CONTENTS.

No. 1. Certificate.

Nos. 2 and ~~3~~. Field Notes.

No. ~~4~~. 3 Dup. Cert.
4 Contract & Decl
5 Old wrapper
Gross
J 4/16/84

7. Copy of 75 SWR 905

File 60. Nap Co

abst. 476

Davis Co.

FIRST CLASS.

David Wilson.

1 Lead. Labor.

Old Wall's record

Certificate No. 494/598

Superior to Jos S-1620
1/20/08 Walker

- Patented -

Ptd.-July 3-1847.

Appeal denied in
Decp. 10 Apr 1897
Hall

No. 432.-Vol. 5.

Mgl. 6801

Contents

1. Certificate Orig
2. Field notes
3. Cert ~~of~~ ~~Rep~~ Dupl
4. Pl.
Aug 22 - 77 Lett,
of Decision
July - 3/47

Cert - Oct - 3 - 7 - Decision
Aug 3/47

476 -

Hays Co. File 60
5875
5

Travis County 1st Class

David Wilson

1 Lea. & 1 Labor

Concept on Map
Jno Hefter Peter
June 47

Cancel for Plotting to
the Heirs of David Wilson Dec

Cancel

Patented 3rd July 47
Brown
Vol 433 Vol 5
Decision
Dpu notified
Lady 3/47
Done

M&B 1801 Mk 421 & mk R

REPUBLIC OF TEXAS. HARRISBURG COUNTY.

No.

This is to Certify, that Daniel Wilson has appeared before us, the BOARD OF LAND COMMISSIONERS FOR THE COUNTY OF HARRISBURG, and proved according to law, that he arrived in this country in Eighteen Hundred and Thirty five and that he is a married man and entitled to One League & Labor of LAND, upon the condition of paying at the rate of five dollars for every labor of irrigable land, three dollars & fifty cents for every labor of temporal or arable land, Two dollars and forty cents for every labor of pasture land, which may be contained in the Survey secured to him by this Certificate.

GIVEN UNDER OUR HANDS, THIS 2nd day of February 1838

R. E. Dobie PRESIDENT.

Wm. F. Harris
James S. Holman } ASSOCIATE COMMISSIONERS.

ATTEST, A. Jackson Davis

TELEGRAPH PRESS—HOUSTON.

1.

Travis Gill ~~[illegible]~~ Colchan

~~Travis~~ Co 1st Class

A.R.C. Cert 1 Lea. 1 Sur.

David Wilson

Filed Oct. 17/84

Entered on leagues of land of the within in the County of Bastrop for all the Waters of Brazos River this 18 in January 1838

Sam Williams County Surveyor Bastrop Co. the County of B

His Certificate is entered on Sequestrum.

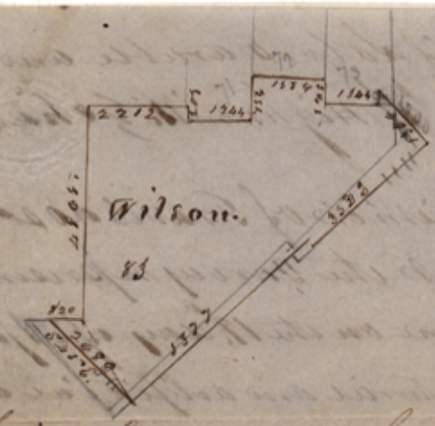
Distributed

8 acres 7 chains 9

6001
8574
13059
13062

Travis 60

494
553



Variation 10° E. } State of Texas
} Travis County

Survey of one league and labor of land made for the legal representatives of David Wilson being the quantity they are entitled to virtue of certificate No. 494 } 933 } issued by the Commissioner General of the Land office on the 11th day of February 1847. as a duplicate of 1st class issued to him Harris County said survey is No 83. on the waters of San Marcos River about 7. miles N. of San Marcos Springs. }

Begining at the S.E. corner of Survey No. 73. in the name of A. Cordova. a.p. of Wm. Gray. a stake and mound in prairie on the side of a hill Thence W. with the line of 73. 1344 vrs. to its S.W. corner a stake & mound at the head of a hollow. Thence N. 545 vrs to the S.E. corner of survey No. 72 a stake and mound on the N side of a hill in a stump oak thickets Thence W. 1556 vrs. a stake & mound in the E boundary line of survey No. 71. made for Benj. C. Franklin. a.p. of F. W. Robertson from which a stump oak. 4 in diam bears S 10° W. 32. vrs. Thence S. 758. vrs. to the S.E. corner of Survey No. 71. Thence W. 1344 vrs. with the S. line of No. 71. to its S.W. corner. Thence N. 213 vrs to the S.E. corner of Survey No. 70. of ½ League. made for A. C. Pannell by B. C. Franklin a.p. Thence W with the S line of said survey. 2212 vrs to its S.W. corner. a stake in the E. line of survey No 87. Thence S 1063. vrs to the N.E. corner. of No. 96. from which a live oak. 12 in diam bears N 30° W. 12 vrs. & an other 9 in dia bears N 10° E. 15 vrs. Thence S. 1268 vrs. to the N.E. corner of survey. No 87. Thence with the E line of No. 97. 633 vrs. to the N.E. corner of No. 98. a stake from which a live oak. 9 in diam bears S. 2 vrs an other live oak. 14 in diam bears N 30° W 8 vrs. Thence with the E line of Survey No 98. 1961. vrs. to the S.E. corner of same a stake from which a ~~stump~~ oak 9 in diam. 15 vrs. an other live oak 14 in diam bears N 30° W 8 vrs. Thence W. 400 vrs a creek. Course S. 1820 vrs the N corner of Survey No 11 in the name of Gideon Dowdich Thence S 45° E with the N.E. line of said survey 2688 vrs to the W corner of A. Beal Survey. No 6. Thence N 45° E. with Beall. N.W. line 2688 vrs to the W corner of No 2. Thence N 45° E. with the N.W. line of No 2 (2688 vrs). to its N corner Thence S. 45 E. 150 vrs to the W corner of B. S. Cove. Survey No 4 Thence with its N.W. line 2688. vrs. to the N corner of the same. Thence N 45° E 834 vrs to a stake in the E line of 80. Thence N 600 vrs to the place

