4-2-1912

Opinion of James B. Wells upon title of Nathaniel Jackson, to Porcion 71, Town of Reynosa, original grantee Narciso Cavazos, 1912

James B. Wells

Brownsville, Texas, April 2, 1912.

Mr. Ralph R. Langley,
P r e s i d e n t,
Standard Land Company,
Lincoln,
Nebraska.

My dear Mr. Langley:-

As requested by you, I now here take pleasure, in giving you my Opinion, as to the correctness,&c., of the Opinion of Mr. Frank C. Pierce, (attorney-at-law, of Brownsville, Texas,) given you, under date of February 10, A. D., 1910, upon the Title of Mr. John Closner, to the lands owned by him in, and out of, Porcion Number Seventy-one,(71), of the Ancient Jurisdiction of the Town of Reynosa, granted to Narciso Cavazos, by the Spanish Government, in America, situated in Hidalgo County, Texas.

In order to make this, my Opinion clear, and to discuss, intelligently, the objections made by Mr. Pierce, to said Closner Title, to his lands in said Porcion Number Seventy-one, (71), it is necessary to quote from Mr. Pierce's said Opinion, all that part of said Opinion, bearing upon the questions at issue, which I now here do, as follows:- - - - - - -

"X X X X Relative to Porcion 71, although this "title has been accepted by the Bank House of H. P. "Drought and by others, I must state that in my opinion "it is practically worthless. The abstract shows that "the title was in one Nathaniel Jackson who purchased "it from E. D. Smith in the year 1857.

"Jackson died prior to 1861, and the next link in "the chain of title is the deed or partition agreement "executed on December 3, 1878, on record in Vol.C,pages "119-121 real estate records of Hidalgo County, Texas, "in which the parties thereto state that they are the "seven natural children of their mother. Unless it can

"be shown that Nathaniel Jackson was married to the "mother no title would vest in these children; and "there is nothing in the abstract to show -- to "the contrary the partition agreement itself states "otherwise. If Nathaniel Jackson had no legal "heirs this land would escheat to the State of "Texas; and there is no limitation against the "State. Therefore on this one phase of the title "the State might come in at any time and claim "the land.

"Again, prior to the Emancipation Act of "1865 a negro was not permitted to hold lands in "the State of Texas. Nathaniel Jackson was a negro. "Therefore, I would have to turn the title down on "this phase as well.

"If Nathaniel Jackson had brothers and sisters "or parents who survived him and any of these were "alive on the date that these seven natural chil- "dren asserted their rights to the land the title "would be good, because it would not matter to the "State of Texas whether these heirs asserted their "rights -- it would merely be a question of whether "the State could escheat.

"It may be possible that these things can be "explained and that Mr. Closner and other purchasers " examined into these matters before making their "purchases. However, until I have these matters "properly before me I could not act on them. There- "fore,as stated above I am of the opinion that your "people have no title to Porcion 71."

Mr. Pierce's said Opinion, just quoted, necessarily carries but little weight with it, from a legal standpoint, from the fact that, he entirely fails to cite any law, or decision, whatever, to sustain the conclusions that he

reaches,-- but I will, herein, from a legal standpoint discuss, and meet his objections, as fully as I can. The following facts seem to be conceded, by his Opinion:- - - - - -

First:- That, E. D. Smith, then owning, and holding the title to all of said Porcion Number Seventy-one, (71), in the year A. D., 1857, by a Conveyance, without question valid under our then Laws, and then duly recorded, conveyed all of said Porcion Number Seventy-one, (71), to said Nathaniel Jackson;- - - - - -

Second:- That, immediately, upon said purchase, of said whole Porcion, by him, from said E. D.Smith, said Nathaniel Jackson, and Matilde Jackson, his wife, moved onto, and made their home, upon said Porcion, and that, ever since then, said Nathaniel Jackson, and Matilde Jackson, his wife, and their children,and heirs-at-law, and John Closner, and all others holding under them, have continuously lived upon, or actually possessed, all of said Porcion, and do so now own, hold, and possess, all of said Porcion, without question, or dispute, from any source,- and ever since said Nathaniel Jackson's purchase of said Porcion, have paid all Taxes on the land of said Porcion,and have held the peaceable, and adverse possession thereof, under such circumstances as will give said Jackson and wife, their children, and heirs-at-law, and those holding under them, including said John Closner, a perfect title, under each and all of the different Statutes of Limitation of this State;- - - - - - - - - - -

