oil and then performing what is known as a squalene test, which was evolved by Dr. Fitelson, a Government witness employed by the Government, and as a result of these tests and the testimony given by him the jury convicted this defendant. This squalene test has never been officially adopted by the Association of Official Agricultural Chemists, and I understand the time for them to determine whether to adopt this as a permanent test or not is to be in November, and action will be taken at that time to determine whether they will adopt this as the test for the detection of olive oil, and as I recall the testimony, Dr. Fitelson testified that he adopted a certain formula based upon his examination of many oils, and adopting that particular formula he came to the conclusion that there was 1 to 2 percent olive oil in each of the cans pertaining to the counts which were left to the jury, but he testified, however, that had he adopted any other formula but the one he did—and it is quite evident that no expert could foresee the formula that he saw fit to adopt—he would get a greater content of olive oil.

"Under the circumstances, I do not think a verdict of guilty is justified, and on the weight of the evidence I am going to set the verdict aside under each count. I do this because perhaps the Government can strengthen its proof by the time a new trial is on, and it should be given the opportunity to do so. It might call other experts or other tests might be made which would have greater probative value in court and before a jury. I am not unmindful of the fact that it is important that if this man is guilty he should be punished. On the other hand I am not unmindful of the fact that in the present state of the proof I cannot conscientiously allow the verdict to stand.

"For these reasons I grant the motion to set aside the verdict, and only upon the grounds which I have set forth in this opinion, and I direct that the case be placed on the calendar for retrial in the early part of November."

The case was retried before a judge without a jury, and in January 1949 a verdict of acquittal was entered.

16740. Adulteration and misbranding of oil. U. S. v. 22 Cases * * * (and 4 other seizure actions). Cases consolidated for trial. Claimant's motion for discovery denied. Case tried to a jury; verdict returned for Government; decree of condemnation entered. Judgment of district court affirmed by circuit court of appeals. Certiorari to United States Supreme Court denied. Claimant's motion to retax costs granted in part and denied in part. (F.-D. C. Nos. 25075 to 25078, incl., 25092. Sample Nos. 8143-K, 8146-K to 8149-K, incl., 8151-K, 8152-K.)

LIBELS FILED: July 14, 1948, District of Connecticut; amended January 26, 1949.

ALLEGED SHIPMENT: On or about June 9, 14, 15, and 16, 1948, by the Antonio Corrao Corp., from Brooklyn, N. Y.

PRODUCT: Oil. 22 cases at New Haven, Conn., 15 cases at Waterbury, Conn., 15 cases at Bristol, Conn., and 5 cases at Torrington, Conn. Each case contained 6 1-gallon cans.

LABEL, IN PART: (Can) "Figlia Mia Brand a blend consisting of 90% vegetable oils, choice cottonseed, corn and peanut oils, plus 10% pure olive oil" or "Pace O Mio Dio Brand 80% choice peanut oil and 20% pure olive oil."

NATURE OF CHARGE: Adulteration, Section 402 (b) (1), a valuable constituent olive oil, had been in whole or in part omitted; and Section 402 (b) (4), artificial flavoring had been added to the product and mixed and packed with it so as to make it appear to be better or to contain substantial amounts of olive oil, which is better and of greater value than the product was. Squalene had been added to the product and mixed and packed with it so as to make

it appear to be of greater value than it was, namely, to be a product containing more olive oil than it actually contained.

Misbranding, Section 403 (a), the label statements "20% pure olive oil" and "10% pure olive oil" were false and misleading as applied to the product, which contained little, if any, olive oil.

DISPOSITION: On September 30, 1948, the court ordered the actions consolidated for trial. On October 1, 1948, the Antonio Corrao Corp. appeared as claimant and filed an answer denying the allegations of the libels. The claimant then filed a motion for discovery and inspection, which the court denied on February 4, 1949, handing down the following memorandum opinion and order:

HINCKS, *District Judge:* "This action arises out of a libel by the Government, pursuant to Section 334 of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A., Sec. 301, et seq., resulting in a seizure of five cases more or less of cans of oil, alleged to have been adulterated and misbranded. It is presently before the Court on a motion by the Antonio Corrao Corporation, as claimant of the libeled merchandise, for an order requiring the government to produce true and exact copies of 'each and every chemical test and analysis' made by the government on the samples taken by it from the seized merchandise. The gist of the claimant's position is that the allegations of the libel do not reveal the nature of the alleged adulteration with exactitude; that the claimant is entitled to know the specific substances and exact percentages thereof with which the government asserts claimant adulterated the oil; and that the rights of the claimants will be seriously prejudiced unless prior to trial the claimant should be allowed to inspect the chemical analyses made by the government's experts, which, presumably will constitute the basis of the prosecution. The claimant contends that he is entitled to this inspection under Rules 26, 33, and 34 of the Federal Rules of Civil Procedure.

