SLEEPY CYCLISTS GRIND ON

Gimm in the Lead of Six-Day Race at San Francisco.

HAPPILY NONE IS YET IN BUG HOUSE STATE

Thirteen Riders Are Still in the Race and Bid Fair to Pull Through in Good Shape—Pierce Recovers.

SAN FRANCISCO, Feb. 16.—One by one the riders are passing the bad spells which every rider is bound to find in a six-day grind. Thirteen riders still remain in the international six-day race and these are due to finish the race now that the third day is practically completed. Few riders ever quit at this time. Positions have become more settled and the distances between the riders place the positions of each more clearly, as changes come less seldom than was the case when the riders presented a fresher appearance.

Today an inspector went out from the city to take up his quarters in the training quarters and watched the men as they came from the track. He talked with the trainers one by one and found that not a rider on the track was in that condition known as "bughouse" in the vernacular of the track.

Sleepy they are, undoubtedly, and in that condition likely to give the impression of having reached the "daffy" stage. But a little rest, which is prescribed by the referee, soon places the man right again.

Round and round the eight lap highly-banked track the thirteen men followed each other today. At times the riders would sprint, but the greater part of the work was steady wearing to it. Incidents were not so numerous and surprises were few and far between.

In the sixty-third hour, when twenty-four miles to the good of Miller, Louis Gimm, the leader, left the track for a rub. "I only want a rub," said he, "for my business this week is 'cycle riding and not sleeping."

Fell Asleep on Rubbing Table.

But he fell asleep while they were rubbing him and a smile was on his face as for fifty minutes he enjoyed the bliss of forgetfulness. Waked again, when Miller was but seven laps to the good, he rose quickly and, with no knowledge of the time he had been from the track, ran out again to the circle where lay money and glory for him. Gimm at once took the initiative and started a galling gait for Miller. The Chicagoan tired of following and tried to run away. Gimm trailed, the game he has worked so persistently since the start of the race. Miller glanced around apprehensively and when Pierce, in the sixty-seventh hour, started sprinting for lay after lap Gimm trailed the Bostonian and Miller had another hard chase. Then Miller left the track and in his dressing room he said that team work was being done against him. He was a victim of vivid imagination, as Pierce was guilty only of good riding and Gimm of following the pace. The recovery of Pierce came as a surprise to many who had thought him out of the race.

Aaronson also did some good work. Nawn quit again and again and at times walked across the track center watching the other competitors.

Trainer Elkes calls Nawn and Barnaby his babes in the woods because they are so often lost. Yet both do some brilliant sprinting at times and Barnaby does much whistling as he worries through the hours. Fredericks is staying and gaining form. The score at 5:47, the sixty-seventh hour, was as follows, the previous record being 1,092 miles, 727 yards, made by Miller in 1897 at Madison Square garden, New York:

	Miles.	Laps.
Gimm	1,183	7
Miller	1,171	3
Fredericks	1,125	7
Aaronson	1,123	2
Hale	1,092	3
Pierce	1,082	7
Nawn	1,076	6
Albert	1,065	7
Barnaby	1,035	5
Pilkington	998	—
Lawson	975	2
Ashinger	925	3
Julius	895	7

ROOT AND STIFT AT DAVENPORT.

Former Man Wins on a Foul in the Seventh Round.

DAVENPORT, Ia., Feb. 16.—Jack Root and Billy Stift of Chicago battled here this evening before 1,200 spectators for the middleweight championship of the northwest. The fight was scheduled for twenty rounds.

It was a fierce one from the start, Root, in the first round, opening a big cut above his opponent's left eye and nagging him at long range throughout six rounds. Stift relied fiercely on fierce rushes and striking his opponent in clinches, which was allowed under the conditions of the fight. In the seventh round Root still had the better of the fight. He went down on one knee in a rush before Stift was struck by the latter when down and Referee Malacy Hogan gave the fight to Root on a foul.

Tommy Ryan challenged the winner and has been accepted for twenty-five rounds under the auspices of the Davenport club.

Crabill Defeats Roberts.

Following upon his defeat of Burke a few weeks ago, Frank Crabill of Missouri Valley Thursday afternoon won out from Roberts of this city in a 100 live bird race at the grounds of the Omaha Gun club over the river. The two men shot for a side bet of $100 and the Missouri Valley man won by a margin of two birds, the score being 92 to 90. The match was an interesting one and was witnessed by a good crowd of shooters and a number of women. The score was as follows:

Crabill	22222	22221	21202	20022	22021
	22222	22122	22121	22112	21222
	22222	21112	22222	01222	22212
	22212	02222	22212	12002	22222—92
Roberts	22221	1*220	22211	01112	11211
	01111	12111	12121	12212	21211
	11012	12112	12111	01222	21122
	11222	02222	01201	21201	21112—90

*Killed out of bounds.

Winners at New Orleans.

