the child to fall down; that it was whipped "because it had befouled its bed;" that it was sick and weakly, and was afflicted with "diarrhea;" that "the whipping was very hard;" that "afterwards large whelks raised on the child." W. B. Bullock testified that about three days before the child was sent to Clay county he and Dr. ——— examined it; that they counted 22 marks on its body, —one above its privates; that the child was swollen. Dr. Breeding testified that he examined the child with W. B. Bullock; that they discovered about 20 switch marks on the child's body, etc.; that "the shock caused by a severe whipping might be dangerous to a weakly and sickly child; that such a shock, acting on the nervous system, might produce instant death, or it might cause gradual decline;" that the child was "badly whipped, and the bruises were sunk to or near the loins of the child. It was thin and feeble, and had diarrhea." The commonwealth introduced evidence showing that the appellant sent this beaten and sick child to its grandfather's, (where it died in a few days,) a distance of 18 miles, on a cold and rainy December day. The appellant objected to this evidence, because it was not included in the allegations of the indictment. But it was competent as bearing upon the question of malice. The appellant's excuse for whipping his child is that he wished to break him from the habit of befouling his bed. But it seems to us that this habit could not have been avoided by the sick and afflicted child of only six years of age. It also appears that the child was cruelly, inhumanly, brutally whipped by a brutal father, which caused its death; and he has great reason to rejoice over the fact that he escaped the death penalty. The error complained of in the instructions, if it be an error, in view of the facts in the case, was not prejudicial to the substantial rights of the appellant.

The judgment is affirmed.

DAVIS *et ux.* v. LANING.

(*Supreme Court of Texas.* May 24, 1892.)

CIVIL DEATH—IMPRISONMENT FOR LIFE — DISTRIBUTION OF ESTATE.

Under the laws of Texas, the estate of one sentenced to imprisonment for life does not descend or vest as in case of death.

Commissioners' decision. Section A. Error from district court, Llano county; A. W. MOURSUND, Judge.

Action to try title to land by W. A. and Minerva Davis against R. H. Laning. Judgment sustaining a general demurrer to the petition, and plaintiffs sue out a writ of error. Affirmed.

W. S. Maxwell, for plaintiffs in error.

MARR, J. This action was brought by the plaintiffs in error against the defendant in error to try title to and to recover a certain tract of land in Llano county, Tex. They claim the land as heirs at law of their son, one C. C. Davis, who was duly convicted in the district court of the above named county, and sentenced to the state penitentiary for the term of his natural life. They contend that this conviction rendered C. C. Davis *civiliter mortuus*, and cast descent upon his heirs. He is, however, still alive in fact, and undergoing the life sentence in the penitentiary. The land belonged to him at the time of his conviction, and he was and is an unmarried man, and has no children. The defendant claims title to the land under a purchase at an execution sale upon a judgment of a justice court which was rendered against C. C. Davis in a suit instituted against him after his conviction and incarceration in the penitentiary. It is alleged, however, in the petition that this judgment and the execution sale are null and void for the want of service of process upon the defendant in said suit. Upon the foregoing state of the case, the court below sustained a general demurrer to the petition of the plaintiffs, and dismissed their suit. The plaintiffs seek to recover the land in their own right, and not for or on behalf of C. C. Davis. They have sued out a writ of error, and have assigned as error the action of the court in sustaining the demurrer.

The question presented for our determination is one of first impression in this state, if it can be deemed a question at all, in view of the bill of rights and our statutory provisions which relate to descent and distribution, administrators and wills, and the probate thereof, etc. Attainders, outlawry, deprivation of property except by due process of law, and the corruption of blood or forfeiture of estate, as a result of conviction of crime, are expressly prohibited by the organic law. Const. art. 1, §§ 16, 19–21. Section 21 declares that "no conviction shall work a corruption of blood or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death." This provision is invoked by the plaintiffs in error, but it aids their case no further than a declaration that a convict may either inherit himself or transmit inheritance. It does not attempt to determine at what time the descent of his estate shall be cast, but excludes this idea by the express regulation concerning the estates of suicides. In any event, it most certainly does not declare that the estates of convicted felons shall, upon conviction, "descend or vest as in case of natural death." In short, we find nothing in the constitution to support the position of the plaintiffs, but much that might warrant an opposite conclusion. It is not necessary, however, for us to determine whether, under the provisions of the constitution before cited, it would be within the power of the legislature to establish a rule of descent as contended for by the plaintiffs, in cases like the present, for the plain reason that, so far as we are aware, the legislature has not yet enacted any such law. The statutes before mentioned are too numerous to be quoted, but an examination of their provisions will, as we think, inevitably lead to the conviction that, whenever these statutory enactments upon the subjects aforesaid speak of death, they mean the natural death of the person whose estate or testament is

