nexed was afterwards appointed, and became a party. This we think is not irregular, so far as making the administrator with will annexed a party. In appealing, it is evident that he should not have been permitted to take the pauper oath, as the assets of the estate are responsible for the costs of his contest, made in good faith. There was no preliminary motion made, however, to dismiss. As the case must result, the matter is not important, as the judgment of the court below must be affirmed, and the cause remanded, to the end that the contest of the will may proceed, if desired. The costs of the appeal will be paid by the appellant, and he will recover the same out of the assets of the estate which may come into his hands.

ROOTS v. ROBERTSON et al.

(Supreme Court of Texas. Feb. 19, 1900.)

HOMESTEAD—EXEMPTIONS—TRANSMISSION BY WILL—DESCENT AND DISTRIBUTION.

1. Under Const. art. 16, and Rev. St. arts. 2046, 2055, providing that upon the death of a head of a family, leaving a widow and minor children, the county court shall set aside the homestead and other exempt property to such widow and children, who are entitled to the use of the homestead, but that the title to the property shall vest in all the heirs, the mother and sister of deceased, who were dependent on him, and constituted his sole family, are not entitled to any of his homestead or exemption rights as against creditors.

2. The right of exemption of homestead property from forced sale for the payment of debts cannot be transmitted by will.

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

Application by Mrs. Mary Roots against B. T. Robertson, administrator, to have the property of the estate of J. A. B. Putman subjected to the payment of her claim, which was refused, and an appeal taken to the district court. From a judgment of the court of civil appeals affirming the judgment of the district court refusing the application, plaintiff brings error. Reversed.

H. C. Hynson, for plaintiff in error. Craddock & Looney, Perkins, Gilbert & Perkins, B. W. Foster, and B. F. Foster, for defendants in error Dinsmore. J. H. Dinsmore, for defendant in error, administrator.

BROWN, J. By the death of her husband, Mrs. Sarah E. Putman was in 1859 left a widow, with a number of children,—among them, a son, J. A. B. Putman, and a minor daughter, Stella Putman, now Mrs. Dinsmore, one of the defendants in error. Mrs. Putman continued a widow until her death, in July, 1895. She had no homestead of her own at any time, and she and her minor daughter lived with, and were supported by, J. A. B. Putman, who was never married. The son was in the Confederate army from 1862 until 1865. After his return, he, with his mother and minor sister, lived with another sister for a short time, after which J. A. B. Putman established his home in the town of Tarrant, Hopkins county, Tex., where he resided with his mother and sister Stella until the year 1870, when he bought the lot in Sulpur Springs now in controversy, and built a house and outbuildings on it in about the year 1872. He removed from the town of Tarrant to Sulphur Springs, taking his mother and sister with him; carrying the household and kitchen furniture, which all belonged to him. From time to time, additions were made to the dwelling house, and the household and kitchen furniture was replenished as it became necessary. He supported his mother and sister. They had no means of their own, and relied upon him. Mrs. Putman had another son and a daughter. Some years before J. A. B. Putman died, his sister Stella married J. H. Dinsmore, and she and her husband resided in the house with her brother a part of the time. After the death of J. A. B. Putman, which occurred in January, 1895, Mrs. Dinsmore and her husband resided with her mother. The homestead property in controversy was at no time worth a sum exceeding $5,000. J. A. B. Putman was a practicing lawyer during all of the time that he resided there, and up to the time of his death; and the library and office furniture in controversy belonged to him, and were used in connection with the practice of his profession. After the death of J. A. B. Putman, his mother died, in July, 1895. She resided, from the death of her son to the date of her own death, on the property in question. J. A. B. Putman made a will, in which he gave his real estate to his mother for her life, remainder to Mrs. Dinsmore; also, to his mother, absolutely, the household and kitchen furniture. He bequeathed his law library and some other personal effects to J. H. Dinsmore. The will was duly probated in Hopkins county. Mrs. Sarah E. Putman left a will, in which she devised all of her real estate to her daughter Mrs. Dinsmore. The will was duly probated in Hopkins county. During the time that Mrs. Putman resided with her son J. A. B. Putman, now deceased, she performed all of the duties of a matron keeping and caring for the house of a family; and he provided for his mother and sister as the head of a family would for his own family of wife and children, if they had been such. B. T. Robertson was appointed administrator of the estate of J. A. B. Putman, and Mrs. Mary Roots presented her claim against the estate, which was allowed and classed as a fourth-class claim. The estate proved to be insolvent, and all of the property, except that which is here in controversy, has been sold, and all of the debts of the first, second, and third class have been discharged. Mrs. Roots made an application in the probate court of Hopkins county to have the property subjected to the payment of her claim, which was refused by that court, and appeal taken to the district court, which re-

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sulted in a like judgment. The court of civil appeals affirmed the judgment of the district court.

