it cannot be said that the case is of any value as authority in determining the issue as to whether the sales in the present case were made in the regular course of business, within the meaning and intent of the statute.

"These sales were made openly and notoriously for the purpose of closing up the business of the tenant. He offered the entire stock either in bulk or in such lots and quantities as suited purchasers. The sales were made at a large discount from the cost price, which, however, of itself would not have been of much importance. The entire stock of $17,000 was thus disposed of in about 42 days, and the defendants here knew that the sales were thus made and for the purposes indicated. If the racket company had—as they would have done, if such a purchaser could have been found—sold their entire stock, in one sale, to one purchaser, it would hardly be contended that such a sale was 'in the regular course of business.' That the tenant failing to find a purchaser for the entire stock in bulk, but still in pursuance of his intention to sell the entire stock, and go out of business, sold to different purchasers in larger quantities, and in a very much different manner from that in which he generally conducted his business, we think would be equally a departure from the general course of business. The general course of the tenant's business was to sell at retail, and in very small quantities, and evidence showing the average number of sales per day to be 2,000. It is true that not all of his sales were of this character, and that he sometimes sold in larger quantities; but such sales were not of frequent occurrence, and amounted to not more than 10 or 15 per cent. of his sales generally. Such sales as were made to defendants cannot be said to have been made in the general course of business. The general course of business of the racket company was to buy and sell as merchants such articles as they dealt in, and in this way to conduct a regular mercantile business. It was in contemplation of such business that appellant leased the premises.

"Appellees contend that the sales made to them were according to the usual course of business in case of sales made for the purpose of closing out a business. With equal force it might be contended that a sale of the entire stock, to one purchaser in one sale, was in the usual course of business in way of closing out sale; but a closing out sale, such as this was, was itself out of the general course of business. The primary purpose of the statute is to give the owner of the building a lien on the goods, wares, and merchandise of his tenant to secure the payment of the rent. As the provision giving this lien, unless qualified in some way, would so embarrass a merchant and trader in the general conduct of his business as to operate a serious restraint upon trade, an exception was made in case of such goods as might be disposed of in the general course of business by the tenant. This purpose of the law emphasizes the view we take of it in its application to the present case. The effect of the undisputed testimony being to show that the sales to defendants were not made in the general course of business, the jury should have been so instructed."

The following cases support the conclusion of the Court of Civil Appeals: Babbitt v. Walbrun, Fed. Cas. No. 694, 2 Fed. Cas. 283; Fowler v. Rapley, 15 Wall. (U. S.) 328, 21 L. Ed. 35; Weil v. McWhorter, 10 South. 131, 94 Ala. 540; Grant v. Whitewill, 9 Iowa, 152.

(100 Tex. 479)

PUNCHARD et al. v. MASTERSON et al.

(Supreme Court of Texas. April 10, 1907.)

1. ACKNOWLEDGMENT — NATURE — STATUTORY PROVISIONS.

When an acknowledgment is prescribed by statute without declaring of what it shall consist, it is meant that the person executing the instrument must appear before a duly authorized officer and state that he executed it.

2. SAME—CERTIFICATE.

Act Feb. 5, 1841 (Laws 1840–41, p. 169; 1 Sayles' Early Laws, pp. 477–478), provided for the registration of deeds upon the acknowledgment of the party or parties before the chief justice of the county. *Held*, that a certificate attached to a deed which merely shows that the officer saw the grantor in the deed sign it is not an acknowledgment, entitling the deed to record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 181, 182.]

3. SAME — RECORDING — STATUTORY PROVISIONS.

Where a deed was never properly acknowledged, its registration was not validated by Act Feb. 9, 1860 (Laws 1860, p. 75, c. 58), making good the record of all instruments, provided they shall have been properly acknowledged.

4. SAME.

Act of April 23, 1895 (Laws 1895, p. 157, c. 99), curing the defects in the record of certain deeds, applies only to instruments acknowledged, proved, or certified according to law, and cannot affect a deed never properly acknowledged.

Action by E. W. Punchard and others against Branch T. Masterson and others. Questions certified to the Supreme Court. Questions answered.

Cox & Cox and Hefley, McBride & Watson, for appellants. Masterson & Masterson, for appellees.