2.

of Beginning — containing five and a half labors arable and 20 ac pasture land — N. W. Bain — J. Highsmith Chain

I J. Bartlett Smith deputy surveyor for the District of Travis do solemnly swear under the oath of my office that the survey represented in the foregoing field notes was made by me on the 19th day of April 1847, & the marks bounds corners and limits natural and artificial are truly described therein and the survey made according to law

Given under my hand. at Austin May 14th. 1847 — J. Bartlett Smith D.S.T.C.

I do certify that I have examined the foregoing field notes and find them correct and the survey made according to law —

Given under my hand at the City of Austin May 17th. 1847 —

James R. Pace
Dist. S. T. Dist

Recorded page 574

2

2. File 60
Travis County – 1st Class

Legal Representatives
David Wilson
Field Notes

1 League & 1 Labor

Correct as Map
T. Pocher
June 47.

Patented June 47
75-c (1)

Brown

Recd $76.70/100 in the
Prom. notes of the late
Repb. of Texas for
Govt. dues on the
within field notes
July 3rd 1847
R. S. [illegible]

433 vol 5

494
593

GENERAL LAND OFFICE,

Austin, February 11th 1847

This is to certify that satisfactory evidence having been produced of the loss of Head-right Certificate No. — — Class 1st issued by the Board of Land Commissioners for Hays County to David Wilson for One League and one labor of land, dated the _____ day of _____

This Duplicate, therefore, will entitle the said Legal Representatives of David Wilson to all the benefits granted in said Original Certificate.

In testimony whereof, I hereunto set my hand and affix the seal of said Office the day and date first above written.

Commissioner.

2

Vouchers 7-92

3. File 61 Dup

Travis Co. 1st Class

The Legal Representatives of

David Wilson

Certificate

1 League & 1 Labor

50 c

Not Located

83

GENERAL LAND OFFICE

Houston April 18th 1866

Agreement Between Ophelia P. Henning formerly the Wife of David Wilson Henning and James M. Wilson of Harris County and State of Texas; and David Thomas of Austin & State of Texas — we the party of the first part have employed David Thomas of the second part to locate the headright of David Wilson of one half league & labour of land which land claim was once located by J. D. Cordova & patented in Hays County by a Duplicate, which said Cordova wrongfully obtained, [illegible] never been lost — But was in the hands of Dr. L. J. Lazey & said David Thomas the [illegible] and within the patent shall issue to our remaining half league & labour we the parties of the first part, do by these presents grant Bargain and convey unto the said David Thomas Eleven hundred and sixty one & one half acres out of our one half of said league & labour, Binding ourselves & our heirs to forever warrant unto the said Thomas his heirs and assigns all our right title & interest in and to said land, and when the patent shall issue to said land this conditional contract & deed shall become unconditional & we hereby authorise the Commissioner of the General Land Office to certify the same, or any other lawfully authorised person to do the same, to witness the same we here unto set our hands this 18th day of April A.D. 1866

Ophelia P. Henning
James M. Wilson

State of Texas }
County of Harris } Before me E. Simmler a Notary Public in and for Harris County, duly qualified and Commissioned, personally appeared Ophelia P. Hennings & James M. Wilson both to me well known, who severally acknowledge to have signed executed and delivered the aforegoing instrument of writing for the purposes and considerations therein set forth and contained. Witness my hand and official seal at my office at Houston on the 17th day of April A.D. 1866.

E. Simmler
Notary Public Harris County

Ophelia Fleming
& James M. Wilson
contract & deed
to David Thomas
Location Warrant for
locating Land.

Washington 17th
August 1860

100

had; and the evidence shows that it is not such a fraternal beneficiary association as is defined by section 1 of the Acts of this state of 1899, p. 195, c. 115, relating to fraternal beneficiary associations, and fails to show that it is such a beneficiary association as is relieved from the provisions of the insurance laws of this state; and hence the evidence does not show that the defendant is entitled to be relieved from the provisions of the insurance laws of this state providing for 12 per cent. penalty and reasonable attorney's fees; and hence I hold defendant liable for both the said penalty and attorney's fees."

Opinion.

1. There is no assignment of error complaining of the foregoing findings of fact as unsupported by testimony; and therefore appellant must be regarded as acquiescing in the correctness of the findings, and the appeal must be disposed of upon the same theory.

