

a traverse of the breaches assigned; (3) performance and payment. Issue was joined by similitur to the first plea, and by replications concluding to the country as to the other pleas. At the trial before the court without a jury, the plaintiff put in evidence the bond and the agreement therein referred to, and gave evidence tending to prove an indebtedness thereunder of \$1,496. The defendant gave evidence tending to prove an extension of time of credit to the person for whom the plaintiff was bound, and the plaintiff, in rebuttal, gave evidence tending to prove that such extension was with the knowledge and concurrence of the defendant. The court thereupon, without passing upon the merits of the controversy, dismissed the cause for want of jurisdiction, upon the ground that the amount in controversy was less than the minimum amount necessary to give jurisdiction to the court. *Cabot v. McMaster*, 61 Fed. 129.

We are without jurisdiction to entertain this writ of error. The dismissal of the suit proceeded solely upon the ground of want of jurisdiction, and there was no adjudication upon the merits. We have held in *Manufacturing Co. v. Barber*, 18 U. S. App. —, 9 C. C. A. 79, and 60 Fed. 465, that, when the only question presented by the record goes to the jurisdiction of the court below, a review of the determination of that question can only be had in the supreme court. See, also, *Railroad Co. v. Meyers*, 18 U. S. App. —, 10 C. C. A. 485, and 62 Fed. 367. The writ of error is dismissed for want of jurisdiction.

INDIANAPOLIS WATER CO. v. AMERICAN STRAW-BOARD CO.

(Circuit Court, D. Indiana. February 6, 1895.)

1. ATTORNEYS—FEES—DEPOSITIONS.

A deposition is taken in a cause, and admitted in evidence therein, within Rev. St. § 824, allowing attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause," where it was taken for use on motion for preliminary injunction, and though not used thereon, by reason of the withdrawal of the motion, was used on final hearing, under stipulation that it be treated as taken after issue joined.

2. SAME.

Though there are objections to an instrument introduced in evidence as a deposition which could have been raised to its introduction, these having been waived by allowing it to be used, it is a deposition, within Rev. St. § 824.

3. SPECIAL EXAMINER—COMPENSATION.

Where testimony is taken in a case in a federal court by a stenographer of a state court, appointed by the federal court, at the instance of the parties, as a special examiner in chancery, and selected because he was a stenographer, there being no statutory rule of compensation, and there having been no contract for fees, he will be allowed the established rate of stenographers' charges in the courts of the state.

Suit by the Indianapolis Water Company against the American Strawboard Company. Heard on motion to retax costs and disbursements.

Baker & Daniels, for complainant.
John W. Kern, for defendant.

BAKER, District Judge. Section 824 of the Revised Statutes of the United States allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause." To entitle an attorney to this fee, there must be a concurrence of three things, viz. (1) there must be a deposition; (2) it must have been taken in a cause; and (3) it must have been admitted in evidence therein. In this case the testimony of the witnesses was taken by a special examiner, who was appointed by the court for the purpose of taking it for use upon the hearing of a motion for a preliminary injunction; but the motion was subsequently withdrawn, and the testimony was not used for that purpose. It was afterwards agreed that the testimony which was so taken should be "treated as taken after issue joined," and read in evidence upon the final hearing of the cause in which it was taken, and it was so treated and used. There is no controversy about these facts, and the statement of them establishes the second and third elements of the claim to these fees, for the testimony of the witnesses was both taken and admitted in evidence in a cause. It only remains to be ascertained whether the testimony which was so taken and admitted in evidence may be properly described as "depositions," within the meaning of the statute.

Primarily, a deposition is simply written testimony. It is testimony that is deposited or laid down in writing. There are only two modes of producing the testimony of a witness before a court upon the trial or hearing of a cause. It may be produced by reading his deposition, or it may be produced orally; and the "oral examination of a witness," within the meaning of the sixty-seventh rule in equity, is not synonymous with the "oral testimony of a witness." *Ferguson v. Dent*, 46 Fed. 89, 90. The rule provides for taking depositions upon "oral examination," instead of written interrogatories. Oral testimony on the trial or hearing of a cause must be spoken and delivered by the witness in the presence of the court. Depositions are a substitute for it. Testimony that is orally delivered before any person who is authorized to receive it, and reduced to writing for use in a court, becomes a deposition. But, in order to render it admissible as evidence in a court, it must be taken according to law. A legal deposition, according to *Bouvier* is "the testimony of a witness, reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provision of some statute law, to be used on the trial of some question of fact in a court of justice." 1 *Bouv. Law Dic.* tit. "Deposition." In *Nail Factory v. Corning*, 7 *Blatchf.* 16, *Fed. Cas. No.* 14,197, it was said by *Nelson, J.*, that it is "testimony taken out of court under an authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court, or before a master. It applies in cases at common law where depositions are given in evidence on the trial, and in suits in equity where depositions are read at the hearing." See, also, *Stimpson v. Brooks*, 3 *Blatchf.* 456, *Fed. Cas. No.* 13,454. The signing of a deposition is a mode of authentication only. If the witness refuses to sign his deposition, it may be signed by the special master

