

witness fees for his own attendance and travel, provided he causes it to appear by his affidavit attached to the bill of costs that his attendance was solely for the purpose of giving his evidence in the cause, and not to assist in its management, and that the travel was solely for the purpose of giving his evidence therein. These facts do not appear by the affidavit filed in this cause, nor is the want of such showing excepted to specifically on this ground by the defendants. Under these circumstances, the complainant's fees for attendance as a witness will be allowed as already taxed, upon his filing a supplemental affidavit in conformity to this opinion, but he cannot now be allowed his traveling fees, as he did not appeal from the disallowance thereof by the clerk.

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CHENEY, Ex'r, etc., v. STONE and others.

(Circuit Court, D. Nebraska. 1886.)

1. LIMITATIONS—NOTE—MORTGAGE FORECLOSURE—PURCHASE FOR VALUE.

In a suit to foreclose a mortgage brought within the 10 years limited for such suit by the statutes of Nebraska, the plaintiff is not deprived of the benefit of the fact that he is a purchaser for value, and before maturity, of the notes and mortgage, by the fact that the statute of limitations has run on the notes.<sup>1</sup>

2. NEGOTIABLE PAPER—POSSESSION—PRESUMPTION.

Possession of negotiable paper duly indorsed is *prima facie* evidence of *bona fide* purchase for value before maturity.<sup>2</sup>

3. MORTGAGE FORECLOSURE—CLAIM OF BONA FIDE PURCHASER—EVIDENCE.

In an action brought in Nebraska by one claiming to be the executor of a former resident of New York to foreclose a mortgage of which it was claimed that the testator was a *bona fide* purchaser before maturity, it appeared that a former action to foreclose had been brought by the testator in his life-time, but was dismissed on account of the failure of the plaintiff to submit to examination; that in that action defendant took out an order for plaintiff's examination; and at the appointed time and place, the place being an office in New York city, a man presented himself claiming to be the plaintiff, but, when questioned about his name, seemed embarrassed, and immediately left the room, and did not reappear for examination. It was also shown that the executor, who claimed to have himself sold the mortgage to the testator, wrote letters to the mortgagor urging payment of the interest due on the mortgage after the date of the alleged sale. *Held*, that these circumstances were not sufficient to justify a conclusion that there was no such person as the alleged testator, and that the pretended sale was fictitious, as against the positive testimony of several witnesses to their acquaintance with the testator, and their knowledge of the circumstances of the sale.

4. FOREIGN EXECUTOR—ACTION BY—RIGHT TO MAINTAIN.

In a state where an executor appointed in another state is allowed to sue like any other non-resident, the right of one to maintain an action as such an executor, on securities in his hands, is sufficiently shown by the production of letters testamentary issued by a county court of another state having general jurisdiction of the settlement of estates, although the testator was a resident

<sup>1</sup>See *Cheney v. Janssen*, (Neb.) 29 N. W. Rep. 239, and note; *Cheney v. Woodruff*, Id. 275, and note.

<sup>2</sup>See *Manistee Nat. Bank v. Seymour*, (Mich.) 31 N. W. Rep. 140, and note.

of a third state when he died, and the recitals of the letters only show that he had property in the state, and not in the county where the letters were issued, and there is no evidence of the will being probated there.\*

**5. JUDGMENT—OF DISMISSAL—WHEN A BAR.**

If a suit is dismissed on account of the failure of plaintiff to submit himself to examination, the judgment is not a bar to a subsequent suit.

Action begun July 12, 1884, to foreclose a mortgage given to secure a loan of \$1,000 and interest. There were two notes, and ten interest coupon notes, which, with the mortgage, were dated July 16, 1872. The principal notes were payable in five years; the coupons, in one, two, three, four, and five years, respectively. Usury, statute of limitations, and former adjudication, among other defenses, were set up.

Among other evidence the defendant introduced a deposition of P. D. Cheney, taken in another suit, to which were attached letters written by Cheney, dated in July and August, 1876, urging payment of the interest coupons. Cheney testified, in the present case, that he sold the notes and mortgage sued on in April, 1875, to the testator, William G. Davis.

*C. E. Magoon, (O. P. Mason, of counsel,)* for complainant.

*S. P. Davidson* and *T. Appleget*, for defendants, claimed, among other things, that the defense of usury was not avoided by the fact, if shown, that plaintiff's testator was a *bona fide* purchaser of the notes for value, and before maturity, as the five-years statute of limitations had run on the notes; citing *Cheney v. Cooper*, 14 Neb. 419, 16 N. W. Rep. 471.

BREWER, J. This is an action to foreclose a mortgage. Several defenses, such as usury and the statute of limitations, are interposed. Many of the questions presented by the pleadings have been already considered by me in prior cases in this district of a like nature, and further reference to them is unnecessary. Some of them have also been considered by the supreme court of this state, and my conclusions, I am happy to state, were fully in accord with those of that learned court. *Cheney v. Cooper*, 14 Neb. 415, 16 N. W. Rep. 471; *Cheney v. Woodruff*, 29 N. W. Rep. 275; *Mundy v. Whittemore*, 15 Neb. 647, 19 N. W. Rep. 694.

Two matters are, however, presented which require notice.

1. Complainant claims that his testator was a *bona fide* purchaser before maturity. Defendants insist that the testimony fails to establish this fact. It must be borne in mind that the possession of negotiable paper, duly indorsed, is *prima facie* evidence of a *bona fide* purchase before maturity. Concede, for the purpose of this argument, that usury in the inception of the paper, which in this case is abundantly proved, does away with the *prima facie* evidence from such possession. We have the positive testimony of two witnesses, complainant and his brother, to the purchase, its time, amount paid, and by one, at least, the information given to the purchaser. The circumstances thus disclosed show a purchase before maturity, payment of full value, and indicate entire igno-

\* See *Lewis v. Adams*, (Cal.) 11 Pac. Rep. 833, and note; *Moore v. Jordan*, (Kan.) 13 Pac. Rep. —.