GAINES, C. J. This case comes to us upon a certified question. The statement and questions are as follows:

"Appellants sued appellees in trespass to try title, and as a link in their chain of title offered in evidence a certified copy from the records of Brazoria county of a certain deed from Oliver Jones for the land in controversy. This deed was dated May 4, 1841, and the original was recorded in the deed records of Austin county, May 25, 1841. At that

time and since the land lay in Brazoria county. On July 29, 1901, a duly certified copy of this deed from the records of Austin county was recorded in Brazoria county under the provisions of the act of 1895 (article 4642, Rev. St. 1895). It was a certified copy of this record that was offered in evidence. The certificate of acknowledgment of the deed is as follows: 'Republic of Texas, County of Austin. Personally came Oliver Jones, who signed the foregoing instrument in my presence, after examining and reading the same, all of which is admitted to record this 4th day of May, 1841. J. H. Money, Chief Justice A. C.'

"The following questions which are material to the determination of the motion for rehearing in this cause now pending before us are certified:

"First. Was this certified copy admissible in evidence in view of (1) the form of the certificate, and (2) the absence of the impress of the official seal of the chief justice before whom the acknowledgment was taken?

"Second. If it should be held, in answer to the foregoing question, that the certificate was not sufficient to authorize the original record of the instrument, was such record validated by any of the curative acts subsequently passed so as to authorize the record of the certified copy in Brazoria county under the act of 1895 above referred to?

"The law in force at the time the deed was acknowledged and recorded in Austin county was section 21 of the act of February 5, 1841. Laws 1840–41, p. 169; 1 Sayles' Early Laws, pp. 477, 478."

We think the first question certified has been practically decided by this court in the case of McDaniel v. Needham, 61 Tex. 269. There it was held that "a certificate made in 1851 by a county clerk, over his seal of office, reciting that one whose name appeared signed to a power of attorney to which the certificate was attached appeared before that officer, and in his presence signed, sealed, and delivered the same for the uses and purposes therein contained, afforded no such proof, under the statutes in force at the time of the execution of the instrument, as would authorize its registration." This decision was followed by the Court of Civil Appeals of the First Supreme Judicial District in the case of Heintz v. O'Donnell, 42 S. W. 797, 17 Tex. Civ. App. 21, where it was decided that a similar certificate was not sufficient to admit a deed to record. That case did not reach this court, but we think that the point was correctly decided. It is true that the language of the statute in force when the certificates passed upon in the cases cited were made is different in language from section 21 of the act of February 5, 1841, which was, in effect, when the certificate in question was executed. Section 21 of the act last mentioned provided for the registry of deeds "upon the acknowledgment of the party or parties before the register, or chief justice of the county." Paschal's Digest of Laws, art. 4978. The article, unlike that construed in the cases cited, does not give either the form or the substance of the acknowledgment. The language of the act of May 12, 1846 (Acts 1846, p. 236), which was the statute under consideration in the cases of McDaniel v. Needham and Heintz v. O'Donnell, supra, is as follows: "The acknowledgment of an instrument of writing, for the purpose of being recorded, shall be by the grantor or person who executed the same, appearing before some officer authorized to take such acknowledgment, and stating that he had executed the same for the consideration and purposes therein stated, and the officer taking such acknowledgment shall make a certificate thereof, sign and seal the same with his seal of office." Paschal's Digest of Laws, art. 5007. We are of opinion that the act of 1841 implies all that is expressed in that of 1846. "Acknowledgment is a proceeding provided by statute whereby a person who has executed an instrument may, by going before a competent officer or court and declaring it to be his act and deed, entitle it to be recorded, or to be received in evidence without further proof of execution, or both." 1 Cyc. 512. Therefore, when an acknowledgment is prescribed, without declaring of what the acknowledgment shall consist, it is meant that the grantor in a deed must appear before a duly authorized officer and state that he executed the same. Hence the decisions cited are as applicable to the prior as to the subsequent act. "This word 'acknowledge,' besides the legal sense in which it has for centuries been used, has also a common meaning, understood by every one, which uniformly relates to something past. It is a confession or admission of some prior act." Roanes v. Archer, 4 Leigh (Va.) 557. The principle so stated is unquestionably correct, and therefore a certificate which merely shows that the officer saw the grantor in a deed sign his name thereto is in no sense an acknowledgment of the instrument. Referring to certain cases hereinafter cited, Mr. Devlin, after an elaborate discussion of the questions says: "These decisions, if they go to the extent that a certificate may be sufficient which omits to state that the grantor acknowledged the execution of the deed, are in direct conflict with the cases cited in other portions of the treatise, and cannot, by either reason or authority, be supported." 1 Devlin on Deeds, § 526. The author then proceeds to discuss the decisions in the following cases: Basshor v. Stewart, 54 Md. 376; Hoboken Land & Improvement Co. v. Kerrigan, 31 N. J. Law, 13—and reaches the conclusion that, in so far as they may hold the contrary doctrine they are not sound. In support of the position that the certificate is not good as an

acknowledgment many cases from other jurisdictions might be cited; but, in view of our own decisions, it is deemed unnecessary.