Third:- That, said John Closner has, and holds, as to all of the land in said Porcion claimed by him, through regular Chain of Title, acquired from, and vested in, said Nathaniel Jackson, by his purchase and conveyance, from said E. D.Smith, in A.D.1857;- -

Fourth:- That, in A. D., 1872,(said Nathaniel Jackson then being dead, intestate,) all of said Porcion was, by due Partition Agreement, and mutual Conveyance, duly and legally partitioned, between said Matilde Jackson, Surviving Wife in Community of said Nathaniel Jackson, and all of their children, and heirs-at-law;- which Partition was, thereupon, duly recorded,-- and that, ever since said Partition, each and all of the different Partition Shares, of said Porcion, have been actually possessed, held, and owned by all those to whom the different Partition Shares were, by said Partition Agreement, allotted, and to them conveyed, and those holding under, and through them, including said John Clesner;- - - - - - - - - - -

Fifth:- That, said Nathaniel Jackson, and his said wife, Matilde Jackson, were negroes, (and necessarily slaves), at the time of the purchase of the Porcion of land in question, by Nathaniel Jackson, from said E. D. Smith, and so continued until they were emancipated by the Emancipation Proclamation;- -

Sixth:- That, said Nathaniel Jackson, and Matilde Jackson, his wife, for some time prior to,and at the time of,said purchase from said E. D. Smith, lived together as man and wife, and so continued to live together, as such man and wife, at their home, upon the Porcion of land in question, until the death of said Nathaniel Jackson,- - and that, since his death, his widow, Matilde Jackson, and their children, and heirs, and those claiming and holding under them, have continuously, actually, possessed, and held said land, peaceably, and adversely, and paying all Taxes thereon, &c.

Now, upon the undisputed facts, above stated, what is the Law of this State?

Upon the facts, my Opinion is,-

First:- That, under the circumstances, the Conveyance from E. D. Smith, to Nathaniel Jackson vested the title, to all of said Porcion, in said Jackson and wife, as their Community Property, and that,such title so continued in them, until his, and her,death, respectively, intestate, and at their death,respectively, passed to, and vested in, their children, and heirs-at-law,- and that all of the title, to all of said Porcion is now so held, owned and possessed, by the children and heirs of the said Nathaniel Jackson, and Matilde Jackson, his wife, and those who hold and claim under them, including the said John Closmor;- -

Second:- That, the children and heirs of the said Nathaniel Jackson, and Matilde Jackson, his wife, and those holding and claiming through them, have, and hold, perfect title to all of said Porcion, by virtue of, and under each, and all of the several Statutes of Limitation of this State,- under both the deed from said E. D. Smith, to said Nathaniel Jackson, and also under said Partition Agreement;- - - - -

Third:- Under Article XII, of Section 27, of our StateeConstitution of A. D., 1869, said Nathaniel Jackson, and Matilde Jackson, his wife, must "be considered as having been legally married; and the issue of such cohabitation shall be deemed legitimate."

And, in order to make this, my position more clear, I now here quote, all of said Constitutional provision:-

"Sec.27. All persons who, at any time heretofore,

"lived together as husband and wife, and both

"of whom, by the law of bondage, were precluded
"from the rites of matrimony, and continued
"to live together until the death of one of the
"parties, shall be considered as having been
"legally married; and the issue of such cohabi-
"tation shall be deemed legitimate. And all
"such persons as may be now living together in
"such relation shall be considered as having
"been legally married; and the children, here-
"tofore or hereafter, born of such cohabita-
"tions shall be deemed legitimate."

And, in this connection, see also, Article 2962, (Section 2846), Revised Statutes of 1895, being the Act of our State Legislature, of August 15, A. D., 1870, which is as follows:- - - - - - - - - - - - - - -

"Art. 2962. (2846) All persons who at any time
"heretofore have lived together as man and wife,
"and both of whom, by the laws of bondage, were
"precluded from the rites of matrimony, and con-
"tinued to live together until the death of one
"of the parties, shall be considered as having
"been legally married, and the issue of such co-
"habitation is declared legitimate; and all such
"persons as were so living together in such re-
"lation on the fifteenth day of August, 1870, shall
"be considered as having been legally married,
"and the children heretofore or hereafter born
"of such cohabitations are declared legitimate."