NEW ORLEANS, Feb. 16.—Racing was resumed this afternoon at the Crescent City Jockey club track, all evidences of the blizzard which prevailed early in the week having disappeared. The weather was cloudy and still quite cool and the track muddy. Father Bill Daly had the honor of landing the only favorite, Sensational. Results:

First race, six furlongs: Sensational won, Molo second, Lady Callahan third. Time: 1:20.

Second race, six furlongs: Uhlers won, Fox second, Tendress third. Time: 1:20½.

Third race, selling, one and three-sixteenths miles: Pete Kitchen won, School Girl second, Joe Shelby third. Time: 2:14.

Fourth race, handicap, seven furlongs: Hobart won, Boanerges second, Double Dummy third. Time: 1:35.

McCoy and Choynski Matched.

SAN FRANCISCO, Feb. 16.—The representatives of Kid McCoy and Joe Choynski today signed articles for a glove contest on March 24, under the auspices of the National club. Sporting men are much interested in the coming event and the fighters will go into training at once.

Sale of Zinc Smelters.

ST. LOUIS, Feb. 16.—A special to the Post-Dispatch from Joplin, Mo., says: At Iola, Kan., the center of the natural gas belt of Kansas, a deal will be closed this week, probably today, by which the big zinc smelters of W. & J. L. Lanyon and of Robert Lanyon's Sons will be sold to the Palmyra Oil company, which is the Kansas branch of the Standard Oil company. The consideration will not be less than $2,000,000 cash. These are the largest natural gas smelters in the world.

Merchant Tailors Elect Officers.

DETROIT, Feb. 16.—The Merchant Tailors' National exchange wound up its fourteenth annual convention today with the election of officers and a banquet. The election resulted as follows: President, W. E. Jones, Boston; first vice president, J. S. Jennings, Detroit; second vice president, F. C. Ebel, Richmond, Va.; secretary, Fred W. Croft, Chicago; treasurer, R. C. Nothdurn, Milwaukee. The next meeting will be held at Louisville February 8, 1900.

ROW OF NAVAL MILITIAMEN

Chicago's Brave Young Men Squabble Among Themselves and Indulge in a Fight.

CHICAGO, Feb. 16.—For two years there has been strong feeling among factions in the Illinois naval militia, which has led to its disbandment and innumerable equabbles.

Tonight it resulted in a lively fight, during which the windows and glass doors of the armory were smashed, heads broken and blood spilled. During the evening a detachment of the old reserves held a meeting at a downtown hotel and after they had finished their business they adjourned to the armory to see their successors drill. The drill did not meet with the entire approval of the old men and contemptous remarks by the latter started the trouble. Canes, fists and anything that came handy were used as weapons and while none on either side was seriously hurt there were any number of bloody noses, torn garments and blackened eyes when the fracas was over.

M'KINLEY GUEST OF BOSTON

(Continued from First Page.)

trust them; I know of no better or safer human tribunal than the people. Until congress shall direct otherwise it will be the duty of the executive to possess and hold the Philippines, giving to the people thereof peace and beneficent government, affording them every opportunity to prosecute their lawful pursuits, encouraging them in thrift and industry, making them feel and know we are their friends, not their enemies; that their good is our aim; that their welfare is our welfare, but that neither their aspirations nor ours can be realized until our authority is acknowledged and unquestioned.

No Designs of Imperialism.

That the inhabitants of the Philippines will be benefited by this republic is my unshaken belief; that they will have a kindlier government under our guidance and that they will be aided in every possible way to be self-respecting and self-governing people is as true as that the American people love liberty and have an abiding faith in their own government and their own institutions.

No imperial designs lurk in the American mind. They are alien to American sentiment, thought and purpose. Our priceless principles undergo no change under a tropical sun. They go with the flat:

"Why read ye not the changeless truth,
The free can conquer but to save?"

If we can benefit these remote peoples who will object? If, in the remote years they are established in government, under love and liberty, who will regret our perils and sacrifices? Who will not rejoice in our heroism and humanity? Always perils and always after them safety; always darkness and clouds, but always shining through them the light and the sunshine; always cost and sacrifice, but after them the fruition of liberty, education and civilization.

Must Look into Far Future.

I have no light or knowledge not common to my countrymen. I do not prophesy. The present is all-absorbing to me, but I cannot bound my vision by the bloodstained trenches around Manila, where every red drop, whether from the veins of an American soldier or a misguided Filipino, is anguish to my heart, but by the broad range of future years, when that group of islands under the impulse of the year just past shall have become the gems and glories of those tropical seas, a land of plenty and of increasing possibilities, a people redeemed from savage indolence and habits, devoted to the arts of peace, in touch with the commerce and trade of all nations, enjoying the blessings of freedom, of civil and religious liberty, of education and of homes, whose children of children's children shall forever bless the American republic because it emancipated and redeemed their fatherland and set them in the pathway of the world's best civilization.