If we concede, for the sake of the argument, that J. A. B. Putman and his mother, while living together, constituted a family, within the meaning of article 16, § 50, of the constitution, so that the exemption expressed in that section would apply to the head of the family in his life, still the mother cannot hold the homestead after the death of her son, because she cannot inherit the exemption which was accorded to him, and does not come within the terms of section 51 of article 16 of the constitution, nor within the provisions of article 2046 of the Revised Statutes. The language, "the homestead of a family shall be and is hereby protected from forced sale for the payment of debts," etc., found in section 50 of article 16 of our present constitution, is practically the same as that embraced in the constitution of 1845 on the same subject, and has been so expressed in each subsequent constitution. In the case of Sampson v. Williamson, 6 Tex. 110, the term "forced sale" was by the court defined as follows: "A forced sale has been defined to be a sale made at the time and in the manner prescribed by law, in virtue of an execution issued on a judgment already rendered by a court of competent jurisdiction; or, in other words, a forced sale is one which is made under the process of the court, and in the mode prescribed by law." This was the recognized meaning of the words "forced sale" when embodied in the present constitution, and they were evidently understood and used in that sense by the members of the convention; for they employed the following clear and explicit language to qualify and limit the definition as applied to deeds of trust upon the homestead: "No mortgage, trust deed or other mortgage on the homestead shall ever be valid except for the purchase money therefor or improvements made thereon as hereinbefore provided, whether such mortgage or trust deed or other lien shall have been created by the husband alone or together with his wife, and all pretended sales of the homestead involving any condition of defeasance shall be void." This language shows that attention was called to the definition given to "forced sale." The sale by deed of trust, excluded by the interpretation of the court from the exemption, is prohibited by this provision, but the language "forced sale" was readopted as construed. The exemption expressed in section 50 applies to property while the head of the family is living, but furnishes no rule for its disposition after his death. Givens v. Hudson, 64 Tex. 473; Zwernemann v. Von Rosenberg, 76 Tex. 525, 13 S. W. 485. In the last-named case, Judge Gaines, speaking for the court, said: "In the previous constitution of the state the disposition of the homestead after the death of the owner was left wholly to the wisdom of the legislature. It is so, also, in the present constitution, except as to the manner of its descent, and the use reserved to the surviving spouse and the minor children." It has been frequently and uniformly held in this state that the homestead exemption does not descend to heirs, but they take the property, under the statute and the constitution, exempted from the debts of the ancestor, not because it was exempted in his hands, but because they come within the class of persons named in the constitution and the law. In the case of Givens v. Hudson, cited above, Judge Stayton said, "The thing is not exempted to the child or widow because it was exempted to the father or husband, who was the head of the family, but because the child or widow was and remains a constituent of the family." Section 52 of article 16 of the constitution is in the following words: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same." The effect of this provision was to change the rule established under the act of 1848,—that, when the homestead of an insolvent estate was set apart to the surviving widow and minor children, they took an absolute title to it, to the exclusion of other heirs,—and to provide that in such case the title to property should vest in the heirs according to law; but the widow and minor children should have the right to use it as a homestead, under the limitations expressed in the constitution. Article 2055 of the Revised Statutes reads thus: "Should the estate, upon final settlement, prove to be insolvent, the title of the widow and children to all the property and allowances set apart or paid to them, under the provisions of this and of the preceding chapter, shall be absolute, and shall not be taken for any of the debts of the estate except as hereinafter provided." That portion of this article which gives to the widow and minor children absolute title to the homestead in case the estate be insolvent is in conflict with section 52, art. 16, of the constitution, and to that extent is void as to the other heirs; and we must read the article of the statute without that provision, in order to determine the rights of such parties to the homestead. Considering section 52, art. 16, of the constitution, as interpreted by this court in Givens v. Hudson and Zwernemann v. Von Rosenberg, in connection with articles 2046, 2055, Rev. St., the law may be concisely stated thus: Upon the death of one who was the head of a family, leaving a widow and minor children, or either, it is made the duty of the county court to set aside the homestead and other exempted property to such

