right of way. He had, however, right of action against it for such damages as resulted from its trespass. It is clear, we think, that by his warranty deed all his title to the land passed to Measles; and it is equally clear that his right of action to recover the damages for the mere trespass did not pass. For the latter he had a right of action, and it was not affected by his conveyance to his vendee. The measure of his damages was the injury to the land which resulted from the mere construction of the railroad, and compensation for the use of so much of the land as was occupied by the company from the time of the entry until the date of his conveyance to Measles. In the case of Railway Co. v. Ruby, (Tex. Sup.) 15 S. W. Rep. 1040, this court held that in a proceeding for the condemnation of land for a railroad the time of the "taking," within the meaning of the constitution was the time of the trial. Having then acquired an absolute title to the entire tract of land, free from any easement or incumbrance by reason of the trespass of the railroad company, Measles, when the appellant receivers filed their plea in reconvention for the condemnation of its right of way, became entitled to recover all the damages incident to that proceeding. These do not embrace the injury which had resulted to the land from the construction of the railroad at the time it was conveyed to him, but do include the value of the land taken, as well as any such deterioration in the value of the remainder of the tract as may have resulted from the fact that the railway company had acquired the right to permanently hold the right of way, and to use it for the purposes of operating a railroad. However, he is not entitled to recover for any damage done to the land before he bought it, and therefore his damages should be assessed with reference to the condition of the property at the time of his purchase. He is not entitled to recover for changes in the surface of the land, resulting from the construction of the road, but is entitled to recover for any depreciation in its value that may have resulted from the right acquired by the condemnation to permanently maintain the road across the tract. Appellee and appellant Measles are entitled to recover sums which, added together, will equal the amount the appellee would have been entitled to recover had he never conveyed, and no more; and care should be taken that the receivers be not subjected to a double recovery. There was error in adjudging that the appellee should recover the entire damages and that Measles should take nothing, and therefore the judgment is reversed, and the cause remanded.

CLAPP v. ENGLEDOW *et al.*

(*Supreme Court of Texas.* Nov. 17, 1891.)

WIFE'S SEPARATE ESTATE — ADMISSIONS BY HUSBAND—PROOF OF LOST DEED.

1. In an action to establish a lost deed conveying certain property to plaintiff's grantor, plaintiff introduced evidence that a deed had been executed as alleged. In rebuttal defendants offered a letter from the husband of plaintiff's grantor to one of defendants. The letter was, in substance, an admission by the writer of the addressee's interest in the property. *Held* inadmissible, as no admission of the husband can affect the wife's separate estate.

2. In an action to establish a lost deed, four witnesses testified to the signing of the deed; two of them also testifying that the grantor wished to convey all her property; and two also testifying that the deed was delivered. *Held*, that the evidence showed the existence of the deed.

Commissioners' decision. Section B. Appeal from district court, Van Zandt county; FELIX J. MCCORD, Judge.

Action by Sarah F. Clapp against Robert Engledow and others. Judgment for defendants. Plaintiff appeals. Reversed.

F. B. Sexton, for appellant. *C. B. Kilgore* and *Alex. Burge*, for appellees.

GARRETT, P. J. Sarah F. Clapp brought this suit against Robert Engledow and other heirs of Amanda Johnson to establish a lost deed, alleged to have been made and delivered by Amanda Johnson to Angelina M. Barrett, the wife of L. T. Barrett. Plaintiff claims title by mesne conveyances from Angelina M. Barrett to a certain tract of land alleged to have been included in the deed, which is sought to be established by this suit. Defendants answered as follows: (1) General demurrer; (2) special exception of the statute of 10 years' limitation; (3) stale demand; (4) general denial; and (5) special answer, setting up that L. T. Barrett and his wife, Angelina M. Barrett, who are remote vendors of plaintiff, in August, 1874, in the probate court of Nacogdoches county, administered on the estate of Amanda Johnson, and returned to said court an inventory of the property of Mrs. Johnson, on which inventory was placed the land claimed by plaintiff and described in plaintiff's petition. Said answer avers that said administrators "undertook to procure, and did fraudulently procure, from the probate court of Nacogdoches county, a decree vesting title to all the real property of said estate [Mrs. Johnson's] in said administrators," and that said decree was void and of no effect. The same answer alleges fraud and combination between Barrett and wife and their son, Ralph A. Barrett, (who is one of plaintiff's vendors,) to defraud defendants, (Mrs. Johnson's heirs;) and that by reason of said fraud, as charged, the said L. T. and Angelina Barrett, and their vendors, immediate and remote, are forever estopped, and cannot now set up claim to said land against the acts and declarations of said Barrett and wife;" also the statute of limitations of 10 years, and that the defendant Robert Engledow had signed a receipt to L. T. Barrett while said Barrett was acting as administrator of Mrs. Johnson, purporting to be for his share of said estate; but that the receipt was fraudulently procured, etc. Plaintiff demurred to the special answer, setting up the proceedings in the probate court of Nacogdoches county, and pleading the estoppel by reason of the administration and inventory. Her demurrer was overruled, and the action of the court in this