Postmaster General Smith, the next speaker, began with a eulogy of the president and then entered upon a summary of the work accomplished by the administration in the revision of the tariff, the restoration of business confidence and the reuniting of the north and south. He was followed by Secretary of the Navy Long in a witty address in which he frequently referred to Massachusetts and its sons.

SNOWING HEAVILY AT ASPEN

Mountain Trails Blocked with Slides and Snow—Ashcroft Miners Snowbound.

ASPEN, Colo., Feb. 16.—It has been snowing for the last thirty-six hours here and conditions surrounding the camp are further complicated. While railroad traffic has been partially resumed the mountain trails to the outlying camps are about all blocked by immense slides of snow drifted many feet. At Independence about a dozen people are still hemmed in with two teams and the problem of their getting out is becoming more difficult every day. The miners at Ashcroft have not been heard from for a month and friends here are greatly concerned about their safety. The snowfall in the camp has been the heaviest in fifteen years.

FORTY THOUSAND EMBEZZLED

Ex-Treasurer of Vernon County, Missouri, Arrested and Put Under Heavy Bonds.

NEVADA, Mo., Feb. 16.—Frank Parker, ex-county treasurer of Vernon county, was arrested today on the charge of the embezzlement of $40,000. He was taken before Judge Coil and his bond fixed at $20,000, which he has not yet given. Mr. Parker says he expects to make a full settlement March 1.

No Choice for Senator.

HARRISBURG, Pa., Feb. 16.—The twenty-sixth ballot for United States senator today: Quay, 97; Jenks, 74; Dalzell, 15; Stone, 56; Stewart, 6; Irwin, 6; Huff, 5; Tubbs, 2; Markle, 1; Widener, 2; Riter, 2; Rice, 2; Grow, 1; necessary to choice, 110; absent and paired, 33.

DOVER, Del., Feb. 16.—The vote for United States senator today resulted: Addicks, republican, 14; Chandler, republican, 7; Gray, 1; no quorum. The democrats remained out of the joint convention to prevent the possible election of Addicks.

SALT LAKE, Feb. 16.—Six senatorial ballots were taken today, the result of the last ballot being: King, democrat, 7; McCune, democrat, 26; Powers, democrat, 3; R. P. Thomas, democrat, 1; B. F. Cook, democrat, 1; Cannon, 11; Sutherland, republican, 13; absent, 1.

Conference on Tariff Rates.

WASHINGTON, Feb. 16.—A conference was held here today between the Interstate Commerce commission and the presidents or other principal officers of the great railway trunk lines over the rate situation. There were about twenty officials present. Since then there have been conferences between the railroad authorities themselves and today they reported in the main a generally satisfactory understanding. No road, it was understood, had broken this informal agreement for uniform tariffs.

LOCAL BREVITIES.

Albert Dewey, a teamster residing at 1520 North Fifteenth avenue, was arrested last evening charged with abusing his family. He was intoxicated and attempted to throw his wife and children out of doors.

Ed Tuttle, locally known as the "Mayor of Sheeley," was taken into custody by the police last night for disturbing the peace. He was pounding the doors of houses in the neighborhood of Eighteenth and Leavenworth streets.

William Burns, an employe of the smelting works, was found on the streets last night insane. Burns was laboring under the impression that a woman hired to kill him was dogging his footsteps. He begged the police to protect him and as he refused to return to his room he was locked up until morning, when he will be sent to appear before the insanity commissioners.

FAVORS A TRADE ALLIANCE

Lord Beresford of England Upon the Chinese Question.

METHODS FOR SECURING DESIRED RESULT

United States, Great Britian, Germany and Japan Should Work for Open Ports Where All Can Trade on Equal Terms.

Lord Charles Beresford is a great big handsome Englishman and a titled foreigner who spent a brief period in the city Thursday evening, enroute to Chicago from San Francisco. He is returning home after a three months' visit to China in the interest of the trade alliance which contemplates a friendly arrangement between the United States, Great Britain, Germany and Japan, which has for its object the maintenance of the integrity of the Chinese empire and the extension of the commerce of those nations in that section of the Orient.

In September last Lord Beresford went to China as the official representative of the various chambers of commerce throughout the United Kingdom to make definite inquiries and report upon the best method of contributing to this alliance. Incidentally his lordship was instructed to ascertain while passing through the United States what the sentiment of the nation is on the alliance subject.

Is a Diplomat.

This distinguished gentleman is a trained diplomat and in spite of the fact that he holds all sorts of titles under her majesty's government, among which is that of admiral of the navy, which he won in the heat of battle, he is the most democratic of good fellows. He is a member of Parliament and expresses considerable anxiety to get home to participate in the sittings of that body.