"In opposing the motion the libelant relies first upon the strict exclusiveness of the language used in Section 334 (c) of the Act allowing a claimant a true copy of the analysis upon which the proceeding is based only where a fresh fruit or vegetable is involved and second on the theory that the libelant should not be required to disclose expert testimony or opinions of its chemists who analyzed the oil seized, particularly in the absence of the claimant's showing of necessity or of hardship resulting from the denial.

"This proceeding, while commencing as a libel under the Admiralty Rules, nevertheless, at this stage, is an action at law and is governed by the Federal Rules of Civil Procedure. *Four Hundred and Forty-three cases of Frozen Egg Product* v. *U. S.*, 226 U. S. 172, 183; *U. S.* v. *935 Cases Tomato Puree*, 136 F. 2d 523; *Reynolds* v. *U. S.*, 153 F. 2d 929, 931. The claimant's request for production and inspection of the tests and analyses made by the libelant comes within the scope of Rule 34.

"There is much support for claimant's contention that the Rules of Civil Procedure governing the discovery process have been liberally construed. 3 Moore's Federal Practice, Sec. 34.04, *Hickman* v. *Taylor*, 329 U. S. 495, 507; *United States* v. *300 cases of Black Raspberries*, 7 F. R. D. 36, 37; *Stark* v. *American Dredging Co.*, 3 F. R. D. 300. But this liberal construction of disclosure before trial has not developed without limitations. As the Supreme Court noted in Hickman v. Taylor, supra, '* * * discovery like all matters of procedure has ultimate and necessary boundaries.' And this is particularly true with reference to Rule 34 under which claimant presently seeks relief.

"Discovery and production of documents under Rule 34 is not a matter of right, *Sutherland Paper Box Co.* v. *Grant Paper Box*, 8 F. R. D. 416, 417. This rule, by its very language, is more rigid than rules relating to depositions and interrogatories, and to entitle the applicant to the order prayed for he must show good cause therefor, designate the documents desired, and show that they are not privileged and are material to the matter involved. *Martin* v. *Capital Transit Co.*, 170 F. 2d 811; *Heiner* v. *North American Coal Corp.*, 3 F. R. D. 63. And this language of Rule 34 must be read in the light of the general principles governing the application of the Federal Rules, 26–37 inclusive, embracing Depositions and Discovery. In *Hickman* v. *Taylor*, supra, the Supreme Court recently enunciated a principle of discovery limiting dis-

closures to those instances wherein the denial of the same would unfairly prejudice the party seeking inspection in preparing his claim or would cause him undue hardship or injustice. Cf. 2 Moore's Federal Practice, 1947 Cumulative Supplement, Sec. 26.12, p. 172.

"What constitutes 'good cause' is a difficult question, and as the learned editor has suggested in 2 Moore's Federal Practice, Sec. 34.04, considerations of practical convenience are of prime importance. But even under the most liberal construction of this rule, mere assertions of threatened prejudice are not enough. The Court must be satisfied that the production of the requested document is necessary to enable a party to prepare his case, or that it will facilitate proof or progress at the trial. *Hickman* v. *Taylor*, supra, 509, *Gordon* v. *Pennsylvania R. Co.*, 5 F. R. D. 510, 512.

"Even with the liberal objective of the Federal Rules in mind I fail to see that the claimant has adequately met the requirement of Rule 34—namely, a good cause for the discovery. Concededly the claimant has had opportunity to make its own tests and analyses which may be offered in evidence in defense against a forfeiture. With such authentic evidence within ready reach I cannot find that the claimant will suffer unfair prejudice if not accorded a preview of the government's evidence.

"This holding is altogether compatible with the Federal Food, Drug and Cosmetic Act which expressly enumerates fresh fruits and vegetables as the only types of products concerning which a claimant is entitled to a true copy of the analysis. Apparently Congress realized that the tendency of such fresh produce to spoil left a claimant with scant opportunity for useful and necessary inspection of his own and that consequently, in fairness, the Government report should be made available to him. But that is not the case here.

