on the line of road engaged in furnishing water to the company. The evidence in this case shows that others, for like service, are receiving $30 per month. We do not think that the appellant, in refusing to use the water, and in removing the tank, can escape his liability to pay this sum agreed upon so long as he enjoys the use of the right of way. If there had been a breach of the contract to the extent of abandoning not only the use of the water, but also the right of way, then an action to recover the damages resulting from the entire breach would have been conclusive of the rights and liabilities of the parties in a second controversy. We do not think the judgment rendered in the former suit was *res adjudicata*. We conclude the case should be affirmed, and so report it.

PER CURIAM. Affirmed, as per opinion of commission of appeals.

HARLOWE *et al.* v. HUDGINS *et al.*

(*Supreme Court of Texas.* March 22, 1892.)

RECORDS — EVIDENCE — DEED — ASSIGNMENT — ACKNOWLEDGMENT.

1. Where the county records show that an assignment of "the within" is recorded on the same page as a deed in which the assignor is grantee, without any space or line intervening; that both the deed and the assignment purport to be acknowledged before the same officer on the same day; that both deed and assignment are recorded in the same handwriting and in the same ink; and that there is but a single file mark for the two instruments,—it is for the jury to determine whether the assignment refers to the deed, and to the land described therein.

2. Under Hartley's Dig. art. 2777, which provides that deeds may be registered, "upon acknowledgment of the parties or party signing the same," before certain officers, a certificate of acknowledgment in which the officer certifies that the grantor "came and acknowledged to me that he signed over the above deed as therein express" is sufficient.

3. A grantee indorsed upon a deed to him the following assignment: "I assine the within to Elizabeth Graham for value received of her the sum of $1,463.33 this April 11, 1843,"—and duly signed and acknowledged it. *Held*, that the assignment constituted a conveyance of the land described in the deed.

Commissioners' decision. Section B. Appeal from district court, Washington county; T. S. REESE, Special Judge.

Trespass to try title by Elizabeth J. Harlowe and others against H. Hudgins and others. The court dismissed the case. Plaintiffs appeal. Reversed.

Bassett, Seay & Muse, for appellants. *Searcy & Garrett* and *M. M. Kinney*, for appellees.

FISHER, J. This is a suit of trespass to try title, brought by appellants against appellees, for certain lands described in the petition. Appellees pleaded not guilty, and the 5, 3, and 10 years' statutes of limitations. It is admitted that William B. Travis and Robert E. Hardy are the original grantees of the land, and that both plaintiffs and defendants, respectively, claim title under them, and that they are the common source. It is admitted that appellants are the children and heirs of Mrs. Elizabeth Graham, wife of John M. Graham; that the said Elizabeth and John M. Graham are both dead. Appellants, as title, introduced in evidence: (1) The record of a deed from R. E. Hardy to James Stephens, whereby Hardy conveyed all his interest in the lands. The deed dated October 23, 1838. (2) Deed executed by James Stephens to John M. Graham, dated October, 1841, and recorded August 7, 1844. The appellants offered to read in evidence from the records of Washington county the following instrument, to wit: "Assignment. I assine the within to Elizabeth Graham for value received of her the sum of fourteen hundred and sixty three dollars and thirty three cents, this April 11th, 1843. [Signed] J. M. GRAHAM. Test: JACOB BARNES. N. D. GRAHAM. Republic of Texas, county of Washington. Before me, John Gray, clerk of the county court in and for the county aforesaid, came John M. Graham, and acknowledged to me that he signed over the above deed as therein express. Given under my hand and seal of office this 7th day of August, 1844. [L. S.] [Signed.] JOHN GRAY, C. C. W. C." To which instrument the appellees objected—*First*, because said instrument was void for uncertainty; *second*, because there was nothing in said record to show to what deed the alleged assignment had reference; and, *third*, because the acknowledgment was not sufficient to admit said instrument to record. Which objections the court sustained, and excluded said instrument. Upon the refusal of the court to admit this instrument in evidence the appellants took a nonsuit, and judgment was thereupon entered, dismissing the case, with judgment for costs against appellants. It appears that the parties to the suit all agreed that copies of deeds found in the records of Washington county may be read in evidence without accounting for the originals, and without filing and giving notice thereof. The appellants presented a motion to set aside the nonsuit and judgment dismissing the case, and that it be reinstated on the docket. The court overruled the motion. The refusal of the court to admit this instrument in evidence, and the overruling of the motion to set aside the judgment dismissing the case, are the only questions determined in this opinion.

