

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.

But because the amounts paid these witnesses (except one) respectively exceed the statutory fees to which they would be entitled had they come a distance of 100 miles or less, it becomes necessary to decide the question whether or not costs are taxable for full mileage of a witness who travels from his place of residence without the state, more than 100 miles distant from the court. So far as the practice of the court should control this question either way, if at all, it has been in favor of allowing such costs for mileage the entire distance actually traveled by the witness. I have requested the clerk to examine the records of the court in this respect, and, going back as far as 1883,—a period of 10 years,—he finds that this has been the invariable practice of the federal courts of this district, as shown by some 30 instances in civil suits during that period; and no case has been found where witnesses have been otherwise paid, or costs therefor otherwise taxed against the unsuccessful party. But this practice is now challenged, and it is urged that it should not be at variance with the statute, or a proper construction of it, if there be any doubt as to its meaning; and an examination of the reported cases shows, perhaps, a greater diversity of decision among the federal judges upon this question of costs than upon almost any other. In the first circuit the cases seem to be uniform, since Judge Story, that costs should be taxed for full mileage of the witness coming from beyond the district, no matter what the distance traveled. *Prouty v. Draper*, 2 Story, 199; *Whipple v. Cumberland, etc., Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 Woodb. & M. 63, 73; *U. S. v. Sanborn*, 28 Fed. Rep. 299, per Gray, J., in 1886. In the second circuit the contrary rule is just as well established where costs for mileage fees of such witnesses are only taxed against the losing party for 100 miles, irrespective of the distances in excess of that which the witnesses, have actually traveled. *Anon.*, 5 Blatchf. 134; *Beckwith v. Easton*, 4 Ben. 358; *Steamship Leo*, 5 Ben. 486; *Buffalo Ins. Co. v. Providence, etc., Co.*, 29 Fed. Rep. 237; *The Syracuse*, 36 Fed. Rep. 830. And such is the well-settled rule in the ninth circuit. *Spaulding v. Tucker*, 2 Sawy. 50; *Haines v. McLaughlin*, 29 Fed. Rep. 70. In other circuits are the cases of *In re Williams*, (S. C.) 37 Fed. Rep. 325; *Eastman v. Sherry*, (Wis.) *Id.* 844; *Smith v. Railway Co.*, (Iowa,) 38 Fed. Rep. 321; *Sawyer v. Aultman, etc., Co.*, (Ill.) 5 Biss. 165, all to the same effect, though the last decision was based upon a rule of the court, of long standing, denying costs for the fees of any witness not regularly summoned, regardless of the distance traveled by him. In the seventh circuit in *Dreskill v. Parish*, 5 McLean, 213, 241, it was held that the fees of a witness not summoned could not be taxed as costs at all; and such were the rulings in this circuit in *Parker v. Bigler*, 1 Fish. Pat. Cas. 285, and *Woodruff v. Barney*, 1 Bond, 528, 2 Fish. Pat. Cas. 244, decided in 1862, though in the latter case the inference would seem to be that Judge Leavitt's ruling goes to the extent of allowing the taxation of full mileage if the witness be summoned; for he says in the opinion:

"If a witness whose residence is not at the place of holding court is summoned there, he is allowed mileage for returning to his home, but not for

coming to the court; and, by a liberal construction of the statute, return travel has been allowed even beyond the limits of the district for which the court is held."

In 1869, Judge Withey held in Michigan that a witness going voluntarily to a court in that state from his home in New York was "entitled to the per diem of \$1.50 and traveling fees from his place of residence and for returning, provided he actually traveled so far to reach the court," (*Anderson v. Moe*, 1 Abb. [U. S.] 299;) while Judge Brown, in the same state, as late as 1888, in the case of *The Vernon*, 36 Fed. Rep. 113, 115-117, in an exhaustive opinion, reviewing all the cases, ruled that the mileage fees of a non-resident witness could only be taxed as costs to the extent of 100 miles from the place of holding court.

As between the witness and the party at whose instance he attends the court, there is no doubt whatever as to the amount he should receive or could recover in a suit therefor. In case of a contract, it would, of course, be the amount agreed upon, and, in the absence of any contract, a quantum meruit, or reasonable sum for loss of time and necessary expenses. And in *Spaulding v. Tucker*, 2 Sawy. 50, Judge Sawyer, in ascertaining such sum, says:

"There being no special circumstances shown to call for a different measure, I know of no better mode of arriving at what is reasonable than to adopt the amount fixed by the act of congress as the compensation allowed witnesses who attend upon compulsory process."

