of their body. How, then, can the performance of this duty be compelled by a suit against one alone? The other members of the court, not being parties to the writ, could not be affected by any judgment that might be rendered, and could not be held in contempt for refusing to admit the plaintiff to act as a member, although this court should in this suit declare him entitled to the office, and command the defendant Townsend to admit him as such. It is clear that a *mandamus* should not issue to compel the county judge to do an act which could only be performed with the consent of others. The mere fact that the act of the county judge in treating appellant's office as vacant and in appointing his successor may have led to the action of the commissioners' court in excluding appellant from the duties of his office can make no difference. In a proceeding by *mandamus* to compel a body of persons to perform an act, all whose duty and privilege it may be to participate in the performance of that act must be made parties defendant.

In Lyon v. Rice, 41 Conn. 245, it was the duty of three selectmen of the town to call a town-meeting upon an application of 20 freeholders. A proper application was presented, and two of the selectmen refused to join the third in calling the meeting. In an application for a *mandamus* it was held that the selectman who was willing to call the meeting was a necessary party. In view of the fact that the disposition of the case in the court below and in this court does not preclude the appellant from bringing another suit, we deem it proper to express an opinion upon another question discussed in the brief. Whether appellant vacated his office or not by accepting the office of mayor of Ysleta depends upon the proper construction of section 40 of article 16 of the present constitution. That section is as follows: "No person shall hold or exercise at the same time more than one civil office of emolument, except the justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided." Does this mean that an incumbent can hold either of the offices named, and at the same time any other office, or that he can only hold two offices when both are among those specially designated? We think the former is the proper construction. The language is copied mainly from section 26 of article 7 of the constitutions of 1845, of 1861, and of 1866, which is the same in each of those instruments, and reads as follows: "No person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace." It is clear that under this section any justice of the peace might hold another office. Powell v. Wilson, 16 Tex. 59 The office of justice of the peace was made an exception to the general rule, and the inference from the use of the same language in the present constitution, with the mere addition of other offices, is strong that it was not meant in any manner to change the general rule, but merely to make additional exceptions. The other construction would materially modify the general effect of the provision. It would prevent even a justice of the peace from holding any other office except one of those specially named, and would be a radical departure from the provisions of all previous consitutions on the same subject. Const. 1869, art. 3, § 30. If the language of the provision in question had been "except those of justice of peace," etc., there may have been more doubt about the construction; but the words are "except that," etc., and they indicate that it was intended that a person might lawfully hold any office, and in addition thereto either of the offices enumerated. The use of the word "those" would have suggested the construction that an incumbent could only lawfully hold two offices at the same time, when both were offices specially named in the section. If the allegations of the petition are true, we are clearly of the opinion that the appellant did not vacate his office of county commissioner by accepting that of mayor. Such we understand to have been the ruling of the court below. But, because the appellant did not make all the members of the commissioners' court parties to his suit, the judgment is affirmed.

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## HILL v. TAYLOR.

(*Supreme Court of Texas.* May 20, 1890.)

LOST DEEDS—CERTIFIED COPIES—BEST AND SECONDARY EVIDENCE.

1. Under a statute of the republic of Texas providing that deeds might be acknowledged without the republic "before any judge of a superior court of record," an acknowledgment taken before "an associate judge of the sixth judicial district of the state of Maryland" is not properly taken, for the court cannot judicially know that such judge was a judge of a "superior court of record."

2. A deed admitted to record, though improperly acknowledged and certified, does not constitute notice, and the lapse of time does not render a certified copy from the record of such deed admissible in evidence as an ancient instrument.

3. An affidavit of the loss of an original deed made by the attorney instead of by the party, which states that the affiant had "prosecuted diligent inquiry in all sources where the original of the copy of the deed from L. to D. and G., conveying one undivided sixth part of surveys Nos. 40 and 44, in the name of Jacob H. Lawton, dated on the 21st day of February, 1842, a certified copy of which deed is on file in the above entitled cause, without effect," is fatally defective as both being made by one other than the party to the suit, and as failing to state that inquiry was made where the information could properly be obtained.

4. An offer in evidence of an inadmissible certified copy of a deed, together with a subsequent deed to the same land executed by the original grantor, is improper, and both instruments are rightly excluded when offered together, though the latter may have been admissible if offered alone.

5. Where the original deed is lost or destroyed, and a certified copy from the record is inadmissible because of the insufficient acknowledgment of the original, the testimony of the original grantor is also inadmissible to prove the execution of the original deed in the absence of a proper affidavit showing its loss.

Appeal from district court, Mandera county; THOMAS M. PASCHAL, Judge.

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*Elias Edmonds*, for appellant. *McLeary & King* and *Barnard & Green*, for appellee.