who has taken it, under the sixty-seventh rule in equity. Its authentication, and the observance of other legal formalities in the taking of it, are necessary only to procure its admission in evidence in a court. A neglect or omission of these formalities affects its admissibility only. An observance of them makes it admissible against any objections on that account. But these objections may be waived. A failure to interpose such objections at the time the deposition is offered in evidence is a waiver of them. In this case there was an express waiver of any objections to the depositions, by the terms of the agreement under which they were used. When depositions are admitted in evidence on the trial or hearing of a cause, and have performed the office and function of depositions, they are, so far as the court in which they were used is concerned, legal depositions, as fully and completely as if every technical formality had been accurately observed in the taking of them. In *Stimpson v. Brooks*, supra, *Betts, J.*, stated it as his opinion that affidavits are taxable as depositions, if used in evidence by agreement on a final hearing; and in *Wooster v. Handy*, 23 Fed. 49, it was held by *Blatchford, J.*, that depositions which were entitled and read in evidence in several cases were taxable in each of them, although they were taken and reduced to writing only once. In the case under consideration, where it must be and is conceded that the testimony of the witnesses was taken and reduced to writing under and by competent authority, and their written testimony has fully performed the office and function of depositions on the final hearing of the cause, it is useless, in determining the compensation of the officer before whom it was taken, and of the attorneys for their services in connection therewith, to inquire whether it had every technical requirement of legal depositions that was necessary to secure their admission as evidence. The waiver supplied any defect. The taxation of attorney's fees on each of the depositions herein is therefore approved. *Evans v. Hetlich*, 7 Wheat. 453; *Shutte v. Thompson*, 15 Wall. 151; *Howard v. Manufacturing Co.*, 139 U. S. 204, 11 Sup. Ct. 500; *Hake v. Brown*, 44 Fed. 734; *Jernan v. Stewart*, 12 Fed. 271; *Ferguson v. Dent*, supra; *Ingham v. Pierce*, 37 Fed. 647.

The testimony in this case was taken by one of the stenographers in the courts of the state, under an appointment of this court as a special examiner in chancery. He was selected by the parties for appointment, and was appointed at their instance. Examiners are appointed under the equity rules, like special masters. There is no statutory rule of compensation or schedule of fees that is expressly applicable to them. The compensation of special masters is fixed by the allowance of the court. In making an allowance to an examiner, the fees of clerks and commissioners for taking depositions might furnish analogies for the guidance of the court. On the other hand, stenographers in the courts of the state have an established rate of charges for their services, and the claim and taxation of compensation for the examiner in this case are founded thereon. There does not appear to have been any contract between the examiner and the parties. Their attorneys were practicing in the courts of the state, and presumably were acquainted with the estab-

lished rate of charges among stenographers. The examiner was selected because he was a stenographer. If the parties considered the known and established rate of charges exorbitant, they should have made a special contract with him. In the absence of any special contract, the examiner had a right to expect that the established rate of charges in the state courts would govern. By accepting the appointment of examiner, he did not agree to accept a less compensation for his services as a stenographer than he was accustomed and entitled to receive for the like services in the state courts. It is not denied that his claim, and the taxation thereon of \$1,668.05, are in accordance with the established rate of charges among the stenographers in the state courts. But there is no reason why the per diem charge should be twice as large in the United States courts as in the courts of the state. It is \$5 in the courts of the state, and it ought to be the same here. The charge of \$320 for per diem, therefore, will be reduced to the sum of \$160, and the examiner will be allowed for his services the sum of \$1,508.05. Except as herein modified, the motion to retax is overruled.

MUHLENBURG COUNTY v. CITIZENS' NAT. BANK.

(Circuit Court, D. Kentucky. November 17, 1894.)

No. 6,360.

1. PRACTICE—SUBSTITUTED SERVICE—ON WHAT BILLS ALLOWED.

A motion for substituted service of the subpoena to answer a bill in equity should not be granted, unless on the face of the bill there be some legal or equitable merit.

2. SAME.

The C. Bank, an Indiana corporation, in 1889, recovered a judgment in the United States circuit court in Kentucky against M. county, upon certain coupons of county bonds. This judgment was paid, under mandamus proceedings, in 1893. After such payment, the county filed a bill in equity against the bank, alleging that the coupons were not owned in good faith by it, but belonged to a citizen of Kentucky, and that the court was without jurisdiction of the action, and praying that the judgment be set aside, and the money paid thereon refunded. There was no allegation of any meritorious defense to the action. Upon this bill the county asked the court to direct substituted service on the bank. *Held* that, as the objection to jurisdiction had not been raised during the pendency of the action at law, and the relief was sought, not to remedy any injustice, but to supply the neglect of the defendant in the action at law to raise the objection to jurisdiction, the bill did not state such a meritorious cause of action as would justify an order for substituted service.

This was a bill in equity by Muhlenburg county against the Citizens' National Bank of Evansville, Ind., to set aside a judgment at law. The complainant moves for an order directing substituted service of the subpoena.

Jonson & Wickleffe, Wm. H. Yost, Jr., D. W. Sanders, and Wm. B. Thomas, for complainant.
Humphrey & Davie, for defendant.