The Bee representative went out on the Union Pacific and came in with Lord Beresford. The gentleman occupied a drawing room of palatial appointments in one of the new sleepers which that company is operating in connection with its Overland Limited trains. He was accompanied by his private secretary, Robin Grey. He talked at length on the subject of his investigation and asserted that he believed the plan of the alliance for trade purpose of Germany, Great Britain, the United States and Japan is not only quite feasable, but a very desirable thing for all concerned.

In discussing the subject his lordship became quite enthusiastic. "You see," he remarked with a broad English accent and the kindliest expression imaginable upon his face," the nations mentioned are the only ones having any trade relations with China. France and Russia want territory, for they have no trade and nothing to gain by any trade considerations, but of course they cannot oppose with force such an aggregation as the powers mentioned. At present England has about $185,000,000 of trade annually with China, Germany follows with $45,000,000, the United States with $35,000,000, while little Japan has $20,000,000. Now this can be increased an hundredfold by the plan the trade unions of the United Kingdom have in view and yet China be the gainer in every respect. At present it is a game of grab and the Chinese empire cannot survive the present plan long. Then, too, the peace of the world is threatened, whereas on the plan of the chambers of commerce, the peace of the world will be secure, the integrity of the greatest empire of the Orient will be guaranteed and all the vast territory be thrown open to trade.

Open Ports Are Wanted.

"At present, of course, each nation has a so-called 'sphere of influence' and in that zone they are supreme and all kinds of conflicting duties are levied. What we trading nations want are open ports where all nations can trade on equal terms. The partition of China among the powers is inevitable if some such solution is not offered soon. In my investigation I visited thirty-one of the prominent ports of China and practically covered all the southern provinces, therefore I am well informed on the subject. Of course China must have revenue and the open ports will afford this. Then when her army and navy are reorganized and officered by representatives of the civilized nations the country will soon bloom like the Garden of Eden. I find much sentiment in this country in favor of this plan. We do not want an alliance, defensive and offensive, such as will give cause for hard feeling on the part of other nations, but merely a friendly understanding.

While his lordship was talking the train was making tremendous speed. The flyer was late and from North Platte to Omaha the long train was being pulled along at the rate of a mile a minute and better. Between Grand Island and North Platte, 135 miles, but 130 minutes were consumed and frequently the train made eighty miles an hour. When Lord Beresford was told what swift time he was making he was amazed.

"Why I never saw anything like it. And then, too, this dining car system, it is grand. The appointments of this train are a constant source of surprise to me. Why, I can write, drink my coffee and be traveling nearly two miles a minute and the flying train scarcely making a single jolt. I have heard a great deal of the Union Pacific, its engineering miracles, etc., but the palatial trains and their wonderful speed are sufficiently interesting to attract all my attention."

When Lord Beresford reaches home he will have traveled 33,000 miles since starting on his investigation.

Music for the Children.

Miss Marie Reuf Hofer of Chicago gave two lectures in the Young Women's Christian association rooms Thursday under the auspices of the Omaha Mothers' club and she will complete her series by giving two more today, one this afternoon and one this evening. Both of the lectures yesterday were largely composed of women. Miss Hofer's lectures bear upon the use of music in the early education of children. She seeks to impress the importance of having children express themselves understandingly in music. Her ideas are another branch of modern methods in kindergarten teaching. She would do away entirely with songs which the children cannot understand and in their place use familiar melodies to which simple sentences have been arranged, thereby interesting the children and inducing them naturally to enter into the spirit of the words and to express their feelings by the manner of their song. She gave examples by singing dancing songs and others which are easy for the young to learn, yet carrying an object lesson.

Runaway Boy Found.

A 9-year-old boy giving his name as Fred McFarland was found by the police last night wandering about the streets in the neighborhood of Sixteenth and Chicago streets. When taken to the station the little fellow said that his home was in Fremont and that he had come to the city from that place during the day, having made the trip in a farmer's wagon. The farmer, the lad said, had abandoned him about supper time and had started to return to Fremont. The story was believed by the police and the boy was given a warm bed in the matron's room. When search was made for his friends it developed that the lad is Freddie Lynn, who ran away from his home, 3423 Mason street, Tuesday afternoon to escape a whipping. His father was notified and Freddie was taken home. He would not tell where he has been since Tuesday.

Close of Revival Meeting.

Rev. Merton Smith will preach his last sermon tonight at the First United Presbyterian church. The meetings have been well attended and much good has been accomplished. A number of persons have been led to God and the membership has been greatly revived. Mr. Smith goes on Saturday to Iowa, where he will hold meetings at Winthrop and later at Fort Wayne, Ind. The evangelist's afternoon talks on prophecy have been greatly enjoyed.

Fight with Detectives.

Detectives Havey and Jorgensen had a fierce encounter under the Tenth street viaduct last night with two sneak thieves, who attempted to lay them out. By good use of their clubs the officers came out victorious, but when they reached the police station with the prisoners they carried nearly as many marks of the fray as the men they took into custody. Frank Lewis and Charles Galvin are the men arrested.