"From this conclusion I cannot recede even though it be deemed at variance with the holding in *United States* v. *300 cases of Black Raspberries*, supra. With all deference, I cannot see the necessity of a court order to enable a claimant to pierce 'the dark veil of secrecy over pertinent facts' when without an order he can poke his head within the veil and make his own observation of the facts.

"IT IS ACCORDINGLY ORDERED that the motion be denied."

The consolidated cases were tried before a jury, and on March 31, 1949, the jury returned a verdict for the Government. On April 1, 1949, the court ordered that the product be condemned and delivered to charitable institutions or sold for use in soap manufacture. The judgment was appealed to the U. S. Court of Appeals for the Second Circuit, and on January 10, 1950, the following opinion was handed down, affirming the decision of the district court:

SWAN, *Circuit Judge:* "This is an appeal by Antonio Corrao Corporation from a decree condemning certain cases of edible oils which the appellant had blended in its plant in Brooklyn, New York, and shipped to purchasers in Connecticut in June 1948. The libel of information in each of the five consolidated proceedings alleged that the oil was adulterated within the meaning of the Federal Food, Drug and Cosmetic Act,[1] in that (1) it contained little, if any, olive oil, (2) artificial flavoring had been added to simulate olive oil, and (3) squalene had been added.[2] The libel also charged misbranding in that the label statements as to the percentage of pure olive oil were false and misleading.[3] The jury returned a special verdict finding that the goods were adulterated and misbranded as charged. The appeal challenges the sufficiency of the evidence to support the verdict and assigns numerous errors to the conduct of the trial.

"1. The evidence is sufficient: Squalene is a hydrocarbon found in olive oil. The squalene content of blended edible oils is the universally accepted criterion of the amount of olive oil present in a blend. However, squalene is also found in shark liver oil and it is impossible to distinguish one squalene from the other. Consequently by adding shark liver squalene to peanut oil a blend can be produced which will appear to contain 10% or 20% of olive oil, although in fact it contains little or none. Knowing that the commercial source of shark liver squalene was a distilling company in Rochester, government agents 'marked' it by mixing a small amount of anthranilic acid in the Rochester

[1] 21 U. S. C. Section 342 (b) (1) and (4).
[2] The third charge was amended by amendment to the libel.
[3] 21 U. S. C. Section 343 (a).

company's product. If any of this 'marked' squalene were added to peanut oil to make the blended oil measure up to the squalene test for olive oil, the fraud could be detected by using a chemical which would cause the anthranilic acid to take on a reddish hue. The chemical test, when it was applied to the seized samples of appellant's oil, disclosed that they contained anthranilic acid. A shipment of the Rochester company's 'marked' squalene was traced to Memmoli in Brooklyn, and he was shown to be an acquaintance of the appellant's president. The 'marked' squalene was not traced beyond Memmoli but it was extremely improbable that any anthranilic acid should have gotten into the seized samples except from using the 'marked' squalene traced to him. The appellant suggests that anthranilic acid may accidentally have gotten on the olives themselves, but that possibility was for the jury to weigh. Their inference that it came from the Rochester company's shipment was certainly a permissible one and amply justified their special verdict as to adulteration and misbranding.

"2. It is contended that the samples put in evidence were not proved to be 'representative' samples of the goods contained in each shipment. For example, the shipment to Market Wholesale Grocers consisted of 180 one-gallon cans, and the government restricted its proof to an analysis of the contents of only one can out of this shipment. However, witnesses testified to the appellant's method of manufacturing and said that as much as 8,600 gallons were mixed at one time. If all the cans in each shipment to a single consignee were filled from the same 'mix,' obviously a sample taken from one can was representative of all the cans in that shipment. The appellant offered no evidence to prove that the contents of the cans in a single shipment came from different mixes. In the absence of such evidence, the jury was entitled to infer that all the oil in any one shipment (the largest of which consisted of only 180 gallons) did come from the same mix and, therefore, that the one gallon sample was representative of all the cans in the shipment. The contention that the burden of proof on this issue was erroneously placed on the appellant is not substantiated by the charge. The jury was instructed that before they could make any finding favorable to the Government they must find that the sample involved was representative of the shipment. This plainly put the burden of proof on the libellant, and the later statement that they could take into consideration the claimant's failure to ask for additional samples can not fairly be construed as an instruction shifting the burden of proof, as the appellant now contends.

