

of East St. Louis. An order that the circuit court be opened for the appointment of supervisors for the entire county was not asked for or desired.

Section 2012 provides what shall be done after the circuit court has been opened upon a proper petition. Supervisors are to be appointed for each voting precinct in the city or town mentioned in the petition, "or for such election district or voting precinct in the congressional district as may have applied in the manner hereinbefore prescribed." I do not think it can be fairly said, construing both sections together, that congress intended the circuit court should be opened solely for the purpose of appointing supervisors for a single election precinct or district in a county. When the court is opened upon a petition signed by the proper number of citizens of a county or parish, it is authorized to appoint supervisors for any or all the voting precincts in the county or parish.

For these reasons I decline to open the circuit court for the purpose prayed for.

HUNTER v. INTERNATIONAL RY. IMP. CO.

(Circuit Court, S. D. New York. October 13, 1886.)

COSTS—DEPOSITION DE BENE ESSE—ATTENDANCE OF DEPONENTS.

If a party takes the depositions of witnesses living at such a distance that he cannot compel their attendance, he is to be allowed therefor in the taxation of costs, notwithstanding the attendance of the witnesses at the trial is procured by the other side, and the use of the depositions thereby prevented.

Appeal from Taxation of Costs.

Ewing & Southard, for plaintiffs.

Dillon & Swayne and *David Keane*, for defendants.

BROWN, J. As the witnesses lived over 100 miles from the place of trial, the depositions were a necessary preparation for the trial on the part of the plaintiff. Had he waived the use of the depositions by his own action, or by procuring the attendance of the witnesses, he could not tax for the depositions and for the subpoenas and attendance. But the defendant, it appears, procured the attendance of the witnesses; and the depositions being *de bene esse* only, that is, to be used conditionally upon their non-attendance, the plaintiff was not legally entitled to read the depositions when the defendant produced the witnesses for examination. Section 865 provides, in general, that the depositions in such cases are not to be used; and such is the general rule in regard to depositions taken *de bene esse*. *Patapsco v. Southgate*, 5 Pet. 604, 617; *Pettibone v. Derringer*, 4 Wash. C. C. 215, 219; *Stein v. Bowman*, 13 Pet. 209; *The Thomas*

& *Henry v. U. S.*, 1 Brock. 367; *Barron v. People*, 1 N. Y. 386; *Guyon v. Lewis*, 7 Wend. 26.

There was in this case no waiver of the depositions by the party who had taken them, and a voluntary substitution therefor of the oral examination on the trial. This apparently distinguishes the present case from that of *Hathaway v. Roach*, 2 Wood. & M. 63.

As the plaintiff could not compel the attendance of the witnesses, and did not procure them, and was compelled to be at the necessary expense of the depositions in order to prepare for trial pursuant to the statute, his right, as the prevailing party, to tax this expense, cannot be justly taken away by the defendant's having produced the witnesses for examination at the trial. That taxation is therefore affirmed.

FAGAN v. CULLEN.

(Circuit Court, E. D. Michigan. October 18. 1886.)

CLERK OF COURT—PERCENTAGE ON MONEY COLLECTED BY MARSHAL.

The clerk of the United States circuit court is entitled to a commission of 1 per cent. upon moneys collected by the marshal upon executions.

This was an informal appeal from the taxation of costs. In delivering the execution to the marshal, the clerk minuted on the back, in addition to the amount of the judgment, interest, and costs, a charge of \$18.15 for clerk's commission on the amount of the judgment. Defendant paid the amount of the execution to the marshal, and requested the opinion of the court as to whether the clerk was entitled to a commission. The matter was submitted without argument.

BROWN, J. By Rev. St. § 828, the clerk is entitled, "for receiving, keeping, and paying out money, in pursuance of any statute or order of the court, one per centum on the amount so received, kept, and paid." It is clear that, although a fund may be subject to a decree of the court, yet the clerk is not entitled to his commission thereon unless the money be actually paid into court, or passes under his control. This was said of a fund in the hands of an administrator which had been the subject of litigation. There had been no order that the fund should be paid into court; and, although it was subject to decree and within judicial control, it was not considered as money deposited in court, or moneys received, kept, and to be paid out by the clerk, and it was held that he was not entitled to a commission. *Ex parte Plitt*, 2 Wall. Jr. 453. So of money in the hands of an assignee in bankruptcy, which the law provides the assignee shall deposit in his own name as assignee, and which