Sale of South Park Line.

DENVER, Colo., Feb. 16.—The sale of the South Park line to the organizers of the Colorado & Southern was approved by J. G. Hallett of the United States circuit court today. Notice of a contest of that action was filed by Wells H. Hendershot, attorney for Mrs. Helen M. Kerr, who claims the land on which Kenosha station is located.

For the Care of Confederate Graves.

WASHINGTON, Feb. 16.—Representative Bland of Missouri toady introduced a resolution providing that the government should take immediate steps to care for the graves of confederate dead in accordance with the suggestion of President McKinley.

Collapse of Stable Kills Two Men.

WASHINGTON, Feb. 16.—By the collapse of the roof of the Ebbitt house livery stable today Clarence Gross and Joseph Hill, drivers, were killed. Five others were slightly injured.

IGNORANCE OF THE FILIPINOS.

Missouri Soldier Describes the Barbarity of Their Methods.

MARYVILLE, Mo., Feb. 15.—(Special.)—Harry H. Kerr, a Maryville young man who is a member of Company L, Third United States artillery, now in the Philippines, forecasted with remarkable accuracy the events of the last few days there in a letter written January 2, which has just been received here. After describing at some length Aguinaldo's advisers, their aims and characters, he said:

"In this sketch of Aguinaldo's generals and intimate associates I have tried not to be prejudiced against the insurgent leaders, but my conclusions are that many of them are greatly in need of education. Most of them are honest, many are rascals of the worst type and all need to learn much of the art and science of war. If they are ever engaged in deadly conflict they will be found wanting in the commonest class of military movements and will have their followers slaughtered like sheep in a butcher pen. All they know about war is what they have learned in resisting the Spanish, and that war was nothing but guerrilla warfare of the most barbarous sort. To come out and meet a foe on an open battlefield would be a new experience to them, and after they have had a taste of it they will not be inclined to face the music again. After one or two brushes with the American soldiers I think they will take to the woods, and conduct a guerrilla warfare. If they do we will have a hard and dangerous time fighting them."

SUPREME COURT SYLLABI.

No. 10483, Bailey against State. Reversed and dismissed. Error from Douglas county. Ragan, C.

1. A woman not "previously unchaste" within the meaning of section 12, chapter iv, of the Criminal Code, is one who has never had unlawful sexual intercourse with a male prior to the intercourse with which the prisoner stands indicted.

2. The object of the statute is to protect the virtuous maidens of the commonwealth; to protect those girls who are undefiled virgins; and a female under 18 years of age and over 15 years of age who has been guilty of unlawful intercourse with a male is not within the act.

3. The gist of the crime denounced by this statute is the defilement of a virgin with her consent over 15 and under 18 years of age by a man over 18 years of age.

4. The prisoner was indicted for rape under the statute for having in Nebraska had sexual intercourse with her consent with a girl over 15 and under 18 years of age and not "previously unchaste." The evidence showed that the female after she was 15 years of age and before her sexual intercourse with the prisoner in Nebraska had had illicit sexual intercourse for the first time with him in the state of Iowa and that she had sustained such relations with no other man than the prisoner. Held: That the evidence would not sustain a conviction.

5. In such an indictment may be included all acts of unlawful sexual intercourse which occurred between the prisoner and the prosecutrix in the state of Nebraska after the female became 15 years of age and which were not barred by the statute of limitations.

6. The state in a criminal prosecution may not invoke against the prisoner the doctrine of estoppel.

7. To sustain a criminal conviction it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law.

No. 10322. State against Kennard. Reversed. Error from Lancaster county. Ragan, C.

1. At the time of the admission into the union of the state of Nebraska the lands therein occupied in common by the Pawnee Indians and known as the "Pawnee Indian reservation" were public lands within the meaning of section 12 of the act of congress known as the enabling act. (13 United States statutes at large, 47.)

2. The fee simple title to said lands at said time was in the United States, encumbered only with the right of said Indians to occupy the same.

3. By section 12 of said enabling act congress granted to the state of Nebraska 5 per cent of the proceeds arising from the sale of said lands, which took effect upon the extinguishment of the Indian's right of occupancy and the sale of the lands by the United States.

4. State against Kennard, 55 Neb. Reaffirmed.

8705. Smith against Neufeld. Reversed. Appeal from Hamilton county. Ryan, C.

1. Equitable relief may be granted for the removal from a homestead of the apparent lien of a judgment on the theory that such lien, though only apparent, is a cloud upon the owner's title.

2. A general demurrer was improperly sustained to a petition wherein were allegations that plaintiff had succeeded to the homestead rights of his grantor and that such rights were within the statutory limits defining homestead exemptions, though such homestead rights were asserted with reference to but a portion of an entire 320 acre tract; and the prayer of the petition was for equitable relief as against the apparent liens of certain described ordinary judgments which had been rendered against the said grantor while he was entitled, as owner of the land, to the statutory homestead exemption invoked by plaintiff.

