IN RE UNITED STATES *VS.* CIGARS, ETC.

District Court, E. D. Pennsylvania. May 25, 1880.

FEES—RETENTION OF BY OFFICERS OF COURT IN REVENUE CASES—PRACTICE.—In revenue cases, when the government is successful, the district attorney, clerk and marshal may retain their fees out of the moneys collected as in other cases

SAME—ACTS OF CONGRESS—CONSTRUCTION OF.—Sections 856 and 3216 of the Revised Statutes, providing that the fees for which the United States are liable shall be paid on the settlement of the officers' accounts, and that costs recovered by the government shall be paid to the collector of internal revenue, relate only to cases in which the government is unsuccessful, and to cases in which it has paid fees in the progress of the cause, and subsequently recovered them as costs.

SAME—CIRCUIT COURT.—Concurring opinion by circuit judge establishing same rule for circuit court.

SAME—PAYMENT INTO COURT—PRACTICE.—The practice of paying the entire amount recovered, including fees, into court, in such cases, approved.

This was a motion for an order to pay the local collector of internal revenue the whole fund recovered by the government in certain revenue cases, and paid into the registry of the court, including the fees, costs, charges and expenses of the officers of the court. The only question raised by the motion was whether the fees of the officers might be retained by them, or should be paid to the collector.

John K. Valentine, U. S. District Attorney, for the motion.

A. Sydney Biddle, contra.

BUTLER, D. J. This motion contemplates a change of practice, respecting the officers' fees in revenue cases. Heretofore, the fees, in these, as in other cases, have been retained by the officers when collected and received, and accounted for in their semi-annual returns. Now, it is claimed, that the amount should be

paid over to the internal revenue department, through the collector, and the officers look to the treasury for its return.

That the practice heretofore pursued conformed to the law, as it existed prior to the act of June 30, 1864, re-enacted

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July 13, 1866, (Rev. St. § 3216,) is not, I believe, open to doubt. The act of February 26, 1853, (Rev. St. §§ 823, 828, 839, 842,) prescribes what fees shall be allowed to the clerk, district attorney, and other officers; and sections 839, 842 and 844 show, with great distinctness, that these fees are to be retained by the officers, when received, until the limit fixed as the maximum of their compensation is exceeded. Each one of these sections 839, 842 and 844 recognizes this right to retain in plain terms, the last declaring "that every district attorney, clerk and marshal shall, at the time of making his half-yearly return to the attorney general, pay into the treasury * * * * any surplus of the fees and emoluments of his office, which said return shows to exist, over and above the compensation and allowances authorized by law to be *retained* by him."

Section 856 provides that "the fees of district attorneys, clerks and marshals, * * * in cases *where the United States are liable to pay the same,* shall be paid on settling their accounts at the treasury." And on this language, and that of the act of July 13, 1866, (Rev. St. 3216,) the argument in support of the motion is based. The "cases where the United States are liable to pay," (referred to in section 856,) are not, however, suits in which the fees are collected from its antagonists; but others, in which it is an unsuccessful party, and, also, where services are required (such as the act specifies) for which no fees are taxed to the defendant. Where the United States is successful, and the fees are recovered from the defendant, it is not liable to pay, and the case does not fall within this

section. This construction is reasonable, and conforms to the language employed; while any other would bring the section into conflict, not only with the several sections before referred to, (which provide, as has been seen, for the officers' retention of their fees,) but also with the section immediately following it, (section 857,) which directs that "the fees and compensation of officers, and persons hereinbefore mentioned, *except* those which are directed to be paid out of the treasury, shall be recovered in like manner 496 as fees of the officers of the states, respectively, for like services are recovered."

The distinction in the mind of the draughtsman of the act, which, without this section, would have been plain, is thus put beyond doubt. The fees, other than those which are to be paid out of the treasury, are those which are taxed and collected in suits; and these are to be recovered as like fees are recovered by similar offices of the state. In Pennsylvania such fees are recovered by taxation and execution, if not voluntarily paid; and when recovered belong exclusively to the officer. The plaintiff in whose suit they are collected has no claim upon, nor responsibility respecting, them. *Beale* v. *The Commonwealth,* 7 Watts, 186. In this case Chief Justice Gibson says: "He who orders the service is also liable on an implied contract. Down to the receipt of them (the fees) by the sheriff he certainly is; but it cannot be doubted that payment to the agent of the creditor, by the debtor ultimately liable, discharges the collateral liability of the intermediate one. If the money be lost in the sheriff's hands it is lost to him whose property it was at the time; for a loss which would not have happened without some degree of negligence must be borne by him whose inattention occasioned it, and it is the business of the officer to see that the sheriff pay over his fees."

The act of July 13, 1866, which provides "that all judgments and moneys recovered or received for taxes, costs, forfeitures and penalties shall be paid to collectors as internal taxes are required to be paid," effects no change in the existing law, except to require the costs, *which belong to the government,* to be paid into a different department in internal revenue cases. These costs consist in expenditures made by it during the progress of suits, and taxed to and recovered from defendants on its account, and this, manifestly, was its only purpose. It does not require the officers' *fees* to be thus paid over, and no proper object is discoverable for such a requirement. The fees belong to the officers as the emoluments of their offices. Conceding that congress might require 497 the payment, and send the officers to another department to recover them back, such a purpose will not be attributed to the statute in the absence of plain terms to that effect.

This interpretation gives full force to the language of the statute, and I have no doubt, to its purpose. The distinction between *costs* to which a successful party is entitled, and *fees* belonging to an officer, is well understood by the profession, and is judically stated by the court in *Messer* v. *Good,* 1 S. & R. 248, and again in *Beale* v. *The Commonwealth,* before cited. In the former case the court says: "*Costs* are an allowance to a *party* for expenses incurred in conducting his suit; *fees* are a compensation to an *officer* for services rendered in the progress of the cause." The act of 1866, manifestly, recognizes this distinction, and was not intended to affect the officers referred to, by taking possession of their fees, but simply to turn the money coming to the government, in the form of costs, from revenue cases, into another department, more appropriate for its reception.

The entire amount collected in the cases referred to, has been paid into court; and we regard this as a

proper practice, as it affords all persons interested an opportunity of contesting the officers' claims.

The motion is therefore denied.

MCKENNAN, C. J. The statutes referred to in the opinion of the district judge apply as well to the disposition of money collected or paid under proceedings in the circuit court as to money in the custody of the district court. Hence it was desired that the circuit judge should sit with the district judge at the argument of the motion.

The questions involved in it were argued with great fullness and ability, and the foregoing opinion is the result of our concurrent judgment. It is to be understood, therefore, as practically an adjudication by both courts, and as establishing the rule by which similar applications will be determined by the circuit court.

*Prepared by Frank P. Pritchard, of the Philadelphia Bar.