to repay the money according to the terms of the bond it was necessary to enter a formal order reversing the confirmation of the sale. The decision and judgment of the supreme court in the ejectment suit had set aside and reversed the sale and the order confirming it by holding the same to be wholly void, and thereupon it became the duty of the circuit court to undo as far as possible all the wrong that had resulted from its mistaken action. It likewise became the duty of the principals in the bond to repay into court the sum of money which had been wrongfully paid them. The terms of the bond, fairly construed, bound them for this repayment. The obligation they had assumed in giving the bond was that, if the supreme court should reverse the confirmation of the sale of Lamaster's property, they would repay the money realized from such sale. The order of confirmation was most effectually reversed by the ruling of the supreme court that the whole proceeding against Lamaster was void and of no effect, and the obligation of the principals in the bond to repay into court the money wrongfully paid them became fixed according to the terms of the bond; and when the court called upon them for repayment of the amount by them received, as was done by the order entered December 22, 1890, and the principals in the bond failed to make such payment, then the condition of the bond was broken, and a right of action existed against the sureties for such default on part of their principals.

We have thus considered the substantial points made on behalf of the plaintiffs in error, and, finding them without merit, the judgment of the circuit court is affirmed.

BURROW v. KANSAS CITY, FT. S. & M. R. CO.

(Circuit Court, W. D. Tennessee. February 27, 1893.)

No. 3,114.

1. COSTS—TAXATION—WITNESS FEES.
   A party in a federal court can only recover as costs the actual amount of fees paid each witness, and only to the extent of the amount legally due such witness; and where he has paid some witnesses more and some less than their legal fees, the legal fees of all cannot be grouped together to make the sum equal the amount paid to all.
2. SAME—MILEAGE.
   Where a witness in a federal court, who lives in another state more than 100 miles away, and therefore cannot be served with subpoena, voluntarily attends in good faith on the request of a party who deemed his testimony material, such witness is entitled to the usual fees and to mileage for 100 miles, but not to mileage for any distance beyond 100 miles.

At Law. Action by Viola W. Burrow against the Kansas City, Ft. Scott & Memphis Railroad Company. Heard on motion to retax costs. Granted.

Statement by HAMMOND, J.:

This was an action at law against a foreign corporation for damages claimed by plaintiff from the defendant for negligently causing the death of her husband in Arkansas, and it resulted in a verdict in the defendant's favor with judgment for costs against the plaintiff and the surety on her $250

prosecution bond in the case. The only items involved in the motion are the fees of four of the defendant's witnesses. The case was continued two or three times at plaintiff's instance, and the witnesses attended at each term until the call of the case for trial. Under the practice of the court these witnesses proved on oath before the clerk their per diem and mileage fees as follows:

John Cocker, first term, 3 days, 487 miles		$ 53 20
G. L. Bowers, first term, 3 days, 287 miles	$33 20	
Idem, second term, 2 days, 287 miles	31 70	
		64 90
W. F. Caudle, first term, 3 days, 487 miles	$53 20	
Idem, second term, 2 days, 487 miles	51 70	
Idem, third term, 2 days, 226 miles	25 60	
		130 50
J. P. Sullivan, first term, 3 days, 287 miles	$33 20	
Idem, second term, 2 days, 287 miles	31 70	
Idem, third term, 3 days, 287 miles	33 20	
		98 10
Total amount proven		$346 70

These fees are computed at $1.50 per diem for attendance and five cents a mile for the distance traveled each way. Plaintiff, in her motion, prays that "mileage be stricken out of the cost bill in this case," and insists in argument that, if any mileage be allowed, it should only be for 100 miles on each trip of the witnesses, which would make these fees as follows:

John Cocker, one trip, 3 days, 100 miles	$ 14 50
G. L. Bowers, two trips, 5 days, 200 miles	27 50
W. F. Caudle, three trips, 7 days, 300 miles	40 50
J. P. Sullivan, three trips, 8 days, 300 miles	42 00
	$124 50

The fees, as proven by these witnesses, have all been respectively assigned by them to the defendant, and it has paid them the following sums in consideration of such assignment and as a compensation for the time lost by them as witnesses in this case, viz.:

John Cocker the sum of	$17 31
G. L. Bowers the sum of	35 96
W. F. Caudle the sum of	75 50
J. P. Sullivan the sum of	29 41—or $158 18

The defendant only claims in this behalf the amounts so actually expended by it in procuring the attendance of these witnesses, a sum considerably less than half the amount proven, and somewhat exceeding the taxation at 100 miles travel for each trip. None of these witnesses were subpoenaed, except Cocker, by the plaintiff, during the trial, while in voluntary attendance upon the court as a witness for defendant. Caudle and Bowers were not in fact examined as witnesses, the plaintiff's evidence being such as made their examination unnecessary; but they all attended the court in perfect good faith, and their attendance was procured "at the instance and request of defendant's counsel, and for the purpose of testifying in behalf of defendant," as the plaintiff alleges in her affidavit filed in support of this motion. The witness Cocker was an employe of the Pullman Palace Car Company, while Bowers and Sullivan were employes of the defendant railroad company, though Caudle was not.