Appellants, in their motion to set aside the nonsuit and reinstate the case, say that they were surprised at the ruling of the court in excluding said instrument, and that they will be able to show on another trial, by one Napoleon Graham, a subscribing witness to said instrument, that it was indorsed on the deed from James Stephens to John M. Graham, and this it referred to the land mentioned and described in said deed; that the witness Graham resides in the state of Washington; and that his affidavit or evidence cannot be procured at the present term, but will be secured at the next term. It appears from the statements of the bill of exceptions made and approved, to the action of the court in excluding this instrument, that it is recorded on page 318 of book E, being the same page on which the record of the deed from Stephens to

Graham is found, and that it follows immediately after said deed, without any space or line intervening; that both instruments purport to be acknowledged before the same officer, and on the same day; that the record of both is apparently in the same handwriting, and done with the same pen and ink; that there is but a single file mark on the record of said instruments. These facts are very persuasive in producing a reasonable belief that the excluded instrument was in fact indorsed and written on the deed from Stephens to Graham, and that it referred to the deed, and the land therein described. At least the circumstances were of sufficient importance to entitle the fact as to what deed, if any, the instrument referred to, to be submitted to the jury, and passed upon by them. The court could not, as a matter of law, determine that this instrument did not refer and relate to the deed from Stephens to Graham.

We think the certificate of acknowledgment to this instrument is sufficient, under the law in force at the time it was taken. Hartley's Dig. art. 2777.[1] It is apparent that it was the purpose of Graham to acknowledge that he signed the instrument for the purpose therein expressed. The words "signed over the above deed" in the certificate of acknowledgment does not detract from the meaning we have given to the certificate. The words not only mean that he has transferred his right in the deed to which the acknowledged instrument refers, but that also he signed the instrument as therein expressed.

The difficult question we have in the case is the proper construction to be given to the excluded instrument. The law in force at the time this instrument was executed gave a form of conveyance, but provided that "other forms, not contravening the laws of the land, should not be invalid." The common law, which was also in force in this state at the date of this instrument, did not require the use of the technical words in making a conveyance. The employment of words sufficient to show a purpose and intent to convey is all that was required either by the statute or common law. No precise technical words are required to be used in creating a conveyance. The use of any words which amount to a present contract of bargain and sale is all-sufficient. Whatever may be the inaccuracy of expression or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the title can be discovered, the courts will give effect to it, and construe the words accordingly. The word "assign" is defined: "To make or set over to another; to transfer; as to assign property or some interest therein." 2 Bl. Comm. 326; Black, Law Dict. 97. The word "assignment" means "the act by which one person transfers to another, or causes to vest" in another, his property, or an interest therein; the transfer or making over the estate, right, or title which one has in lands and tenements. Black, Law Dict. 97, 98. Burrill, Assignm. § 1. The construction of instruments alike in many respects to the one before us was passed upon and considered in the case of Hutchins v. Carleton, 19 N. H. 510. In the opinion the court say: "As to the words necessary to be used in a deed under our statute a great latitude, at least a great liberality, has been allowed. * * * It may well be said, as is said in regard to deeds of bargain and sale, nothing can be more liberal than the rule of law as to the words requisite to create them. 'Assign and make over' are as effectual when a good consideration is expressed as 'quit any claim,' or many other forms that have been sanctioned as sufficient to raise a use or pass an estate. 'Assign' is, in the opinion of Chancellor Kent, tantamount to 'grant,' and effectual for all purposes of the deed of grant established by the statutes of the state of New York. 4 Kent, Comm. 491, 492, in notes." The word "grant," when used in an instrument, is construed as an operative word of conveyance. The instrument before us mentions Elizabeth Graham as the grantee, and that the sum of $1,463.33, the consideration stated, was received from her, and states that "I assign the within to Elizabeth Graham." If it be true that this instrument refers to the deed executed by James Stephens to Graham, or was written and indorsed on the deed, (which are facts to be passed on by the jury,) then the words, "I assign the within," are effectual not only to pass the title to the paper upon which the deed from Stephens to Graham was written, but also to pass the title to land described in the deed. Such was the evident purpose and intention of Graham in executing this instrument. This is gathered, not alone from the use of the words "assign the within," but also from the consideration paid, as stated in the instrument. If the word "within" refers to a certain deed, and it is produced, and it appears therefrom that it conveys certain described lands, then the essential of this instrument as a perfect conveyance—that is, the description of the land conveyed, which upon the face of the instrument is not given—is supplied and made perfect by the deed referred to. We think the instrument before us sufficient as a conveyance, when aided by the "within" referred to. We report the case for reversal.

GARRETT, J., being disqualified, did not sit in this case.

PER CURIAM. Reversed, as per opinion of commission of appeals.

[1] Hartley's Dig. art. 2777, provides that any conveyance "shall be duly registered in the office of the proper county upon the acknowledgment of the parties or party signing the same" before certain officers named in the act.

TEXAS PAC. RY. CO. *et al.* v. COLLINS *et al.*

(*Supreme Court of Texas.* March 22, 1892.)

NEGLIGENT KILLING — ACTION AGAINST RECEIVER.

1. In a joint action against a railroad company and its receiver for the death of a servant, caused by the negligence of the receiver, a recovery cannot be had against the company, where the receiver was not primarily liable.

2. At common law, a receiver of a railroad company is not liable for the death of a servant