We answer the first part of the first question in the negative, and therefore need not answer so much thereof as pertains to the necessity of a seal.

We are at a loss to ascertain definitely the curative acts mentioned in the second question, but presume they are the act of February 9, 1860 (Laws 1860, p. 75, c. 58), and the act passed April 23, 1895 (Laws 1895, p. 157, c. 99). The second section of the former act validates the registration of certain instruments. Its main purpose seems to have been to make good the record of all instruments authorized by law to be recorded, when properly acknowledged and proved, and when the acknowledgments had been made before an officer not authorized to act in the matter. The more specific idea appears to have been that there were many deeds upon record, the registration of which was invalid, by reason of the fact that they had been acknowledged or proved before officers of counties other than those in which the land was situated. Perhaps the act has a more extended effect, but that matter is unimportant. The section by its terms clearly applied to such instruments only as had been acknowledged or proved before certain officers specified. The words "provided that the same shall have been acknowledged by the grantor or grantors before any chief justice," etc., leaves no room for any other construction. Having found that the certificate appended to the deed in question is not acknowledged, the act of February 9, 1860, cannot apply to it.

The act of April 23, 1895, provided, in effect, that, where a deed had been recorded in a county other than that in which the land is situated, a certified copy thereof might be recorded in the county where the land lay. But the act applies only to instruments "which shall have been acknowledged, proved, or certified according to law." Therefore it cannot apply to the deed in question.

We answer the second question also in the negative.

(100 Tex. 483)

MISSOURI, K. & T. RY. CO. OF TEXAS v. TOLBERT.

(Supreme Court of Texas. April 10, 1907.)

1. ANIMALS—STOCK LAWS—ELECTION—PETITION.

A stock law election under the acts of the Twenty-Sixth Legislature was void, where the petition of the requisite number of freeholders, asking the commissioner's court to order such election, failed to describe the limits of the justice precinct for which it was to be held by metes and bounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 149–151.]

2. RAILROADS—INJURIES TO ANIMALS—ADOPTION OF STOCK LAW.

The fact that a stock law election has been declared to be in force, and is being observed in a district through which a railroad runs, does not affect the liability of the railway company, under Rev. St. 1895, art. 4528, for stock killed by its trains, where the election was void.

3. SAME—STATUTORY PROVISIONS—FAILURE TO FENCE—DEFECTIVE FENCE.

Rev. St. 1895, art. 4528, provides that a railway company is liable for stock killed by its trains unless its track is fenced, irrespective of negligence. *Held* that, where the fence along the track was so out of repair, that it was ineffective as a fence, an action for injury to stock by being on the track is controlled by the statute applicable to unfenced tracks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1451–1453.]

Certified Questions from Court of Civil Appeals, Fifth Supreme Judicial District.

Action by R. L. Tolbert against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Certified questions from the Court of Civil Appeals. Questions answered.

See 90 S. W. 508.

T. S. Miller and W. C. Jones, for appellant. C. E. Mead, for appellee.

WILLIAMS, J. Certified question from the Court of Civil Appeals for the Fifth district as follows:

"Appellee's mule was struck and killed by one of appellant's locomotives on the night of October 13, 1904, and this suit was brought to recover its value. From a verdict and judgment in favor of appellee for the sum of $175, this appeal is prosecuted. Appellant's railroad runs through Hunt county, and appellee's mule was struck and killed in Precinct No. 1 of said county. Prior to the killing of the mule appellant had fenced its right of way, but a panel of what is called a 'wing fence,' made of plank leading from the wire fence on the edge of the right of way to a cattle guard placed in the roadbed had been burned, through which the mule passed onto the track. It is conceded by appellee that, if appellant was not required to maintain and keep in repair its right of way fence in the precinct where appellee's mule was killed, he is not entitled to recover. Appellant does not, on this appeal, controvert the claim of appellee that its said fence was out of repair, and that it caused the death of the mule in question. Appellant's contention was and is that the stock law prohibiting the running at large of horses, mules, etc., was legally in force in said precinct at the time appellee's mule was killed, and that, unless appellant's servants operating the engine causing its death were guilty of negligence, appellant is not liable. In support of this contention appellant in the court below introduced in evidence a petition signed by the requisite number of freeholders and qualified voters of said precinct, which was filed August 17, 1900, praying the commissioner's court of Hunt county, Tex., to order an election to determine whether or not horses, mules,