respect is assigned as error. There was a trial before a jury, and judgment was rendered in favor of defendants, October 23, 1889, from which the plaintiff has appealed.

This case has been before the supreme court once before, on appeal also by the plaintiff. Clapp v. Engledow, 72 Tex. 252, 10 S. W. Rep. 462. As held on the former hearing of this case, although the administrators were not estopped by the inventory filed by them in the administration of Mrs. Johnson's estate, still "it was competent, as declarations against interest by the party in possession, as a circumstance following and attending the transaction." 72 Tex. 255, 10 S. W. Rep. 463. The evidence was also properly limited by the court in its charge to the jury. No evidence was introduced by the defendants in support of the pleading as to the decree of the probate court of Nacogdoches county, but the record of the pleading and decree in said court in the estate of Amanda Johnson was introduced by the plaintiff. There was consequently no error in overruling the demurrer to the answer of which the appellant can complain. On the trial the purpose of the plaintiff was to establish a deed from Mrs. Amanda Johnson to Mrs. Angelina M. Barrett for all her property, real and personal, and there was direct testimony, as well as circumstantial evidence, to show that such deed had been executed as alleged. Defendants, in rebuttal, offered in evidence a letter written by L. T. Barrett, the husband of Angelina M. Barrett, to the defendant Robert Engledow, as follows: "Melrose, July 13th, 1877. Mr. Robert Engledow—Bob: I have just received your letter of 8th inst. I am obliged to you for the information concerning the trespass on my timber, and this authorizes you to assess, or have assessed, the amount of damage to my land or timber, and collect the money by suit or otherwise. Relative to your interest in Mrs. Johnson's estate, I must say that I am not in a condition just now to make you an offer for it. However, come down as soon as it may suit your convenience to do so, and I think we can make disposition of your interest in the estate so as to benefit you. Yours, truly, L. T. BARRETT."

Plaintiff objected to the admission of this letter, because: (1) It was immaterial and irrelevant to the matter in controversy in this suit. (2) If it was offered to affect Barrett's credit, it was not admissible, because he had not been examined in regard to or given an opportunity to explain it. (3) Nothing said by Barrett in the letter could affect his wife's title to the property she acquired by the deed of gift in question in this proceeding. There was also objection to evidence of certain conversations testified to by Engledow. Plaintiff excepted to the ruling of the court, and has assigned it as error.

No admission of the husband can affect the wife's separate estate, and the letter from Barrett to Engledow was clearly inadmissible. Statements of the witness Engledow, as to conversations between himself and Barrett and wife, were admissible, in so far as it was shown that Mrs. Barrett was present and in a position to hear them. Whether or not the judgment of the court below should be reversed for the error in the admission of the letter will depend upon the sufficiency of plaintiff's evidence to show the execution of the deed; for if it should appear that, notwithstanding the admission of the erroneous evidence, the plaintiff's evidence is insufficient to show the existence of such a deed, then the error might be immaterial. Appellant, by her 7th, 8th, 9th, 10th, 11th, and 12th assignments of error, contends that the verdict of the jury is against the preponderance of the testimony, and should, on the law and facts of the case, have been in her favor. We will consider these questions together. If Mrs. Amanda Johnson executed a deed to Mrs. Angelina M. Barrett conveying to her all her property, both real and personal, the plaintiff ought to prevail in her suit. It was shown that a deed was executed by Mrs. Johnson to Mrs. Barrett for all her property in Nacogdoches county, and that the same was duly acknowledged and recorded. This deed was executed January 2, 1873, and is referred to in the evidence as the first deed. The deed, the execution of which is in controversy, is called the second deed. Amanda Johnson was a widow, and died childless, March 12, 1873. The defendants are her collateral heirs. Angelina M. Barrett, the wife of L. T. Barrett, was her niece. Mrs. Barrett's mother died when she was quite young, and Mrs. Johnson took charge of and reared her. At the time of Mrs. Johnson's death, and the execution of the first deed, and the alleged execution of the second deed, she was residing with Mrs. Barrett.

