

consent was that it would not remove its suits from the state to the federal courts. This decision, sustaining the law, was made by a divided court; but in the later case of *Barron v. Burnside*, 121 U. S. 199, 7 Sup. Ct. 931, the court affirmed the *Morse Case*, which held such a stipulation invalid, and explained and limited the *Doyle Case*. The court, speaking of the rule established in the *Morse Case*, says (94 U. S. 538):

"This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights."

The temporary injunction will be granted.

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DESPEAUX et al. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. May 19, 1897.)

**DEPOSITIONS—PRACTICE.**

The act of March 9, 1892 (27 Stat. 7), entitled "An act to provide an additional mode of taking depositions of witnesses in causes pending in the courts of the United States," which provides that in taking such depositions the usage of the state in which the cause is pending may be followed, does not extend the right to examine parties to the cause in advance of trial. It only affects the mode of making the examination. *Shellabarger v. Oliver*, 64 Fed. 306, and *Register Co. v. Leland*, 77 Fed. 242, followed.

Motion on behalf of plaintiffs for an order on A. J. Cassatt to testify, under a pending eight-day rule, touching an agreement between the Pennsylvania Railroad Company and the National Transit Company, dated August 22, 1884.

These were suits to recover the amount of alleged excessive charges collected upon oil transported by defendant for plaintiffs between July, 1881, and January, 1890, and also to recover treble damages for the collection of such excessive charges, under the provisions of the act of assembly of Pennsylvania approved June 4, 1883 (P. L. p. 72). Mr. A. J. Cassatt had been a director of the defendant since 1883. Before that time he had been one of its executive officers. A jury had been sworn in the cause, and some testimony, including that of Mr. Cassatt, who was called for cross-examination by the plaintiffs, had been taken, when, by agreement of the parties, a juror was withdrawn. He was recalled for examination in advance of trial, under a rule which is set out at large in the opinion. Under advice of counsel, he declined to answer as to the agreement referred to in the motion. The cases cited upon plaintiffs' brief on motion for reargument, which are referred to in the opinion, are *Shellabarger v. Oliver*, 64 Fed. 306, and *Register Co. v. Leland*, 77 Fed. 242.

Jas. W. M. Newlin, for plaintiffs.

David W. Sellers, for defendant.

DALLAS, Circuit Judge. The plaintiffs have moved "for an order on A. J. Cassatt, requiring him to testify, under the eight-day rule pending herein," touching a certain agreement. The eight-day rule referred to was entered under clause 3 of rule 10 of the rules at law

of this court, which were adopted in or about the year 1882. That clause is as follows:

"A rule may be entered by either party to take the depositions of witnesses, without regard to the circumstance of their being ancient, infirm, or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects, to existing rules and regulations."

This provision was included, as I am informed, in a body of rules which the bar, or a committee thereof, submitted to the court, and which was therefore promulgated, about 18 years ago. This clause seems to have been derived from a rule of the courts of the state of Pennsylvania, in which, no doubt, it may be properly enforced; but its validity as prescribing a mode of procedure for this tribunal is attacked, both on behalf of the witness and of the defendant, upon the ground that it is in conflict with section 861 of the Revised Statutes. It is not desirable that I should pass upon this broad question on this application. It is enough for the present purpose that I should say that it is not pretended, in this instance, that any fact exists to bring the proposed examination within any of the specified exceptions to the section which has been referred to, and which is in these words: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided." In my opinion, the very question now presented was decided in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, and in such manner as to preclude the granting of the order now asked for. I cannot agree that "the question is one of personal privilege of A. J. Cassatt." It is a question of the court's authority. The statute having prescribed "the mode of proof," neither as respects the witness nor a party can a different mode be substituted.

Nor can I sustain the plaintiffs' contention that "the defendant is estopped." It is not necessary to determine the dispute as to which side introduced the agreement about which it is proposed to examine this witness. The plaintiffs' right to examine him, at the proper time and place, upon that or any other subject, is not now for decision; but that the court has no power to subject him to the particular examination proposed, or to any other, by the method now insisted upon, I have no doubt.

The motion for an order requiring A. J. Cassatt to testify is denied.

#### On Motion for Rehearing.

DALLAS, Circuit Judge. The two cases referred to in the properly candid brief submitted by plaintiffs' counsel upon his motion for reargument of his motion for an order requiring Mr. Cassatt to testify are both squarely against the granting of the original motion. I follow the decisions in those cases with entire satisfaction. I think it would be unfortunate if the act of March 9, 1892, had been differently construed. Where, as in this instance, no good reason appears for taking the testimony of a witness by deposition and in advance of the trial, instead of in open court, the latter, which is the usual and regular course, is much to be preferred. The motion for reargument is denied.

## BLACKMORE v. PARKES et al.

(Circuit Court of Appeals, Sixth Circuit. July 6, 1897.)

No. 457.

**1. FRAUDULENT CONVEYANCE—CONSIDERATION—PREFERRING CREDITORS.**

A conveyance of real estate, made in good faith by a failing debtor, in consideration that the grantee assumes and agrees to pay bona fide debts of the grantor to an amount near the value of the property, will not be set aside as in fraud of other creditors, although it appears that the purpose was to prefer certain creditors.

**2. SAME—KINDRED OF DEBTOR AND CREDITOR.**

The fact that a son of an insolvent debtor, who conveyed property in consideration of the assumption of certain of his debts by the grantee, subsequently purchased the principal part of the debts assumed, is not of itself sufficient to establish fraud in the conveyance.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Champion, Head & Brown, for appellant.  
Henderson & Eggleston, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is a bill by a judgment creditor of the defendant J. L. Parkes to reach and subject to the satisfaction of complainant's judgment certain real estate in the town of Franklin, Williamson county, Tenn., theretofore conveyed by Parkes to the defendant J. P. Hanner by deed bearing date March 12, 1886. The deed mentioned was duly registered, and conveys to the said Hanner two lots and storehouses in consideration of the assumption and payment by him of certain debts particularly described as due from the grantor to the several persons named in the deed, and aggregating some \$6,000. This bill was filed October 25, 1894. The other defendants to the bill are J. L. Parkes, Jr., a son of the grantor, and W. A. Roberts, to whom a lease of one of the storehouses has been made by the grantee with an option of purchase. It appears that in 1892 one of the storehouses so conveyed to said Hanner was sold by the grantee to Maria and Mattie Vaughn in consideration of \$3,000 paid to said Hanner, and deed with covenants duly executed and registered. The bona fides of this purchase by the Misses Vaughn is not assailed, and the purchasers are not, therefore, made parties. In this situation no further consideration need be given to so much of complainants' bill as seeks to set aside the conveyance of that particular property to the defendant Hanner. So far as the defendant W. A. Roberts has acquired any interest in the remaining storehouse by virtue of his contract of purchase and under his lease, he is entitled to protection as an innocent purchaser without notice of any fraudulent purpose; and complainants practically concede that any recovery by them must be subject to his rights under his lease and option, the purchase money to be paid by him under his contract