sioner, who said that the commissioners' court were accustomed to apportion hands to work it. There was no evidence which throws the shadow of a doubt upon this question. Whether the engineer formally recognized it or not is immaterial. The object of putting in the qualifying clause, "recognized by the engineer as such," would seem to have been to enable the company, by the act of its engineer, to remove all doubt as to the duty of the contractors, where a question of keeping open a road should arise between themselves. That the parties who constructed the railroad recognized the dirt road as public is shown by the fact of their cutting down the banks as approaches to the crossing; by their opening the construction to let wagons pass on the day of the accident; and by the further fact that they made a good crossing after the accident, on the same day it occurred. It was the duty of the contractors, under their contract, to keep this crossing in safe condition for public use; and if any injury resulted from their failure to do this, for which the railroad company was held responsible, they were liable to the company to make good the loss. The court did not err in so charging. It was immaterial whether under the contract O'Conner & Co. were independent contractors or not. If not, they were liable to the company for damages recovered of it by reason of their own negligence. *Water Co.* v. *Ware*, 16 Wall. 566. The injury having been caused by the negligence of the contractors, they are primarily liable in any event; and the company employing them, being compelled to pay the damages, they become responsible to it for the amount. Wood, Mast. & Serv. § 325, and cases cited. We find no error in the proceedings of the court below which requires a reversal of the judgment, and it is therefore affirmed.

(72 Tex. 209.)

SLATON *v.* SINGLETON *et al.*

(*Supreme Court of Texas.* December 4, 1888.)

1. WILLS—PROBATE IN FOREIGN STATE—CONVEYANCE OF PROPERTY—NOTICE.
   The probate of a will in another state, affecting lands in Texas, is not notice of its existence or contents to parties in the latter state,—act Tex. March 28, 1887, providing for recording foreign wills, having the effect to place such wills on the same footing as deeds; and a purchaser without notice from an heir cannot be affected by the existence of an unrecorded foreign will, by which such heir's portion is diminished.
2. SAME—FAILURE TO RECORD.
   The fact that the purchaser knew that his grantor was one of the heirs of a deceased person does not make him chargeable with notice that there was a will; as, if he had made the inquiry which such knowledge might prompt, he would not have found any record of the will within the state.

Appeal from district court, Wichita county; P. M. STINE, Judge.

Partition proceedings brought by W. D. Slaton against E. S. Singleton and others. Plaintiff appeals.

L. C. Barrett, for appellant. *Robert E. Huff*, for appellees.

WALKER, J. Slaton appeals from a judgment and decree in which he is allowed, in partition, one-eighth interest in certain lands, when he insists he was entitled to one-fourth interest. The lands were granted in right of heirs of R. J. Scott, a soldier who fell at Goliad in 1836, unmarried, without issue, and intestate. His parents, John and Sarah Scott, resided in Tennessee, and were his heirs. Sarah Scott died in 1842, leaving four children. The father, John Scott, died in Tennessee, in 1865, the four children surviving. It appears in the record that John Scott left a will, which in 1865, was probated in Tennessee, (in what county is not shown,) by which his interest in these and other Texas lands, to the extent of one-fourth, was devised to the children of Mary Yell Cannon, who, it seems, would have inherited one-fourth had he died intestate. This will, with its probate, was duly recorded in the several counties where the lands were situated, in 1887, and, it seems, under