In support of the execution of the second deed, four witnesses testified, all of them by deposition. They were L. T. Barrett, James B. Hamlett, Victor J. Simpson, and A. J. Simpson. L. T. Barrett testified substantially that Mrs. Johnson executed two deeds to Mrs. A. M. Barrett. The first was executed January 2, 1873, and conveyed to Mrs. Barrett and her children (naming them) all of Mrs. Johnson's property, real and personal, then in Nacogdoches county. On the 3d of February, 1873, she executed the second deed. Witness appended the original draft of the second deed to his deposition, with explanation that he had made it on the day of or day before the execution of the deed, and that it was copied by James B. Hamlett for Mrs. Johnson to sign. His son found the original draft among his papers on the day that his deposition was taken, March 29, 1886. Mrs. Johnson signed or had her name signed to the copy made by Hamlett, and it was witnessed by him, (James B. Hamlett,) and witness thought two other witnesses. Immediately after the execution of the deed Mrs. Johnson placed it in his possession. That the deed was lost. That he had searched in all places, where it would likely be found, for the deed, but had not been able to find it. That his wife and son had aided him in the search. He stated that Mrs. Johnson said, with reference to the execution of the deed: "I have given or sold to Angelina all of my property. I have placed her in

possession of it, and I want it fixed now while I am able to attend to it, so as to prevent my other relatives from interfering with or giving her trouble." The original draft testified to by Barrett, and attached to his deposition, recites "that I, Amanda Johnson, * * * did, when I executed the deed of conveyance on the 2d day of January last to my niece, Mrs. Angelina M. Barrett and her children, desire to transfer and convey to her all my property, both real and personal, and I do now, by these presents, for the consideration expressed in the aforesaid deed, and for the paramount consideration of the love and affection always manifested by my said niece for me, and especially for the kind and affectionate care and attention given to me by my said niece, and her husband and children, in my late illness, in the absence of all my other relatives, while I was in a helpless condition, give, grant, sell, transfer, and convey unto the said A. M. Barrett, for her own use and benefit, and for the use and benefit of her children, all of my property, both real and personal." James B. Hamlett testified that Mrs. Johnson, when told by the justice of the peace who took her acknowledgment to the first deed that it did not include all her property, requested that another deed be drawn embracing all her property, both real and personal, not only in Nacogdoches county, but all of whatever nature and wherever located. A second deed was drafted by Capt. Barrett, and copied by the witness, including all of the property. Witness read this deed to Mrs. Johnson, at Capt. Barrett's request, and asked her if she wished him to sign it as a witness, and she answered, "Yes." He asked her if it fully embodied her wishes, and she said it did. He then walked across the street to the store, and signed it. Witness did not recollect who the other witnesses were, but was certain that they resided in and around Melrose, the village where Mrs. Johnson then lived. He could not remember the date of the deed, but thought it was the summer or fall prior to Mrs. Johnson's death. Witness was a partner of L. T. Barrett in business, and married his niece. Victor J. Simpson testified that he saw two deeds from Amanda Johnson to Angelina M. Barrett, in Melrose, after Mrs. Johnson's death. He did not remember the dates of the deeds, nor how long it was after her death. He remembered that the dates were previous to her death. They were witnessed by two persons. It was his impression that the witnesses were James McKnight and James Hamlett. The deeds were in the possession of L. T. Barrett, and bore different dates. The oldest conveyed all Mrs. Johnson's property in Nacogdoches county, and the other conveyed all her property without regard to location. It was signed by Mrs. Johnson and witnessed. Witness could not state that he was acquainted with Mrs. Johnson's signature, nor that the signature was genuine. A. J. Simpson testified that he was the officer who took Mrs. Johnson's acknowledgment to the first deed. After explaining his official position and his acquaintance with Mrs. Johnson, he stated that he read the deed to her, and she remarked: "It does not convey everything to Angelina." That he told her "No," it only conveyed the property in Nacogdoches county; and she replied that she intended to convey all her property to Angelina, no matter where situated. It was shown on the part of the defendants that