"3. There was no error in denying appellant's counsel permission to make an opening statement to the jury. While there appears to be an absolute right to open, without express statutory provision therefor, in a few jurisdictions,[4] the rule is by no means universal.[5] We think that opening is merely a privilege to be granted or withheld depending on the circumstances of the individual case. Since an opening must not be argumentative, its utility lies chiefly in outlining the facts to be proven, especially where they are rather complex.[6] Here the issues to be tried were simple and had been clearly explained by the court upon the voir dire. Hence we see no abuse of discretion in the denial of counsel's request. Even if the denial were erroneous, the error would not appear to be prejudicial since counsel was accorded the right of summation.

"4. Nor was there error in excluding the appellant's president from the court room. The appellant had requested that witnesses be excluded. The judge granted that request but, in effect, annexed to the grant the condition that Mr. Corrao, who was also to be a witness, should likewise be excluded. This was not, as appellant contends, the exclusion of a party; the corporation, not Mr. Corrao, was the claimant. One case has been found holding it was prejudicial error to exclude a corporation's president from the courtroom where he was charged with the duty of looking after the corporation's interest at the trial. *Sherman* v. *Irving Merchandise Corp.*, 26 N. Y. S. 2d 545. That decision appears never to have been cited. As the matter is clearly procedural, we shall follow the rule of universal application in federal courts that the exclusion of witnesses from the courtroom lies within the discretion

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[4] *Curtis* v. *People*, 211 P. 381 (Col.); *People* v. *McDowell*, 284 Ill. 504.
[5] *Woods* v. *State*, 17 So. 2d 112 (Fla.); *Henderson* v. *State*, 29 So. 2d 698 (Fla.); *Stewart* v. *State*, 17 So. 2d 871 (Ala.).
[6] 2 Bishop, New Criminal Procedure, Sec. 969 (2d Ed.).

of the trial judge. See *Holder* v. *United States*, 150 U. S. 91; *Oliver* v. *United States*, 10 Cir., 121 F. 2d 245, 250; *Mitchell* v. *United States*, 10 Cir., 126 F. 2d 550. There was no abuse of discretion in attaching to the granting of appellant's motion to exclude witnesses the condition that the witness Corrao should also be excluded.

"5. The next objection is denial of the claimant's motion for discovery. Before trial the claimant moved for an order directing the United States to furnish it with true and exact copies of each and every chemical test and analysis made by or for the United States on the samples of oil taken from the seized goods. The motion was based on Rule 34 of the Federal Rules of Civil Procedure. The Government suggests that a condemnation proceeding under the Food, Drug and Cosmetic Act is not subject to the Civil Rules because 21 U. S. C. Section 334 (b) provides: '* * * the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty * * *.' However, the Supreme Court has interpreted this as referring only to the initial procedure of seizure by process *in rem*. *443 Cans of Frozen Egg Product* v. *United States*, 226 U. S. 172. It now appears well established that the Rules of Civil Procedure do apply to condemnation proceedings. *Eureka Productions, Inc.* v. *Mulligan*, 2 Cir., 108 F. 2d 760; *United States* v. *88 Cases, etc., of Bireley's Orange Beverage*, 5 F. R. D. 503 (D. C. N. J.); *cf. United States* v. *720 Bottles*, 3 F. R. D. 466 (D. C. N. Y.). And discovery need not be limited to analyses of fresh fruits and vegetables under the better interpretation of 21 U. S. C. Section 334 (c).[7] *United States* v. *300 Cases, etc., of Black Raspberries*, 7 F. R. D. 36 (D. C. Ohio).

"Rule 34 permits discovery only when 'good cause therefor' is shown. Judge Hincks rightly ruled that no good cause for the discovery appeared, since the claimant had already made its own tests and analyses upon samples which had been supplied at its request. The motion for discovery preceded by a few days the amendment to the libel asserting adulteration by the addition of squalene. The claimant evidently anticipated that this charge would be made since its brief states that 'its chemist had advised that there was no known method of determining whether squalene had been added, and consequently claimant moved for discovery.' The claimant had no knowledge until the trial as to the anthranilic acid evidence. Objection was then made on the ground that there was no charge that such acid had been added. This was not a valid objection; testimony as to the presence of anthranilic acid was not offered to establish adulteration of the oil by the addition of this acid but to establish the addition of 'marked' squalene. Had the claimant urged surprise in the introduction of the evidence dealing with anthranilic acid, he would have been entitled at most to a continuance, but no such request was made. See *Murphy* v. *Overlakes Freight Corp.*, 2 Cir., Oct. 28, 1949.

