continuously from the date of said contract. The defendant below objected to the introduction of the same, because "the paper has no legal effect, as it has no description." The objection was overruled, and the bond or contract was admitted in evidence, and such admission is now assigned as error. The position taken by counsel for the plaintiff in error during the argument of this cause before this court that the said paper was offered as color of title is not sustained by the record, is in fact refuted by the bill of exceptions, which certifies that its purpose was, in connection with other evidence, to show possession of the land by said Trivett and those claiming under him "from the date of the contract ever since." The only objection presented for the consideration of the trial judge was that the paper had no legal effect, for the reason that it had no description. No other point will be considered by this court, as the court below ruled on that alone. An appellate court will only pass upon those questions as to which a foundation was laid by a specific objection on which the court below ruled, and concerning which an exception was not only noted at the time, but fully set forth in the bill of exceptions. Turner v. Yates, 16 How. 14; Hanna v. Maas, 122 U. S. 26, 7 Sup. Ct. 1055; Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171.

On the question of possession, the contract for the sale of the land, accompanied by oral testimony showing occupation thereunder, was clearly proper. Such evidence was admitted by the court as competent for the jury to consider, its weight being left for their determination. The evidence of Trivett as to his possession under said contract, as well as of others who testified concerning the time and character of the same, was offered, admitted, and not excepted to. Why the paper under which he entered and so held was not admissible it is difficult to conceive, as the evidence connected his possession with the same. The description was sufficient, as it located the land on a certain ridge in a particular county, designated as a square of 100 acres, and alludes to it as the same land that had been sold to one Timothy Price, and by him transferred to Trivett. Under such circumstances parol evidence as to possession and identity was properly heard by the jury.

The plaintiff below having closed its case to the jury, the defendant introduced no evidence, but tendered the following issues as proper to be submitted to the jury: (1) Is the plaintiff the owner and entitled to possession of the land described in the pleadings? (2) Is the defendant in the unlawful possession of said lands? (3) What damage has the plaintiff sustained? The court refused to submit such issues, and presented the following for the finding of the jury thereon: (1) Has the plaintiff shown title to the land embraced in the grant he claims to the 59,000-acre grant as therein described? (2) Is the tract described in the grant—the 59,000-acre tract—within the black lines on the official plat in evidence in this case? To this the plaintiff in error objected. In order to fully comprehend and properly dispose of the questions raised

by this objection, it is necessary that we understand what the record discloses concerning the same. In the order consolidating the cases, we find this language:

"It is ordered by the court that, for the purpose of the trial of the plaintiff's title and the location of the grants under which the plaintiff claims, these two causes be consolidated, and tried as one cause, each defendant being entitled to a separate issue upon his own title after the determination of the issue as to boundary and location of plaintiff's title."

The plaintiff below expressly waived damages, and consequently it was not necessary to submit the issue relating to that matter asked for by the defendant below, and the court very properly declined to do so. As to the question of possession, it appears that it was admitted during the trial that the plaintiff in error was in possession of parts of the land in controversy. The question of possession was thus eliminated. It is evident from the record that the plaintiff below claimed to own two adjoining tracts of land, and that it insisted that they were located inside the lines of the 59,000-acre grant, which it claimed was located as shown by the black lines laid down on the official map used by the jury. The real controversy was, therefore, as to the true location of the 59,000-acre grant. If the jury found that the land was located as claimed by the plaintiff, the defendant admitting possession, and damages being waived, then the only further finding required was as to the title; and, as we see the case, the answer of the jury would have been the same to either the issue tendered by the defendant or the one submitted by the court, relating to the question of ownership and title. No particular form is required of the issues to be submitted to a jury, but it is essential that the real matters in controversy raised by the pleadings should be fairly presented. Cuthbertson v. Insurance Co., 96 N. C. 480, 2 S. E. 258; Code N. C. §§ 395, 396. Of necessity, these issues are to a great extent left to the discretion of the presiding judge. Emery v. Railroad Co., 102 N. C. 209, 9 S. E. 139; State v. Mitchell, 102 N. C. 347, 9 S. E. 702; Lineberger v. Tidwell, 104 N. C. 506, 10 S. E. 758; Everett v. Williamson, 107 N. C. 204, 12 S. E. 187; Bradsher v. Hightower, 118 N. C. 399, 24 S. E. 120. That the court below wisely exercised the discretion reposed in it under the North Carolina statutes and practice in submitting the issues to the jury is fully shown by all the facts offered to the jury and recited in the record, but not deemed essential to be now referred to in detail.