2. One of the defenses relied on is by-law 55; appellant's contention being that it was binding upon the assured and the beneficiaries in the policy, and resulted in scaling the policy from $5,000 to $2,000, the amount paid by appellant before suit was brought. Appellees contend that as the by-law referred to was enacted after the policy or certificate was issued, and was not consented to by them or the assured, it cannot affect their rights, and they cite decisions from other jurisdictions which support their contention. They also contend that under the facts presented in this case, if the by-law be considered valid, the policy should not be scaled. This contention is founded upon the proviso embodied in the by-law to the effect that the face value of benefit certificates shall be paid, so long as the emergency fund of the order has not been exhausted, and the fact that at the time of the death of the assured, and at the date of the proof of her death, the fund referred to had not been exhausted, but was then over $400,000. While the writer believes that appellees are correct in both contentions, the decision of this court is rested upon the correctness of the latter contention. The proviso in by-law 55 states in clear and unambiguous language "that the face value of the benefit certificate shall be paid, so long as the emergency fund of the order has not been exhausted, if the member shall at the time of death be a member of the order in good standing, and shall have complied with all the laws, rules, and regulations of the order." The words "face value" undoubtedly mean the amount stated in the body of the certificate as payable upon the death of the assured, which in this case was $5,000. Therefore, the emergency fund not being exhausted, according to the very terms of the by-law itself the entire $5,000 was owing and due.

3. The release executed by the appellees was without consideration, except as to the $2,000 then paid on the debt, which is not involved in this suit. Appellant never denied liability in toto, but always conceded its liability for $2,000, the amount which it paid; and therefore, having paid nothing more than its conceded liability, the receipt or release was without consideration as to the remainder of the debt. Franklin Insurance Co. v. Villeneuve (Tex. Civ. App.) 60 S. W. 1014, 68 S. W. 203.

4. The trial court properly excluded the amended by-law of 1901, because the same had not been pleaded. The plaintiffs sued upon a written contract, which, if the facts alleged in their petition were true, entitled them to recover; and, if the defendant sought to defeat such recovery on account of a subsequent change in the contract (and such seems to have been the purpose for which the excluded by-law was offered), then it devolved upon the defendant to specially plead such change.

5. Having failed to pay the full amount of the policy or certificate at maturity and after demand, the defendant became liable, under the statute regulating insurance, for 12 per cent. damages and reasonable attorney's fees, unless it was made to appear that it was a fraternal beneficiary association, as defined by the act of May 12, 1899. According to the findings of the court, this was not shown, and therefore appellees were entitled to recover damages and attorney's fees. Mutual Reserve Fund Life Ass'n v. Payne (Tex. Civ. App.) 32 S. W. 1065.

6. There are some other minor questions, which we deem it unnecessary to discuss in this opinion. They have been duly considered, and our conclusion is that no reversible error has been shown.

Judgment affirmed.

(32 Tex. Civ. App. 538.)

HENNING et al. v. WREN et al.

(Court of Civil Appeals of Texas. May 27, 1903.)

ADVERSE POSSESSION—JOINT AND SEVERAL PLEA—DEEDS—DESCRIPTION—RECORD—SUFFICIENCY—PAYMENT OF TAXES.

1. In trespass to try title against several defendants, the answer set up that, if plaintiffs ever had any cause of action against defendants, it was barred by limitations, because defendants and those under whom they claimed had had adverse possession of the land for more than five years, and that "each of the defendants say that, if plaintiffs ever had any cause of action, such action is barred by the statute of limitations, which they and each of defendants plead in bar of this action." *Held* to plead the statute jointly and severally for each of defendants, so as to allow them to prove limitations separately as to the particular portions of the entire tract sued for.

2. Where a deed described land "as my undivided one-half interest in the David Wilson league and labor of land," but the deed as recorded described it as the Daniel Wilson survey," the record was insufficient to support the five-year statute of limitations.

3. In the absence of a statement of facts, it will be presumed that there was sufficient evidence to warrant findings of the trial court.

4. Where the grantee in a recorded deed pays taxes on the number of acres called for in his deed, actually believing he is paying for the full quantity in his possession, he is not deprived of the benefit of the five-year statute of limitations, merely because his tract is larger than he supposed.

On Rehearing.

5. Where the record of a deed to an undivided interest in a survey of land was defective for failure to describe the land as it was described in the deed, the defect could not be cured by parol.

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Action by Alice V. Henning and others against James A. Wren and others. From a judgment for defendants, plaintiffs appeal. Reversed as to defendant Parke alone.

W. G. Barber, E. B. Coopwood, and P. N. Springer, for appellants. A. B. Storey, S. B. McBride, and Walton & Walton, for appellees.

STREETMAN, J. Appellants, as heirs of Mrs. Ophelia P. Wilson (who was afterwards Mrs. Talbot, and finally Mrs. Henning), sought in this action to recover an undivided half interest in the Daniel Wilson league and labor of land in Hays county, Tex. Upon change of venue to Caldwell county, a trial was had without a jury, and the court found the following facts:

"(1) On the 9th day of October, 1830, David Wilson and Ophelia P. Morrell were married at Vincennes, in the state of Indiana, and emigrated together to the state of Texas and county of Harrisburg, where they arrived in 1835.

"(2) That on February 2, 1838, said David Wilson appeared before the board of land commissioners of said Harrisburg county and made the proper proof, upon which said board issued to him, as a married man, a written certificate for one league and labor of land, which certificate is the basis for the patent to the land in controversy.