"6. Calling Memmoli as a witness: After a shipment of the Rochester distiller's 'marked' squalene had been traced into the hands of Memmoli, he was put on the stand by the libellant. When asked his occupation, he claimed his privilege against self-incrimination, disclosing that he was under federal indictment in New York. Thereafter a series of questions were put to him, culminating in the question whether he had sold any squalene to the claimant. As to each question he claimed his privilege. The claimant then moved for a mistrial on the ground that the propounded questions were prejudicial to it.

"In *Wigmore on Evidence*, 3d, ed. Section 2268, the learned author says: 'The privilege is merely an *option of refusal*, not a prohibition of inqury,' and 'it is universally conceded that the question may be put to the *witness on the stand*.' [Emphasis in original.] Nevertheless we are not prepared to say that it would not be ground for reversal if the party who called a witness connected with a challenged transaction knew, or had reasonable cause to know, before putting the witness on the stand that he would claim his privilege. See *McClure* v. *State*, 251 S. W. 1099 (Tex.); *Rice* v. *State*, 51 S. W. 2d 364 (Tex.); *cf. People* v. *Kynette*, 104 P. 2d 794; 802 (Cal.). However

[7] Sec. 334 (c): "Availability of samples of seized goods prior to trial. The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained."

that may be, in the case at bar it had not been proven that the libellant knew or had reasonable cause to know that Memmoli would claim the privilege when he took the stand. Hence there was no error in calling him to the stand. After he had claimed the privilege, in response to the third question put to him it was apparent that he would continue to claim it. Nevertheless, counsel for the Government propounded a series of increasingly pointed questions as to each of which the privilege could be, and was, claimed. Had this been done over the claimant's protest, it might have been error serious enough to require reversal. As to that, we need not say; for here, the claimant allowed the questions to go on without a whisper of objection and then moved for a mistrial. The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by his silence he has helped to create. See *Morrow* v. *United States*, 7 Cir. 101 F. 2d 654, 658, cert. den. 307 U. S. 628; *Louisville R. Co.* v. *Masterson*, 96 S. W. 534 (Ky.). The motion for a mistrial was properly denied. In his charge Judge Hincks handled the matter as well as may be done by admonition; he instructed the jury that Memmoli's 'reluctance to incriminate himself may not be used to incriminate others * * *.' The situation, then, is just as though Memmoli had never been called.

"7. Exclusion of evidence: There was no error in excluding chemical reports as to the goods seized in Philadelphia. They were irrelevant without proof that the Philadelphia shipments came from the same 'mix' as any of the seized Connecticut shipments.

"8. The charge: The contention that the charge was biased and unfair is wholly unjustified. Nor was there error in refusing the request to charge that a mere preponderance of the evidence is insufficient to prove the charge. This is a civil proceeding in which the usual rule as to burden of proof prevails. *United States* v. *Regan*, 232 U. S. 37; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237, 266–7; *Boxes of Opium* v. *United States* (C. C. Cal.), 23 F. 367, 396; *cf. Van Camp Sea Food Co.* v. *United States*, 3 Cir., 82 F. 2d 365.

"9. Claimant's remaining assignments of error do not require discussion; examination reveals them to be without merit.

"Judgment affirmed."

On May 29, 1950, the claimant's petition for a writ of certiorari to the Supreme Court of the United States was denied. The claimant then filed a motion to retax costs; and on June 2, 1950, the district court handed down the following opinion granting the claimant's motion in part and denying it in part, and retaxing costs:

HINCKS, *District Judge:* "This action was brought under the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301, et seq., and a decree of condemnation was entered on April 1, 1949. Costs were taxed by the Clerk, and the claimant has moved that they be corrected in certain respects. The specific objections to the Clerk's taxation will be considered in the order stated in claimant's brief. Sections of Title 28 U. S. C. hereinafter cited are those which were in effect on September 1, 1948, and prior to the 1949 amendments, since this was the law applicable when the costs accrued.

"Claimant contends that the subsistence fees of $16.50 taxed for witness Damasiewicz for 2¾ days, and $3.00 taxed for witness Jacobson for one half day were erroneously based upon a subsistence fee of $6.00 per day under 28 U. S. C. Sec. 1823, rather than a subsistence fee of $3.00 per day under 28 U. S. C. Sec. 1821. The latter section was applicable since neither witness was a government employee (Tr. 264, 280). This objection is well taken.

