

of Nebraska. The mortgages were given for *bona fide* debts due from the mortgagor to the mortgagees. There was no trust, secret or expressed, in favor of any one else. This is a question of local law, and the latest utterances of the supreme court of Nebraska show very clearly that the execution of these mortgages was not prohibited by, or a fraud on, the assignment laws of that state, but were lawful and valid transactions. *Britton v. Boyer*, 27 Neb. 522, 43 N. W. Rep. 356; *Davis v. Scott*, 27 Neb. 642, 43 N. W. Rep. 407. In the last case cited the court say:

"That this mortgage was given to secure *bona fide* debts seems to be fully established, and in this state, under the holdings of this court, a creditor in failing circumstances may prefer his creditors. Justice would be subserved by requiring an equitable distribution of the property between all creditors in such cases, and a change in the law on that subject is worthy of the consideration of the legislature. But the common law in regard to preferences is in full force in this state, and, as that law recognizes the right of a failing debtor to prefer his creditors, error cannot be assigned because of such preference. The mortgagee, therefore, being a *bona fide* creditor, and having a prior lien to that of the attaching creditors, was entitled to the possession of the property until a sufficient amount had been sold to satisfy his claims."

A private corporation, in a failing condition, has the same common-law right that a natural person has to prefer, by way of payment or by giving security on its property, one or more of its *bona fide* creditors, to the exclusion of others. *Mor. Priv. Corp.* § 802, and cases cited; *Id.* § 385. The plaintiff will be allowed to prove in the master's office for the amount of his debt, as an unsecured claim, to be paid *pro rata* with other unsecured debts, out of the surplus, if any, that remains after satisfying the mechanics' liens, mortgages, and other debts that are liens on the property; and as to all further relief the bill is dismissed.

The complainants in the cross-bills (the banks) are entitled to a decree foreclosing their respective mortgages, as prayed.

Let a reference be made to the master to ascertain and report without delay the order of priority and amount of the several liens on the property.

McCLASKEY *et al.* v. BARR *et al.*

(Circuit Court, S. D. Ohio, W. D. February 21, 1891.)

1. WITNESS—MEMORANDA TO REFRESH MEMORY—SERVICE OF PROCESS.
Memoranda made by an officer, showing how he served process, may be referred to in order to refresh his memory in testifying as to the facts.
2. SERVICE OF PROCESS—RETURN—IDEM SONANS.
A return of process against "Jacob Kraig" as served on "Jacob Krug" is insufficient, the names not being *idem sonans*.

In Equity: For former reports, see 38 Fed. Rep. 165, 40 Fed. Rep. 559; and 42 Fed. Rep. 609.

Cowan & Ferris, H. T. Fay, and Carson, Shields & Carson, for complainants.

Stephens, Lincoln & Smith, Bateman & Harper, and S. T. Crawford, for respondents.

SAGE, J. Exceptions to report of special master, to whom was referred the application of certain defendants to set aside the returns of service made upon them in the superior court of the city of Cincinnati, before the removal of the case to this court.

I have carefully examined the report, together with the testimony submitted to the master. My conclusion is that his findings are, with one exception, correct. I do not think that the testimony offered on behalf of defendants, being altogether negative in its character, is sufficient to overcome the evidence afforded by the returns of service, and by the positive testimony of the officers who made the service. Their memoranda, showing how the service was made, could properly be referred to by them in testifying as to facts of which they had no recollection independent of the memoranda, the same having been made at the time. Whart. Ev. § 518.

It appears, however, that service was made upon "Jacob Krug," whose name does not appear in the petition, in the amended bill, or in the writ, nor is there any name similar to it in the pleadings. The master finds that, under the doctrine *idem sonans*, service was good as against Jacob Kraig, who is a defendant, although there is no evidence, aside from the return last above, that he was served. In this I think the master is in error. I know of no case in which the doctrine of *idem sonans* has been carried to that extent.

Mr. Chitty, in his work on Practice, (volume 3, p. 232,) says that "the most recent publications have drawn the conclusion that it is only in material deviations that the defects in the spelling of names will be treated as irregularities, but that the term 'material' has been so technically construed as in some cases to give effect to objections which, in ordinary acceptation, would be considered immaterial." The result, therefore, he adds, "seems to be that, although the courts are now indisposed to give effect to summons or motions on account of mistakes that have not altered the sense or meaning of process, nor could have misled the most ignorant person, yet, unless in the clearest cases, it will be found most judicious to abandon any objectionable process, and proceed *de novo*."

In 10 East, 83, *King v. Shakespeare*, the defendant was indicted for an assault under the name "Samuel Shakepear," Lord ELLENBOROUGH said that the final "e" might not make a material difference, but the omission of the "s" in the middle makes it a differently sounding name from the true one. Whereupon, all the judges assenting, it was considered that said Samuel Shakespeare be not compelled to answer said indictment, and he was discharged without day.

In *Rex v. Calvert*, 2 Crompt. & M. 189, the court set aside an attachment, and discharged the defendant out of custody, because in the copy of the rule served upon him his name was spelled "Calver" instead of "Calvert."