"(3) That prior to the 3d day of July, 1847, said David Wilson died, leaving surviving him only one child, named James M. Wilson, and his widow, Ophelia P. Wilson.

"(4) That on July 3, 1847, the state of Texas, by patent No. 433, vol. 15, granted to the heirs of said David Wilson, deceased, the league and labor of land described in the petition of plaintiffs in this cause, and in controversy in this suit; it being survey No. 83 and abstract No. 476.

"(5) That said Ophelia P. Wilson was the wife of the original grantee, David Wilson, at the date of the issuance of said certificate and at the date of the accrual of his right thereto, and as such she owned an undivided half interest in said land in her community right.

"(6) Prior to the 31st day of March, 1852, O. P. Wilson intermarried with one James Talbot, and was the wife of said Talbot on said date and prior and subsequent thereto.

"(7) That on said 31st day of March, 1852, said Ophelia P. Talbot, joined by her husband, James Talbot, executed and delivered to Francis Brichta a deed, attempting or purporting to convey all said land. In said deed it is recited that she, as the widow of David Wilson, owned an undivided one-half interest in said land, and that James M. Wilson, as the son, owned the other undivided one-half interest. She attempts to convey the whole survey of the land by this deed, reciting that her son, James, is a minor, and that she has been authorized to convey his interest by certain orders from the First district court of the city of New Orleans, state of Louisiana. This deed is properly acknowledged by the husband, James Talbot; but the purported acknowledgment thereof by the wife, Ophelia P. Talbot, was and is defective, and not in compliance with the requirements of the law. Said certificate of acknowledgment of the wife wholly fails to show that the instrument was explained to her in any way by the officer, and further fails to show in any way that she acknowledged to the officer that she did not wish to retract same.

"(8) On May 15, 1855, said Ophelia P. Talbot married Albert Henning, and continuously thereafter was the wife of and lived with the said Albert Henning until the 25th day of November, 1892, when said Albert Henning died.

"(9) That said Ophelia herself died on the 12th day of August, 1897, intestate, and there has been no administration upon her estate, and no necessity has ever existed therefor.

"(10) That said Ophelia was the mother of only two children; that is, the plaintiff Alice V. Henning, who was born in 1857, being the daughter of said Ophelia and her last husband, Henning, and the other child being the said James M. Wilson, by her first husband, David Wilson.

"(11) That said James M. Wilson died in Harris county, Tex., intestate, and no administration was ever had upon his estate.

"(12) That James M. Wilson was married in 1858 to Artimisia Habermacher, by whom he had three children; that is, the plaintiffs Charles A. Wilson, Ophelia Black (whose husband is Peter Black), and Jas. M. Wilson.

"(13) That said Artimisia also died prior to the institution of this suit, and in the early part of 1897, and that said three children were the only children of the said Artimisia and the said James M. Wilson.

"(14) That the said Ophelia P. Wilson never sold or conveyed her interest in the said land, and never attempted to do so, except by the said deed executed to said Brichta, as shown above.

"(15) That plaintiffs each claim the undivided one-half interest in said land involved in this suit through the said Ophelia P. Wilson, who is common source of title as to such undivided one-half interest.

"(16) That the title to said land, as conveyed by the said deed from said Ophelia Talbot and her husband, attempting to convey all

of the survey, one-half for herself and one-half for her son, to said Brichta, passed by successive conveyances, duly executed, acknowledged, and recorded, to Mrs. Emma Burleson, John T. Allen, and D. C. Osborn; the said Mrs. Emma Burleson owning an undivided one-half thereof, and the said Allen and Osborn owning the other one-half thereof. That on the 21st day of April, 1871, the said Mrs. Burleson, joined by her husband, on the one hand, and Allen and Osborn, on the other, executed partition deeds, by which they conveyed in severalty to said Osborn and Allen all the land lying north and east and northeast of the partition line, and by which they conveyed to said Mrs. Burleson in severalty all the land lying west and south and southwest of said partition line; the said partition line being set out in said partition deeds, the same as set out in the amended original answer of defendants in this cause.

"(17) That on the 16th day of February, 1880, said Allen and Osborn conveyed to the defendant Jas. A. Wren, by deed of that date, all the land lying northeast of said partition line, describing it as containing 2,302½ acres, more or less. This deed was regularly acknowledged for record by the grantors, and properly recorded in the deed records of Hays county, Tex., on March 3, 1880.

"(18) On June 30, 1871, said Emma Burleson and her husband, Ed. Burleson, by deed, properly acknowledged, and duly recorded immediately thereafter, conveyed to Joseph D. Sayers that portion of said survey lying south of said division line; and on March 11, 1878, by deed of that date, properly acknowledged, and immediately thereafter recorded, said Sayers conveyed to W. O. Hutchison the land so conveyed to him by same description.

"(19) On September 12, 1882, W. O. Hutchison, by deed of that date, duly recorded on September 26, 1882, in the deed records of Hays county, conveyed to D. A. Nance and S. N. Heard nine different tracts of land in Hays county, Tex.; one of them being described as 2,304 acres, the west half of the David Wilson league and labor of land, and all thereof lying southwest of said division line.

