

considered as exculpatory (3 Sandford 662.) The receiver's counsel were wrong in giving such advice. The order standing alone, and not taken in connection with the decision of the court, authorized and justified the question put to the receiver. If, in their opinion, the order was incorrect, it was their duty to have promptly moved the court for its correction and amendment, and the examiner, on their stating their wish, would have doubtless have suspended temporarily the examination of the witness until the decision of the court upon their application to amend could have been obtained.

It has been held that a referee has no power to dismiss a suit because of a refusal of the plaintiff, or a witness, to testify. He should report the matter to the court and await its decision. In this case, however, the examination has not been so fully closed that it may not be resumed. We are of the opinion that under the amended order the examination should proceed before the same examiner. We are not willing that the conduct of such officers should, when challenged so seriously as is the case here, be allowed to pass without a full and complete examination, by means of which the charges made may be either proven or the persons accused exonerated. The hearing, therefore, must be continued as rapidly as possible.

Were it not for the excuse presented by the receiver for his conduct before the examiner, a fine would be imposed on him. His refusals to answer, although no one has suffered therefrom, were unjustifiable and contemptuous, and, unexcused, would have merited serious and severe punishment. Under the circumstances presented here, however, the proceedings looking to his punishment should be arrested and the application therefore denied. He will be allowed an opportunity in the examination, when resumed, to show that he purges himself of this particular contempt by answering the questions ruled upon by the examiner as proper.

The question of compensation to be allowed him, will, as was heretofore directed, remain undisposed of until the completion of the examination now to be resumed.

An order will be entered providing for the further and speedy investigation of the charges of improper and unprofessional conduct, such investigation to be carried before Examiner Harkness, the time and place of which will be fixed by the court in its order. As to the terms of the order re-submitting the matter to the examiner, I concur in the opinion read by Judge Henderson.

BY JUDGE HENDERSON:

The reference to investigate the charges against the receiver and his attorneys has failed. When the report of the examiner, to whom was referred the matter of compensation to the receiver and his attorneys, was presented to this court, or it was announced that it was ready to be filed, the petition of the school trustees was presented, asking for the

right to intervene as parties to that proceeding, we held that the interests of the petitioners were too remote to be allowed to intervene as parties, but the petition contained charges of grossly improper, fraudulent and dishonest conduct; that, by this misconduct the fund had suffered a loss of over \$200,000.

The charge was directly made that this court has been imposed upon and deceived by the representatives of the receiver and his attorneys, and that the receiver had fraudulently acted in collusion with the defendants in the case, and with some of his bondsmen, and that fraudulent and unconscionable compensation had been sought. At once upon the hearing of these petitions, without entering upon any investigation of the matters contained in Judge Sprague's report as to the amount of compensation, deeming that question wholly immaterial to us. If the charges contained in the petition were true, and that the question of the amount of compensation would never be reached by this court in that event, this court directed that the petition be received and filed as charges of official misconduct on the part of the receiver and the attorneys, so far as such fraud and misconduct were alleged herein, and directed an examination of the charges at once.

The session of the court necessarily terminated on the day this order was made; the engagements of the judges imperatively called them to their respective districts at once thereafter; but to facilitate the investigation it was sought to refer the taking of testimony upon these charges to an examiner, and with the consent of all parties concerned selection was made of one of the most eminent and learned members of the bar of this Territory, whose action in the matter has fully justified the confidence reposed in him. At the time of making this order the court filed in writing a memorandum of the order that was intended by it. This was done in view of the fact that the court would necessarily adjourn before the order could formally be reduced to writing and entered upon the journal, and attention was expressly called to it at the time, and counsel were directed to co-operate in preparing the order pursuant to the directions. This seems to have been neglected, and the order entered and given to the examiner referred all matters contained in the petition to the examiner. No answer had been filed to the charges, and under such circumstances the reference was somewhat uncertain. Ample time was given by the order to each party to produce testimony. The answer of respondents was thereafter filed, traversing the entire petition, and on the day appointed by the order all these matters were taken to the examiner and an examination was attempted, and he has reported to us sixty-five pages of proceedings had before him, and not more than ten pages of this is testimony.

At once an application was made for an intervention by certain parties. The parties differed widely as

to the scope of the examination; on the part of the petitioners it was claimed that it was but a continuation of the examination before Judge Sprague, and that everything was in issue that was put in issue by the petition and answer, that the respondents having been examined before Judge Sprague could be recalled, and that their character was in issue the same as though they were plaintiffs in an action of libel or slander, and that they might be cross-examined upon that theory; on the other hand, this was denied, and it was claimed that nothing upon the subject of compensation could be received. The petitioners called respondent Dyer and proceeded to examine him upon the theory claimed by them. The examination was without authority conferred by the order of reference. We fully appreciate the embarrassing situation of the learned examiner, and fully affirm his conduct of the matter before him, and only regret that he was not clothed with authority in the premises, and we propose to refer it back to him and give him that authority. We can see no good reason why the petitioners should not have proceeded with other testimony, especially in view of the fact that the respondents offered to stipulate that the examiner should have authority to pass upon all questions of the admissibility of testimony and the scope of the inquiry.

It is but fair that a speedy investigation should be had. Counsel as well as receiver are resting under grave charges. The examination to be had before the examiner is in no wise a continuance of the investigation before Judge Sprague. We have expressly reserved that question until after this investigation. We have not examined the matters of that report, and do not care to until we hear from this investigation. If in the end it comes to be a mere question of computing and estimating the amount of compensation, this court will proceed to do this upon its responsibility as guardian of the fund in controversy, and will seek such information as is necessary for that purpose. On the other hand, if these charges of fraud are sustained, no inquiry of that kind will become necessary, and the bond of this receiver will stand as indemnity to make good any loss the fund has sustained thereby.

The examination is to be had under the order of reference. It is the order of the court which specifies the matters to be investigated and confers jurisdiction upon the examiner, and points out the range of inquiry; and the parties cannot by their allegations and denials upon other immaterial matters make them material. We have examined with care the supplemental report made by the examiner, containing a detailed statement of all that transpired before him, and we are satisfied with the rulings he took the responsibility of making, as well as the action he intimated he would take if he was himself hearing the case and had authority in the premises.

An order should be entered referring it back to the examiner, and