the sovereingty of the soil is not bound to look to other deeds to the grantee than the one found in the regular chain of title. In Veazie v. Parker, 23 Me. 170, cited above, one Joe Hills conveyed the premises to Parker by a deed dated November 16, 1835, recorded July 13, 1837. On the same day the deed was made Parker mortgaged the premises back to Hills, and the mortgage was recorded on that day. January 25, 1836, the Casco Bank attached the land as the property of Hills, and it was afterwards sold, and Veazie became the purchaser. It was held that the record of the mortgage could not be considered notice of the unrecorded deed; that is, the record of a conveyance not from the grantor could not be considered as giving notice that he had conveyed. We conclude that so much of the judgment of the court below as forecloses a lien in favor of the appellee, Heidenheimer, upon the land described in the judgment, should be reversed, and that judgment should be here rendered in favor of the appellant, A. B. Frank, that he go hence without day, discharged, and recover costs of the appellee for both this court and the court below.

Adopted by supreme court, May 17, 1892.

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## AUERBACH *et al.* v. WYLIE *et al.*

*(Supreme Court of Texas. May 17, 1892.)*

SALE OF COMMUNITY PROPERTY BY SURVIVING WIFE—PRESUMPTIONS — EXECUTION OF DEED — EVIDENCE OF IDENTITY.

1. The authority of a surviving wife to dispose of the husband's interest in community property in payment of community debts ceases when she contracts a second marriage.

2. The lapse of 38 years after community property has been sold and conveyed by the surviving member of the community raises the presumption that there were community debts, and that it was disposed of for the purpose of paying them. Hensel v. Kegans, 15 S. W. Rep. 275, 79 Tex. 347, followed.

3. A deed of a headright land certificate which had been the community property of one A. and his wife, Louisa, who, after A.'s death, had married one "Antone" H., was signed by "A." H. and Louisa H. The deed gave the grantors' names as "Andres" H. and Louisa H., but it recited that the certificate conveyed was "the headright of A., first husband of Louisa H." *Held*, that the deed was admissible in evidence, and it was for the jury to say whether the Louisa H. who executed it was the surviving wife of H., the recitals in the deed being competent original evidence for the purpose of identification.

Commissioners' decision. Section B. Appeal from district court, Runnels county; J. W. TIMMINS, Judge.

Action of trespass to try title by F. Auerbach and others against R. K. Wylie and R. M. and H. A. Thompson. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

*Powell & Smith*, for appellants. *Crosson & Crosson*, for appellees the Thompsons. *C. O. Harris* and *C. H. Dillingham*, for appellee Wylie.

TARLTON, J. This is an appeal from a judgment rendered by the district court of Runnels county in favor of R. K. Wylie and of R. M. and H. A. Thompson. The suit, in trespass to try title, was brought May 29, 1889, by F. Auerbach, Constantine Kohlleffel, and her husband, C. F. Kohlleffel, and Ida Schmidt and her husband, F. Schmidt, against R. K. Wylie, to recover an undivided interest of 246 6-7 acres in the A. Auerbach 640-acre survey in Runnels county. The appellees Thompson were made parties defendant as warrantors of the appellee Wylie. The plaintiffs and appellants claim as children and heirs at law of August Auerbach, deceased. The initial link in the appellees' chain of title is a conveyance of the certificate by virtue of which the survey was located by Louisa Hammer and A. Hammer, the former alleged to be the surviving wife of August Auerbach. The certificate was the community property of August Auerbach and his wife, Louisa. August Auerbach and his wife, Louisa, immigrated to Texas as German colonists about the year 1846, by virtue of the colonization contract of Fisher & Miller. August Auerbach became thus entitled, as the head of a family, to the certificate in question. After his arrival in this country, August Auerbach died in the latter part of 1846, or in the early part of 1847. He left his widow, Louisa, and five children, three of them the plaintiffs in this suit. In 1848 or 1849 the widow Louisa married a second husband, Antone Hammer. May 11, 1850, the certificate in question was issued to the "heirs of August Auerbach, deceased." September 13, 1851, this certificate was transferred to Henrich Zehner, by written conveyance of Andres Hammer and Louisa Hammer, the instrument being signed by A. Hammer and Louisa Hammer. It was filed for record in Runnels county, July 3, 1883. July 16, 1874, the certificate was located on the 640-acre tract in question. May 17, 1875, by virtue of the certificate in question, patent issued to the "heirs of August Auerbach, deceased." Appellees claim under the deed to Henrich Zehner, and contend that it was executed by the surviving wife, Louisa Hammer, joined *pro forma* by her husband, A. Hammer, in payment of the community debts of herself and her former husband, August Auerbach. The jury trying the case so found.

