The question whether or not, upon the facts now before this court, the agent who makes these contracts is to be held a "managing agent" of the defendant within the meaning of the state statute as to service upon foreign corporations, has been decided adversely to defendant by the general term of the state supreme court. There seems no good reason for giving a different construction to the state statute from that given by the courts of the state in a case where the foreign corporation, by doing business within the state, has impliedly assented to the state regulation as to service of process. The motion to set aside service of the summons is denied.

KIMBLE v. WESTERN UNION TEL. CO.

(Circuit Court, D. Delaware. December 4, 1895.)

PRACTICE—STAYING ACTION TILL COSTS OF FORMER ACTION PAID.

Plaintiff commenced an action in a state court to recover damages for injuries alleged to have been caused by defendant's negligence. The cause was removed by the defendant to the United States circuit court, in which, after the court, on the trial, had instructed the jury to render a verdict for the defendant, the plaintiff submitted to a voluntary nonsuit. The plaintiff afterwards commenced another action against defendant, for the same cause, in the United States circuit court in another district. *Held*, that the plaintiff's proceedings in such second action should be stayed until the costs of the first action were paid, although the first action was prosecuted by plaintiff in forma pauperis, under the act of congress of July 20, 1892 (27 Stat. 252).

This was an action by George T. Kimble against the Western Union Telegraph Company to recover damages for personal injuries. Defendant moved for a stay of plaintiff's proceedings.

Anthony Higgins and Albert Constable, for plaintiff.
Levi C. Bird and Andrew E. Sanburn, for defendant.

WALES, District Judge. The plaintiff has sued the defendant to recover damages for personal injuries alleged to have been received by him in consequence of the negligence of the defendant. He had already sued the defendant for the same cause in the circuit court of the Second judicial circuit of the state of Maryland, from which, on motion of the defendant, the case was removed to the United States circuit court for the district of Maryland. At the trial of the cause, after the close of the evidence, the court, on motion of the defendant's attorney, instructed the jury to find a verdict for the defendant; and thereupon, upon the order of the court, the plaintiff, being called, made default, and judgment of non pros. was entered. On these admitted facts, and on motion of defendant's counsel, the plaintiff has been ruled to show cause why he should not be ordered to pay the costs of the first, before prosecuting the present, action.

Formerly, excepting in actions of ejectment, it was not usual to stay the proceedings in a second action until the costs in a prior one for the same cause, and between the same parties, had been paid.

But at a very early period, in actions of tort, for a malicious arrest or prosecution, or for a trespass, the court would make such an order, in the exercise of a sound discretion, in a proper case. Tidd, Prac. (3d Am. Ed.) 438; Weston v. Withers, 2 Term R. 511; Crawley v. Impey, 8 Taunt. 407; Henderson v. Griffin, 5 Pet. 158. In more recent times the practice has been recognized, and it is now the general rule to compel the plaintiff to pay the costs of the first action before prosecuting a second one for the same cause, against the same defendant, in the same court, or in another court of concurrent jurisdiction. The application of the rule is governed only by a just regard to the rights of the parties, and to the circumstances under which it is applied for. Henderson v. Griffin, supra. The rule of practice as thus stated is not disputed by plaintiff's counsel; but it is claimed that the plaintiff is exempt from its operation, inasmuch as he sued in forma pauperis in the first action, under the provisions of the act of congress of July 20, 1892 (27 Stat. 252).

"Section 1. That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security of costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

"Sec. 3. That the officers of the court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: provided, that the United States shall not be liable for any of the costs thus incurred."

By the first section of this act, it will be observed that the plaintiff is not "required to prepay fees or costs, or to give security therefor," on filing a sworn statement that, because of his poverty, he is unable to do either. Section 5 provides that judgment may be rendered for costs as in other cases. It is urged in opposition to the pending motion that to grant it would be to virtually nullify the act of July 20, 1892. We do not concur in this. It does not follow that, because the plaintiff was not required to prepay or give security for the costs of the first action, he may not be compelled to pay the judgment for costs therein before prosecuting a second one. The statute does not extend that far. He has already had his day in court, taken the benefit of the statute, and voluntarily abandoned his suit, without assigning any satisfactory reason, then or since, for doing so. He