Angelina M. Barrett and her husband, L. T. Barrett, administered on the estate of Mrs. Johnson lying outside of Nacogdoches county, filed a bond in the sum of $8,000, and inventoried the property in controversy as the property of the estate of Amanda Johnson, deceased. Administration was open from September, 1874, to September, 1882. It was not shown that the administrators sold any of the property on the inventory, and it appeared, when some of the defendants in this case filed an application for partition, that Mrs. Barrett then claimed all of the property under the alleged lost deed, and it was set apart to her by the court. Robert Engledow, one of the defendants, testified that Barrett and his wife told him that they did not claim any of the property outside of Nacogdoches county. Mrs. Barrett said, in reply to a suggestion of his that the estate ought to be closed and the property divided among the heirs, "Yes; and we ought to pay Uncle Robert his part as soon as possible." Some time in January, 1878, Barrett paid witness $150 as part of his interest in said estate. Witness had never heard of the deed until informed of it by J. F. Starr, acting agent for the plaintiff. The receipt of witness shows that the money was paid in entire settlement, but that it is not true that witness was imposed upon by Barrett. At common law it was not necessary that a deed should be attested by subscribing witnesses. 1 Devl. Deeds, § 255. When the deed sought to be established was said to have been executed, the act of February 5, 1840, concerning conveyances, was in force. According to it, no estate of inheritance or freehold, or for a term of more than five years, in lands and tenements, could be conveyed from one to another, unless the conveyance were declared by writing, sealed and delivered. Pasch. Dig. art. 997. Seals were abolished by the act of February 2, 1858. Id. art. 5087. A deed, then, is a writing signed and delivered. Victor Simpson testified that the writing in question was signed by Mrs. Johnson, and purported to convey all her property. James Hamlett testified that he signed the writing as a witness at the request of Mrs. Johnson. L. T. Barrett said that Mrs. Johnson executed the deed; that she signed it,—had her name signed. A. J. Simpson testified that Mrs. Johnson told him of her wish to convey all her property to Mrs. Barrett. As to delivery, Victor Simpson saw the deed in the possession of L. T. Barrett. Barrett said, "Immediately after the execution of said last-mentioned deed, it was placed in my possession by Mrs. Johnson." Acknowledgment of a deed by the grantor, or the proof thereof by one of two witnesses, is necessary only for the purpose of registration. As between the parties, no acknowledgment is necessary. Proof of the deed can be made

either by the grantor that he signed it, or by any other person who saw it signed, or by proof of the signature of the grantor. 1 Devl. Deeds, § 465. It is true that there is no direct testimony that any one saw Mrs. Johnson sign the deed, or that she acknowledged her signature to any one, or that the signature appended to the deed was her genuine signature; but a deed may be proved by circumstantial evidence, and the circumstances in this case indicate that Mrs. Johnson must have signed the deed. Crain v. Huntington, (Tex. Sup.) 17 S. W. Rep. 243; Bounds v. Little, 75 Tex. 316, 12 S. W. Rep. 1109. There was not only sufficient testimony to support a verdict in favor of the existence of the deed in this case, had it been in favor of the plaintiff, but we think, from a careful examination of the record, there was also a preponderance of testimony in support of its existence. Both for the error of the court in admitting in evidence the letter from L. T. Barrett to Robert Engledow, and because the verdict of the jury was against the preponderance of the testimony, we think the judgment of the court below should be reversed. We desire to call the attention of the parties to the record in this case. Original and amended pleadings are all copied in the record. According to the rules, the amended pleading should stand in lieu of the original. Rule for district court 13. The statement of facts contains the deeds in plaintiff's title copied at length, with certificates of acknowledgment and record, the depositions of witnesses are written out at length, sometimes including the question as well as answer, and the full proceedings of the probate court of Nacogdoches county are copied at length. This is in direct violation of the rules. Id. 71. A compact, though full, record, with as little useless matter as possible, is intended by the rules, and such a record greatly facilitates the work of this court. In view of another trial, the parties should replead. It is not necessary to notice appellant's other assignments of error. We report the case for reversal.