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involved. Analogous statutes are so construed in similar cases by the court of appeals of New York and the supreme court of Ohio. As our statutes regulate the time when the descent is cast, viz., when the ancestor is in fact dead, we are not, therefore, relegated to the common law for a rule of decision, although, under that law, even an attainted convict was not divested of the title to his lands until after office found, but could dispose of them by will, subject to a forfeiture at the instance of the crown, etc. Avery v. Everett, 110 N. Y. 317, 18 N. E. Rep. 148. In the case just cited it was held that, although a statute of that state declared that "life convicts should thereafter be deemed civilly dead," still, in case of a devise of land to such a convict with directions that if he should die without issue the property shall not vest in another, the land "does not so vest upon his civil death." The decision was not rested upon the intention of the testator, but upon the broader ground that the conviction had not divested the convict of his title to the land. We have no such statute as the one above quoted, and for stronger reasons, therefore, would the principle just announced apply to the case in hand. The supreme court of Ohio held that "a man sentenced to imprisonment for life in the penitentiary, in punishment for crime, is not civilly dead, and letters of administration cannot be granted upon his estate." Frazer v. Fulcher, 17 Ohio, 260. The learned judge who delivered the opinion observed that "we know that in England there are cases in which a man, although in full life, is said to be civilly dead, but I have not learned until this case was brought before us that there was but one kind of death known to our laws." This, perhaps, about expresses the state of our own laws upon the subject. It has been decided that convicted felons may be sued and may dispose of their property by will or deed, etc., and it would seem that, under the terms of our own statutes, there exists no valid objection to a convict devising his lands, if otherwise possessed of the statutory qualifications essential to testamentary capacity. Avery v. Everett, supra; Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. 531; Rev. St., art. 4857. See, also, art. 3222. If he can be sued, and his property seized by his creditors after conviction, as has been held; if he can dispose of it by will to vest as he shall direct after his death,—then, clearly, he is neither dead in fact nor in law, and *a priori* there can be no descent of his estate to "his heirs at law," under such circumstances. We do not deem it important to pursue the inquiry to any greater extent. We think that we have said sufficient to indicate our views of the point at issue. The subject, however, in many of its phases, is exhaustively discussed in the case of Avery v. Everett, supra, and in a learned note to that decision, as reported in volume 6 of the American State Reports, (page 379.) See, also, 2 Lawson, Rights, Rem. & Pr. § 899. We have no statute like that in England, providing for the appointment of a trustee or guardian of the estate of a life convict. That is a matter for the determination of the legislative department. We conclude that the conviction and sentence of C. C. Davis did not effect a devolution of the title to his land upon the plaintiffs in this case as his heirs at law, and that the maxim, *nemo est hæres viventis*, applies. The judgment should be affirmed.

Adopted by supreme court, May 24, 1892.

LYNE *et al.* v. SANFORD *et al.*

(Supreme Court of Texas. Oct. 27, 1891.)

ADMINISTRATION OF ESTATES — ASSETS — LEAGUE AND LABOR CERTIFICATE—ISSUE TO HEIRS—EXECUTOR'S SALES—JUDGMENTS—COLLATERAL ATTACK.

1. Sp. Act Feb. 11, 1850, provided that the commissioner of the general land office "issue a certificate for a league and labor of land to the heirs or legal representatives of Willis A. Forris, deceased: * * * provided, however, this act shall only be in force and effect if the party has not heretofore received his headright." *Held*, that the terms of the act show that the grant was in pursuance of a right existing in the grantee by his compliance with the laws under which a certificate was earned, and the grant was therefore not a gratuity to the heirs, but assets of the estate.

2. The law in force at the time administration on such estate was granted (1852) not fixing any time after intestate's death within which administration should commence, such administration was not void for being granted more than 10 years after death.

3. The commissioner of the general land office had no power under such act to issue a certificate to the heirs so as to vest title in them as against the administrator, his duty being simply ministerial.

4. That the certificate was not in existence when the order of sale was made, and was not inventoried as assets, was not material, the certificate having been issued before administrator's sale thereof.

5. Where a sworn appraisement and inventory showing the condition of the estate was made before sale, a failure to attach to the application for sale an exhibit showing the condition of the estate, and what debts had been allowed, would not invalidate the sale. Finch v. Edmonson, 9 Tex. 504, and Miller v. Miller, 10 Tex. 333, explained and partially disapproved.

6. Where the administration was on the estate of Willis A. Farris, and the certificate read the same as the act, "Willis A. Forris," and the certificate purported to be sold by the administrator was that of Willis A. Farris, the sale passed title to the certificate of Forris, it being evident that the same person was intended.

7. A county court has general jurisdiction of estates, and when its judgments are collaterally attacked it will be presumed that it found the facts to exist that would give it jurisdiction.

8. In such collateral attack it cannot be urged that the order of sale was obtained and the certificate sold by the administrator without notice, and that the application shows no cause for administration or reason for sale of the certificate, or that the sale thereof was fraudulent, or that the claim for which it was sold was barred on its face, and would not support an administration.

9. Where the application for order of sale set out a claim, and asked that the certificate be sold for the purpose of paying the debt, and the court granted the order of sale, it was tantamount to an allowance of the claim by the administrator, and an approval by the court.

Commissioners' decision. Section B. Appeal from district court, Clay county; P. M. STINE, Judge.

Action by W. C. Lyne and others against

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