Appellants' first assignment of error presents the question of the admissibility in evidence of this deed to Zehner. The instrument, as already stated, is signed by "A. Hammer" and "Louisa Hammer." On its face it purports to be executed by Andres Hammer and his wife, Louisa Hammer. In describing the property sold it recites that "the said certificate is known to be the headright of August Auerbach, first husband of Louisa Hammer." The deed recites "a consideration of one hundred dollars, to us in hand paid," and to it is attached a receipt dated September 17, 1851, by A. Hammer, for $100, the money referred to in the deed. Objection was urged to the introduction of the deed on the ground that there was no evidence indicating that the grantor, Louisa Hammer, was the surviving wife of August Auerbach. This objection rests upon the fact that Louisa Auerbach had married Antone Hammer, and not Andres Hammer, the name of the husband stated

in the deed. If there was evidence showing that Andres and Antone Hammer was the same person, there can be no merit in this objection. The identity, we think, is indicated by the recital in the deed that August Auerbach was the first husband of Louisa Auerbach, the wife, at the date of the instrument, of Andres Hammer. For the purposes of identification, recitals in deeds are admissible as original evidence, when including facts of birth, marriage, and death. Chamblee v. Tarbox, 27 Tex. 140; Russell v. Oliver, 78 Tex. 16, 14 S. W. Rep. 264. The court properly permitted the jury to determine the question whether the Louisa Hammer who signed the deed as the wife of Andres Hammer was the same person as the Louisa Auerbach who married Antone Hammer after the death of August Auerbach.

A more serious objection to this instrument, however, is suggested in appellants' first assignment of error, and relied on in their brief. Appellees contend that the deed conveyed the title to the entire certificate, including the community interest of August Auerbach, because it was executed by his surviving wife in payment of community debts. Appellants reply that after and during her marriage with Hammer, the grantor, Louisa, was deprived of her powers as the surviving wife of Auerbach, and was incapable of conveying his interest in the community property, even in payment of community debts. Adhering to the opinion of this court in the case of Davis v. McCartney, 64 Tex. 588, we sustain the objection to the deed on the ground last stated, as urged by appellants. In that case the conclusion is reached that the powers of the surviving wife cease with her widowhood, as well with reference to the equitable as the legal title to community property. Her freedom of agency is, in the eyes of the law, so absorbed in the will of her husband that she is deemed to be incapacitated "to successfully wind up the connubial partnership she has so effectually put behind her." We concur in the reasoning of the court in the case cited. In this instance, we find a practical illustration of its force. As shown by the receipt attached to the deed to Zehner, the latter paid the purchase money of the certificate to the husband, Hammer. This fund was thus placed subject to his exclusive control and disposition, though to the extent of the half interest belonging to the estate of August Auerbach he was an utter stranger. It cannot be said with entire accuracy that the husband is but a formal party to the deed. While, in one sense, this may be true, it is nevertheless also true that without his co-operation the deed of the wife is a nullity. His concurrence in the execution of the deed is essential to its validity. He thus becomes active in the disposition of property in which he has no interest. The power exerted by the wife is not and could not be exercised by herself alone, but by her through and under the co-operation of her husband. The law correctly imputes to the husband such control over the wife, springing from the marital relation, as should deprive her of the power of executing deeds in payment of the debts of a former community. The case cited arose after the act of 1876, which provides that, in the event of a second marriage by the wife, her power as a survivor should cease. The case itself, however, involved a transaction, not by a surviving wife, who had qualified under that statute, but by one who had acted independently; and the reasoning of the court clearly indicates that its opinion was in no way due to the provisions of that statute.

Appellants complain of the following paragraph of the court's charge: "You are instructed that if you find from the evidence that plaintiffs are the surviving children of August and Louisa Auerbach, then you will find for plaintiffs for the land sued for, unless you find that the deed from Louisa and A. Hammer to Zehner, dated September 13, 1851, conveyed the whole of the land certificate by virtue of which said land was located; and in this connection you are instructed that if the said Louisa Hammer was the surviving wife of August Auerbach, and she made said sale for the purpose of paying debts of the community estate, or to reimburse her for her separate estate, expended in paying said debts, then the said deed conveyed title to the whole of said certificate, and in that event you will find for the defendants." The foregoing charge is assailed as involving an assumption by the court that Louisa Hammer was the surviving wife of August Auerbach, and as inferentially instructing the jury that the certificate had been sold by the surviving wife for the purpose of paying debts or of reimbursing her for her separate means expended in paying debts. The charge does not merit the criticism. The identity of Louisa Hammer, the existence of community debts, and of the remaining conditions referred to, were fairly submitted to the jury for their determination.

