

words, they cannot be construed as a prohibition upon receiving money by the officers of the court. The very language of section 995 makes this clear. It refers to moneys which may be "received by the officers" of the court. This is further made clear by the fact that the court acts alone through its officers, and I know of no method of taking money into legal custody except by and through the instrumentality of the court's officers. It is common practice, when the court is about to take money into judicial custody, to order it paid to the clerk. His duty then arises, under section 995 above quoted, to deposit it forthwith in the registry of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did. On receipt of the money in question, he was required by law to forthwith deposit it in the registry of the court. Instead of doing so, he deposited it to his individual credit in some bank where he was keeping his individual account. He thereby violated the law, failed to perform his duty as clerk, and his subsequent use of the money for his own private purposes is but further evidence of his conversion of the same to his own use. When the court subsequently rendered final judgment in the case of *Stewart v. Henry County* it practically ordered this money to be paid to the plaintiff. The right to said money, and all legal remedies for the enforcement of the right, were thus vested in the plaintiff. It may or may not be, as claimed by defendant's counsel (as to which I express no opinion), that plaintiff has a present subsisting right enforceable against Henry county for the payment of his judgment. The assertion of such right, if it exists, would be grossly inequitable, and the court is not inclined to so rule this case as to unnecessarily invite such proceeding. It results that plaintiff is entitled to judgment for the penalty of the bond, with an assessment of damages in the sum of \$2,525, with interest thereon from the date of the institution of this suit at the rate of 6 per cent. per annum.

UNITED STATES v. SCHOONMAKER et al.

(Circuit Court, W. D. Texas, El Paso Division. April 8, 1899.)

CONTINUANCE—SUFFICIENCY OF APPLICATION.

An application for continuance by a plaintiff on account of the absence of a witness, in addition to showing the diligence of the party to obtain the attendance of the witness, should disclose the substance or effect of his testimony, that it may appear not only that it is material, but that it will tend to support plaintiff's cause of action, and also that the personal presence of the witness is necessary.

On Motion for Continuance.

Henry Terrell, U. S. Dist. Atty.

T. J. Beall, for defendants.

MAXEY, District Judge. The district attorney brought this suit in behalf of the government to recover of D. W. Schoonmaker and the sureties on his bond the sum of \$1,138.95 for the alleged failure on the part of Schoonmaker to construct a frame cavalry stable at Ft. Bliss

according to the provisions of his contract. The parties to the contract were Schoonmaker, in his own behalf, and George Ruhlen, assistant quartermaster of the United States army, representing the government.

The question for determination arises upon a motion made by the district attorney to continue the case for want of the testimony of Quartermaster Ruhlen. This is the third application made by the government for a continuance. The petition in the cause was filed on the 6th of March, 1897. On April 8th following, the cause was continued by agreement of counsel, and on October 5, 1897, it was continued on the application of the defendants. On April 5, 1898, and again on October 5, 1898, it was continued upon the application of the government. As before stated, the government is now seeking a continuance for the third time. The present application of the district attorney, premitting certain correspondence therein mentioned, is as follows:

"Now comes Henry Terrell, United States attorney, Western district of Texas, representing the plaintiff herein, and asks the court to continue this cause for the following reasons, to wit: One Lieutenant Colonel George Ruhlen, chief quartermaster United States volunteers, is the chief witness for plaintiff in this cause, and his testimony is material herein, in this: That the cause of action is for a breach of contract in the construction of certain cavalry stables for plaintiff at Ft. Bliss, Texas; that the said Lieutenant Colonel George Ruhlen was, on the part of plaintiff, in charge of said construction; that, upon the breach of said contract by defendant, the said Ruhlen, representing the United States, took charge of said work, and completed same; that he alone knows and is able to testify as to the condition of the accounts between plaintiff and defendant, and as to what balance is due the said plaintiff for said breach; that it is and has been impracticable to take the testimony of the said Ruhlen by deposition on account of the character of said Ruhlen's testimony, the same being a long and intricate account of debits and credits, covering the construction of said stables, partly by defendant, and partly by plaintiff, and hence impossible to give the court a clear understanding of the rights of plaintiff and defendant without the personal presence and oral testimony of said Ruhlen. The plaintiff further says that he has used all diligence to secure the attendance of the said Ruhlen, as appears by the following correspondence with the solicitor of the treasury: * * *. The facts in the knowledge of Colonel Ruhlen cannot be obtained from any other source. That the said George Ruhlen is now stationed, by order of the war department of the United States, at Honolulu, Hawaiian Islands, United States. The plaintiff is anxious to dispose of the case, but for reasons set forth cannot safely go to trial. This application is not made for delay, but that justice may be done. * * *"