The other assignments of error remaining to be disposed of are those relating to the refusal of the court below to give certain instructions asked for by the defendant, and to the charge of the court to the jury. As to these assignments, we are compelled to sustain the position assumed by the counsel for the defendant in error, that this court cannot consider the same. The exceptions and the assignments referring to the charge are to the same as a whole, which is specially prohibited by rule 10 of this court. 21 C. C. A. cxi., 78 Fed. cxi. So far as the bill of exceptions is concerned, there is an absolute disregard of the requirement that the

several matters of law excepted to, and those only, shall be inserted, and the effort to remedy this in the assignments of error will not be permitted. Nor does it appear that the exceptions to particular parts of the charge, referred to in the assignments of error, were made and the attention of the court called to them at the time the charge was given. The reasons requiring this to be done have been so frequently stated by the courts that we must decline to again enumerate them. Van Gunden v. Iron Co., 8 U. S. App. 229, 3 C. C. A. 294, and 52 Fed. 838; Improvement Co. v. Frari, 8 U. S. App. 444, 7 C. C. A. 149, and 58 Fed. 171. So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded by such instructions, and therefore we presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them. Improvement Co. v. Frari, supra. The bill of exceptions in this case does not show affirmatively the errors alleged, and that they were prejudicial; nor does it show that timely objections were made, and the grounds thereof clearly stated, so far, at least, as the question relating to the refusal of the court to give such instructions is concerned; and therefore it is fatally defective, and will not authorize us to consider and dispose of the points based thereon presented by counsel for plaintiff in error.

We deem it proper to refer to the fact, shown by the record, that after the jury had returned its findings on the issues submitted the court inquired of the plaintiff in error if he, under the terms of the order of the court theretofore entered, desired to try before the court and jury any separate issue upon his own title, and that he refused to tender such issue. The judgment complained of was then entered, and, as we find no error, the same is affirmed.

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## UNION PAC. RY. CO. v. REED.

(Circuit Court of Appeals, Eighth Circuit. March 22, 1897.)

No. 863.

1. DEEDS—DEFECTIVE EXECUTION—RATIFICATION.
   A deed ratifying a former deed, which did not pass the title because of its defective execution, cannot affect a title acquired under a deed to a third person between the date of the original deed and the date of the ratification.

2. LOST INSTRUMENTS—EVIDENCE.
   A lost instrument cannot be proved by a certified copy of its record, in the absence of a statute which expressly authorizes the admission of such evidence.

3. RECORD OF DEEDS—EVIDENCE.
   Under the territorial statutes of Nebraska (Sess. Laws 1856, c. 31, §§ 5, 14, 17, 23), and Consol. St. Neb. 1891, §§ 4337, 4338, a power of attorney acknowledged before the mayor of a city in another state was not entitled to record in the absence of a certificate of a clerk of court as to the mayor's official character and genuineness of his signature; and under Consol. St.

Neb. 1891, §§ 4337, 4338, a certified copy of the record of such an instrument was not admissible in evidence; nor was its admissibility affected by Laws Neb. 1887, c. 61, § 4, providing that all deeds theretofore executed and acknowledged in accordance with the provisions of that act should be legal and valid.

4. SAME—FEDERAL COURTS—STATE DECISIONS.

A decision of the highest court of a state construing the registration statutes of a state as to the competency as evidence of the records of deeds establishes a rule of property, and is binding upon the federal courts, no question of right under the constitution and laws of the nation and no question of general or commercial law being involved.

In Error to the Circuit Court of the United States for the District of Nebraska.

W. R. Kelly and E. P. Smith, for plaintiff in error.

Herbert J. Davis, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This was an action for the recovery of the possession of specific real property, and the writ of error challenges a judgment in favor of Lewis S. Reed, the defendant in error, who was in possession. The Union Pacific Railway Company, the plaintiff in error, had never been in possession of the premises, but relied upon its legal title and its right of possession thereunder for a recovery. In the pleadings upon which the case was tried, each party claimed the title, and the only question at issue at the close of the trial was whether or not the railway company had proved any title to the demanded premises in itself. That question is presented here upon this state of facts, which was found by the court below, after a trial without a jury: Samuel Frodsham owned the land in controversy on February 23, 1857. The railway company could not prove the original of a power of attorney to sell and convey this land made by him to one Birkett, a record of which, under the date of May 25, 1858, was found in the register's office of the county in which the land was situated, and it offered in evidence a certified copy of that record. This copy disclosed the fact that the acknowledgment of the instrument was taken and certified in the state of Missouri by the mayor of the city of Savannah, in that state, and that there was no certificate attached to it, made by the clerk or other proper certifying officer, that the signature of the mayor was genuine, or that the instrument was executed or acknowledged according to the laws of the state of Missouri. The plaintiff then introduced in evidence the record of a deed of the premises by Birkett, as attorney in fact of Frodsham, under this power of attorney, to one Davis. This deed was dated and recorded on May 22, 1858. It then deraigned its title from Davis, and also introduced in evidence a deed dated February 19, 1894, from Frodsham and his wife to itself, in which the grantors recited, ratified, and confirmed the power of attorney to Birkett and the deed from him to Davis, and conveyed the land to the railway company. The defendant proved that Frodsham made a deed of the land to one Van Wyck on May 23, 1857, and that this deed was duly recorded on the same day; but the plaintiff, in rebuttal, introduced

evidence that this deed was in fact a mortgage, and that Van Wyck had never paid any taxes or exercised any acts of ownership over the property. The defendant also proved that on June 24, 1882, Frodsham made a deed of all his right, title, and interest in the land to one Jones, for the consideration of $10, and that on July 23, 1883, Jones conveyed the land by a quitclaim deed to the defendant Reed, who was then in possession. Other facts were found by the court below, but none of them strengthen the title of the plaintiff, or affect the decisive issue in the case.

A plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. The defendant in this case has been in possession of the premises in dispute for many years, and the plaintiff was never in possession. The only question, therefore, upon the facts found, is whether or not the plaintiff has established a legal title in itself. The briefs and arguments in this case devote much space and time to a consideration of the legal effect of the evidence relative to the deed from Frodsham to Van Wyck in 1857. Counsel for the plaintiff in error insist that it did not show any outstanding title, and that, at most, it was only a mortgage, which did not convey the legal title. In our view of this case, it is unnecessary to consider any of these questions, and we lay them aside. The case of the railway company cannot be stronger than it would have been if that deed had never been made, and we will consider and dispose of it upon that assumption. We also lay out of the case the deed of 1894, from Frodsham and wife to the plaintiff, because this is a question of title, and that deed could not by any possibility have conveyed any title to the property. If the deed from Frodsham to Davis, in 1858, conveyed the title, it had passed through Davis to the plaintiff long prior to 1894. If the deed to Davis did not convey the title, then it was vested in Frodsham in 1882, and his quitclaim deed of all his right, title, and interest in the land to Jones on June 24th of that year conveyed it to Jones, and it passed through him to the defendant. When this deed was made, in 1894, Frodsham had no title or interest in the property. The title was either in the railway company or in Reed, and no act of attempted ratification or conveyance by Frodsham could affect the title of either. Cook v. Tullis, 18 Wall. 332, and cases cited.

The crucial question in the case, therefore, is whether or not the deed to Davis conveyed the title of Frodsham, and that depends on the sufficiency of the proof that Birkett had a power of attorney from Frodsham to make the deed; for it was not made by Frodsham himself, but by Birkett, as his attorney in fact. The only proof of that power was a certified copy of its record in the office of the register of deeds of Douglas county, Neb., where it appears to have been recorded on May 25, 1858. The competency of this copy depends on the provisions of the statutes of Nebraska, for a lost instrument cannot be proved by a certified copy of its record, in the absence of a statute which expressly authorizes the admission of such evidence. The statutes of Nebraska in force at the time when this power of attorney purports to have been executed and recorded provided that, unless the acknowledgment of such an instrument without the territory of