Appellants further complain of the following paragraph of the court's charge: "In determining whether there were community debts at the death of August Auerbach, you will take into consideration the great lapse of time since said deed to Zehner was made, and that plaintiffs have made no claim to the land in controversy, and that defendant and his grantors have held possession of said certificate; and after so great lapse of time the jury are at liberty to presume that there were community debts, unless the evidence affirmatively shows that there were no debts." It is insisted that this charge is on the weight of evidence; that the court assumes as facts the great lapse of time since the execution of the deed to Zehner, the absence of claim by the plaintiffs to the land in controversy, and the possession by the defendant and his grantors of the certificate. In the recent case of Hensel v. Kegans, 79 Tex. 347, 15 S. W. Rep. 275, it appears that a headright certificate issued to a married man, and that in 1855—five years after his wife's death—he transferred it to the plaintiffs, to whom the patent was issued in 1858. The suit was brought in 1887, and it was held by this court that after so great a

lapse of time the presumption of fact might be indulged that the certificate was sold in payment of community debts. The presumption would have to be rebutted by evidence on the part of the defendants. In the present case the record presents the fact of great lapse of time as undisputed, and the court was therefore authorized to assume its existence, and to instruct the jury with reference to the presumption following therefrom. As the lapse of time alone was sufficient to justify the instruction, reference to the remaining facts, the absence of claim by the plaintiffs, and the possession of the certificate by the defendant, was superfluous, and, if erroneous, harmless. As, however, the deed to Zehner was erroneously admitted, these instructions are without support. The judgment should be reversed, and the cause remanded.

Adopted by supreme court, May 17, 1892.

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KING v. MANSFIELD.

(*Supreme Court of Texas.* May 17, 1892.)

CONFLICTING BOUNDARIES—INSTRUCTIONS.

On a question of boundary between two surveys, (plaintiff's land and survey No. 8,) the evidence as to the location of the calls in the field notes was conflicting. The jury was instructed that, if they found that survey No. 8 was located on the ground a certain distance "west from the west line of F. county school land, as claimed by plaintiff, to find for plaintiff." *Held*, that the instruction was error, as it confined the consideration to one connection called for by the field notes, in disregard of evidence of other calls.

Commissioners' decision. Section B. Error from district court, Wise county; J. W. PATTERSON, Judge.

Trespass to try title by Z. S. King against George W. Mansfield. Defendant had judgment, and plaintiff brings error. Reversed.

*Z. S. King, in pro. per. Soward & Martin*, for defendant in error.

FISHER, J. This suit was instituted by plaintiff in error against defendant in error in trespass to try title for the Z. S. King pre-emption survey. By agreement of the parties, the question to be decided was one of boundary between the King survey and survey "No. 8, G. H. & H. Ry. Co." The court below, on verdict of the jury, rendered judgment in favor of defendant in error. It appears that survey No. 8 is the older survey of the two. The court below charged the jury "that, if they believed that said section No. 8 was located on the ground 5,274 varas west of the west boundary line of Falls county school land, as claimed by plaintiff, then you will, by your verdict, find for plaintiff." It is insisted by plaintiff in error that it was error to give this charge, because "the jury should not have been confined to any one connection unless that connection was called for in the field notes of the survey of which the location was in question, and the charge confined them to the consideration of the evidence of one party to the exclusion of the evidence of the other party." Survey No. 8 calls for the northwest corner of the W. M. Williams survey. The Williams survey on the south calls for the north boundary line of the Richie survey, and on the west for the Trayland De La Garza survey, and the north line of the Williams running east from its northwest corner calls for the southwest corner of survey No. 2, and the west boundary line of Falls county school land. Survey No. 2 calls for the west line of the Falls county school land. It appears that No. 8 and the Williams surveys were not located on the ground. There is evidence tending to establish that the west line of the Falls county school land and the southwest corner of No. 2 are found on the ground. There is also evidence going to show that some of the lines of the Richie and Garza surveys are found identified on the ground. Defendant in error contends that constructing the Williams survey from the west line of the Falls county and the southwest corner of survey No. 2, going the distance called for, would locate the east line of survey No. 8, where he claims it to be, and, if so, it would cover the King pre-emption survey. Upon the other hand, plaintiff in error contends that, if the Williams survey is constructed from the calls of the Richie survey, it will locate survey No. 8 west of where it is claimed to be by defendant in error, and therefore it will not cover or conflict with the King pre-emption survey. The theory of each party is supported by the evidence. We think it was error to give the charge quoted. It had the effect to confine the jury to a construction of the survey alone from the west line of the Falls county survey. The vice in this charge was sought to be removed by a request from plaintiff in error to the court to give the following charge, which was refused: "That if the jury find from the testimony that section 8, G. H. & H. Ry. survey, the true location of which is in question, was located from the northwest corner of the old W. M. Williams, they will ascertain from the testimony the true locality of said Williams survey by calls and connections from the John Richie survey, or any better marked and defined corner around the said Williams survey, originally located, regarding—*First*, calls for natural objects; *second*, artificial objects; and, *third*, course and distance." This charge may be incorrect in that it only permits the jury to locate the Williams survey from some call other than the Richie survey, when such call is better marked and defined than the Richie. If there is a call equally as good and as certain as the Richie, the jury would be permitted to construct the Williams survey from such call, although they may be satisfied that it is no better or more certain call than the call for the Richie. But, while the charge is inaccurate in this respect, we think it sufficient to call the court's attention to the proper charge to be given on the subject. We conclude the case should be reversed and remanded, and so report it.

Adopted by supreme court, May 17, 1892.