

In the present case the proceeding before the examiner is, substantially, "in the face of the court," and, moreover, the assignor has done nothing "to clear his motive from suspicion."

The interruption of proceedings before an examiner for the purpose of obtaining the opinion of the court upon questions raised during their progress, is not, in general, to be encouraged. Ordinarily, it is much to be preferred that the objections should be merely noted, and their consideration be postponed until the hearing. The point in this instance is, however, so distinctly presented, and is, in my opinion, so free from difficulty, that I deem it proper to decide it at once, especially in view of the fact that the evidence proposed has for its object the maintenance of an imputation of a gross fraud charged to have been perpetrated by persons whose lips have been closed by death. The examiner is instructed to decline to take the testimony proposed by the offer referred to the court.

---

CALLAHAN v. HICKS et al.

CALLAHAN et ux. v. SAME.

(Circuit Court, W. D. Virginia. December 9, 1898.)

1. APPEARANCE—CURING DEFECTIVE PROCESS.

A plaintiff cannot object to the jurisdiction of a federal court over a cause removed from a state court on the ground that the proceedings for bringing the defendants into the state court were irregular, where the defendants appeared, and, after removing the cause, filed answers.

2. SAME—DOMICILE OF DEFENDANT—WAIVER OF OBJECTIONS.

The provision of the judiciary act exempting a defendant from being sued in any district other than that of his domicile is for his benefit, and may be waived by him; and, if he makes no objection to the jurisdiction of the court on that ground, the plaintiff cannot, nor is the court ousted of jurisdiction.

3. DISMISSAL—RIGHT OF PLAINTIFF—CROSS BILL.

A plaintiff is not entitled as a matter of right to dismiss his bill, where defendants have appeared, and by appropriate pleading asked affirmative relief; and such dismissal will not be permitted, where it would be inequitable to defendants.

On Motion to Dismiss.

John E. Dinneen, for plaintiffs.

Julian Meade, for defendants.

PAUL, District Judge. The plaintiffs in these causes move to dismiss the same on the ground that this court is without jurisdiction to entertain these suits. On the 21st of June, 1893, M. M. Callahan, the plaintiff in the first cause, in her own name instituted a chancery suit in the circuit court of Wythe county, Va., against the defendants, Benjamin E. and George E. Hicks, who are spoken of in the pleadings as Hicks Bros., and who will be so designated herein. Hicks Bros. were nonresidents of the state of Virginia, and were proceeded against by an order of publication, under the statute law of Virginia. The object of the suit, as alleged, was to subject a certain tract of land, containing 131 acres, conveyed by the plaintiff and her husband, C. W. Callahan, to

the defendants, to the payment of \$4,083.32; being the balance of purchase money due on said land by the defendants to the plaintiff. On petition filed by the defendants in the state court, the cause was removed into this court. After the removal of the cause the defendants filed their answer to the bill, in which they alleged that the plaintiff M. M. Callahan was merely a nominal plaintiff; that the substantial interest in the suit was in her husband, C. W. Callahan; that the bonds on which the suit was based were executed, not to said M. M. Callahan, but to her husband, C. W. Callahan. The answer further alleged that said bonds were procured by fraud; that said C. W. Callahan had induced said defendants to join him in the purchase of a tract of land in Wythe county, Va., in which the defendants were to have an interest of three-fourths, and said Callahan an interest of one-fourth; that said Callahan represented that the land had cost \$13,500; that the three-quarters interest of the defendants would cost them \$10,126, whereas in truth said Callahan had agreed with one Allen to purchase said land at the price of \$10,000. The answer further averred that the defendants, acting on the representations of said C. W. Callahan, had made a cash payment to said Callahan of \$4,000, and had paid the first of three bonds which they had executed for the deferred payments, of \$2,041.66 each. The defendants asked that their answer be treated as a cross bill; that the said C. W. Callahan be made party defendant thereto; that the deed from said C. W. Callahan and wife to the defendants, and the two remaining bonds, for \$2,041.66 each, executed by the defendants for the deferred payments on their supposed three-quarters interest in said land, be declared void; and that the same be annulled and canceled. On this cross bill, process issued against said C. W. Callahan; and the same being returned executed, and no appearance being entered, at the March term, 1894, of this court, a decree was entered canceling and rescinding the deed from said C. W. Callahan and wife to said Benjamin E. and George E. Hicks, and canceling the last two bonds, of \$2,041.66 each, for the deferred payments, and further decreeing a recovery by said Hicks Bros. of said C. W. Callahan of the sum of \$6,041.66, the amount of purchase money paid to said C. W. Callahan. This cause remained in this condition until the 2d day of March, 1898. On that day said C. W. Callahan and M. M. Callahan, his wife, the plaintiffs in the second cause, filed their bill in this court, praying an injunction against the enforcement of said decree of March term, 1894, in the cause of M. M. Callahan against Hicks Bros., and praying that the same be set aside and annulled on the ground that no process had been served on said C. W. Callahan, requiring him to answer the cross bill filed by Hicks Bros. The bill recites the history of the sale of the land bought of Allen, to the Hicks Bros., the cash payment made by Hicks Bros., their payment of the first bond for the deferred payments, and alleges that said C. W. Callahan was not interested in the suit of M. M. Callahan against Hicks Bros., and that he could not be amenable to any decree entered in that cause. To this bill Hicks Bros. filed their answer, setting up the same defenses they had made to the bill filed against them by M. M. Callahan. On the 15th of March, 1898, the following decrees were entered, without opposition from counsel,—the first being in the handwriting of the attorney for the