ACKER, P. J. H. W. Hill brought this suit against R. M. Taylor on the 8th day of September, 1886, in the usual form of trespass to try title to an undivided interest of 320 acres of land in two surveys described in the petition. The defendant answered by general denial, plea of not guilty, and the three, five, and ten years statutes of limitation. There was verdict for defendant, upon which judgment was rendered that plaintiff take nothing by his suit, and pay all costs, and he appealed. The plaintiff offered in evidence a certified copy from the records of Bexar county of a deed from Emeline Lawton, dated February 21, 1842, and filed for record in Bexar county on the 2d day of August, 1843, to which defendant objected upon the ground that the deed had not been properly acknowledged and certified for record by an officer authorized by the laws of the republic of Texas to take such acknowledgment. The objection was sustained, and that ruling is assigned as error.

It appears from the copy offered that the execution of the deed was acknowledged before and certified by "an associate judge of the sixth judicial district in the state of Maryland" on the day of its date, and that the vice-consul of the republic of Texas for the port of Baltimore attached to the deed his certificate of the official character of the officer who took and certified the acknowledgment. The statute of the republic of Texas providing for the acknowledgment of the execution without the republic of conveyances of land within the republic in force at the time the deed from Emeline Lawton purports to have been executed and acknowledged, was as follows: "If such grant, deed, or instrument executed abroad shall be acknowledged or proved by two subscribing witnesses before any circuit or supreme judge or chancellor of the United States of North America, certified by him, with the certificate of the chief magistrate of the nation as to the official character of him taking acknowledgment or probate, and the great seal of the United States thereto annexed; or if so acknowledged or proved before any judge of a superior court of record, or in any such court of any other nation or kingdom, and certified by such judge, or the record thereof exemplified, and either so counter-certified by the chief magistrate or sovereign of such other nation or kingdom under the great seal, or by the consul of this republic or minister resident there, the same shall be admitted to record, and shall be good and effectual, as aforesaid, from and after registration." Appellant contends that under this statute "deeds executed abroad should be acknowledged before a judge of a superior court and certified by the resident consul of the republic." The language of this law is very peculiar, and just what it means is difficult of ascertainment. It may, however, be conceded, as contended by appellant, that the expression "or if so acknowledged or proved before any judge of a superior court of record" includes the judges of the superior courts of the several American states, and yet the ruling of the trial court in excluding the instrument must be sustained, for there is nothing in the certificate or elsewhere in the record tending to show that the person who certified to the acknowledgment of the execution of the deed was a judge of a superior court of record. This court cannot judicially know that "an associate judge of the sixth judicial district in the state of Maryland" was a judge of a superior court of record on the 21st day of February, 1842.

Appellant insists that when a deed has been registered for 20 years the probate of its execution is conclusively presumed to be proper. We believe it to be settled that the benefits accruing from the registration of a deed are invariably dependent upon its proper registration. Without proper acknowledgment, and proper certificate of such acknowledgment, of the execution of a deed, its registration would not constitute notice, nor would any lapse of time make admissible as an ancient instrument a certified copy from the record of such deed.

What we have said disposes of the first and second assignments of error. The plaintiff offered in evidence the certified copy of the deed from Emeline Lawton, together with the testimony of the grantor to the execution of the original by her, "as evidence of an equitable claim of right to the land," to all which defendant objected "because there was no proper affidavit of the loss of the original instrument to allow parol evidence of its contents and its execution." The objection was sustained, and this ruling is complained of as error. The affidavit of the loss of the original deed was made by the attorney for plaintiff, and states that he was employed by plaintiff to procure the original title papers to the land, and to institute this suit; that he has "prosecuted diligent inquiry in all sources where the original of the copy of the deed of Emeline Lawton to W. H. Daingerfield and J. L. Generes, conveying one undivided sixth part of surveys Nos. 40 and 44 in the name of Jacob H. Lawton, dated on the 21st day of February, 1842, a certified copy of which deed is on file in the above entitled cause, without effect; that such original deed has been lost or destroyed, and cannot be found to be used on the trial of this cause." The certified copy of the deed was secondary evidence, the admissibility of which was dependent (1) upon the proper registration of the original and (2) upon the proper affidavit of the loss of the original. We have seen that, because of the imperfect proof of the acknowledgment of the execution of the original, its registration was not proper, and the certified copy was not therefore admissible, even though a proper affidavit of the loss of the original had been made. The proposed testimony of the grantor as to the execution and contents of the deed was also secondary evidence, which was inadmissible until the predicate therefor had been established by filing the proper affidavit of the loss of the original deed. It has been said that the statute making secondary evidence admissible upon the affidavit of the loss or destruction

