

law arising in the case, believe that the testimony of such witnesses may become material in the progress of the trial. The fact that they are not presented to testify in the case and are not examined is conclusive that they were not material, and their presence unnecessary, and the party who thus brings them to court should be held responsible for their costs. *Pugh v. Good (Or.)* 23 Pac. 827; *Deweese v. Smiley (Ind. App.)* 27 N. E. 444; *Osborne v. Gray*, 32 Minn. 53, 19 N. W. 81; *Pike v. Nash*, 16 How. Pr. 53; *Dean v. Williams*, 6 Hill, 376.

Objection is made to the taxation of fees in favor of Earl Hulse and Mrs. Grace Snyder for their attendance at some other term of court than the one at which the case was tried, for the reason that no subpoenas for these witnesses are found among the files in the case; but these witnesses did attend court at said term upon the request of the plaintiff, and also appeared as witnesses and testified at the trial of the case. It is a settled rule of this jurisdiction that a witness who attends court upon the request of a party to the suit, and testifies in the case, is entitled to his fees, notwithstanding the absence of a subpoena. This rule of practice was applied by this court in the case of *Pinson* against this same defendant, and at the instance of defendant's counsel, and it is a poor rule that does not work both ways.

It follows that the fees of Charles Simpkins, R. M. Sharp, and S. E. Sharp are disallowed as against this defendant, and the same are taxed as against the plaintiff. The objections to the fees of Earl Hulse and Mrs. Grace Snyder are overruled, and said fees stand taxed against the defendant.

SIMPKINS v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, W. D. Missouri, W. D. June 11, 1894.)

No. 1,813.

WITNESS FEES—TAXABLE COSTS.

A person subpoenaed as a witness in a personal injury case had a case of his own against the same defendant, growing out of the same accident and set for trial the same day. His case was first reached, and, by agreement, the other was made to depend on its result, without a separate trial. It appeared that he was necessarily present, looking after his own case, and as a material witness therein. *Held*, that his fee as a witness in the other case should not be taxed against the common defendant.

This was an action by Charles Simpkins against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for personal injuries. Defendant moved to retax the costs.

Harry K. West, for plaintiff.

Gardiner Lathrop and S. W. Moore, for defendant.

PHILIPS, District Judge. Motion is made by the defendant in this case to retax the costs for the witness fee of Foster Simpkins. The record and evidence in this case show that the plaintiff and said Foster Simpkins had pending in this court at the same time,

and set for trial on the same day, separate actions for damages growing out of the same accident. The case of Foster Simpkins was first reached and taken up and tried (61 Fed. 999), and the case of Charles Simpkins was, by agreement of counsel, made dependent upon the result of the Foster Simpkins case, and was adjusted between them without trial. It appears, both from the statement on behalf of defendant and the affidavit of the witness Foster Simpkins, that he attended upon court looking after his own case, and was a material witness therein, and testified as such in the case. It would be no ground of exclusion of the witness fees in another case pending in the same court and at the same time that he himself had a suit pending therein, as he might well intrust the management of his case to his counsel without his presence, and if, in this case, the witness Foster Simpkins had stated in his affidavit that he would not otherwise have attended upon the court but in response to the subpoena as a witness in the Charles Simpkins case, his fees therein should be allowed him. But when it is made to appear, as it does in this case, that he would have attended upon court in his own case with or without having been subpoenaed as a witness in the Charles Simpkins case, the foundation and title to witness fees disappear, for the theory of the law in the taxation of witness fees is that the witness has withdrawn himself from his usual and ordinary avocation and business, and given his time to the attendance before the court in the case in which he is called. Allied as the two cases were, the one in favor of the father and the other the son, and growing out of the same transaction, it would be an imposition upon the common defendant for each of them to have themselves subpoenaed as witnesses, the one for the other, and claim their fees while attending upon the court as interested parties and witnesses in their own case.

For this reason the motion is sustained.

UNITED STATES v. LING.

(District Court, D. Connecticut. June 22, 1894.)

No. 1,028.

POST OFFICE—INDECENT LETTERS—INDICTMENT.

Rev. St. § 3893 (1 Supp. Rev. St. p. 621), provides that "every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, * * * whether sealed as first-class matter or not, is hereby declared to be non mailable matter." *Held*, that a private letter in a sealed envelope is within the prohibition of this statute if it is of an indecent character.

At Law. Indictment against Willie Ling for mailing an indecent letter.

Geo. P. McLean, U. S. Atty.

Gross, Hyde & Shipman, for defendant.

TOWNSEND, District Judge. Demurrer to an indictment for mailing an indecent letter, under section 3893, Rev. St. (1 Supp. Rev. St. p. 621), which reads as follows: