At section 1200 is the statement that possession of a note is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed, and to this are cited Bank v. Mallan, 37 Minn. 404, 34 N. W. 901; Tarbox v. Gorman, 31 Minn. 62, 16 N. W. 466; First Nat. Bank v. Loyhed, 28 Minn. 396, 10 N. W. 421. But these cases were based on a statute so providing.

We are of opinion, however, that in this jurisdiction, under previous decisions of this court and the Court of Appeals, the production of a note by plaintiff at the trial, with an indorsement thereon by one whose name is identical with that of the payee, and purporting to be the indorsement of the payee, is prima facie evidence of title in the holder. 15 Am. & Eng. Enc. Law (2d Ed.) 920. In Wyman v. Bank, 5 Colo. 30, 33, 40 Am. Rep. 133, it was ruled that possession of a promissory note, by one who holds as indorsee imports prima facie that the holder is the owner thereof, and that, when such possession is once shown, the burden of proof is on the one seeking to impeach any of the elements of validity or rights of the holder which such possession implies. To this is cited 1 Daniel on Negotiable Instruments (4th Ed.) § 812. If such was not the law, still, under the doctrine of Davis v. Johnson, 4 Colo. App. 545, 36 Pac. 887, the judgment in this case was right. For it was there held that, under our law and Code of Procedure, a note payable to order may be transferred by delivery only, and without indorsement, so as to vest in the purchaser a complete title, subject, of course, to defenses in favor of the maker existing at the time of notice of the transfer. It is also held that such purchaser can sue in his own name. This case meets with our approval.

As these notes, with what purported to be an indorsement upon them by the payee, were delivered to the plaintiff, he might have altogether disregarded the indorsements or written transfers, and relied on delivery and possession alone. He was entitled to the judgment which the court gave him, for it appears that he had possession of the notes and produced them at the trial, and thereby established prima facie his title thereto. Defendants not having or establishing any defense to the notes at the time they received notice of the alleged transfer, or at any other time, plaintiff's title was sufficiently established below.

The judgment is therefore affirmed. Affirmed.

BOARD OF COM'RS OF LAKE COUNTY v. SCHRADSKY.

(Supreme Court of Colorado. March 2, 1903.)

JUDGMENT—RES JUDICATA—DISMISSAL OF ACTION — EFFECT — PARTIES — ASSIGNEES — ABATEMENT — PENDENCY OF APPEAL IN FEDERAL COURT—EFFECT IN STATE COURT.

1. The dismissal of a suit on negotiable judgment bonds in the federal court for want of jurisdiction, on the ground that the plaintiff was not the absolute assignee of the bonds sued upon, does not operate as a bar to a suit by the assignee on the bonds in the state courts, if his interest in the bonds would entitle him to bring it in such courts in the first instance.

2. An assignee or pledgee of a negotiable bond is the "real party in interest," within the meaning of Mills' Ann. Code, § 3, and may maintain suit upon the same in his own name, irrespective of the nature of his title, or the consideration paid by him for the transfer.

3. The pendency of a writ of error in the Supreme Court of the United States to review a judgment of dismissal for want of jurisdiction entered by the federal Circuit Court, where no supersedeas was granted, does not bar an action in the state courts between the parties for the same cause of action.

Appeal from District Court, Arapahoe County.

Action by Frieda Schradsky against the board of county commissioners of Lake county. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles Cavender and Thomas, Bryant & Lee, for appellant. H. B. Johnson, for appellee.

CAMPBELL, C. J. This is a suit on coupons cut from negotiable judgment bonds issued by Lake county. Both the bonds and coupons are payable to bearer. The answer sets up a number of defenses, only two of which are material upon this appeal. The one is that the plaintiff is not the real party in interest, but that she took the coupons for the sole purpose of enabling her—a nonresident of the state of Colorado—to bring suit upon the same in the United States Circuit Court for the District of Colorado, and therefore she cannot maintain an action in the state courts. The other is that there is a former suit pending between the same parties on the same cause of action.

1. To establish the first defense, the defendant offered the same evidence given in a former action on the same coupons between the same parties in the Circuit Court of the United States for the District of Colorado, tending to show that, while the plaintiff held them under a bill of sale absolute on its face, as a matter of fact the transaction was not a sale, but virtually a loan—the plaintiff paying at the time of delivery of the coupons, which amounted to more than $7,000, less than $1,000, and various other sums from time to time thereafter and down to the beginning of this action—and that the agreement and understanding was that upon the conclusion of the suit and the recovery of judgment the amount collected was to be paid over to the real owner, the assignor or pledgor, less what money had been paid to him prior to that time by the assignee or pledgee, with interest at 1 per cent. a month. In the former suit to which reference is made in this offer, namely, Board of Com'rs of Lake Co. v. Schradsky, 38 C. C. A. 17,

¶ 2. See Bonds, vol. 8, Cent. Dig. § 97.

97 Fed. 1, the United States Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the Circuit Court of the United States for the District of Colorado in plaintiff's favor, upon the ground that the evidence before the latter court was at least sufficient to go to the jury to sustain the claim made by defendant that the coupons in suit were in fact owned by a citizen of the same state with the defendant municipal corporation, the maker of the bonds, and that the alleged transfer to plaintiff was merely colorable, and for the purpose of enabling suit to be brought in the United States court, and, as such, a fraud on its jurisdiction, and that the lower court should have dismissed the suit as collusive, or, if not fully satisfied thereof, should have granted defendant's request to submit that issue to the jury under proper instructions. The circuit court at the second trial dismissed the action for lack of jurisdiction. As we understand the argument of appellant, it is that since the federal court, upon this evidence in the action before it, found that the transfer of the coupons to the plaintiff was merely colorable, or that plaintiff was not the absolute owner, or that the evidence at least tended to make a case for the jury upon that issue, and so dismissed the action for want of jurisdiction, it follows that plaintiff cannot sue in the state court. For, they say, if plaintiff was not the real owner when she brought suit in the federal court, she is not now, and, if that fact prevented her maintaining that suit it has the same effect here. This conclusion is not tenable. And it is not true that plaintiff is not "the real party in interest," in the sense in which those words are used in section 3 of Mills' Ann. Code. If the federal court did not have jurisdiction over the subject-matter of the suit, neither its finding that the transfer was collusive, nor its judgment of dismissal for want of jurisdiction, operates to extinguish plaintiff's right of property in these coupons, or prevents her from bringing suit in the state court to enforce their collection; and that, too, even though she is only a pledgee A judgment of dismissal of a suit for want of jurisdiction of the subject-matter is not res adjudicata of the cause of action. Under the uniform construction of the act of Congress which is the source of the jurisdiction of the federal Circuit Courts, unless a transfer or sale of a cause of action to a nonresident is absolute, and the assignor has parted with all interest therein, the assignee may not maintain an action thereon in such Circuit Court against a citizen of a different state. If the sale be absolute, the motive of the transfer cannot be investigated. If colorable or fictitious, or if the assignor retain some interest therein, upon such fact being established the court proceeds no further, but dismisses the action. Such dismissal, however, has no bearing upon the right of a plaintiff to sue in the state courts if his interest in the cause of action, even though not absolute, would, under the local laws, entitle him to maintain it therein in the first instance, though such right to invoke the jurisdiction of the federal court is lacking. And the fact that the federal court has dismissed a suit because the interest or title of the plaintiff assignee is not absolute is not a bar to a subsequent suit in the court of the state where the defendant resides.

The bill of sale under which plaintiff holds was absolute on its face, and she had possession of the coupons, which were payable to bearer, and brought them into court in this action, and surrendered them for cancellation. The offer of proof in support of this defense, as made by counsel themselves, was that the transaction between plaintiff and Gen. Johnson—the former owner, and, as they say, still "the real owner," of the coupons, was virtually a loan. If that is true—and for the purposes of this case we may assume that it is—plaintiff unquestionably has the right to maintain the action. An assignee or pledgee of a negotiable instrument may maintain suit upon the same, and in the courts of this state it is not a proper subject of inquiry by the maker, when such suit is brought, that no consideration therefor was paid, or that the pledgee's title is not absolute and unconditional. The maker is protected by the judgment against him from further suit by the pledgor or assignor Bassett v. Inman, 7 Colo. 270, 3 Pac. 383; Moulton v. McLean, 5 Colo. App. 454, 39 Pac. 78; Walsh v. Allen, 6 Colo. App. 302, 40 Pac. 473; Robinson Reduction Co. v. Johnson, 10 Colo. App. 135, 50 Pac. 215; Gumaer et al. v. Sowers, 71 Pac. 1103. In 18 Amer. & Eng. Law (1st Ed.) 681, 682, and in the twenty-second volume of the second edition, page 894 et seq., a number of authorities are collected which sustain the text, which declares that when a negotiable instrument, either before or after maturity, is transferred and delivered to a creditor as collateral security, the control thereof passes to the pledgee, and it is his right and duty to enforce payment when the same falls due, though the pledgor's debt to the pledgee, for which the latter holds the security, is less than the amount of the collateral. It is also held that such pledgee is the legal holder, has the legal title, and therefore is "the real party in interest," and may bring suit upon it in his own name. For additional authorities, see 14 Enc. Pl. & Pr. 435, 436. This offer of proof was properly refused, as, even if it abundantly established the ultimate fact alleged, that the transfer was a loan, it would be no defense to the action.

Counsel cite the case of Wonderly v. Lafayette County, 150 Mo. 635, 648, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. Rep. 474, to the proposition that, where a judgment has been obtained in a federal court as the

result of a fraud practiced upon its jurisdiction, a bill of equity will lie in the proper state court to set it aside because of the commission of such fraud. With due respect to counsel, we do not see what bearing that decision has upon the case here. In the opinion of the Supreme Court of Missouri it is expressly stated that the plaintiff in the action in the federal court never owned the bonds in suit; that the true ownership was known only to him and the true owner, and they fraudulently concealed this fact from the defendant, and prevented him from making that defense thereon, as well as another meritorious defense which he had. Not having any interest whatever in the bonds, such plaintiff could not sue even in the state court. But as we have already seen, the plaintiff in this action had the right to institute an action in the state court, though the federal court was closed to her.

2. As heretofore indicated, upon the remanding of the cause by the Circuit Court of Appeals to the Circuit Court for a new trial, the latter tribunal, after hearing evidence in behalf of the plaintiff, upon defendant's motion, dismissed the action solely upon the ground that it had no jurisdiction of the cause. From this judgment of dismissal the plaintiff there (who is the plaintiff in the action here) sued out a writ of error in the Supreme Court of the United States to the judgment of the Circuit Court to review its judgment of dismissal. No supersedeas was granted. The defendant contends that, while this writ of error is pending in the Supreme Court of the United States, further proceedings herein should be suspended. The rule which counsel has in mind has been enforced where two suits are pending in the same jurisdiction, but the great weight of authority, both in the federal and state courts, is that pendency of a prior action in one jurisdiction is not a bar to a subsequent action in another, even though the two suits are upon the same cause of action and between the same parties. Some of the authorities directly in point are Defiance Water Co. v. City of Defiance (C. C.) 100 Fed. 178; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Allen v. Watt, 69 Ill. 655; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383. In McJilton v. Love, supra, it was held that the pendency of a writ of error cannot be pleaded in abatement of another action in the same state unless the writ of error operates as a supersedeas, and not even then if the writ of error was sued out after the commencement of the second action.

Neither of the defenses upon which the appellant relies upon this appeal is good, and the judgment of the district court in favor of the plaintiff upon the causes of action set up in the complaint was right. It is therefore affirmed. Affirmed.

BOARD OF COM'RS OF LAKE COUNTY v. JOHNSON.

(Supreme Court of Colorado. March 2, 1903.)

JUDGMENT—RES JUDICATA—DEFENSES NOT PLEADED.

1. Where a judgment established the validity of bonds in suit against an attack for fraud, a subsequent action by a holder of coupons detached from such bonds could not be defended on the ground that plaintiff was not a bona fide purchaser of the coupons, notwithstanding the fact that such defense was not pleaded in the former suit.

Appeal from District Court, Lake County.

Action by Adaline P. Johnson against the board of county commissioners of Lake county. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles Cavender and Thomas, Bryant & Lee, for appellant. H. B. Johnson, for appellee.

CAMPBELL, C. J. This is an action upon coupons detached from judgment bonds of Lake county, both the bond and coupons being payable to bearer. In some of its aspects the case is like that of Board of County Com'rs v. Schradsky, 71 Pac. 1104. The question here argued arises out of the action of the court in sustaining plaintiff's demurrer to the third defense of the answer, the substance of which is that the judgment, in payment of which the bonds in question were issued, is void, and that, to the knowledge of the owner of the coupons, all the proceedings leading up to the judgment were fraudulently instituted and prosecuted.

The coupons in suit were cut from one of the bonds involved in Board of Com'rs v. Platt, 25 C. C. A. 87, 79 Fed. 567, and the same fraud here pleaded was interposed as a defense there, and held not good. Counsel for appellee concede that that decision is against their present position, but endeavor to draw a distinction in this: that the facts which they have set up in this defense are different from those formerly alleged; that the pleading here was drawn after the judgment there, and in the light of the opinion of the learned Court of Appeals, they have endeavored to avoid the imperfections which were there pointed out. The only alleged material difference in the facts to which our attention is called is that it is averred here that the plaintiff is not a bona fide holder of the coupons, but that H. B. Johnson, her attorney, is the real owner, and was cognizant of all the illegal steps taken in the procurement of the judgment and the issue of the bonds. If such allegation makes a different defense, still it cannot be interposed here; for, in the action on the bonds from which these coupons are cut, the judgment rendered established the liability of defendant on them, and necessarily made it liable on the coupons. And if this defense was not pleaded in the action on the bonds, it might have