And also, Article 1699, (Section 1656), Revised Statutes 1895, as follows:-

"Art. 1699. (1656) Where a man, having by a
"woman a child or children, shall afterward in-
"termarry with such woman, such child or chil-
"dren, if recognized by him, shall thereby be

"legitimated and made capable of inheriting his es-
"tate. THE ISSUE ALSO OF MARRIAGES DECLARED NULL IN
"LAW SHALL NEVERTHELESS BE LEGITIMATE."

The above provision of our Constitution and Laws, have been frequently considered, and decided, by the Supreme Court of our State, in many cases,- and, in conformity with the views which I express in this Opinion.

In Hector Steward v. The State

(Tex. Crim. Court of App. Reports, 327), Chief Justice Clark, in rendering the Opinion, says:- - - - - - - - - - - - - - - - -

"Under the operation of sect. 27 of art.12 of the "Constitution of 1869, all persons who were formerly held in "bondage, and who in such condition lived together as husband "and wife, and were so living together in this State at the "date of the adoption of said instrument, were legally married. "The abrogation of that Constitution cannot be construed as an- "nulling such marriages; nor are such persons exempt from prose- "cution for a violation of our laws relating to unlawful mar- "riage."

And in,-

Clements v. Crawford,

(42 Tex.Rep. 601), it is said:- - - - - - - - - - - - - - - - - -

"1. Marriage. Article 12, Section 27, of the State Con- "stitution, refers to persons who were both precluded, not "from inter-marriage with each other merely, but from marriage "with any one else. Its object was to legitimate the offspring "of those whose bondage had disabled them from legal marriage, "until the death of one of them, or until the adoption of the "Constitution."

And in,-

Waff et al v. Seesums,et al

(66 S.W.Rep. 865), it is said:-

"Where slaves cohabiting together continued to live to-

"gether as man and wife after their emancipation, their marital "status became legal, entitling the wife and her children to "property acquired during the existence of such relation as "against children of another woman with whom the husband co- "habited."

See also,-

Livingston v. Williams,et al

(75 Tex.Reps. 653), as follows:-

"1. Marriage Among Slaves.- Section 27, Article 12,of "Constitution of 1869, validated the marriages of such persons "(former slaves) as were living together as husband and wife "at the time of its adoption, and legitimated the children of "such persons, whether born before or after that time."

See also,-

Cumby v. Henderson

(6 Tex.Civ. App.Reps., 519), as follows:-

"1. Slave Marriages.- Alice Cumby was born in slavery, "and was the daughter of a man and a woman who were married "during slavery. Her parents lived together as man and wife "from the date of emancipation until 1865, when they separated, "and each married again. The father and second wife accumulat- "ed property, and he died intestate, and without issue by "his second wife. HELD, that Alice was a legitimate child,and "and entitled to recover one-half of the community property "accumulated by her father and second wife.

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"4. Marriage Defined.- Marriage is constituted by "the agreement of two parties, competent to marry, to become "husband and wife in praesenti, or an agreement to assume that "relation at a future date, followed by the actual assumption "of the status, and the concurrence of such facts constitutes "a valid marriage, unless the law of the place requires the "observance of some additional form or ceremony, and makes "void all attempted marriages not celebrated in accordance "therewith.

"5. Common Law Marriage.- A marriage good at common "law is good, notwithstanding the existence of any statute on "the subject, unless the statute contains express words of "nullity."

"6. Slave Marriages discussed.- The relations exist- "ing between slave men and women when they took each other for "husband and wife with the consent of their masters, was na- "tural and moral, and not concubinage, and lacked only the le- "gal capacity of the parties to make it lawful wedlock. That "capacity came with their freedom, and then no reason existed "why, if they chose, they could not invest their union with "all the lawful incidents of marriage."

And to, practically, to the same effect, is the decision "of our Supreme Court, in

Hill v. Fairfax,

(38 Tex. 220-223), as follows:-

"The 27th Section of Article 12 of the Constitution of "1869 confers on those negroes who had lived together, while "in slavery, upon the terms and under the conditions described "in that section, marital rights and legitimates their off- "spring."