The correspondence above referred to discloses that on September 16, 1898, the district attorney requested the attorney general to secure, through the war department, the presence of Col. Ruhlen at the October term, 1898, of the court. On September 27th, the war department advised the attorney general that Col. Ruhlen was on duty at Honolulu, and could not attend the court. On the 28th of January, 1899, the district attorney applied to the solicitor of the treasury to have Col. Ruhlen report as a witness at El Paso, and in this letter it is said by the district attorney that, " * * * in order to try the case, it will be necessary to have Major George Ruhlen, U. S. army, ordered to El Paso to testify. It is impracticable to take his testimony by deposition. The court has set case for first day in April of the term, and,

unless the government is ready, he will grant motion to dismiss. I trust the department will render me promptly all aid possible to get this case ready. I inclose copy of petition." The solicitor of the treasury, in his reply of January 31, 1899, informed the district attorney that he had requested the secretary of war to detail Col. Ruhlen to attend the trial; and, on the 28th of February following, the solicitor wrote further that the quartermaster general had notified him that Col. Ruhlen was then stationed at Honolulu, and it would be against the interests of the public service to take him away from his duties. From the correspondence, it is apparent that the district attorney has used reasonable diligence, without effect, to secure the presence of Ruhlen. But is that alone sufficient? There is nothing in the application to show to what Ruhlen would testify, if present. For aught that appears on the face of the papers, Ruhlen's testimony might disclose that the government has no case against the defendants. In other words, neither the substance nor effect of what Ruhlen would testify to is set out in the application; and hence it is not shown that the government would be able to make out its case, as alleged, were Ruhlen present as a witness. The materiality of his testimony is not disclosed. The district attorney doubtless regards him as a material witness; for it is alleged in the application "that he alone knows and is able to testify as to the condition of the accounts between plaintiff and defendant, and as to what balance is due the said plaintiff for said breach." But upon which side of the ledger does the balance stand? If the defendants are really indebted to the government, the application for continuance should disclose the fact, and, further, that Ruhlen's testimony would establish, at least prima facie, the cause of action.

But for another reason the application should be denied. The court is not satisfied that Ruhlen's personal presence is either indispensable or necessary. The district attorney insists that the court would be unable to obtain a clear understanding of the rights of the parties from the deposition of the witness, because of the fact that it would be necessary to state a long and intricate account of debits and credits, which could not be satisfactorily done except by the witness on the stand. The reverse would be more nearly true. In order to thoroughly understand intricate accounts, they must be stated in writing; and such work may be more intelligently and accurately done by a party in the quiet and privacy of his own office. While litigants should be accorded all reasonable opportunities to prepare their causes for trial, the court is of the opinion that it would be neither right nor just to the defendants, under the circumstances of this case, to grant a further continuance of the cause. The application will therefore be denied. Ordered accordingly.

CHIATOVICH v. HANCHETT et al.

(Circuit Court, D. Nevada. April 7, 1899.)

No. 634.

COSTS IN FEDERAL COURTS—TAXATION—SUFFICIENCY OF AFFIDAVIT.

Rev. St. § 983, providing that in federal courts "the amount paid printers and witnesses * * * shall be taxed * * * against the losing party," does not require any affidavit to be attached to the memorandum of costs filed by the successful party; and where a rule of court provides for such an affidavit, and what it shall contain, an affidavit which complies with such rule is sufficient, though it does not state in terms that the fees of the witnesses have been actually paid.

On appeal from an order of the clerk taxing costs.

M. A. Murphy, for plaintiff.

Torreyson & Summerfield, for defendants.

HAWLEY, District Judge (orally). Defendants claim, and the clerk held, that the fees of witnesses should not be allowed because there is no affidavit filed which shows that the witnesses' fees had been actually paid. Section 983 of the Revised Statutes provides that "the amount paid printers and witnesses * * * shall be taxed * * * against the losing party." The cost bill in the present case is accompanied by an affidavit, "on behalf of the plaintiff, * * * that the items in the above memorandum contained are correct, * * * and that the said disbursements have been necessarily incurred in the said action." It will be noticed that section 983 does not provide that any affidavit shall be attached to the memorandum of costs. Section 984 does provide for an affidavit, as to the fees of certain officers, "that the services charged therein have been actually performed"; but the fees of witnesses are not mentioned. In the absence of any rule of court upon the subject, it was at an early day, in some of the districts, held that an affidavit ought to be made to the memorandum of costs to the effect that the witnesses' fees had been paid. In course of time, regular rules were adopted in the various circuits, declaring what the substance of the affidavit to the memorandum should be, and was doubtless adopted in order to secure uniformity in the several districts. Rule 17 of this court provides what the affidavit shall contain. The affidavit in the present case complies with this rule. Of course, the losing party would have a right to show by affidavit, or otherwise, that the witnesses had not been paid. Rule 18 of this court provides how that may be done, and the proceedings to be taken are separate and independent from the affidavit that is required by rule 17. In the present case there is no pretense that the witnesses have not been paid, but the objection is based solely upon the ground that the affidavit does not conform to the language of the statute. It is purely technical, and, in the light of the rules of this court, cannot be sustained. The action of the clerk in refusing to allow the fees of witnesses because the affidavit did not in direct terms state that they "have been paid" is set aside, and he is directed to allow the witnesses' fees. In all other respects the taxation as made by him is approved.