the act twentieth legislature, of March 23, 1887, (Sayles, Civil St. art. 548*a*,) July 27, 1883, Mary Yell Cannon conveyed by warranty deed her undivided one-fourth interest in two of the tracts of land, and June 27, 1884, a like interest in the other tract in controversy, to W. G. Estis, who conveyed the land to J. G. Estis, who conveyed same to E. F. Ikard, by and with general warranty. Appellant holds by deed from Ikard, of date August 8, 1887, prior to the registry of the will of John Scott, in Texas. Ikard, the grantor of appellant, testified that "he paid the purchase money in cash at the time he got the deeds from Estis; that he got the deeds in October, 1886; that he did not investigate the title to the land, but he asked W. G. Estis (who, as attorney in fact for J. G. Estis, sold witness the land) if the title was good, and said W. G. Estis told him it was good; that witness believed it, and thought he was getting a good title to it; that he did not know of the will of John Scott when he bought the land, and paid for it, and took said deed." On cross-examination, Ikard stated that he knew the "land was patented to heirs of Robert J. Scott; that he just took Estis' word that the title to said land was good, and made no examination of the records, and made no inquiry as to who the heirs of Robert J. Scott were." On re-examination, he stated "that he had bought land from Estis several times before this, and, up to the time he bought this land, the title to all the lands he had bought from him had been good, and had not failed, and he had found all right, and this was the reason he had taken Estis' word." The conveyance by Mary Yell Cannon was recognized as to her one-fourth interest in her mother's estate. The court, however, held that the will of John Scott passed to her children the one-fourth interest in his estate to which she would have been an heir, had there been no will. The appellant claims to hold under Ikard, a *bona fide* purchaser without notice of the will. There is no controversy as to the facts that Ikard bought and paid for the one-fourth interest from Mary Yell Cannon; and that she was an heir to one-fourth, or was one of four persons, heirs at law of John Scott; and that at the time of Ikard's purchase and payment, he had no knowledge of the existence of the will; and that at that time, and not until two years later, was the will and its probate duly recorded in Texas. The deed from Mrs. Cannon to W. G. Estis in terms conveyed her one-fourth interest in the lands. She was the legal and equitable owner of one-eighth interest, and the apparent owner of one-fourth interest. We are required to ascertain what effect, if any, the will and its probate in Tennessee had upon the *bona fide* purchaser from the heir. Under our statutes, as at common law, the lands of a deceased pass to his heirs. Rev. St. art. 1817. Under our statutes, the estate vests in the devisees of a will, if such will exists. The law presumes that a person proven to be dead, left an heir or heirs. Lawson, Pres. Ev. 198. No such presumption obtains as to the existence of a will. A devisee must establish his right through the will; but an heir is not required, before taking as heir, to prove that the deceased was intestate. The law casts the estate upon proof of the facts which make the heirship. It has therefore been held in our courts, as elsewhere, that a purchaser from an heir is not precluded from availing himself of the protection which our registration laws accord to innocent purchasers, when such purchase is asserted against an unregistered deed from the intestate, (*Holmes* v. *Johns*, 56 Tex. 52; *Taylor* v. *Harrison*, 47 Tex. 454;) and the same rule has been assented to as against an unregistered will, (*March* v. *Huyter*, 50 Tex. 243; *Ryan* v. *Railroad Co.*, 64 Tex. 242.) It is well recognized that a will only probated elsewhere than in the state is not admissible in the courts of the state as evidence affecting the title to lands, the subject of such will. *Holman* v. *Hopkins*, 27 Tex. 38; *Vogelsang* v. *Dougherty*, 46 Tex. 472; *Mills* v. *Herndon*, 60 Tex. 355; *Houze* v. *Houze*, 16 Tex. 598; *Paschal* v. *Acklin*, 27 Tex. 192. The probate act of 1848, (Pasch. Dig. art. 1265,) re-enacted in Revised Statutes, art. 1856, provided: "When application is made for the

probate of a will which has been probated according to the laws of any of the United States, * * * a copy of such will, and the probate thereof, attested by the clerk of the court in which such will was admitted to probate, and the seal of the court annexed," etc., "may be filed and recorded in the court, and shall have the same force and effect as the original will, if probated in said court: provided," etc. Article 4876, Rev. St.: "Every such will, together with the probate thereof, shall be recorded by the clerk of the county court in a book to be kept for that purpose, and certified copies of such will, and the probate of the same, or of the record thereof, may be recorded in other courts, and may be used in evidence as the original might be." Act 23d March, 1887, (20th Leg.) c. 56, § 1: "When any will or testament, or testamentary instrument of any character, conveying or in any manner disposing of land in this state, has been duly probated according to the laws of any of the United States or territories, a copy thereof, and its probate, attested by the clerk of the court in which such will and testament or testamentary instrument was admitted to probate, * * * may be filed and recorded in the register of deeds in the same manner as deeds and conveyances are required to be recorded, and without further proof or authentication." Section 3: "Every such will and testament, or testamentary instrument, and its probate, which shall be attested and proven as provided in section 1 of this act, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid and effectual as a deed of conveyance of said property, and the record thereof shall have the same force and effect as the record of deeds, and other conveyances to land, from the time when such instrument was delivered to such clerk to be recorded, and from that time only." Section 4: "The record of such will and testament, or testamentary instrument, and its probate, duly attested and proven, as provided in the preceding sections of this act, and duly made in the proper county, shall be taken and held as notice to all persons of the existence of such will and testament, and of the title or titles conferred thereby."

