

SPILL *v.* CELLULOID MANUF'G CO.

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

1. COSTS—TAXATION—WHAT ALLOWED—TRAVEL OF WITNESSES.

Fees for travel of witnesses in going and returning can only be taxed once for each occasion of taking testimony, although each occasion embraces a number of days.

2. SAME—DEPOSITIONS.

Costs are not taxable for depositions taken for use upon an accounting before a master and in contempt proceedings as for depositions for the final hearing, notwithstanding they are referred to upon a motion for rehearing which results in a dismissal of the bill as upon a final hearing.

3. SAME—EXAMINER'S FEES.

Upon a charge of \$1,275 for fees paid an examiner. \$1,085 thereof disallowed.

In Equity. Appeal by defendant from clerk's taxation of costs.

E. M. Felt, for plaintiff.

E. Luther Hamilton, for defendant.

WHEELER, J. This is an appeal by the defendant from the disallowance by the clerk, in the taxation of costs, of fees paid witnesses for travel from their places of residence to the place of taking their depositions, 212 miles, each day during several days of attendance; of \$1,085.05 of \$1,275 of the fees paid an examiner for taking testimony under a commission; of depositions taken by defendant, and of solicitor's fees for attending the taking of depositions by the plaintiff for use on an accounting before a master, and other depositions taken in proceedings for contempt,—all of which were referred to on a motion for rehearing on which the bill of complaint was dismissed.

The statute allows fees of witnesses for each day's attendance, and for travel in going and returning. Rev. St. § 842. Witnesses are allowed their attendance by the day for being at the place of giving their testimony from the beginning to the end, and are allowed for their travel for going in the beginning, and returning at the end. *Schott v. Benson*, 1 Blatchf. 564. There is no provision for travel in the mean time. The clerk allowed travel for going and returning on each occasion of taking testimony. There is no question about the number of days. The allowance for travel appears to be what the statute allows.

The charge of \$1,275 for examiner's fees was objected to as excessive. The clerk allowed what appears to be usual according to the practice in this district, which seems to be proper.

The costs of the reference to the master, and of the proceedings for contempt, stand by themselves, and depositions taken to be used there are not understood to be taxable by the clerk, as depositions under the rules in equity for the final hearing are. *Stimpson v. Brooks*, 3 Blatchf. 456; *Troy Iron & Nail Co. v. Corning*, 7 Blatchf. 16. It is claimed, however, that these depositions should be taxed as if taken

for final hearing, because they were used on the motion for rehearing, which resulted in a dismissal of the bill as upon a final hearing. *Spill v. Celluloid Manuf'g Co.*, 21 Fed. Rep. 531. But the reference made to these depositions upon that hearing did not change their nature, nor affect their standing as evidence. They were in the case for the purposes for which they were taken, and were taxable or not as the law provided. There does not appear to be any provision of law for taxing them differently because they came to be used for other purposes.

The taxation of the clerk, in the respects appealed from, does not appear to be erroneous. Taxation affirmed.

CENTRAL TRUST Co. and others v. WABASH, ST. L. & P. RY. Co.
(BOUTWELL and others, Intervenor.)¹

(Circuit Court, E. D. Missouri. September 27, 1886.)

RAILROADS—MORTGAGES—LIENS—LACHES.

Where a claim for damages for the loss of property in the course of transportation, against a railroad in the hands of receivers, originated more than three years before the appointment of such receivers, *held*, that the claimant was not entitled to any priority over mortgage creditors, notwithstanding the fact that negotiations for the purpose of settling the claim had been carried on between the claimant and the railroad company from the time of the loss until the receivers were appointed.

In Equity.

The intervenors sue for the value of four car-loads of grain which the Wabash, St. Louis & Pacific Railway Company undertook, before being placed in the hands of a receiver, to transport to Troy, New York, and there deliver to intervenors, but which it failed to so transport and deliver; and the intervenors pray that the sum claimed to be due them be ordered to be paid out of the rents and profits of the property in the hands of the receivers of said road.

The matter was referred to a master, and submitted to him on an agreed statement of facts, from which it appears that said railway company received said grain for transportation, and transported it as far as Toledo, Ohio, where the different car-loads arrived at the following dates, viz.: Two car-loads, December 10, 1880; one car-load, December 20, 1880; and one car-load, January 21, 1881; that all four car-loads were negligently detained at Toledo until February 11, 1881, when they were all greatly damaged by a flood, which was an act of God, and could not have been foreseen, but which would have been avoided if the grain had been forwarded to Troy within a reasonable time; that, after being damaged by the flood, the grain

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.