

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

they would co-operate with him in the litigation and participate in and contribute to the expenses of the legal proceedings. To this view I cannot assent. I perceive nothing collusive or improper in such understanding, if it existed. The fourth exception is therefore sustained.

See *Dravo v. Fabel, infra*.

DRAVO and others, Assignees, etc., v. FABEL and others.

(District Court, W. D. Pennsylvania. August 25, 1885.)

1. **WITNESSES—EXAMINATION OF PARTY TO SUIT—PENNSYLVANIA STATUTE.**
The Pennsylvania statute, which provides that a party to the record, when called by the adverse party, may be examined as if under cross-examination, is not applicable to a suit in equity in a court of the United States.
2. **SAME—HOSTILITY OF WITNESS—IMPEACHMENT—CONTRADICTION.**
Where a party is called by the opposite party, he stands in a different position from an ordinary witness; he is necessarily hostile to the party calling him, who is not bound by what he testifies. It may be that he cannot be directly impeached by the party who called him, but he may be freely contradicted, even though this may incidentally discredit him.
3. **SAME—EFFECT OF TESTIMONY OF PARTY.**
But a party who has voluntarily put his adversary on the witness stand cannot insist that his testimony be ignored if it happen to disappoint him. It is competent testimony in the case, and, unless self-contradictory or inherently improbable, it must prevail in the absence of countervailing evidence.
4. **DEED—EFFECT OF DELIVERY.**
By the law of Pennsylvania a deed takes full effect by mere delivery, without recording.
5. **FRAUDULENT CONVEYANCE—EVIDENCE.**
The evidence in this case stated and discussed, and *held*, that it fails to sustain the charge contained in the bill, but denied by the answer, that certain deeds of conveyance were executed in fraud of the creditors of the grantor.

In Equity.

J. H. McCreery, W. S. Pier, and D. T. Watson, for complainants.
H. W. Weir and Knox & Reed, for respondents.

ACHESON, J. The purpose of this suit is to set aside two deeds of conveyance from John Dippold and wife to Philip Fabel and Kate Fabel, (*nee* Dippold, and daughter of the grantors,) his wife, one dated January 22, 1876, for a tract of about 11 acres of land, reciting a consideration of \$10,000; the other, dated January 26, 1876, for a tract of 237 $\frac{3}{4}$ acres of land, reciting a consideration of \$18,000; all situated in Beaver county, Pennsylvania. Both deeds purport to have been acknowledged January 26, 1876, but they were not recorded until February 16, 1878. On March 1, 1878, John Dippold and his copartners in the firm of John Dippold & Sons were adjudged bankrupts, upon a petition filed February 28, 1878. The plaintiffs are the assignees in bankruptcy of John Dippold, and they attack said