In *Whitwell v. Bennett*, 3 Bos. & P. 559, "John Couch" was held to be a fatal variance from "John Crouch;" and in *Queen v. Drake*, 2 Salk. 660, it was held that where a letter omitted or changed in a name makes another word, though it be insensible, the variance is fatal.

"Burrell" for "Burrill" was held to be a fatal variance in *Com. v. Gillespie*, 7 Serg. & R. 470, where the rule of *idem sonans* is fully discussed.

The court said in *Petrie v. Woodworth*, 3 Caines, 219, that, where the name appears to be a foreign name, the variance of a letter, which according to the pronunciation of that language does not vary the sound, is not a misnomer. There "Pitrie" was sued as "Pitris," which did not affect the pronunciation in French.

In *Mann v. Carley*, 4 Cow. 148, "Grautis" and "Gerardus," also "Quartus" and "Gerardus," were held to be different names.

Justice WASHINGTON, in *Lessee of Gordon v. Holiday*, 1 Wash. C. C. 285, says that the use of names is to describe the individual of whom we speak so as to distinguish him from some other person, and therefore a rational and sound rule is that where two names have the same original derivation, and where one is an abbreviation or corruption of the other, but both are taken promiscuously and according to common use to be the same, though different in sound, the use of one for the other is not a material misnomer; and, if in common use the names be the same, the person cannot be misnamed if either be used. He cites *Griffith's Case*, as given in *Gilb. Com. Pl.* 219, as a strong one to illustrate the rule. There it was said that "Saunders" and "Alexander," which differ entirely in sound, are not distinct names of baptism, because "Alexander" is called "Saunders," so "Piers" and "Peter," "Joan" and "Jane," "Franciscus" and "Francis," "Garret," "Gerald," and "Gerard." But if the name be wholly mistaken, if it be repugnant to truth, as if "Alexander" be used instead of "Thomas," the misnomer is fatal. Therefore he says the question always is, are the names different, not in sound, but in derivation or in use?

To test the matter in the present case, I have referred to the Cincinnati directory for the year 1890. I find one name "Kraig;" the Christian name is Jacob. I presume that he is the defendant in this case. Turning to the name "Krug," I find that there are 32 persons, male and female, in the city to whom it belongs; and therefore I am still more strongly led to conclude that the return of service as made upon "Jacob Krug" is not a good service as against the defendant "Jacob Kraig," and to that extent the exceptions to the master's report will be sustained. In all other respects they will be overruled.

MCARTHUR *et al.* v. WILLIAMSON *et al.*

(Circuit Court, S. D. Ohio, W. D. February 21, 1891.)

1. REVIVAL OF ACTIONS—PERSONAL AND REAL.

Ejectment is not merely a personal action, in Ohio, but involves also questions of title; and though such action, pending in a federal court in that state, when abated by the death of a party, cannot be revived under Rev. St. U. S. §§ 955, 956, which apply only to personal actions, it may be revived under the provisions of the Code of Civil Procedure of Ohio by virtue of Rev. St. U. S. § 914, which provides that the practice and modes of proceeding in civil causes in the federal courts shall conform to the practice of the courts of the state in which such federal courts are held.

2. SAME—DISCRETION OF COURT—LACHES.

In Ohio, an action may, in the discretion of the court, be revived after a year from the death of a party, where due diligence has been used. *Held*, that where an application to revive an action of ejectment is made more than three years after the death of defendant, and after plaintiff had notice of such death, and of the names and residences of his heirs, and after decedent's realty has been sold, his debts paid, and the residue distributed, there is not the required diligence, and the order of revival will be denied.

At Law.

Rev. St. U. S. § 914, is as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held."

Lawrence Maxwell, Jr., for plaintiff.

R. A. Harrison and A. H. Gillett, for defendants.

SAGE, J. In this, which is a consolidated case against several defendants in ejectment, a supplemental petition was filed November 28, 1890, setting forth that the defendant John Rathbun has died pending the action, leaving as his heirs at law Rei Rathbun, (who was appointed administrator of his estate,) George W. Rathbun, *et al.*; and that, shortly after the decease of said John Rathbun, his son, George W. Rathbun, died, leaving as his heirs at law six children, of whom five are minors, and James Williamson as their guardian. The prayer of the petition is that the consolidated action may be revived against said heirs at law, and said James T. Williamson in lieu of said John Rathbun, deceased.

The separate answers of Rei Rathbun and James T. Williamson, as guardian, are filed, each setting up that John Rathbun died on the 28th of March, 1887, intestate, and that subsequent to his death, to-wit, at the October term, 1887, of this court, said consolidated action was finally tried, and judgment rendered therein in favor of the plaintiff against the other original defendants thereto, and therefore that the action was not pending when the so-called "supplemental petition for revivor" was filed, the same having been theretofore finally determined.

The answer further sets forth that the plaintiffs were advised of the death of John Rathbun within a few days after it occurred, to-wit, in the month of March, 1887; and that in May, 1887, through their attorneys,