From these citations from the statutes it appears that the probate of the will of John Scott, at any time since his death, could have been certified, and the will and its probate recognized in this state. Since the enactment of the Revised Statutes the will and probate, or copy of same, could have been duly recorded in any of the counties where the lands devised are situated; and from the time the act of March 23, 1887, went into effect, such record became as necessary as the record of deeds and other instruments relating to lands. This late act of the legislature places wills upon a like plane with deeds between parties; and it does not appear why, in the absence of the statute, the will, though duly probated, could or should have more sacredness, as a means of passing the title, than a deed duly acknowledged or proven could have, for the same property, and between the same parties. Inasmuch as the foreign probate of a will gives no validity to such will until certified to and registered in some county within the state, we may conclude that such foreign probate proceedings are not chargeable as notice upon the purchaser of lands affected thereby, within the state, until after such registration; and, by the act of March 23, 1887, in the county where the land is situated. We hold, therefore, that the probate of the will in Tennessee, in 1865, was not notice of the contents of it to the parties in Texas, dealing together in buying and selling the Texas lands. In two of the deeds from Mrs. Cannon to Estis, the land is described as having been patented to the heirs of R. J. Scott. She inherited from John and Sarah Scott, the parents and heirs of the deceased soldier, R. J. Scott. That she sold as heir, charged those taking the lands through her deeds with the burden of ascertaining such relation between her and the grantee named in the patents. This would be satisfied upon showing such relationship in fact between R. J. Scott and his parents, and ascertaining their heirs at law. On the trial, Ikard, the grantor of Slaton, the appellant, testified that at the time of his purchase, and payment of the purchase money, he

had no notice of the will of John Scott, and that he thought he was getting a good title to the lands. It is insisted that, from his making no inquiry into facts he should have known, likely to attend such chain of title through a deceased person, Ikard is chargeable with some degree of negligence which should affect his innocence as a purchaser; that he is chargeable with what he might have known upon inquiry. 1 Sugd. Vend. 1057. It appears, also, that no search or inquiry within the state would have discovered the probate of the will. It had not been probated or registered in Texas. We have stated that he was not chargeable with notice of its probate in Tennessee. There is no presumption of fact or of law that a decedent left a will. Where negligence or carefulness of investigation or inquiry would have reached the same failure, no presumptions should follow from the presence of either. In showing that Mrs. Cannon was the heir at law to one-fourth of the estate of John Scott, and that defendant was the purchaser under her apparent legal title, without actual notice, and before the will was registered in Texas, he was entitled to protection of his possession. The judgment below should have given appellant one-fourth of the three tracts in which such interest was claimed. Judgment will be reversed, and is here rendered giving to appellant one-fourth interest in the lands; the other parties taking three-fourths in the proportion given in the judgment. The judgment as to the other tract of land, 1,569 acres, in Wichita county, is not changed. Reversed, and rendered.

Judgment will be rendered here that, of the three tracts, 1,920 acres in Baylor, 907 acres in Wichita, and 640 acres in Young county, patented to heirs of R. J. Scott, E. S. Singleton take 3-20, R. L. Singleton take 3-70, Mrs. Sallie Carr take 23-560, H. E. Huff take 1-8, E. W. Scott take 9-23, A. F. Scott take 23-560, and appellant, W. L. Slaton, 1-4. And, in the 569-acre tract in Wichita county, Mrs. E. S. Singleton take 5-24; R. L. Singleton, 1-20; Sallie Carr, 23-480; H. E. Huff, 7-48; E. W. Scott, 3-8; A. F. Scott, 23-480; and Mary Y. Cannon, 1-2 interest. Costs in court below in proportion to interest taken. The commissioners reappointed, and to make return to the district court forthwith of their action; costs of appeal against appellees.

ZUNDELL *et al.* v. GESS.

(*Supreme Court of Texas.* December 4, 1888.)

ALIENS—CONSTRUCTIVE TRUST IN LAND—RIGHT TO ENFORCE LIEN.

While aliens cannot, in Texas, claim a resulting or constructive trust in lands purchased by a citizen partly with funds paid him by the aliens through mistake, yet they are entitled to a lien on the land for the amount so furnished, and which is superior to any homestead right acquired by the purchaser.

Commissioners' decision. Appeal from district court, Cooke county; F. E. PINER, Judge.

Potter & Hughes, for appellants. *Davis & Garnett*, for appellee.

COLLARD, J. Zundell & Co., bankers in Switzerland, had on deposit in their bank a sum of money belonging to Rudolph Gess, of Cooke county, Tex. By mistake in reducing franks to United States money, the bank remitted Gess $684.74 more than he was entitled to. Gess, being ignorant of the mistake, mingled the money with some of his own, and some that belonged to his wife, and, after spending a part of the whole amount, invested the residue in a lot for a homestead, and in furnishing and repairing the same. The bank (plaintiffs below) brought this suit to recover of Gess, the defendant, such part of the premises as the $684.74 purchased, and, in the alternative, for judgment for the amount of money used of plaintiffs, and foreclosure of lien upon the premises, predicating their right to the realty and the lien upon the principles of a constructive trust. The court below denied