And, also, in,-

Schwarz v. Allen, et al.,

(37 S.W.Rep.986-987), the Court thus expresses itself, by Chief Justice Garrett:-

"1. A common-law marriage between former slaves is shown "by an agreement between them to live together as man and wife, "and by their so living, irrespective of whether they were mar- "ried, before emancipation, after the manner of slaves.

"2. On the issue as to the existence of a common-law "marriage between former slaves, it is error to instruct the "jury to consider the customs of slaves after emancipation, "where there is no evidence as to such customs, as it leaves "the jury to draw on their own knowledge in regard thereto."

"This was an action of trespass to try title, brought by "the appellees, to recover certain interests claimed by them in "two tracts of land situated in Austin County as the heirs of "their father, Ephraim Allen. Their right to recover depends "upon whether or not they are the legitimate children of their "father, and this involves the question whether or not he and "their mother were ever lawfully married. Their father and "mother were both negroes, and had been slaves, and were never "married according to the statute of this State regulating "marriages. But there was much evidence tending to show that "they became husband and wife by a present agreement to live to-"gether as such, and that they in fact did live and cohabit as "man and wife, and that the appellees were recognized by their "father as his children. Common-law marriages are recognized "as valid in this state, and cases of the same nature as the "one now under consideration have been heretofore passed on "by this court, and received the approval of the Supreme Court, "holding such marriages to be valid. Cumby v. Henderson, 6 "Tex. Civ.App.519, 25 S.W.673; Chapman v. Chapman (Tex.Civ. "App.) 32 S.W.564; Id.(Tex.Sup.) 32 S.W.871."

Thus we see, from the Constitutional and statutory provisions of our State, and the uniform line of decisions of our Supreme Court, as well, just quoted, whether treated as a "Slave Marriage," or a Common-law marriage, the union, living together, &c., of said Nathaniel Jackson, and Matilde Jackson, his wife, was that of a husband and wife, and their children, legitimate, and those holding under them, including the said John Closner, thus acquired a perfect title, to all of the land, the title to which is under consideration, being all of said Porcion Number Seventy-one, (71). Many additional decisions of our Supreme Court, touching such slave unions, and common-law marriages could be easily referred to, and quoted,- but I deem it entirely unnecessary.

Again, the law presumes that a person proved to be dead left heirs.-

See-

Slayton v. Singleton,

72 Tex. 209.

And it, without question, nothing appearing to the contrary, the children of said Nathaniel Jackson, and Matilde Jackson, his wife, will be presumed to be their heirs,-- and the title of the ancestor inures to the benefit of those who were heirs at the time descent cast. In other words, that, at the time of the death of said Nathaniel Jackson, intestate, descent was cast upon his children, and his title inured to their benefit,-- and the same rule applies to their mother, Matilde Jackson, the surviving wife in community of the said Nathaniel Jackson.

See-

Hornsby v. Bacon,

20 Tex. 556.

The fact that, said Nathaniel Jackson, and Matilde Jackson, his wife, emigrated to Texas as man and wife, and, thereafter, lived, continuously, upon the land , the title to which is now under consideration as, and were received, and treated, by the world around them, as such man and wife, is sufficient to establish the heirship of their children.

See,-

Kaise v. Lawson,

38 Tex. 163.

The law which I have just quoted, and discussed, dispose, effectually, of the question of any tiltle being vested in the State, to the land in question, by virtue of our Escheat Laws, and the possibility on the part of the State authorities, to attempt to Escheat the land, and assert such Escheat Title ~~will prevent any proceedings to that end, and~~ is tooremote to be worthy of serious consideration,- as said Nathaniel Jackson has been dead, and his children and heirs, and those holding under them, in

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actual possession of said Porcion Number Seventy-one, (71), for more than half a century,-- during all of which long period of time, no attempt, or suggestion, of any such Escheat, claim, or proceedings, on the part of the State, have ever been had.

Trusting that you will find this Opinion fully covering the objections made by Mr. Pierce in his said Opinion to the title under consideration, and satisfactory to you, I am-

W-St.

Very truly yours,

(Signed) James B. Wells

O P I N I O N

Of

James B.Wells upon the title of Nathaniel Jackson, to Porcion 71,Narciso Cavazos,Original Grantee,of the Ancient Jurisdiction of the Town of Reynosa, Hidalho County,Texas.