availed himself of the privilege of using the processes of the court and the services of its officers in the effort to establish his claim, without complying with the conditions imposed on the general suitor, and the statute cannot be construed in such manner as to confer upon him any additional favor. He is entitled to no other exemption than those expressly given by the act, and he now stands in the same position as any other person who brings a second action for the same cause. To adopt the construction contended for would have the effect of converting the statute into the means of indefinitely harassing the defendant. Such, clearly, is not the purpose of this beneficial act. It was designed to help an honest poor suitor in establishing his just claims in a court of justice, not to put into his hands a weapon of offense. It not seldom happens, when a plaintiff, at the close of the evidence, foresees an adverse verdict, he will take a nonsuit, with the hope of procuring more proof in another trial before another jury, and in another court. This course leads to a multiplicity of suits, subjects a defendant who has a just and legal defense to needless trouble and expense, and should not be encouraged. If the plaintiff should now be allowed to proceed with the action which he has brought in this court, and claim immunity from the payment of costs of the first action, when and where would his experiments stop? His cause may be a righteous one. Its merits have not been discussed here, and can have no effect in the disposal of the motion. Let the rule be made absolute.

UNITED STATES v. STANTON.

(Circuit Court of Appeals, Second Circuit. December 10, 1895.)

No. 607.

1. UNITED STATES ATTORNEYS—FEES—ATTENDANCE BEFORE COMMISSIONER.
   Under the provision giving attorneys a fee of five dollars per day for examination before a judge or commissioner of "persons charged with crime" (Rev. St. § 824), they are not entitled to such fee for days necessarily spent in investigating cases, partly in the office of the United States commissioner, before arrest, and where no formal accusation was in fact made, nor any witnesses sworn and examined before the commissioner. 37 Fed. 252, reversed.

2. SAME—ATTENDANCE BY COUNSEL.
   No fee can be allowed for attendance of a United States attorney before a commissioner, where he was not present in person, but by counsel, whom he employed to represent him. He must appear in person, or by some one authorized by statute to appear in his behalf. 37 Fed. 252, reversed.

3. SAME—INTERNAL REVENUE COMPROMISED CASES.
   A United States attorney is not entitled to a five-dollar fee for attendance before a commissioner in internal revenue compromised cases in order to discontinue the same pursuant to the order of the commissioner of internal revenue, as the peremptory order of the commissioner is practically a withdrawal of the charge. 37 Fed. 252, reversed.

4. SAME—OFFICE EXPENSES—CLERK HIRE.
   He is entitled, out of the fees and emoluments of his office, to the expenses of the ordinary and necessary telegraphic communications in re-

gard to criminal business, and of necessary clerk hire, printing, and stationery. 37 Fed. 252, affirmed.

In Error to the Circuit Court of the United States for the District of Connecticut.

This is a writ of error to the circuit court for the district of Connecticut. Lewis E. Stanton, United States attorney for said district from January 2, 1885, to April 2, 1888, duly filed his petition under the act of March 3, 1887 (chapter 359), to recover certain items in his accounts as district attorney which had been suspended or disallowed by the accounting officers, or which, although allowed, have not been paid. Issue being joined, the case came on for hearing. Some of the items claimed were allowed by the court, and others disallowed. 37 Fed. 252. No review of any such disallowance was sought by the petitioner, but the United States assigned error, and took out this writ to review so much of the findings and conclusions of the circuit court as allowed anything to the petitioner. Since the decision of the court, however, several of these items have been either withdrawn by the petitioner or paid by the accounting officers. It is only necessary, therefore, to discuss the items still in dispute.

