

that a mere acknowledgment of a debt was sufficient to interrupt the running of the statute of limitation. *Shepherd v. Thompson*, 122 U. S. 231, 238, 7 Sup. Ct. 1229; *Biddel v. Brizzolara*, 56 Cal. 374, 380.

In this last case the plaintiff relied upon a written acknowledgment made by the defendant before the statute had run upon the original debt. The acknowledgment of the debt was contained in an agreement with another person wherein the payment of the debt was to be made by the latter. The court held that this acknowledgment was not sufficient; that the writing must contain an express promise or acknowledgment of the debt as an existing debt from which a promise may be inferred,—citing *McCormick v. Brown*, 36 Cal. 180; *Farrell v. Palmer*, Id. 187; *Bell v. Morrison*, 1 Pet. 362.

In the present case the defendant in his first letter says: "Beg to say that I cannot pay the note or interest time, nor until I can turn some realty or other property into cash, which seems impossible to do at present;" and in the second: "I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this, I can pay you at least a part." There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff; but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred. In other words, it is not an unqualified acknowledgment, since it is accompanied with the condition that he cannot pay, or he does not see any chance to pay, unless he can turn some realty or other property into cash; and there is no evidence that this condition has been reached.

It is clear that upon this evidence the court was in error in awarding a judgment in favor of the plaintiff on both notes. The defendant is entitled to a new trial.

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HANCHETT v. HUMPHREY et al.

(Circuit Court, D. Nevada. April 11, 1899.)

No. 660.

1. COSTS—FEES OF WITNESSES—VOLUNTARY ATTENDANCE.

A witness who in good faith attends the court, whether in obedience to a subpoena or at the request of a party, is to be considered as attending "pursuant to law," within the meaning of Rev. St. § 848; and a successful party is entitled to recover as costs the legal amount paid a witness who attends voluntarily, the same as though he had been legally subpoenaed.

2. SAME—MILEAGE OF WITNESSES—LIMITATION AS TO DISTANCE.

Mileage is taxable for a witness in a federal court from any point or for any distance that could be reached by a subpoena, viz. from any point within the district, and for a distance of 100 miles if the witness comes from a point at a greater distance and without the district.

On Appeal from Taxation of Costs.

Reddy, Campbell & Metson and Torreyson & Summerfield, for plaintiff.

M. A. Murphy, for defendants.

HAWLEY, District Judge (orally). The memorandum of costs in this case contained charges for three witnesses "100 miles and re-

turn." Two of them resided without the state at a greater distance than 100 miles, and one within the state at a distance of 100 miles. Neither of these witnesses were served with subpoena, but came voluntarily, at the request of the plaintiff. The clerk, following the ruling of Sawyer, Circuit Judge, in *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221, and *Haines v. McLaughlin*, 29 Fed. 70, disallowed these charges. When my attention was first called to this matter, several years ago, I informed the clerk that I entertained a different opinion; but, inasmuch as the circuit judge had announced the rule, it was, perhaps, better to follow it, and it has been ever since, pro forma, adhered to. Judge Ross, without regard to his own views upon the subject, pursued this course in *Lillienthal v. Railway Co.*, 61 Fed. 622. The question, however, has often presented itself to my mind whether such rulings were fair to litigants and in conformity with sound reason, equity, or justice. These questions I have, in my own mind, always answered in the negative. My individual views were expressed in *Meagher v. Van Zandt*, 18 Nev. 236, 2 Pac. 60, and have never been changed. I am of opinion that witnesses may be required to attend court by agreement, or by the request of a party, without the service of a subpoena; and, if they do so attend, they can collect their fees for mileage and attendance from the party at whose request they were required to attend. Fees thus paid would, it seems to me, be a necessary disbursement in the action, which could, under the provisions of the Revised Statutes, be taxed as disbursement costs against the defeated party. Such attendance would be as "pursuant to law" as if the witnesses had been regularly subpoenaed. It is, of course, true that the statutory means of compelling the attendance of witnesses is by subpoena. But what right has the defeated party to complain because the other party caused his witnesses to come without a subpoena, and thereby saved expense? If a subpoena was served, the winning party could recover, not only the mileage of the witnesses, but the costs and expenses incurred in subpoenaing them; and these costs might, in many cases, be much greater than the mileage of the witnesses allowed by the United States statute. The objection to allowance of mileage because no subpoena is served, ground down to the common sense of the question, is that the winning party ought not to collect any disbursements he necessarily incurred by paying the legal fees of the witnesses because he did not go to the further expense of having them subpoenaed. Such reason does not appear to me to be sound. Its tone is not judicial, and its logic is certainly faulty, and the result, if continued, would lead to unnecessary expense to litigants, and ought not to be adhered to any longer. It is time to call a halt. If a mistake has been made, why not correct it, without waiting for an authoritative decision from the circuit court of appeals or from the supreme court? The question may never reach either of said courts. Is it not, therefore, better to follow a well-recognized and sound principle of law, than to blindly adhere to a precedent simply because it was made in your own circuit?