"(20) On April 8, 1884, D. A. Nance and wife, by deed of that date, duly acknowledged, and recorded on April 19, 1884, in the deed records of said Hays county, conveyed to the defendant O. G. Parke an undivided one-half interest in the same lands conveyed by the said deed from W. O. Hutchison to Nance and Heard by a like description.

"(21) On the 25th day of January, 1887, said S. M. Heard executed, properly acknowledged for record, and delivered to the defendant O. G. Parke a deed in writing of which the following is an exact copy:

" 'State of Texas, County of Hays. Know all men by these presents, that I, S. M. Heard, of said state and county, for and in consideration of the sum of twenty-five hundred and twenty-five dollars, cash to me in hand paid by O. G. Parke, of said state and county, the receipt whereof I do hereby acknowledge, have bargained, sold, aliened, transferred, and conveyed to the said Parke, to have and to hold to him and his heirs, forever, all of my interest, which is an undivided one-half interest, in the following tracts and parts of tracts of land situated in Hays county and state of Texas, to wit: My undivided one-half interest in the David Wilson survey, containing 1,664½ acres; my one-half undivided interest in the R. J. Smith 640-acre survey; my undivided one-half interest in the 1,006 acres out of the Martha Andrews 1,280-acre survey—the aforesaid tracts of land being owned by myself and the said Parke in equal undivided interest, and hereby convey to him my undivided one-half interest in each of said tracts. The 1,006-acre Martha Andrews survey is all of said survey except 274 acres. The said Parke has conveyed to me his undivided one-half by deed of this date, and said 274 is described in said deed; and for the better description and identification of the aforesaid tracts and parts of tracts of land, reference is here made to all of the title papers, and to the record of the same, and to plat and map made by Otto Groos, the county surveyor of Hays county, Mark A. And the said Heard, for myself, my heirs, and legal representatives, do warrant the title to the undivided one-half interest in said tracts of land herein conveyed, and will defend the same against the claims of all persons claiming or to claim same by lawful title.

" 'Witness my hand this 25th day of January, A. D. 1887. S. M. Heard.'

"The plat referred to in said deed was not introduced in evidence and was not of record. That said deed was filed for record on its day of execution, and was recorded on the 29th day of January, 1887, in Book V, pages 40, 41, of the deed records of Hays county, Tex. That the clerk of the county court of Hays county, in recording said deed, did accurately transcribe same upon the records, except, where there is written in the deed 'David Wilson,' it is written upon the record of said deed 'Daniel Wilson'; the result being that the deed shows upon the record exactly as originally written, except 'Daniel Wilson' is substituted for David Wilson.'

"(22) On the 10th day of October, 1887, the state of Texas granted to the defendants O. G. Parke and S. M. Heard, as assignees of Martha E. Andrews, a patent, No. 517, vol. 16, for 1,280 acres of land, which land was and is in fact part of the same land covered by the grant heretofore made to the heirs of David Wilson. That said patent was duly filed and recorded in the deed records of Hays county, Tex., on March 8, 1888.

"(23) By deed dated January 25, 1887, and at once thereafter recorded in said deed records, O. G. Parke conveyed to S. M. Heard the former's undivided one-half interest in

274 acres of land covered by the said Andrews patent, describing said 274 acres as being all thereof lying south and west of a certain line identified and described in said deed.

"(24) By deed dated March 8, 1888, and recorded in said deed records on March 12, 1888, said S. M. Heard and wife conveyed an undivided one-half interest in a number of tracts of land, including the said 274 acres, to John W. Herndon; and by deed dated May 11, 1889, said John W. Herndon conveyed to the defendant B. F. Herndon an undivided one-half interest in a number of tracts of land, one being described as containing '274 acres out of the Martha E. Darden survey of 1,280 acres.' This deed refers for further description to the deed to John W. Herndon, shown in next preceding finding of fact; and the word 'Darden' was written therein by the mutual mistake of the parties, instead of the word 'Andrews.'

"(25) The defendant James A. Wren inclosed all of the land claimed by him, and lying north, northeast, and east of the said partition line fixed in the partition deed between Burleson, Allen, and Osborn, in the latter part of 1886, and the first of 1887; the inclosure being completed by the 1st day of May, 1887. Since that date said James A. Wren has used, occupied, and enjoyed the land so claimed by him, holding the same peacefully and adversely to all persons, and claiming same as his own under deeds duly registered, and paying taxes thereon, as herein shown. Prior to his inclosure of said land, and subsequent to his purchase thereof, his wife died intestate, leaving only two heirs at law; that is, the defendants John Wren and Mack Wren. The community one-half interest of their mother vested by inheritance in these two children, and the occupancy and claiming of the land by the father has been for himself and his said two children; they living with him.

"(26) Since, for and before the said year 1887, Wren has rendered, as appears from the assessor's rolls, collector's rolls, and the original tax receipts, for taxes, 2,032 acres of land, showing the original grantee as David Wilson. Such rendition has also shown the abstract number of the survey as No. 476, except for the years 1896 and 1897, for each of which years the rendition so made by the said James A. Wren shows the abstract number as 475. None of the renditions made by the said Wren show the certificate number, nor the survey number of the said land, nor the number of the patent, nor do they in any way describe the particular land so rendered by him, except only to show, as the name of the grantee and the owner, 'James A. Wren'; as the abstract number, '476,' for the various years except 1896 and 1897, when it is shown as '475'; as the name of the original grantee, 'David Wilson'; and as the number of acres rendered, '2,302.' The receipts for the taxes issued to the defendant Wren correspond with the renditions so made by him, and do not further describe the land.