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of the original being in derogation of the common-law rules of evidence, should be strictly complied with, (Butler v. Dunagan, 19 Tex. 566;) and that, if the affidavit is made by any other person than a party to the suit, it should exclude the supposition that the party offering the evidence has it in his power to produce the original. Crayton v. Munger, 11 Tex. 234; Butler v. Dunagan, supra; Hooper v. Hall, 30 Tex. 158. It has also been held that such affidavit must show "that there has been diligent search and inquiry made of the proper person and in the proper places for the lost deed; that the loss must be proved if possible by the person in whose custody it was at the time of the loss, if such person be living, and if dead, application should be made to his representatives, and search made among the documents of the deceased." Vandergriff v. Piercy, 59 Tex. 372. Tested by these authorities, the affidavit in this case is fatally defective. It is not shown that inquiry was made of the vendees, or, if dead, of their representatives; nor does the affidavit exclude the idea or supposition that the plaintiff may have been able to produce the original deed. The only diligence shown by the affidavit is that the affiant had "prosecuted diligent inquiry in all sources where the original * * * without effect." It is not even stated that the inquiries were prosecuted in sources where there was any reason to expect that information relating to the original could be had. We think the third assignment is not well taken, and that the court did not err in excluding the evidence.

The fourth assignment of error is: "The court erred in excluding the certified copy of deed from Emeline Lawton to W. H. Daingerfield, and John L. Generes, dated 21st of February, 1842, when offered as evidence of an equitable title or claim in plaintiff to the land in controversy in connection with his original deed from Emeline Keys (formerly Lawton) confirmatory thereof, dated June 22, 1887, and in excluding said last-named deed in such connection." For the reasons already given we have seen that the certified copy of the deed of February 21, 1842, was not admissible in evidence, and it could not be made so by offering it in connection with other evidence, however legitimate and pertinent such other evidence may be. Offering the two instruments in connection with each other could not have the effect to remove the objections to the inadmissible one, but would necessarily have the effect to render the other inadmissible also, although it may be clearly admissible if offered disconnected from and independent of the inadmissible instrument. We think the court did not err in excluding the two instruments when offered in evidence together, and in connection with each other.

The fifth assignment of error complains that the court erred in excluding the testimony of Emeline Keys (Lawton) proving the execution and contents of her deed of February 21, 1842, to Daingerfield and Generes as a lost instrument. What has been said in disposing of previous assignments disposes of this. There was no proper predicate laid for the introduction of this secondary evidence.

The sixth assignment of error is substantially the same as the fourth. Questions raised by remaining assignments of error are immaterial, as they could not control the disposition of the case. Our attention has not been called to any error that we think would justify reversal, and we are of opinion that the judgment of the court below should be affirmed.

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## HYBURN v. STATE.[1]

*(Court of Appeals of Texas. May 8, 1886.)*

CRIMINAL LAW—CONTINUANCE.

On an indictment for an assault with intent to commit rape, the prosecutrix testified that defendant came to her house at night, and, after some conversation with her, attempted to seize her, which she avoided by stepping back and closing the door, and that there was no one else in the house at the time. *Held*, that a continuance to procure absent witnesses should have been granted where the affidavit alleged that the absent witnesses were in the house at the time, and could have heard all that transpired between the prosecutrix and defendant, as detailed by the prosecutrix.

Appeal from district court, Travis county; A. S. WALKER, Judge.

Indictment against Ross Hyburn for an assault with intent to rape one Jane Cain. Prosecutrix testified that her husband and defendant were teamsters employed by Dr. Cummings, and that they kept their teams in a yard near the house of prosecutrix and her husband. That on the night of the alleged assault defendant, while the husband of prosecutrix was in the yard attending to his team, knocked at her door. That not knowing who was knocking, she opened the door. That defendant then said to her: "Come nearer; I want to speak to you. I want to tell you something." That she then said: "You are a negro. It is night, and I don't want to talk to you. Go away;" whereupon defendant said that he had come to have intercourse with her, and attempted to seize her, but that she avoided him by closing the door. That defendant told her she "had better keep her mouth shut." That no one else was in the house at the time. That the alleged assault was on Friday night, but the prosecutrix did not tell her husband until Sunday, because she was ashamed, and was also afraid that it would cause her husband some trouble. She told her husband's mother on the next day, (Saturday,) and on Monday the complaint was made. The prosecutrix further testified that there had been trouble between defendant and her husband, but she did not know what it was about. William Radam testified that defendant had worked for him for more than a year, and that he had always been well behaved and industrious. Dr. Cummings testified that he had known defendant for three or four years, and that he had the reputation of being an industrious, polite, and inoffensive negro. Defendant was

[1] This case, filed May 8, 1886, is now published by request, with four others, in order that the Southwestern Reporter may cover all cases in volume 20, Texas Court of Appeals Reports.

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