ATWOOD et al. v. JAQUES.

(Circuit Court, W. D. Missouri, W. D. July 2, 1894.)

No. 1,840.

1. TAXABLE COSTS—EXPENSE OF AFFIDAVITS ON MOTION FOR PRELIMINARY INJUNCTION.
   A respondent who succeeds in defeating an application for preliminary injunction is entitled to have taxed the cost of the notarial certificates and seals attached to the affidavits used by him on the hearing, but not the expense of writing the affidavits in the form of depositions.
2. SAME—PRINTING EVIDENCE AND ABSTRACT OF RECORD.
   The expense of printing evidence and abstract of record is not taxable in the circuit court, in the absence of any rule of court or special order requiring such printing to be done.
3. SAME—COPIES OF TESTIMONY
   Payments to stenographer for making carbon copies of testimony for use of the party or his counsel is not taxable.

Motion to Retax Costs.

Barton & Brown and Gage, Ladd & Small, for complainants.
J. S. Brown, for respondent.

PHILIPS, District Judge. Motion is made in this case by complainants to retax part of the costs taxed by the clerk against them. Objection is made to the charge of $26.50 for affidavits used on behalf of respondent upon complainants' application for preliminary injunction. It is quite apparent from the amounts charged for these affidavits, respectively, that they include the writing of the affidavit in the form of a deposition. The law and the practice do not warrant this charge. Stimpson v. Brooks, 3 Blatchf. 456, Fed. Cas. No. 13,454. But it seems to me, inasmuch as the complainants invited the issue on the application for a temporary injunction, and such applications are heard only upon affidavits, that it would be but equitable and right that the prevailing party should at least be accorded the sums paid out by him to the officer administering the oath and certifying thereto; and therefore I shall allow to the respondent as costs the sum of 50 cents for the notary's certificate and seal to each affidavit, aggregating $15.50.

The next item of costs objected to by complainants is the charge of $506.65 paid by respondent to printing company for printing evidence and abstract of record on behalf of respondent. In the absence of any rule of court requiring this to be done, and in the absence of any special order by the court in this case, or any agreement between the parties that the same should be printed, and charged as costs in the case, there seems to be no warrant, under equity practice, for this charge. Hussey v. Bradley, 5 Blatchf. 210, Fed. Cas. No. 6,946a.

The next and final item objected to is the sum of $60.20 paid to Frances E. Mullett by respondent for carbon copies of testimony taken by her, as stenographer. As these copies were evidently for the use of respondent or his counsel, they are not chargeable as costs in the case; and the motion, to the extent above indicated, is sustained, and the costs ordered to be retaxed accordingly.

EWERS' ADM'R v. NATIONAL IMP. CO.

(Circuit Court, W. D. Virginia. April 2, 1894.)

1. NEW TRIAL—MISCONDUCT OF JUROR.
Proof that while a case was pending, and before the testimony was concluded or the charge given, one of the jurors privately measured the distances testified to in the case, and told several persons that he had made up his mind, and would hold out for heavy damages, is ground for setting aside the verdict.

2. SAME—EVIDENCE—AFFIDAVITS OF JURORS.
On motion for a new trial on the ground of misconduct of a juror, affidavits of fellow jurors are admissible to sustain the verdict.

Action by Ewers' administrator against the National Improvement Company. The verdict was rendered for the plaintiff, and defendant moves for a new trial.

Ford & Ford, for plaintiff.
Harrison & Long, for defendant.

PAUL, District Judge. This motion is based upon the following grounds, to wit: First, that the verdict is contrary to the law and the evidence; second, on account of the misconduct of a juror.

The court does not care to discuss the evidence in the case, as it is involved in the first ground, and will confine its views to the second ground, on which the motion is based. The charges against the juror, as contained in the affidavits filed by the defendant, are: That while the case was pending before the jury, and before the evidence was concluded, before the jury had received instructions from the court, and before the case had been argued by counsel, the juror, when separated from his fellows, had taken private measurement of distances testified to by witnesses in the case; had, in conversation with two different persons, at different places, about the same time, made himself the special champion of the character of the mother of the dead child, who was a witness in the case, the child being the same to recover damages for whose death this action was brought. There had been some criticism, the evening before, during the progress of the trial, of the conduct of the mother, Mrs. Ewers, on account, as was alleged, of her efforts to influence some of the witnesses in their testimony. The juror said to two persons that he believed her to be a lady. That he knew where she lived on Daniel's hill: To one he said he had been out on Rivermont bridge that morning, and could see her house; to the other he said he had gone over to Mrs. Ewers' house the evening before, to see her, but did not find her at home. To one of these persons he said: "Some of the witnesses had testified that the little girl was running down Sixth street, and some that she was not, but that it did not make any difference; that the car certainly struck her, and her mother ought to have some damages. He further stated that he had it all down in his mind then exactly what he would do. That a few days before that he had been on a jury that tried a man for counterfeiting money, and that he was the only man who stood bullheaded, and hung the jury." That conversation lasted 10 or 15 minutes.