"(27) The defendants John Wren and Mack Wren made no rendition for taxes, and paid no taxes upon said land, or any part thereof; but in paying same their father, James A. Wren, did so in recognition of their rights therein and for their benefit.

"(28) The defendant O. G. Parke, in the latter part of 1886, inclosed and took possession of all that portion of the David Wilson survey lying south, southwest, and west of the said partition line, and has since then occupied same continuously and adversely to all other persons, claiming same as his own; except only the 274 acres above described. The said Parke, prior to the year 1892, and for that year, and for each succeeding year, has rendered for taxes 1,664 acres of the David Wilson survey, and paid the taxes thereon under such rendition. The rendition did not otherwise describe the particular land paid upon, except by showing, as the name of the owner, 'O. G. Parke'; as the abstract number, '476'; as the original grantee, 'David Wilson'; and as the number of acres rendered, '1,664.' No survey number, nor certificate number, nor patent number are shown by such rendition, and the taxes paid by the defendant Parke were paid under such renditions, only from 1884 to 1887 said Parke paid on 2,303½ acres of the Wilson league, and from 1887 to 1901 he paid on 1,664 acres of the Wilson and 1,006 acres in the name of Andrews 1,280-acre survey, that had been patented over the Wilson in 1887. Said Parke also rendered, as stated, prior to and for the year 1892, and for each succeeding year, 1,006 acres of the land upon the M. E. Andrews survey, which rendition does not show the survey number, the certificate number, nor abstract number. It does not otherwise describe the particular lands rendered, except only by showing as the name of the owner, 'O. G. Parke'; as the abstract number, '659'; as the original grantee, 'M. E. Andrews'; and as the number of acres rendered, '1,006.' The payment of taxes by the said Parke was made under such rendition only.

"(29) Defendants Heard and Herndon, in the latter part of 1886, inclosed and took actual possession of the 274 acres of land, and have since then had and held actual peaceable possession thereof, claiming same adversely to all persons and as their own. For the year 1892, prior thereto, and continuously since then, said Heard and Herndon have rendered and paid taxes upon 274 acres of the said M. E. Andrews survey. The renditions made by them as basis for the payment of such taxes did not show survey number nor the patent number of said land, nor otherwise describe the particular land paid upon, except only to show as the name of the owner, 'Heard and Herndon'; as the abstract number, '659'; as the

certificate number, '1,264'; as the original grantee, 'M. E. Andrews'; and as the number of acres, '274.'

"(30) On March 6, 1891, the state of Texas patented to A. Wyschetski, as assignee of the Texas Central Railroad Company, 314½ acres of land, known as 'Survey No. 3.' This 314½ acres of land is in fact part of the said David Wilson survey; it being placed upon land which was not vacant, but which was already covered by the David Wilson survey. Since and including the year 1892 taxes have been each year regularly assessed upon said survey in the name of A. Wyschetski, and taxes so assessed have been paid by said A. Wyschetski, and none of the defendants have paid the taxes upon said land, unless same was paid by the defendant James A. Wren, under said rendition of 2,302 acres, shown as being upon the David Wilson survey.

"(31) For the year 1892, and each year since then and prior thereto, there was regularly assessed in the name of 'Unknown Owner' 639 acres of the David Wilson survey, abstract No. 476, and the taxes so assessed against said 639 acres in the name of 'Unknown Owner' have not been paid by any of the defendants, unless same were paid under their several renditions herein above shown.

"(32) The testimony tends to show that the said David Wilson survey is considerably in excess in acres of the amount called for by the patent. The testimony tends to show, and the plaintiffs ask the court to find, that there is as much as 314½ acres of said Wilson survey over and above the 2,302 acres as rendered for taxes by defendants Wren, and lying on the north, northeast, and east side of said partition line; and the evidence further tends to show, and the plaintiffs ask the court to find, that there is lying on the other side of said line as much as 639 acres of said Wilson survey over and above the 1,664 acres thereof as rendered for taxes by defendant O. G. Parke, and over and above all of portions of said Wilson survey covered by the Andrews patent. But the court, although so requested by plaintiffs, declines to find in any way on the question of excess in acreage or the amount thereof, because the court holds same to be wholly immaterial, as, defendants having paid on as many acres as their title papers call for, and as many acres as they thought they had, any excess in acreage cannot defeat their title by limitation to all the land. The M. E. Andrews survey all lies upon the south, southwest, and west side of said partition line, and the said Texas Central Railroad Company's survey lies upon the north, northeast, and east side of said partition line.

"(33) In making his said rendition of 2,302 acres upon said Wilson survey, said Wren intended thereby to render and pay taxes on all the Wilson survey which he had, including the land covered by said Texas Central Railroad Company's survey, which he has all the time claimed, and yet claims, and has possession of as part of said Wilson survey.

"(34) Said Parke has during these several years supposed that said renditions of the 1,664 acres of land of the said Wilson survey and 1,006 acres upon the said Andrews survey covered all the land which he had within the limits of the Wilson survey, and in paying taxes under such renditions his purpose has been to pay upon all the Wilson survey owned or claimed by him.