And this amount, when ascertained, would be the measure of a recovery of costs in favor of the other party according to the weight of authority.

While it is true that in the courts of the United States, in cases at law, the oral testimony of witnesses has been the preferred and favored method of proof since the first judiciary act of 1789, and that section 861, Rev. St., taken therefrom, provides that "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," yet the same original act prescribed a method whereby "the testimony of any witness may be taken in any civil cause pending in a district or circuit court by deposition de bene esse when the witness lives at a greater distance from the place of trial than one hundred miles," etc. Rev. St. § 863. The undoubted object of this provision, or certainly one of its principal objects, was to reduce the expenses of litigation, and enable parties to obtain in a comparatively inexpensive mode the testimony of witnesses residing at great distances from the place of trial, and often the necessary expense of procuring their attendance in court would be an absolute denial of justice because of the inability of parties to incur such expense, and perhaps the ruin of unsuccessful litigants in answering judgments for enormous costs, where the other side was able to incur the expenditure.

Without reviewing the cases on this subject, and notwithstanding the practice which has obtained in the courts of this district, and which has hitherto been practically unchallenged, and in view of the later cases in this and nearly all the other circuits except the first, I am inclined to hold, though with some hesitation, that

costs can only be recovered for the fees of a witness in a civil suit within the limit of his compulsory attendance under a writ of subpoena. It need not, of course, be further said that even such fees cannot be recovered as costs where the successful party has actually settled with the witness for a less sum, when, of course, only the amount paid, or perhaps agreed to be paid, would be the measure of the recovery. Let the costs for the fees of these four witnesses, therefore, be taxed according to the principles of this opinion, and it is accordingly so ordered.

TYLER MINING CO. v. SWEENEY et al.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1893.)

No. 62.

1. JUDGMENT—RES JUDICATA—CONFLICTING MINING CLAIMS.

The Tyler M. Co. applied for a patent to the Tyler mining claim. The Last Chance M. Co. protested against such application, and brought suit to determine the right of possession to so much of the surface ground as was included in the conflicting locations of the Tyler and Last Chance claims, as shown upon the diagram in the opinion of the court. The Tyler M. Co., after appearing and making a defense to said suit, withdrew its answer in open court, and judgment was entered for the Last Chance M. Co., reciting the priority of its claim. Subsequently the Tyler M. Co. left out from its original location a certain portion thereof, including the portion described in said judgment, and thereafter brought an ejectment suit against the Last Chance M. Co. for the ground not embraced in said judgment. *Held*, that the judgment in the prior suit was not res adjudicata as to the priority of the Last Chance location, and that it was conclusive only as to the right of possession to the triangular piece of ground involved in that suit.

2. SAME—PARALLELISM—RIGHT TO FOLLOW DIP—ABANDONMENT OF PART OF CLAIM.

The fact that the Tyler withdrew its answer in the prior suit, and allowed the Last Chance to obtain judgment therein by default, did not have the effect of changing the Tyler location to a five-sided figure, so as to destroy the parallelism of the location, as required by section 2320, Rev. St.; or to prevent the Tyler company from thereafter claiming its end line to be at a point which left out the ground in dispute in the former suit; or to deprive it of the right to follow the dip of its lode beyond its side lines, as provided by section 2322, Rev. St. A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the balance of the claim.

3. SAME—LODE CROSSING SIDE LINES.

Under Rev. St. §§ 2320, 2322, the owner of a mining claim located approximately lengthwise of a lode, and having parallel end lines, may, if the apex passes out of the claim across a side line thereof, follow the dip beyond the side line, the same as if one original end line had been drawn at such crossing parallel to the other end line. *King v. Mining Co.*, (Mont.) 24 Pac. Rep. 200, approved.

SAME—LOCATION OF CLAIM ACROSS THE LODE.

Where a mining claim is located so that the lode crosses the side lines nearly at right angles, the location is a valid one, but the side lines should be taken as end lines, and the owner has no right to follow the dip beyond them. *Argentine Min. Co. v. Terrible Min. Co.*, 7 Sup. Ct. Rep. 1356, 122 U. S. 478, followed.

5. SAME—PRIORITY.

When a claim is located along a lode, and its owner's right to follow the dip beyond the lateral lines conflicts with the right of an owner of a claim