

McHENRY and others v. New York, P. & O. R. Co. and others.

(Circuit Court, W. D. Pennsylvania. August 13, 1885.)

REMOVAL OF CAUSE—RECEIVER—ORDER APPOINTING, RESCINDED.

An order was made in the state court upon an *ex parte* application appointing a receiver of a railroad company. After removal of the suit to the circuit court, upon a hearing of both sides, it not appearing that the property of the company was in jeopardy, or in need of the protecting control of the court, and the continuance of the receivership being likely to prove prejudicial to innocent holders of the securities of the company, held, that the order appointing the receiver should be rescinded.

In Equity. *Sur* motion to rescind the order appointing a receiver. *W. W. MacFarland, R. P. Ranney, Adams & Russell, and John J. Henderson*, for the motion.

J. B. Brawley, W. R. Bole, and C. Heydrick, contra.

Coram MCKENNAN and ACHESON, JJ.

ACHESON, J. The order appointing a receiver was made by the learned judge of the court of common pleas upon an *ex parte* application, while we have had the benefit of a fuller hearing and a discussion by counsel representing both sides. It would, of course, be altogether premature at this preliminary stage of the case for us to consider the merits of the controversy or intimate any opinion thereon. We content ourselves with saying that the most material allegations of the bill are denied, and the right of the plaintiffs to any final relief is not yet satisfactorily established.

It is not shown to our satisfaction that the property of the defendant company is in any jeopardy, or needs the protecting control of the court. On the other hand, it is not difficult to see how the innocent holders of the securities of the company may be greatly embarrassed and prejudiced by the continuance of the receivership. Indeed, the effect of the order in question is to suspend the operation of the trust established by the agreement of all the parties in interest, and this, too, when the trustees are not before the court.

The office order that the bill be taken *pro confesso* as against the New York, Pennsylvania & Ohio Railroad Company, for want of an appearance, was entered by the prothonotary upon the baldest technical default, if, indeed, even that had occurred. A motion to vacate that order was immediately made, and, although not yet acted upon, it ought to be considered as allowed, in relief of innocent parties whose rights are here involved. We have no hesitation in holding that the order appointing a receiver should no longer remain in force. And now, August 13, 1885, upon consideration, it is ordered, adjudged, and decreed that the order made in this case on July 11, 1885, appointing a receiver, etc., be, and the same is, rescinded, and the receiver is discharged.

PENNSYLVANIA R. Co. and others v. ALLEGHENY VALLEY R. Co. and others.

(Circuit Court, W. D. Pennsylvania. March 17, 1885.)

1 WITNESSES—EXAMINATION OF PARTY TO SUIT—STATE STATUTE.

The Pennsylvania statute providing for the examination of a party to a suit, when called by his adversary, as if under cross-examination, is not applicable to a suit in equity in a United States court.

2. REMOVAL OF CAUSE—COLLUSION.

If a party, by virtue of his citizenship and *bona fide* ownership of bonds prior to the commencement of litigation, and before it was contemplated, had the right to sue in the circuit court, or to intervene in a suit in a state court and remove the cause to the circuit court, his intervention in such pending suit, with a view to its removal, is not collusive, although there may have been an understanding between him and resident bondholders that he should pursue this course, and that they would co-operate with him in the litigation, and participate in and contribute to the expenses of the legal proceedings.

In Equity. *Sur* exceptions to rule for commission to examine E. W. Ross, and to interrogatories.

George Shiras, Jr., for exceptions.

J. F. Stagle, contra.

ACHESON, J. 1. I think the plaintiffs have a right to sue out the proposed commission, and the first exception is overruled.

2. Section 858, Rev. St., embodies legislation found in the acts of July 16, 1862, (12 St. at Large, 588,) July 2, 1864, (13 St. at Large, 351,) and March 3, 1865, (13 St. at Large, 533.) This legislation, which was all prior to the Pennsylvania statutes upon which the plaintiffs rely for their right to examine Mr. Ross as if under cross-examination, covers the whole subject of the examination of the parties to a suit. And as suits in equity are not within section 721, making the laws of the states rules of decision in the courts of the United States, or section 914, conforming the practice, etc., therein to the state practice, etc., it follows that the Pennsylvania statutes are not applicable here. The second exception is therefore sustained.

3. In so far as the interrogatories numbered 5, 6, 7, 12, and 13 seek to elicit confidential communications passing between Mr. Ross and his counsel, the objection thereto on that ground is, I think, well founded.

4. But the interrogatories from number 5 to 15, inclusive, are objected to as irrelevant and incompetent. They certainly take a very wide range, and, it does seem to me, relate to immaterial matters. They proceed upon the theory that, notwithstanding Mr. Ross may have been the *bona fide* holder and owner of income bonds aggregating \$3,200 at the time this suit was commenced, and may have acquired them long before the litigation began or was thought of, he yet could not intervene and remove the cause into the circuit court of the United States if there was a prior understanding between him and resident bondholders that he should pursue this course, and that