"(35) At the time the said Andrews survey was located by the said Parke and Heard, they then thought the land thereby covered was part of the Wilson survey, and part of the land claimed by them upon the Wilson survey; but on account of the excess in acreage of the said Wilson survey, and as a precaution, and upon the advice of the county surveyor of Hays county, they filed upon said land and caused same to be patented to them as assignees of M. E. Andrews."

There is no statement of facts in the record. The court concluded that the defendants had established their defense under the five-year statute of limitation, and rendered judgment accordingly.

The third and four assignments of error complain of the admission of evidence to support the plea of limitation, and of the judgment based thereon, because it is claimed to be at variance with the pleadings on that issue. Appellants insist that the answer of the defendants is a joint plea of limitation as to the whole tract, and that under this plea they should not have been permitted to prove limitation separately as to particular portions of the tract. We do not deem it necessary to determine what the result would be if the pleading was as claimed. The portion of the answer setting up the five-year statute on which the judgment was based is as follows:

"(2) And, further answering, defendants say that, if plaintiffs ever had any cause of action against the defendants for the land sued for, the same has long been barred by the statute of limitation of five years, because they say that they (defendants) and those under whom they claim have had the actual, peaceable, adverse, and quiet possession of said land sued for, using, enjoying, possessing, and cultivating the same, and paying the taxes thereon, and claiming the same under a deed or deeds duly registered for more than five years next before the institution of this suit, and they and each of defendants say that if plaintiffs, or either of them, ever had any cause of action against them for said land, said action is barred by the statute of limitations of five years, which they and each of defendants here plead in bar of this said action."

It is evident that this answer pleads the statute jointly and severally for each of the

defendants. Had only one of the defendants been sued and pleaded limitation as to the whole tract, we do not doubt that he could have recovered any portion of the tract which the evidence might have shown him entitled to under the statute, although he might not have sustained his defense as to the whole. So, each of the defendants having pleaded limitation as to the whole tract, we see no reason why they should not have been permitted to hold the portions, respectively, to which they established their defense of limitation.

The fifth assignment of error attacks the deed from S. M. Heard to O. G. Parke, and the record of said conveyance, as insufficient to support the five-year statute of limitation. We are of opinion that this assignment should be sustained. The description in the deed as recorded is as follows: "My undivided one-half interest in the Daniel Wilson survey, containing 1,664½ acres." Had the deed been recorded as it is written, it would probably have been sufficient; but almost the only feature of the description which would serve to identify the land conveyed was the name of the survey, and this was so changed in recording the instrument that this means of identification was not only destroyed, but rendered positively misleading. The object of the statute in making registry of the deed, necessary to enable the possessor to avail himself of the five-year limitation, is to give notice to the owner that the defendant in possession is claiming under the deed; and, if there is such falsity or uncertainty of description as that it will not answer the purpose intended, it cannot be considered a deed duly recorded under the statute. Flanagan v. Boggess, 46 Tex. 335; Kilpatrick v. Sisneros, 23 Tex. 136. While it may not be necessary to literally transcribe an instrument, in order to say that it is duly registered, yet there should certainly not be such an error in recording it as to destroy the effect of the descriptive part of the instrument. We cannot believe that a record purporting to show a conveyance of an "undivided one-half interest in the 'Daniel Wilson survey,' containing 1,664½ acres," would impart notice that the grantee was claiming an undivided half interest of 1,664½ acres in the "David Wilson league and labor."

The remaining assignments complain of the insufficiency of the evidence to show payment of taxes for the time required to complete the bar of the statute. It will be observed that during the years 1896 and 1897 the defendant James A. Wren rendered his land under abstract No. 475; the correct abstract number being 476. For these years, however, the name of the survey was correctly given, as well as the name of the owner. There being no statement of facts, we cannot tell what other evidence the court may have acted upon in finding, as it must have found, that the payment was made upon the lands in controversy. It is not shown, as it was in Dutton v. Thompson, 85 Tex. 116, 19 S. W. 1026, that there was another survey in the county to which the description would apply, and that the land rendered was really different from that claimed by the defendant. We will presume, in the absence of a statement of facts, that there was evidence sufficient to warrant the court in finding that the land rendered, and upon which payment was made, was the land in suit, and that the abstract number, as shown on the tax rolls, was an error, but not sufficient to destroy the identity of the land on which taxes were paid.

It is insisted, because there was evidence tending to show that the lands held by defendants actually contained a larger number of acres than rendered by them, that this would defeat the operation of the statute, at least as to the excess. The court found that the defendants rendered as many acres as their deeds called for, and as many acres as they thought they had. We do not hold that such a disparity might not exist between the quantity of land held in possession and that rendered for taxes as to prevent the statute from running, nor do we hold that the number of acres called for in the deed is conclusive; but we do not believe, where a grantee in a recorded deed pays on the number of acres called for in his conveyance, actually believing that he is paying for the full quantity in his possession, that he should be deprived of the benefit of the statute, because it may subsequently be ascertained that his tract is somewhat larger than he believed it to be.

We have carefully considered all of the assignments, and find no error, except as shown in the fifth assignment. This error affects only the portion of the lands claimed by the defendant O. G. Parke. As to all the other defendants, the judgment will therefore be affirmed. We are unable to determine definitely to what extent and what portions of his tract the defendant Parke may be able to hold under the three-year statute of limitations; and, in addition, the findings of fact are not sufficiently full and definite to enable us to settle the questions of rents and improvements between him and plaintiff. The judgment in favor of the defendant Parke will therefore be reversed, and as to him alone the cause remanded.