Geo. F. McLean, U. S. Atty., for plaintiff in error.
Lewis E. Stanton, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). 1. The circuit court allowed three items of five dollars each for attendance before United States commissioner in the cases of Meech and Roath. These persons were defaulting cashiers in two Norwich banks. The days charged for were days necessarily spent in Norwich in the actual examination and investigation of the cases, partly in the office of the commissioner, but before the arrest was made. No sworn testimony of witnesses was taken before the commissioner on the days which were disallowed. The claim is made under section 824 of the United States Revised Statutes, which provides that United States attorneys shall receive "for examination before a judge or commissioner of persons charged with crime five dollars a day for the time necessarily employed." A strictly literal construction of this section would confine the allowances to days when the accused person was himself examined. The section, however, has been discussed in a brief but well-considered opinion of the attorney general, June 7, 1858 (9 Op. Attys. Gen. 170), and the conclusion reached that the words "examination of the person charged" mean "investigation of the case." This interpretation seems to have been uniformly accepted by the treasury department, for allowances are made for attendances before commissioners when sworn testimony is taken, although the person charged with crime is not himself examined. The section does, however, distinctly require that there should be that formal accusation of crime which makes the investigation of the case by examination of witnesses before the commissioner a judicial function of that officer. No such accusation appears to have been made in this case, nor any witnesses sworn and examined before the commissioner. We are unable, therefore, to concur in the opinion of the circuit judge. The item should be disallowed.

2. The next assignment of error is to the allowance of two per diems in the cases of Sparks and Romer. There were hearings before the commissioner in those cases, respectively, on August 12th and August 15th, when the district attorney was absent on vacation. There is no assistant attorney in the district of Connecticut, and petitioner therefore employed counsel to represent him before the commissioner. They attended, and were paid five dollars each. We are of opinion that the allowance of this item was error. No compensation should be allowed for attendance of a United States attorney before a commissioner unless he is present in person, or by some person whom the statutes of the United States authorize to appear in his behalf. The relation between the attorney and the government is personal, and he cannot delegate his functions to other counsel. As this item is not brought within the provisions of section 363, 365, or 366, it should be disallowed.

3. The next assignment of error is to the allowance of $70 for an item improperly described in the original bill of particulars as "14 discontinuances before commissioners at $5." The bill of particulars was amended so as to read, "Fourteen per diems for attendance before commissioners in internal revenue compromised cases in order to discontinue proceedings pursuant to the order of commissioner of internal revenue, $5.00 each,—$70." This claim is made under section 824. The circuit judge finds as to each of these attendances that the service "is a necessary one, requires time, is useful, and is in the interest of economy and efficiency." He does not find, however, that it was concerned with the investigation of the case of a person charged with crime. The peremptory order of the commissioner of internal revenue, which, except in certain cases pending in court, is conclusive, is practically a withdrawal of the charge. Rev. St. U. S. §§ 3229, 3231. The per diems are therefore not covered by section 824, and should be disallowed.

4. The remaining assignments of error are to the allowance of claims, $699 for clerk hire, $38.37 for telegrams, and $64.55 for stationery. These claims are made under section 835, which reads as follows:

"Sec. 835. No district attorney shall be allowed by the attorney general to retain of the fees and emoluments of his office which he is required to include in his semiannual return for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the treasury department, a sum exceeding six thousand dollars a year."

The circuit judge finds that the telegrams, which were produced, were the ordinary and necessary telegraphic communications in regard to criminal business; that the assistance of clerks was important and necessary, and the sum claimed a moderate one (it was approved by the attorney general); and that the printing and stationery were a part of the necessary expenses of the office, the articles mentioned furnished and paid for. Inasmuch as both sides admit that the total fees and emoluments of the United States attorney for the district of Connecticut are less than $6,000 per annum by an

amount greater than these three items, it is unnecessary to discuss any of the special objections raised as to the propriety of these charges. We concur with the circuit judge in the conclusion that they are all "necessary expenses of the office, including necessary clerk hire," and should be paid as such out of the fees and emoluments of the office of the United States attorney, which presumably have all come into the hands of the treasury department. Rev. St. U. S. § 3617. But if it were conceded that such claims for clerk hire and expenses should be disallowed, then an equal sum would stand to the credit of the attorney as fees and emoluments not exceeding $6,000 a year, which the statute gives him as his personal compensation. The section last above quoted uses the word "retain," it being apparently the theory of the original draftsman that the attorney would collect all the fees and emoluments of each fiscal year, and, after deducting the clerk hire and necessary expenses, would retain the whole residue as his personal compensation if it be less than $6,000, and, if it be greater, would transmit to the treasury only the excess above $6,000. In practice, however, all the fees and emoluments go to the treasury, and the attorney draws on the appropriate officers of the treasury department, with proper vouchers, for whatever items he is entitled to. It is suggested in the brief of plaintiff in error that the petitioner should not be paid this clerk hire and these office expenses, "because he has already received them by receiving all the emoluments of his office." There is not in the record sufficient evidence to enable us to determine whether this quotation accurately states the facts. Assuming that the total fees and emoluments for a given year were $4,000, and that in the same year the attorney paid for clerk hire $250, and for necessary office expenses $50, his account would stand as follows:

