

Case No. 12,397.

SAWYER v. AULTMAN & T. MANUF'G CO.

[5 Biss. 165.]¹

Circuit Court, N. D. Illinois.

July, 1870.

WITNESS FEES—WHEN TAXABLE—NOT
SUBPŒNAED.

1. Witness fees cannot be taxed in the federal courts unless the witness has been regularly subpoenaed.

[Cited in *U. S. v. Sanborn*, 28 Fed. 303; *Burrow v. Kansas City, Ft. S. & M. R. Co.*, 54 Fed. 282.]

2. It is not sufficient that they attended at the request of the party. The act of congress evidently contemplated some process of the court.

This case was tried by a jury at the May term of the court, and plaintiff came in with an affidavit and asked to have the costs of his witnesses taxed, although his witnesses were not subpoenaed.

BLODGETT, District Judge. There has been a rule in existence in this court since some time about 1842, prohibiting the clerk from taxing the costs of any witnesses except 561 such as were regularly subpoenaed. The witnesses in this case were not subpoenaed, but attended and testified at the request of the plaintiff; and counsel of plaintiff, I presume, acting as is the practice in the state courts, now claim to have their costs taxed as witness fees. On consultation with Judge Drummond, we are not disposed to change the rule which has been standing so long in this court, and so long acquiesced in that counsel should by this time understand it. We are satisfied that more mischief would result from a change of the rule than by strictly adhering to it; and, more than all that, I am somewhat in doubt whether the court has any right to tax costs for witnesses not regularly subpoenaed. By act of congress, provision for compensation for witnesses reads, "for each day's

attendance in court, or before any officer pursuant to law, each witness shall," etc. 10 Stat. 167. Now no person can be said to be in attendance before the court pursuant to law unless duly subpoenaed.

Then, again, another paragraph in the same act commences: "When a witness is subpoenaed in more than one cause," etc.; thereby clearly conveying the idea that the only case in which witnesses can draw their compensation is when they are acting in pursuance of a subpoena. This being the act of congress, and the rule being in consonance with the act of congress, we are disposed to adhere strictly to it.

Motion overruled.

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