Affirmed in part, and reversed and remanded in part.

On Rehearing.

(July 1, 1903.)

Appellants and appellee have filed motions for rehearing of so much of the former judgment as is adverse to them, and appellants have also filed a motion requesting that judgment be rendered in their favor against appellee Parke for so much of the land as they would be entitled to recover under the decision herein rendered. Appellees contend that the description in the deed from S. M. Heard to O. G. Parke is either sufficient in itself, or that it might be made sufficient by parol evidence, and conclude by saying that "if the

ambiguity in the deed cannot be removed by testimony, * * * there would seem to be no reason for a reversal of the case." We do not think the defect in the record of the deed could be cured by parol evidence, and, in this situation, we understand that appellees would prefer that the case be not reversed.

Some question has arisen as to the extent to which appellants are entitled to recover against appellee Parke; said Parke having established title by limitation to an undivided half interest in the tract in question, and appellants having sued for an undivided half interest in the land, including said tract. The question has not been argued by counsel, but we have concluded that the recovery should be for an undivided half only of the portion to which Parke failed to establish title; that is, for an undivided one-fourth of the Parke tract, after deducting the portions which said Parke can hold under the three-year statute of limitations. On account of the absence of field notes from the record, and the general nature of the description contained in the findings of fact, we deem it best not to undertake to render judgment; and, as the case must be remanded for a partition and adjustment of the questions of rents and improvements, we will modify our former judgment reversing and remanding the case as to the appellee O. G. Parke, and reverse and remand the case as to said defendant, with directions to the lower court to render judgment for appellants against said Parke for an undivided one-fourth interest in all the land in suit lying on the west and southwest side of the partition line established between Mrs. Emma Burleson on the one part and John T. Allen and D. C. Osborn on the other part, by deed dated April 21, 1871, except so much thereof as is covered by the Martha E. Andrews 1,280-acre survey—this direction being conclusive only upon the question of title, and not as to the rights of any of the parties concerning partition, rents, or improvements.

The motions for rehearing will be overruled.

(33 Tex. Civ. App. 85.)

CASEY-SWASEY CO. et al. v. VIRGINIA STATE INS. CO.

(Court of Civil Appeals of Texas. June 13, 1903.)

WITNESSES—IMPEACHMENT—CROSS-EXAMINATION—DISCREDITING PARTY'S OWN WITNESS.

1. A witness cannot be impeached by showing indictments of perjury pending against him, except on cross-examination.
2. A party offering a witness may not impeach his character.

Appeal from District Court, Comanche County; J. C. Randolph, Special Judge.

Action by the Casey-Swasey Company and others against the Virginia State Insurance Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Geo. E. Smith and Orrick & Terrell, for appellants. G. H. Goodson, for appellee.

STEPHENS, J. Appellee was permitted, against the objections of appellant, to prove by witness Z. P. West that two indictments for perjury were pending against him (West) in the district court of Comanche county, Tex.; and by witness J. T. Maroney that he, too, had been indicted in the same court for the same offense. That it is incompetent to thus impeach a witness, except on cross-examination, is well settled. Texas Brewing Company v. Dickey (Tex. Civ. App.) 43 S. W. 577. True, it has been held by this court and several others that a witness may be thus discredited on cross-examination, but there are numerous authorities, including some from our Courts of Civil Appeals, to the contrary. See cases cited by us in Texas Brewing Company v. Dickey, supra, and the following, cited by appellants: Hill v. Dons (Tex. Civ. App.) 37 S. W. 638; Freedman v. Bonner (Tex. Civ. App.) 40 S. W. 49; Kruger v. Spachek (Tex. Civ. App.) 54 S. W. 295; Van Bokkelen v. Berdell, 130 N. Y. 141, 29 N. E. 254; Stanley v. Insurance Co. (Ark.) 66 S. W. 432; Hendrickson v. Com. (Ky.) 64 S. W. 954; Lewis v. Com. (Ky.) 42 S. W. 1127; Miller v. Curtis, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469. The rulings in this instance are not brought within the exception to the general rule, since the record refutes the idea that this testimony was drawn out on cross-examination. It was not until after West, who was an important witness for appellant, had been examined in chief and cross-examined, and not until after appellant had rested, and appellee had offered him as a witness, as appears from the statement of facts, that the fact of his having been indicted was proven. Maroney was not offered as a witness by appellant at all, though his testimony in the main was favorable to appellant, agreeing substantially with that of West; and the fact of his having been indicted appears to have been drawn out on his direct examination by appellee. The bills of exception, besides showing that the testimony was introduced on the trial over objection, only show the questions, answers, and objections, and do not, therefore, of themselves show how it was introduced; but, read in connection with the agreed statement of facts, leave no room for the inference that it was drawn out on cross-examination, particularly as to witness Maroney. The objections stated in the bills of exception were prima facie good, and the record, as a whole, so far from bringing the case within the exception to the general rule, which exception at best rests upon conflicting authority, affirmatively excludes that view, at least as to Maroney.

Another well-settled rule of evidence was violated in the admission of this testimony of Maroney—that which forbids the impeachment of the character of a witness by the

7) Copy of
75 S.W.R. 905

Henning et al vs. Wren et. al.