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widow and minor children, who would be entitled to the use of the homestead under the limitations of section 52, art. 16, of the constitution; but the title to the property would vest in all of the heirs,—not, however, subject to the debts of the deceased, because, being set apart by the court, it is withdrawn from the administration of his estate, and would not afterwards become subject to the payment of debts if not used as a homestead, because the exemption by law attaches, after death, in favor of the persons named. There is no provision of the law that authorizes a court to set apart exempt property of an estate to the surviving constituents of every family to which it may have been exempted. The constituents of a family who are entitled to the homestead and other exempted property upon the death of the head are named in the law and the constitution. The mother of the deceased is not named, and Mrs. Putman had no homestead right in the property. Under the will of J. A. B. Putman, the defendants in error did not take the property free from his debts. Howard v. Marshall, 48 Tex. 471. In the case cited the judgment was reversed because the facts did not show that the deceased had a family and was entitled to the exemption of homestead, but in remanding the case this court, by way of instruction, held that, if deceased had a homestead exempted by law, he could not dispose of it by will so as to defeat the claims of creditors. It is well established that a creditor's claim for payment out of the estate of a decedent is superior to the rights of heirs, legatees, and devisees. The exemption of property from forced sale cannot be transmitted by descent, nor transferred by will.

It was suggested in argument that Putman could have given the property to the defendants in error in his lifetime, and might have made the conveyance take effect after his death, and that the donee would have taken it free from creditor's claims, from which it is argued that he could give it by will. It is true that an estate may be made to commence in the future by deed, but the deed must vest the right at the present, or it will be construed to be a will. Griffis v. Payne, 92 Tex. 293, 47 S. W. 973. The superior right of the creditor, under the law, attached, upon the death of the debtor, in preference to the right claimed under the will. It is ordered that the judgments of the district court and court of civil appeals be reversed, and that the cause be remanded to the district court, to be disposed of according to this opinion.

McCARTNEY v. McCARTNEY.

(Supreme Court of Texas. Feb. 19, 1900.)

DEEDS — DELIVERY — HUSBAND AND WIFE — QUESTIONS FOR JURY—PAROL EVIDENCE.

1. In 1888 plaintiff wrote, signed, and read to his wife a deed purporting to convey to her a certain interest in the farm on which they lived, and in a few days he acknowledged and recorded the deed. He testified that the only reason he executed the deed was because of signs of insanity in his wife, and in order to quiet her fears of being left destitute; and also that he never delivered the deed to her, nor intended that it should take effect. The insanity of the wife continued to increase, and in 1895 he executed another deed of the same property to her, acknowledged it, and procured another to read it to her. He testified that he executed the latter deed on the suggestion of a neighbor, who thought it might pacify the wife, and also that he assumed and retained possession of the deed until it was recorded, without his consent or knowledge. *Held*, that the question whether the deeds, or either of them, were executed with intent to thereby pass the title, was for the jury.

2. The rule that parol evidence is inadmissible to show that a deed was not intended to pass title, as it purports to do, is not applicable, where the issue is as to the execution of the deed, and not as to its effect.

3. The rule that a deed executed by the husband to his wife need not be actually put into her possession or out of his, but its retention by him for her is a sufficient delivery, applies only where there is an intent on the part of the husband to pass the title.

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

Action by N. S. McCartney against S. J. McCartney. From the judgment of the court of civil appeals (53 S. W. 388), affirming a judgment for defendant, plaintiff brings error. Reversed.

Cox & Meek, Cunningham, Cunningham & McCollum, and Clark & Bolinger, for plaintiff in error. John S. Patterson, guardian ad litem, and Baker & Ross, for defendant in error.

WILLIAMS, J. Plaintiff in error brought this suit against defendant in error, his wife, who was a lunatic confined in the asylum, to cancel a deed of date January 28, 1895, appearing of record, and purporting to have been executed by plaintiff to defendant, conveying to her certain lands. As the ground for the relief sought, plaintiff alleged that the deed had never been delivered by him, and was never intended to take effect, but was merely signed, acknowledged, and read to defendant when she was insane, and laboring under the delusion that she and her children were to be left destitute, in order to allay her fears and soothe her mind, and had been retained by plaintiff until it was taken from his possession by some other person, and placed upon record, without his knowledge or consent. The guardian ad litem, appointed to represent the interests of the defendant, by his pleadings traversed the allegations made by plaintiff, and asserted that the deed had been delivered and had taken effect. He also alleged that plaintiff had, on the 20th day of March, 1888, executed and delivered to defendant a deed, and caused it to be recorded on the 10th day of October, 1892, by which plaintiff intended to convey to defendant the land subsequently described in the deed of 1895, but that the description of the land in the first deed was defective, and the last was executed for the purpose of curing this defect. To this plain-

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