fact that said section 88 had not been brought into the Revised Statutes. Under the principle of that decision, the eight heirs of Mrs. Mayes might each have occupied as his home 200 acres of land inherited from her, and thus have exempted from the claims of her creditor 1,600 acres.

BROWN, J., not sitting.

COLE et al. v. ADAMS.

(Supreme Court of Texas. June 23, 1898.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS — PAID-UP STOCK.

The promoters of a corporation had secured a $17,000 contract for work and materials, and a valuable option contract (afterwards exercised), which were turned over to the company after its incorporation, together with land of the value of $14,000. After the company's incorporation the net earnings were invested in the corporation, and some nine months thereafter the first issue of capital stock, to the amount of $28,000, was divided among the promoters, who had formed and owned the property of the corporation. *Held* that, in determining whether the stock was fully paid up, the value of the land, the contracts, and the net earnings invested before the issuance of the stock should be considered, since they are "property actually received" by the corporation, warranting the issuance of stock therefor, within Const. 1895, art. 12, § 6.

Certified questions from court of civil appeals of First supreme judicial district.

Action by J. J. Adams, receiver of the Bryan Water, Ice & Electric Light Company, against J. N. Cole and others, as stockholders