8714. Moseley against Chicago, Burlington & Quincy Railroad Company. Reversed. Appeal from Lancaster county. Sullivan, J.

1. The agreed consideration for the grant of a right-of-way, is conclusively presumed to include the value of the land conveyed and all damages to the grantor's adjacent land resulting from the non-negligent construction and operation of the road.

2. Where the part of the consideration for a right-of-way deed is the promise of a railroad company to construct and operate a line of road over the grantor's land, the failure of the company to perform its agreement does not entitle the grantor to a cancellation of the deed.

3. The remedy in such case is by an action at law to recover the damages resulting to the grantor from the company's failure to perform its contract.

4. Where a plaintiff has mistaken his remedy, but is apparently entitled to some relief, the cause may be remanded with directions to the trial court to permit a reformation of the issues.

No. 8611, Stuart against Bank of Staplehurst; No. 8612, Stuart against Bailey; No. 8613, Stuart against Holt; No. 8614, Stuart against Jones National Bank; No. 8615, Stuart against Utica Bank. Affirmed. Error from Seward county. Harrison, C. J.

1. In an action in a state court wherein a removal to a United States court is sought under the provisions of section 2 of the act of congress of March 3, 1887, as corrected in 1888 (see 25 United States Statutes at Large, 433), and it appears from the face of the record that the suit is not a removable one, the application does not deprive the state court of its jurisdiction.

2. The better practice in such a case is, upon a proper application in the state court for removal to the federal court, for the state court to suspend proceedings in the suit and await the action of the federal tribunal on a motion to remand, but its action during the interim may be of force and valid.

3. Directors of a national bank, who in simulated performance of the duties prescribed by the law applicable to such an institution relative to the preparation and publications of advertisements, statements and reports, knowingly make and publish false statements and reports of the financial condition of the bank with intent to deceive, and such matters are believed and acted upon by parties to their damage, are liable for the damages in an action for the deceit.

4. The liabilities which are fixed in the national banking law for violation of its provisions are not exclusive and do not preclude the action for deceit.

5. The petition in the case at bar held to state a cause of action for deceit and not for relief under the national banking law and to present no federal question for adjudication.

6. The statements and reports which are required and are made to the comptroller and published in the newspapers have among their purposes that of conveyance of information to those persons each or all who contemplate dealings with the bank in which its financial condition enters as a vital matter.

7. A petition in an action for a tort which joins several parties as defendants, if it states a joint act and relative to a tort which may from its nature be joint or committed by persons in combination, is not open to attack by demurrer on the ground of misjoinder of parties defendant.

8. Questions of which there is no assignment in the petition in error will not be considered on review.

8696. Luse against Rankin. Reversed. Appeal from Blaine county. Sullivan, J.

1. A judgment rendered against a party upon whom process has not been served and who has not submitted to the jurisdiction of the court is unauthorized and void.

2. When the state accepts a statutory application for a lease of school lands and issues its receipt in due form for an installment of rent paid by the applicant, antecedent conditions being performed, a binding and enforceable contract is created.

3. One who has occupied and improved school lands of the state, waives his right to compensation for the improvements by electing to remove them.

8685. New Hampshire Trust Company against Kersmeyer Plumbing and Heating Company. Affirmed. Error from Lancaster county. Irvine, C.

1. A judgment in an action tried to the court without a jury will not be reversed for the admission of improper evidence, provided there be sufficient proper evidence to sustain the finding.

2. To render admissible in evidence a letter purportingly an answer to another, it is not necessary to also offer that which it answers provided the letter offered be in itself fairly self-explanatory.

3. Evidence held to sustain the finding of the district court.

8851. O'Neill against Clark. Reversed. Error from Douglas county. Irvine, C.

If an irregularity in the manner of administering an oath to a witness be known at the time, objection must then be made, or it will be waived.

2. Under the statute relating to arbitrations, the arbitrators must in their award state separately their findings of fact and conclusions of law; but this requirement is met if the finding is as certain as is required of the verdict of a jury.

3. A single cauce of action having been submitted to arbitration, an award wherein the arbitrators "find for the plaintiff, assess her damages" at a sum named and "award" her that sum is a sufficient separate finding of facts and of law.

4. A submission to arbitration provided for three arbitrators, that the award might be made by any two and that the award would be binding, it also provided that the award should be in writing signed by the three arbitrators named. Held, that the last provision should not be so construed as to nullify that for an award by two, but that it meant that the award must be signed by those of the arbitrators concurring therein.

8689. Missouri, Kansas & Texas Trust Company against Richardson. Reversed. Appeal from Lancaster county. Sullivan, J.

1. In an action to foreclose a mortgage, prior incumbrances may be made parties defendant for the purpose of having the amount and rank of their liens adjudicated.

