lish the drain, and this presents a single and entire controversy, in which all the landowners are equally interested. The assessment of benefits and damages is merely incidental to the main, and, for the purpose of removal, the indivisible, issues tendered by the original petition and report. Whether a removal could be had if the sole issue presented by the remonstrants was the amount of the assessments, it is not necessary to determine. But see Brooks v. Clark, 119 U. S. 502, 7 Sup. Ct. 301. Tested by the principle established in these cases, it is manifest that neither the original petition nor the report discloses any such separable controversy wholly between the petitioners for removal on the one side and the original petitioners for the drain on the other as will warrant a removal.

Leave to file the transcript and docket the cause is denied at the cost of the petitioners for removal, and the transcript is ordered to be transmitted to the circuit court of Lake county, Ind.

MULCAHEY v. LAKE ERIE & W. R. CO.

(Circuit Court, N. D. Ohio, W. D. July 27, 1895.)

1. EVIDENCE—STENOGRAPHER'S NOTES—PRACTICE IN FEDERAL COURTS.
   Act of congress providing that, in addition to the mode of taking depositions in courts of the United States, depositions or testimony may be taken in the mode prescribed by the laws of the state in which the courts are held, merely allows a change in the mode of taking a deposition where some other act of congress allows a deposition to be used in place of oral testimony, but does not authorize the admission of testimony found in the stenographic notes of a former trial, where the laws of the state in which the court is held allows it.
2. FEDERAL COURTS—JURISDICTION—GRANTING NEW TRIAL TO QUESTION.
   Where a case has been removed to a federal court, and tried there without objection to the jurisdiction, verdict will not be set aside and new trial granted to enable objection to be made to the jurisdiction, but the party will be left to his remedy by writ of error.

Action by Patrick Mulcahey against the Lake Erie & Western Railroad Company. There was a verdict for plaintiff, and defendant moves for a new trial.

Finley & Bennett, John N. Doty, and Hurd, Brumback & Thatcher, for plaintiff.

A. W. Scott, and John B. Cockrum, for defendant.

HAMMOND, J. On its merits the motion for a new trial in this case must be overruled. I do not think the exclusion of the testimony of Andrew Shainer, which was found in the stenographic notes of the former trial, was error. The act of congress (Acts 52d Cong., 1st Sess., c. 14) which provides "that in addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the district and circuit courts of the United States it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the states in which the courts are held" has not changed the ordinary rule of the federal courts that the witness must be produced and his testimony taken orally. Con-

gress has prescribed the only conditions under which depositions may be substituted for oral testimony, and we can use other than oral testimony only in compliance with those conditions, which are so familiar that it is unnecessary to cite them. All that the recent act of congress above quoted has done is to permit depositions authorized by congress to be taken according to the mode in vogue in the state. It has not enlarged or changed the conditions under which depositions may be substituted for oral testimony, and the state of Ohio cannot, therefore, prescribe other and different conditions than those prescribed by congress. Except, therefore, in directing how a deposition may be formally taken, section 5243 of the Revised Statutes of Ohio (Laws Ohio 1894, p. 86) has no effect upon this question. Our acts of congress prescribe that the deposition of a witness beyond the jurisdiction of a court may be taken under certain conditions, and the testimony of this witness so beyond the jurisdiction of this court might have been taken under that act of congress in any mode authorized by the laws of Ohio. But it is quite another thing to say that his testimony found in the stenographic report of a former trial may be used in evidence, and, congress not having said this, the legislature of Ohio cannot prescribe such a rule of evidence for us. The recent act of congress was not intended to have any such effect.

In regard to the objection that the court excluded from the jury the evidence of the negligence of the conductor it is sufficient to say that for the reasons so fully stated in the charge itself I still think that was the correct view of the rights of the parties. The result is that the verdict here must be sustained and the motion for a new trial overruled.

But we are now confronted with another and an anomalous ground for a new trial, one that, so far as I know, has not been presented before; at least no case has been cited in which it has occurred. This case has been twice expensively tried in this court, once resulting in a mistrial and now in this verdict for the defendant. Yet, for the first time, attention is called to a defect of pleading in the petition for removal which is said to be fatal to our jurisdiction. And we are asked to set this verdict aside and grant a new trial in order that we may then hear a motion to remand the case to the state court from which it came for want of jurisdiction here. It does seem to me that if ever a new trial should be refused upon such a ground as that it should be done in this case. It is entirely true that the recent legislation of congress has made it quite unnecessary to make any objection to the jurisdiction, and the court is required, whenever the want of it appears, to dismiss the case. This legislation is in hostility to the jurisdiction of the federal courts, and reverses the general rule for quieting all questions of jurisdiction by the appearance and waiver of the parties, and the final judgment in the case. And these cases are dismissed in the appellate courts where the want of jurisdiction appears, and often on the motion of the courts themselves. But it does not follow from this, in my judgment, that the court here must aid this objection to the jurisdiction by changing the attitude of the party making it, releasing him from the technical obstructions that