Upon a careful review of all the decisions in the national courts, it is manifest that the great weight of authority and of reason is

opposed to the conclusions heretofore followed in this circuit. Notwithstanding some conflict in the earlier cases, the law is now well settled that a witness who in good faith attends the court, whether he comes in obedience to a subpoena or at the mere request of a party, plaintiff or defendant, is to be considered as attending "pursuant to law," within the meaning of those words as used in section 848, Rev. St., and is entitled to his fees and mileage; and the party for whom he attends is entitled to recover costs for the legal amounts paid such witness, the same as if he had been legally subpoenaed. *Anderson v. Moe*, 1 Abb. (U. S.) 299, Fed. Cas. No. 359; *Cummings v. Plaster Co.*, 6 Blatchf. 509, Fed. Cas. No. 3,473; *Dennis v. Eddy*, 12 Blatchf. 195, Fed. Cas. No. 3,793; *U. S. v. Sanborn*, 28 Fed. 299, 304; *The Vernon*, 36 Fed. 113, 116; *The Syracuse*, Id. 830; *In re Williams*, 37 Fed. 325; *Eastman v. Sherry*, Id. 845; *Burrow v. Railroad Co.*, 54 Fed. 278; *Pinson v. Railroad Co.*, Id. 464; *Sloss Iron & Steel Co. v. South Carolina G. R. Co.*, 75 Fed. 106.

In *Eastman v. Sherry*, Jenkins, Circuit Judge, after referring to the conflict in the authorities as to whether the mileage of witnesses who attended the trial voluntarily without subpoena could be charged for, said:

"It needs only to state the conclusions to which my mind is constrained upon a careful consideration of the questions. The conclusion that a witness attends 'pursuant to law' only when present in obedience to a subpoena is, to my thinking, quite too narrow a construction of the statute. The object of the law is to reimburse the prevailing party for the necessary expenses of his evidence. The only purpose of the writ is to compel attendance. But, voluntarily attending, the witness is clothed with all the immunities of a witness served with process. He subjects himself to the jurisdiction of the court, and, when sworn, is subject to like penalties and protection as one attending in obedience to a writ. He attends pursuant to law when he subjects himself to the law. He waives the formal service of the writ. That is a matter personal to himself and to the party who calls him."

In *Sloss Iron & Steel Co. v. South Carolina G. R. Co.*, Simonton, Circuit Judge, referring to *Spaulding v. Tucker*, and the other cases that hold that the subpoena is necessary in order to authorize the taxation of costs, said:

"With deference, I cannot concur in this view. The costs of witnesses are a part of his disbursements, to which the successful party is entitled. The purpose of the subpoena is to enforce attendance. If it be disobeyed, the party summoned can be attached; but, if he attend without compulsion, he is entitled to compensation. This is the conclusion reached by Mr. Justice Gray, on circuit, in *U. S. v. Sanborn*, 28 Fed. 302, and was concurred in by Mr. Justice Brown (then district judge) in *The Vernon*, 36 Fed. 116. In the conflict of persuasive authority, the two cases just cited will be followed."

There is some conflict of authority as to whether witnesses who live within the district, but over 100 miles distant from the place where the court is held, can charge mileage for a distance of over 100 miles. Some of the courts have held that the mileage ought to be confined to 100 miles, for the reason that section 863, Rev. St., provides for the taking of the testimony of any witness by deposition *de bene esse* when the witness lives at a greater distance from the place of trial than 100 miles. The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the acts of congress were intended to, and do, allow mileage to witnesses to

the full extent of the distance that could be legally reached by subpoena, viz. at any place within the district, or at any point without the district to the extent of 100 miles from the place where the court is held. *Anon*, 5 Blatchf. 134, Fed. Cas. No. 432; *Beckwith v. Easton*, 4 Ben. 357, Fed. Cas. No. 1,212; *Dreskill v. Parish*, 5 McLean, 241, Fed. Cas. No. 4,076; *The Leo*, 5 Ben. 486, Fed. Cas. No. 8,252; *Spaulding v. Tucker*, 2 Sawy. 50, Fed. Cas. No. 13,221; *Buffalo Ins. Co. v. Providence & Stonington S. S. Co.*, 29 Fed. 237; *The Vernon*, 36 Fed. 113; *Eastman v. Sherry*, 37 Fed. 844; *Burrow v. Railroad Co.*, 54 Fed. 278, 282; *Pinson v. Railroad Co.*, Id. 464; *Hunter v. Russell*, 59 Fed. 964, 966.

