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.

HADDEN et al. v. DOOLEY et al.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 25.

On rehearing. For former opinion, see 92 Fed. 274.

Henry B. Twombly, for appellants.
Edward W. Paige, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The contention of the appellees upon the rehearing is that the statement of facts in regard to the service of the Hadden attachment on May 21, 1895, was not sustained by the testimony, and that it did not appear when the warrant was delivered to the sheriff, or that any one but the appellants knew of it until after May 25th. The court had found that the removal of the 45 cases to Brooklyn was for the purpose of preventing the appellees from completing their attachment of the goods. Upon examination of the record, it appears that in answer to the question: "I show you a warrant of attachment (Plaintiffs' Exhibit 47). When was that received in the sheriff's office?"—the deputy sheriff said, "That was received May 21st." Plaintiffs' Exhibit 47 was not the Hadden & Co. warrant, but the Rice warrant, of attachment, which was obtained May 16th, and was attempted to be served on May 18th; and, if there was no other or explanatory testimony, the contention of the appellees would be supported. The entire testimony of the deputy sheriff shows that the reference to Exhibit 47 was a clerical error or a mistake; that the warrant for the Hadden attachment was delivered to the sheriff on May 21st; that a copy was on the same day delivered to Thompson, who had the immediate charge of the goods, and who represented that they did not belong to the silk company; that subsequently Hadden & Co. gave to the sheriff a bond. And it appears from the testimony of Thompson that after May 21st, and before May 25th, he knew that the 45 cases were to be removed by the bank, and that he had given instructions to permit such a removal, if desired by the bank's representatives. There was no error in the statement of the facts, or in the inferences from them which were given in the opinion. We find no reason for altering the conclusions of the court, and its previous decision is affirmed.

STEEL et al. v. LORD.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 114.

PROCEEDINGS IN ERROR — SCOPE OF REVIEW — FAILURE TO WAIVE JURY IN WRITING.

Unless there is a written waiver of trial by jury in an action at law in a circuit court, Rev. St. §§ 649, 700, do not apply; and where findings made by a referee are ordered to stand as the findings of the court, the only question that can be reviewed by an appellate court is the sufficiency of the findings to support the judgment.