STAYTON, C. J Reversed and remanded, as per opinion of commission of appeals.

NUNNALLY *et al.* v. TALIAFERRO.

(*Supreme Court of Texas.* Nov. 17, 1891.)

SLANDER—EXCESSIVE VERDICT—PREJUDICE OF JURY.

1. In action of slander plaintiff's counsel stated in his remarks to the jury that "plaintiff wanted a large verdict, not because he thought he could get it, as defendants were insolvent," but as a vindication; that plaintiff was delayed in getting a trial "by the machinations of defendants;" and that "defendants had tried to suppress testimony material to plaintiff's case." The court charged the jury to disregard all remarks of counsel not pertaining to the facts. Under a prayer for $5,000 exemplary damages, a verdict of $8,000 exemplary damages was awarded, together with $24,000 actual damages. All the exemplary damages, and $14,000 of the actual damages, were remitted. *Held*, that the jury were actuated by improper motives, and the verdict would be set aside as excessive.

2. In an action for slander an excessive verdict will be set aside, though remitted in part, where the excess is considerable, and is not ascertainable by any rules of law.

Commissioners' decision. Section A. Appeal from district court, Rusk county; JOHN R. ARNOLD, Special Judge.

Action for slander by Edward Taliaferro against C. L. Nunnally and others. Verdict and judgment for plaintiff. Defendants appeal. Reversed.

J. H. Wood and *W. J. Graham*, for appellants.

HOBBY, P. J. The appellee, Edward Taliaferro, brought this action of slander and libel against C. S. Nunnally, Benjamin Blanton, L. C. Cunningham, and N. R. Bagley. The three first mentioned, it was alleged, constituted a mercantile firm in the town of Henderson, Tex., known as Blanton & Nunnally, and of which firm Bagley was an employe. The petition states substantially that appellee had been employed by said firm as its bookkeeper, in which capacity he served for about two years; that defendants, conspiring together for that purpose, uttered and published charges against him to the effect that he had embezzled and stolen the money of said firm. For injury to his reputation as a business man, and loss of time in being compelled to leave his home in Florida and return to Henderson to answer this charge, and expenses for transportation therefor, he claims damages in the sum of $30,000. For the humiliation and mental agony arising from the accusation made by defendants he claims $5,000; and he also asks for exemplary damages in the sum of $15,000 for the alleged malicious publishing of said slander. There were numerous special exceptions to the original petition, which it is not important to notice. Defendant Cunningham denied under oath that he was a member of the firm. The other defendants denied having uttered and published the alleged slanderous language, and that, if they did, they had reasonable grounds for believing them to be true. The trial resulted in a verdict for the appellee against the appellants C. L. Nunnally and N. R. Bagley for the sum of $24,000 actual damages and $8,000 exemplary damages. The jury found also in favor of the defendants Benjamin Blanton and Cunningham. Appellee's counsel in the court below remitted all of the exemplary damages and $14,000 of the actual damages. Judgment was thereupon entered up against the defendants Nunnally and Bagley and in favor of plaintiff for the sum of $10,000. This judgment is appealed from.

There was evidence substantially as follows: That appellee, from about April, 1882, until December, 1885, was the trusted book-keeper of the firm of Blanton & Nunnally, in Henderson, Tex. He stood well, was popular in the community, and possessed the confidence in a great degree of the defendant Nunnally, who appears to have been the active managing member of the firm. Appellee represented his father-in-law, who resided in Virginia, to be quite wealthy, and that he was in easy circumstances. In December, 1885, he, to the regret of his employers, moved to Florida for the purpose of establishing a