"Claimant next contends that the travel and attendance fees of $10.10 taxed for witness DiCarlo, who was neither sworn nor called by the Government, were improper. 28 U. S. C. Sec. 1821, as the Government points out, does not require testimony of a witness as a condition of taxing the cost of his presence, but specifies that an 'attending' witness shall be paid. True, when witnesses are supoenaed but do not testify, a presumption arises that their testimony was not material and if the presumption is not rebutted, costs will not be taxed against the losing party, although the matter lies within the discretion of the court. *U. S.* v. *Lee*, 107 F. 2d 522 (CA 9), cert. den. 309 U. S. 659; *Federal Bank* v. *Mitchell*, 38 F. 2d 824. But here the court has before it the affidavit of the U. S. Attorney filed pursuant to 28 U. S. C. Sec.

1924, listing DiCarlo's name separately opposite the amount and stating that the costs shown have been necessarily incurred. In the *Lee* case, supra, cited by the claimant, the court on a supposedly similar 'duly verified statement of the district attorney' held the presumption rebutted and taxed the expenses of non-testifying government witnesses against the claimant. I feel that the presumption has been rebutted here, and there being no showing by the movant that no *bona fide* reason existed for DiCarlo's presence, I overrule this objection.

"The breakdown of witness expenses originally furnished claimant's counsel by the government incorrectly listed witness Bassen's travel expenses as $32.42. This item should have been $43.12, which makes the amount of $55.42, as taxed by the Clerk, correct.

"Claimant contends that since witnesses Dolke, Williams, Bassen and Damasiewicz came without subpoena from a distance of more than 100 miles from the courthouse, travel fees were erroneously taxed. 21 U. S. C. Sec. 337 (Sec. 307 of the Food & Drug Act) is applicable here, and it places no hundred-mile limitation upon the reach of the Court's subpoena. *Friedman* v. *Washburn Co.*, 155 F. 2d 959, cited by the claimant, was decided under former 28 U. S. C. Sec. 654, repealed by the new judicial code. Cf. F. R. C. P. 45 (e) (1). There being no hundred-mile restriction, the travel fees were properly taxed against the claimant.

"Claimant next contends that 'subsistence fees for witnesses are permissible only where the witness is unable to return home on the same day.' But under 28 U. S. C. Sec. 1821 this principle applies only to witnesses who are not government employees, and the claimant names ten witnesses, eight of whom were government employees and covered by Sec. 1823. As to witnesses Jacobson and Damasiewicz only, the objection is well taken and no subsistence should have been taxed for fractions of days.

"Although, as claimant further contends, witness Dolke was present in court on one day only, he came from Rochester, N. Y., and was properly allowed travel time under Sec. 1821. Travel fees were taxable on account of witnesses Geller and Memmoli, at five cents per mile, under Sec. 1821. These were taxed at $16.60 and $17.60 respectively. Claimant has made no showing that this was excessive, and it is not the task of the court to ascertain the correct mileage. These objections are overruled.

"In connection with the U. S. Marshal's fees complained of, there is no showing that such fees were diminished by the consolidation of the five actions into one. These costs should stand as taxed.

"Claimant contends that no fees should be allowed for government employees who appeared as voluntary witnesses. This contention is based upon a construction of the word 'summoned' in Sec. 1823 to mean 'subpoenaed,' rendering the section inapplicable to voluntary witnesses. No authority is cited for so narrow a construction of the section, and I have found none. Under Paragraphs 604 and 604(a) of former Title 28, from which Sec. 1823 is derived, the decisions made no distinction between voluntary and subpoenaed government-employee witnesses (see *Gleckman* v. *U. S.*, 80 F. 2d 394, 403–4, and cases cited), and the Reviser's Notes to Sec. 1823 mention no intended change. There is no basis for the distinction sought to be made by the claimant here and I hold that the word 'summoned' in Section 1823 means only 'brought on' and includes witnesses appearing at the request of the government even though not served with subpoena. As for claimant's contention that Sec. 1823 makes witness expenses payable out of a special fund and thus not taxable as costs, it seems plain that the provision referred to, pertaining to the obligation of the government to the employee-witness, has nothing to do with the taxation of costs against the losing party to reimburse the government for its payment.

"Finally, claimant contends that costs may not now be taxed since the decree has been entered, affirmed, and certiorari is pending. But the last sentence of Sec. 1920 provides that a bill of costs 'shall be filed' and 'upon allowance' be included in the decree. This clear mandate has no reference to pending appeals, and although the costs need not be paid until the outcome of the appeal is finally determined, the court has jurisdiction to determine what costs should be allowed and included in the decree of condemnation.

"The motion is therefore granted in part and denied in part, and costs should be retaxed in accordance with the foregoing."