In treasury to credit of district		$4,000
By drafts for clerk hire	$ 250	
" " " office expenses	50	
" " " residue as personal compensation	3,700	
		$4,000

If, however, the drafts for clerk hire and expenses were rejected, the attorney would not be paid all he is entitled to, unless there is paid him an additional $300 over and above the amount of his original drafts for personal compensation. Inasmuch as petitioner is still claiming the clerk hire and expenses, it seems improbable that he has ever drawn for the amount of these items as personal compensation. Without definite information on that point, however, we cannot determine whether or not the circuit court erred in allowing him $802.92 for these items.

The decision of the circuit court is reversed, and a new trial ordered; but, since plaintiff in error has prevailed as to some items only, and failed as to others, without costs of this court.

HARMAN v. HARMAN (two cases).[1]

(Circuit Court of Appeals, Seventh Circuit. November 6, 1895.)

Nos. 39 and 55.

1. PAROL EVIDENCE—CONTEMPORANEOUS WRITING.
Where parties make an agreement partly in writing and partly by parol, and do not profess to reduce the entire contract to writing, but only a certain part thereof, it is competent to show by parol evidence the entire contract; but—per Jenkins, Circuit Judge, dissenting—the oral agreement must be consistent with and must not contradict the stipulations of the written contract.

2. SAME—WITNESSES—COMPETENCY AND CREDIBILITY.
Where nephews who had taken possession of their uncle's lands under a written lease from him, and had made extensive improvements at their own expense, claimed, after his death, that the lease was only a part of the contract, and that there was a further parol agreement that upon his death they were to have the lands as their own, *held*, that while, under the statute of the United States, their own testimony was admissible as against devisees of their uncle, yet the court would be unwilling to decree in their favor upon their testimony alone, but would do so where their evidence was sufficiently corroborated.

3. DEEDS—DELIVERY TO EXECUTOR.
A delivery of deeds, pursuant to an oral contract under which the grantees were to have the lands after the grantor's death, to one of the grantees, as the executor of the grantor, to be opened after his death, is not a delivery such as will immediately pass the title; and, if the deeds are afterwards recalled, the transaction is a nullity.

4. PAROL EVIDENCE—ADMISSIBILITY—CONTRADICTION OF WRITING—ADDITIONAL AGREEMENT.
Certain nephews went into possession of lands belonging to their uncle, executing a written lease thereof. They also received of him some $15,000, for which they gave their notes, with interest at 10 per cent. They spent the money mainly in making improvements, and after his death claimed that there was an oral agreement, in addition to the lease, that upon his death the land was to be theirs absolutely, and that their notes for the borrowed money were also to be void. The lease was renewed from time to time during the uncle's life, and rent and interest were regularly paid. The lease contained some expressions apparently inconsistent with the alleged oral agreement; and in the last extension a condition was added that "the party of the second part will quit and give up possession of said premises at the expiration of any one year in case the party of the first part shall sell or convey all or any part of said lands, or in the event that either party should die or become dissatisfied," or upon failure to pay rent or interest. The nephews testified that they signed the extension containing this condition because their uncle insisted upon it, assuring them that it would make no difference, and they should have the lands just the same, and because he was aged, infirm, fretful, and with evidences of insanity, which made them afraid to oppose him. Their testimony was strongly corroborated, both as to this point and as to the existence of the oral agreement. This extension was executed some months before the expiration of the then existing term, and never went into operation, because of the uncle's death before that time. *Held* that, assuming the nephews had a valuable equity in the land, there was no consideration for this release of their rights, except as the seal to the agreement imported a consideration; that in a suit by the nephews against persons to whom the uncle had devised the lands the lease did not operate as an estoppel by deed, because it came in question only in a collateral way; that it did not operate as an estoppel in pais, because no person was induced by it to change his condition to his prejudice; that its highest effect was as an admission by the nephews under

[1] Rehearing denied January 30, 1896.