2. A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim.

3. Nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property. Neither is he entitled to a decree cancelling fraudulent transfers already made.

4. A lessee is entitled to interest at the rate of 7 per cent per annum upon advance payments of rent made for the accommodation of the lessor and at his request.

5. Without the landlord's consent, a tenant cannot, by assigning the lease, absolve himself from an express covenant to pay rent, or otherwise change the conditions of his obligation.

10499. Troup against Horbach. Affirmed. Appeal from Gage county. Sullivan, J.

1. Where a judgment in an equitable action is reversed and the cause remanded for further proceedings not inconsistent with the opinion filed in the case, the district court may, if consistent with the views expressed in the opinion, permit a reformation of the issues and a trial de novo.

2. But there is no strict and absolute right to file new pleadings in such case. The matter is committed to the sound discretion of the court and its action in the premises will not be reversible error unless it amounts to an obvious abuse of discretion.

3. In order to bring up for review any action of the trial court with reference to the amendment of pleadings it must appear by the record that an exception was taken to the order complained of.

4. An order denying an application for leave to amend pleadings is interlocutory and not appealable.

5. An order refusing a party permission to dismiss his action is not final and cannot be brought here for review by appeal.

6. On appeal to this court the only question to be considered is whether the judgment or final order responds to, and is warranted by, the pleadings and proofs. To reach errors in interlocutory orders a petition in error should be filed with the record.

10330. Nebraska Children's Home Society against State. Affirmed. Error from Douglas county. Irvine, C.

In a contempt proceeding based on the alleged violation of a judicial order, such order may be examined only with a view to ascertaining whether it was coram judice. No mere error or irregularity therein, or in the proceedings leading thereto, excuses its disobedience.

2. A writ of habeas corpus, allowed by competent authority, may not be disregarded because allowed on an insufficient petition. A writ so allowed is not therefore void.

3. Although our habeas corpus act requires a writ to be directed to the sheriff, where the person charged with an unlawful restraint is not an officer charged with the custody of lawful prisoners; still the court or judge in vacation, who has jurisdiction of the proceedings, may, when such writ proves unavailing to produce the prisoner, require by order any party to the proceeding who is shown to have control of the prisoner, to produce his body.

4. The power to punish for contempt is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid, and may generally be exercised only by that tribunal whose order has been violated or proceedings interfered with.

5. Contempt proceedings may be punitive merely, or they may be remedial, to compel obedience to an order for the time resisted.

6. Without determining the power in such a case to conduct purely punitive proceedings, held: That a judge in vacation, vested by law with jurisdiction to conduct certain proceedings, has the inherent power incident to that jurisdiction to hear and determine proceedings for the purpose of enforcing his orders in the principal matter.

7. The power to punish for contempt being restricted to the tribunal whose authority is defied, it is not error for a judge who, within his authority has made an order in vacation, to refuse to transfer to another judge for hearing a proceeding in contempt based on the disobedience of such order.

8. If the terms of an information in contempt clearly show that the act complained of was willful the information will not be held bad for the failure to use the word "willful."

9. It is not necessary in a contempt proceeding that the defendant be formally arraigned.

10. Where a contempt proceeding is instituted by information and a rule to show cause, it is the duty of the defendant to file an answer if he desires to traverse the facts charged. Failing on sufficient opportunity to do so, the court may treat the facts alleged in the information as confessed.

11. Where the object of a contempt proceeding is to compel obedience to an order which may still be obeyed, it is not error to sentence the defendant to imprisonment until he shall obey such order and in addition to impose a reasonable fine for past disobedience.

8880. Tripol against Shutt. Appeal from Burt county. Norval, J.

1. While a court may construe and enforce contracts duly entered into, it is not the province of the judiciary to make contracts for parties.

2. A tender, to be effectual, must be without conditions and made to the party entitled to receive the same.

3. Ordinarily a bank check is not a sufficient tender of money.

4. A written contract cannot be varied, modified or contradicted by parol evidence of a prior or contemporaneous agreement between the parties.

5. Rulings on the admission or exclusion of testimony cannot be reviewed where the cause is brought to this court on appeal.

6. One is not entitled to a rescission of a contract who is unwilling to perform his part of the agreement.

7. The contract for the exchange of lands set out in the opinion construed, and held that the forty days designated therein for the exchange of deeds did not commence to run from the time the contract was made, but from the effecting of a loan of a certain sum of money stipulated to be made by one of the parties in consummation of the trade.

8. Under the evidence plaintiff was entitled to a specific execution of the contract for the exchange of lands.

8908. Arlington State Bank against Paulsen. Reversed. Appeal from Douglas county. Ragan, C.

1. Whether the title to the testator's real estate vests at his death in his executors or heirs is not to be determined solely by the presence in, or absence from, the will of some particular words or conveyance, but determined so as to accord with the testator's intention as deducible from an examination of the entire will.

2. The presumption is that the executors are invested with such power and all the power necessary to enable them to carry out the testator's intention with reference to the disposition directed by him to be made of his property.

3. The will of a testator directed his executors to pay his debts out of his personal estate and if that proved insufficient, "to sell and convey" his real estate for that purpose; and, "to sell and convey" his real estate and pay the proceeds over in certain proportions to certain heirs. Held: That the legal title to the real estate of the testator vested on his death in his executors.

4. The executors of such will conveyed the testator's real estate to one of his heirs upon the sole consideration that she would mortgage it to secure money for the use of the executors and then re-convey to the executors subject to such mortgage. This was done. Held: That the transaction between the executors and heir was not a sale and conveyance within the meaning of the will.

5. The will gave the executors power to convey the real estate only to an actual bona fide purchaser thereof.

6. The conveyance by the executors to the heir was a voluntary one; and, as to her and her grantees with notice, void at the suit of the estate and its creditors and at the suit of prior judgment creditors of the beneficiaries of such estate.

7. One who took from such heir a mortgage on the real estate so conveyed to her by the executors, having knowledge at the time that the heir had not actually purchased such real estate; or one who, having knowledge of such facts in the premises as ought to put a prudent man on inquiry as to the character of the heir's title, took such mortgage without inquiry, when a reasonable investigation would have revealed the defect in the heir's title, is not a subsequent innocent purchaser and entitled to protection as such.

8. That one is a subsequent innocent purchaser of real estate is an affirmative defense, which the claimant, to avail himself of, must plead, and upon him is the burden of proof to establish it.

9. One who claims the protection of the rule applicable to subsequent innocent purchasers without notice, is not relieved from the duty of affirmatively pleading and proving the facts, which he claims show him to be such innocent purchaser, because he claims under the vendee of an executor, and the conveyance from such executor is attacked by the judgment creditors of the beneficiaries of the trust property as having been made without consideration to the knowledge of the one claiming to be an innocent purchaser.

10. Where the will of a testator vests the legal title to his real estate in his executors and directs them to sell and convey it and pay the proceeds over in certain proportions to certain heirs the interest of such heirs in such proceeds is property.

11. But the heirs have no interest in the real estate as such; and, it cannot be seized on attachment by their creditors nor is a judgment against them a lien thereon.

12. The district courts of the state are invested with ample powers to enjoin executors from diverting trust property; to annul conveyances made by them without consideration in violation of the trust; and, on application of a prior judgment creditor of a beneficiary of such trust property, when such creditor has exhausted his legal remedies, to compel the interest of such beneficiary in such property, if not exempt, to be applied to the payment of his debts.

13. The presumption is that a will which simply clothes executors with power "to sell and convey" the testator's real estate for paying debts and make distribution of the remaining proceeds to certain persons does not confer on the executors the power to mortgage such real estate.

14. But such presumption may be overthrown, when an examination of the whole will shows that the disposition directed by the testator to be made of his property is of such a character as authorizes the inference that it was the testator's intention that his executors should have power to mortgage his estate.

15. When executors of a will have individual interests in the testator's property, whether a conveyance made by them shall be construed as an execution of the trust or a conveyance of their individual interests is a question of intention; and if from the conveyance itself it is apparent that it was intended as an execution of the trust in pursuance of the will it will be so construed.

16. Where a trustee wrongfully makes a voluntary gift or conveyance of trust property whether a subsequent creditor of the beneficiaries of such trust property may successfully invoke the aid of a court of equity to annul the wrongful disposition made of the trust fund, to restore it to the trustees and cause it to be applied to the payment of debts of the beneficiaries, not decided.

17. The doctrine or rule of subrogation is not a fixed and inflexible rule of law or equity; it does not owe its origin to statute or custom; it is a creature of the equity courts invented and applied by them to do justice or prevent an injustice being done in a particular case and under a particular state of facts where the law is powerless in the premises.

18. A testator directed his executors to sell and convey his real estate and pay the proceeds over in certain proportions to certain heirs. The executors deeded the real estate without consideration to one of the heirs and she mortgaged it to a trust company and a bank in a suit by the judgment creditors of the heirs to annul the conveyances of the executors and the mortgages made by the heir the creditors were given a decree as prayed, but, held, that the mortgagees were entitled to judgments against the testator's estate for such of the moneys represented by their mortgages as were actually applied to the payment of debts allowed by the probate court against the testator's estate; as were actually used to discharge taxes against the real estate of the testator; as were actually applied to discharge debts of the testator secured at the time of his death by mortgages on his real estate, such judgments to be liens against the property of the testator's estate as the allowed claims of other creditors and paid in due course of administration.

8924. Phoenix Insurance Company against Holcombe. Affirmed. Error from Dawson county. Sullivan, J.

1. In an action on a contract of insurance containing a clause forbidding other insurance without the written consent of the company, a reply effectively alleging notice to the insurer that additional indemnity had