J. J. Dupuy, for the motion.
Adams & Trimble, opposed.

HAMMOND, J., (after stating the facts.) Costs in the federal courts include, among other items, "the amount paid printers and

witnesses," (Rev. St. § 984,) and defendant can therefore recover here only the amount actually paid by it to each of these witnesses, (O'Neil v. Railroad Co., 31 Fed. Rep. 663; Beckwith v. Easton, 4 Ben. 358; The Highlander, 19 How. Pr. 334.) And it cannot even recover the amount so paid if in any instance such amount exceed the legal fees due to the witness. Nor can these fees of the different witnesses be grouped together, in order to make the sum equal or exceed the entire amount paid to them all.

Section 848 of the Revised Statutes, prescribing the fees of witnesses in the federal courts, is as follows:

"For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing and five cents a mile for returning."

This provision is compiled from section 3 of the act of congress approved February 26, 1853, (10 St. at Large, p. 167,) the punctuation in the revision as quoted following that of the original act as published. The statutory provision relating to the issuance of subpoenas is the following:

"Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same." Rev. St. U. S. § 876.

Under this provision defendant could not have procured the issuance and legal service of process of subpoena to procure the attendance of these witnesses on the trial of the case if they resided out of the state, and more than 100 miles from the place of holding court. And, even though they lived within the reach of process under the statute, if they were material witnesses for the defendant upon the trial of the issues involved in the suit, and their voluntary attendance was procured, without subpoena, in entire good faith on the part of defendant, through its counsel, of which there cannot be the slightest doubt, it would seem to be wholly immaterial to the plaintiff whether they were actually subpoenaed or not. The only office of the writ is to procure the attendance of the witnesses, and good faith is no less required in procuring their attendance by means of compulsory process than voluntarily. A party will no more be allowed to multiply costs unnecessarily by the procurement under process of immaterial witnesses or material ones in numbers largely in excess of the reasonable requirements of a case, than without process. Here these witnesses, no matter where their residences, might have been served with subpoena upon their arrival at the court, and, had writs issued for that purpose, plaintiff would now be liable to pay as costs the fees accruing thereunder in addition to what she must pay as it is; for by far the better opinion and the weight of authority are that the service of subpoena upon a witness is not a prerequisite to his right to fees from the party in whose behalf he in good faith attends the court, nor to the consequent liability of the losing party for the costs of such fees when paid by his adversary. U. S. v. Sanborn, 28 Fed. Rep. 299; Cahn v. Monroe, 29 Fed. Rep. 675;

Anderson v. Moe, 1 Abb. (U. S.) 299; U. S. v. Williams, 1 Cranch, C. C. 178; Cummings v. Akron, etc., Co., 6 Blatchf. 509; Dennis v. Eddy, 12 Blatchf. 195; The Syracuse, 36 Fed. Rep. 830; In re Williams, 37 Fed. Rep. 325; The Vernon, 36 Fed. Rep. 113; Eastman v. Sherry, 37 Fed. Rep. 844. And such has always been the practice in this district, as an examination of the records of the court show. Nor does it make any difference whether the witness was in fact called to testify, or whether he was sworn or not, provided always, of course, that his attendance was procured by the party to the suit in good faith, and that his testimony was deemed material to the issues involved. Clark v. American Dock & Imp. Co., 25 Fed. Rep. 641; Hathaway v. Roach, 2 Woodb. & M. 63.

The first question here, then, is one of fact as to the residence of these witnesses. They know where they reside, and have sworn to the facts before the clerk, and upon their oaths have proven the number of miles traveled by them respectively from their places of residence in Missouri to Memphis, Tenn., where the court is held in which the case was tried. Opposed to this is the affidavit of plaintiff that "she is informed and believes" that the witness Cocker is "a resident and citizen of the county of Shelby, and city of Memphis, and that he made his home in Memphis," running as a Pullman car porter between here and Springfield, Mo., and did not come to Memphis as a witness to testify on the trial, but, being here, simply remained at defendant's request. Counsel for defendant makes oath in this regard that said witness "made his home and headquarters at Kansas City, Mo.," and "that his attendance was procured at Memphis upon application to the superintendent of the Pullman Palace Car Company at Kansas City; and that said Cocker was sent here from Kansas City to Memphis for the purpose of testifying." The inevitable conclusion from this proof, therefore, is that Cocker's residence was Kansas City, as he himself swore, and plaintiff's information and belief cannot, of course, avail against his oath, nor against the positive affidavit of the defendant's counsel as to the manner in which his attendance as a witness was procured. The only evidence here as to the "place of residence" of the other three witnesses is the oath of each to the fact before the clerk. But plaintiff makes affidavit that they "are and were all employes of defendant, and run as train men on defendant's railroad from and to Memphis, Tenn., from and to Springfield and Kansas City, Mo.," and "supposes they were requested by defendant's solicitor to attend, and, coming to Memphis on their regular duty as trainmen on defendant's road, remained voluntarily over the days of trial to attend the court at the request or command of their employer or defendant's solicitor." The affidavit filed for defendant says "that the witness Caudle was not at that time an employe of the defendant," but admits that Bowers and Sullivan were its employes. Whether any of the witnesses were in the employ of either plaintiff or defendant is wholly immaterial. They have claimed their fees here under the statute, and substantiated their claims by their respective oaths. What plaintiff "supposes" cannot avail her, without more, and therefore the conclusion is that the place of residence of these three witnesses is as they have respectively sworn.