Nebraska was taken before a commissioner appointed by the governor of the territory for that purpose, it should have attached thereto "a certificate of the clerk or other proper certifying officer of a court of record of the county or district within which it was taken, under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment or proof was at the date thereof such officer as he is therein represented to be, that he is well acquainted with the handwriting of such officer, and that he believes the signature of such officer to be genuine, and that the deed is executed and acknowledged, or proved according to the laws of such state or territory" (Sess. Laws Neb. 1856, p. 241, c. 31, § 5; Laws Neb. 1855, p. 245, § 56); that the certificate of acknowledgment and the certificate provided for by section 5, supra, should be recorded together with the instrument; and that, unless so recorded, neither the record nor the transcript thereof should be received in evidence; and that deeds should not be deemed lawfully recorded unless they had been previously acknowledged or proved in the manner provided in that chapter (Sess. Laws Neb. 1856, c. 31, §§ 14, 17). Section 23 of the same chapter provided that "it shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment or proof thereof if, when the acknowledgment or proof purport to have been taken by an officer having an official seal, there be a statement in the certificate of acknowledgment or proof that the same is made under his hand and seal of office, and the records show by a scroll or otherwise that there was such a seal, which shall be presumptive evidence that the official seal was attached to the original certificate." In 1887 the legislature of the state of Nebraska amended certain sections of their statutes relative to the execution and acknowledgment of deeds, and enacted that "all deeds heretofore executed and acknowledged in accordance with the provisions of this act shall be and are hereby declared to be legal and valid." Laws Neb. 1887, p. 562, c. 61, § 4. The statutes in force at the time of the trial provided that the certificate of the proof or acknowledgment of every instrument affecting real estate, and the certificate of the genuineness of the signature of any officer, in cases where such certificate was required, should be recorded together with the deed so proved or acknowledged, and that, unless the said certificates were so recorded, neither the record of the instrument nor the transcript thereof should be read or received in evidence, but that the record of an instrument duly recorded, or a transcript thereof, might be read in evidence, with the like force and effect as the original instrument, whenever the original was known to be lost, or did not belong to the party wishing to use the same, or was not within his control. Consol. St. Neb. 1891, §§ 4337, 4338.

A glance at these provisions of the statutes is sufficient to show, not only that they fail to authorize the introduction in evidence of a certified copy of the record of the power of attorney in question, but that they expressly prohibit its introduction. Sections 5, 14, 17, c. 31, Laws Neb. 1856. They made the certificate of the proper certifying officer that the person whose name was subscribed to the certificate of acknowledgment was the mayor of Savannah, that his signa-

ture was genuine, and that the power of attorney was executed and acknowledged according to the laws of Missouri, and the record of this certificate with the power of attorney, conditions precedent to the right to record this power at all. They made such a certificate and the record of it prerequisites to the right to record any instrument affecting real estate, which was acknowledged without the territory before any other officer than a commissioner appointed by the governor of Nebraska; and this instrument was not acknowledged before such a commissioner. The power of attorney had no such certificate attached to it. Section 4338, Consol. St. Neb. 1891, which was in force during the trial of this case, provided that the certificate of the genuineness of the signature of an officer, where such certificate was required, should be recorded with the instrument acknowledged, and that, unless it was so recorded, neither the record of the instrument, nor the transcript thereof, should be read or received in evidence. The conclusion is irresistible that the power of attorney was never entitled to record, and that neither the record of it nor the certified copy of that record, which was offered in evidence, constituted any legal proof of its existence. Prentice v. Forwarding Co., 19 U. S. App. 100, 115, 116, 7 C. C. A. 293, 302, and 58 Fed. 437; Morton v. Smith, Fed. Cas. No. 9,867; Lowry v. Harris, 12 Minn. 255 (Gil. 166); O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Greenwood v. Jenswold, 69 Iowa, 53, 28 N. W. 433; Ely v. Wilcox, 20 Wis. 523, 526; Fisher v. Vaughn, 75 Wis. 609, 615, 44 N. W. 831, 833.

It is strenuously argued by counsel for plaintiff in error that section 23 of chapter 31, supra, which provides that it shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment, if there is a statement in the certificate of acknowledgment that it is made under the hand and seal of office of the person who took the acknowledgment, and the records show, by a scroll or otherwise, that there was such a seal, relieves the copy of the record of this power of attorney of the objection we have been considering. But the only effect of that section was to relieve the record of certain instruments affecting real estate from the objection that the official seal of the officer taking the acknowledgment did not appear thereon. It had the effect to relieve the record of the objection that the official seal of the mayor of the city of Savannah did not appear upon the face of the page on which it was recorded. That is not the objection to this evidence which we have been considering. The objection is not that the official seal of the mayor of the city of Savannah does not appear upon the record, but that the certified copy of that record is no evidence, under the statutes, that the power of attorney there recorded ever existed. No number of official seals would relieve the certified copy of this objection, while the certificate of the genuineness of the signature of the mayor, and of the execution and acknowledgment of the power according to the laws of the state of Missouri, was still wanting.

It is also contended that the want of this certificate is cured by the amendment found in section 4 of chapter 61 of the Laws of Nebraska of 1887, to the effect that all deeds theretofore executed and acknowledged, in accordance with the provisions of that act, should be, and