In *Hunter v. Russell*, District Judge Knowles, with reference to the right of a party to collect mileage for his witnesses residing within the district over 100 miles from the place where the court is held, said:

"In the case of *Prouty v. Draper*, 2 Story, 199, Fed. Cas. No. 11,447, this section [863] came up for consideration. \* \* \* In this the distinguished Justice Story held that the taking of a deposition under that section was a privilege to be exercised at the option of the party desiring the evidence of a witness living more than 100 miles from the place of trial, and that the opposite party had no right to demand that, under such circumstances, a deposition should be taken. Having, then, the right to compel the attendance of a witness from any point within the district, and having the option to take a deposition if living at the distance named, it does not seem to me to be going too far to hold that, if the litigant does not exercise the option to take the evidence of his witness by deposition, he can recover for what he is compelled to pay his witness by law as travelling fees."

In *Pinson v. Railroad Co.*, Philips, District Judge, with respect to the question raised as to the right of witnesses to mileage when they come from without the state a greater distance than 100 miles, after quoting the provisions of section 876, Rev. St., said:

"This question was thoroughly considered in the case of *The Vernon*, supra, by Judge Brown, now one of the associate justices of the supreme court, who maintains that, where the witness comes from without the state, at a greater distance than 100 miles, he is entitled to claim for mileage for the distance of 100 miles, and no more, and, of consequence, his per diems. On consideration, I am of the opinion that this is a proper and equitable construction of the statute. While it is true the party calling the witness has the right, under section 863 of the statute, to take his deposition *de bene esse*, he ought not, in justice, in every case to be held to that course, at the risk of paying the entire cost of the witnesses for personal attendance. Every lawyer and court knows, from observation and experience, the importance and advantage, and sometimes the necessity, of the personal presence of the witness at the trial. It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury. Questions and incidents of facts may arise on the trial, which could not be reasonably anticipated by the party taking the deposition in advance, which could be successfully and truthfully met by the witness when present in court. The party ought, as a matter of right, if he prefers to have the personal attendance of the witness, to be permitted to bring him at his own expense to the point of 100 miles distant from the court, and have the cost of mileage therefrom to the court taxed the same as if the witness resided within the 100 miles."

The clerk is authorized to tax the mileage for the three witnesses as costs herein. In all other respects the action of the clerk is approved.

## SMYTH v. NEW ORLEANS CANAL &amp; BANKING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 676.

## 1. EVIDENCE—ANCIENT RECORDS—SUFFICIENCY OF AUTHENTICATION.

To prove a French grant of land in Louisiana, claimed to have been made in 1757, and by a second confirmatory grant in 1764, there were offered in evidence from the proper custody a number of sheets from a record book, of ancient appearance, whose edges and corners had been burned, bearing watermarks and stains, and containing, in a more or less legible French writing, what purported to be the proceedings relating to such grants, including the formal grants themselves. It was shown historically that there existed as a part of the Spanish archives of the province of Louisiana a series of books, called "registers of grants," containing records of grants or concessions of lands in the province by both the Spanish and French authorities, and that such books, on the cession of the territory, were transferred to the authorities of the United States, and subsequently became, and were made by law, a part of the records of the land office at New Orleans, and that there was a fire in such land office in 1865, in which the greater part of the records were destroyed, and the remainder damaged by fire and water. The sheets offered were identified as a part of one of the books rescued from such fire in a damaged condition. There was further offered in evidence a certified copy of each of said grants, made by the register of the land office at New Orleans in 1854 and 1855, respectively, and a certified copy of the original grant of 1757, made by the secretary of the Spanish colonial governor in 1795. These copies corresponded with each other as to the pages of the record from which they purported to have been made, and in their contents with each other and with the sheets offered in evidence. *Held*, that such sheets were sufficiently authenticated to render them admissible in evidence.

## 2. SAME—FRENCH GRANT OF LANDS—SUFFICIENCY OF PROOF.

Such sheets, together with the certified copies, constituted sufficient evidence that the grants therein referred to were made.

## 3. SAME—ANCIENT DOCUMENTS—PROOF OF OFFICER'S SIGNATURE.

The signature to a certificate, purporting to have been made in 1795, which recites that the signer is the secretary of the Spanish government of the Louisiana colony, and that the paper to which it is attached is a copy of a public record in his custody as such secretary, will be presumed genuine, where it is historically known that the person whose name is signed was such secretary at the time, and is fully authenticated by the testimony of experts, showing its genuineness by comparison with the signatures to other documents executed by such officer before a notary public.

## 4. SAME—RECORD OF FRENCH GRANT IN LOUISIANA.

The fact that a French grant of lands in Louisiana was dated in 1764, after the cession of the territory to Spain, does not render the record of such grant inadmissible as an evidence of title, as it may be shown to have been ratified or recognized by Spain, or by France after again acquiring possession.

## 5. EJECTMENT—ISSUES—MATERIALITY OF EVIDENCE.

In ejectment, where proof of a prior grant, pleaded by defendant, would of itself render plaintiff's claim of title invalid, the failure of defendant to connect his own title with such grant is immaterial; and the admission of incompetent evidence offered for that purpose by defendant is not prejudicial to plaintiff, who can only recover upon his own title.

## 6. EVIDENCE—SURVEY—OFFICIAL RECOGNITION.

The Trudeau survey of a tract of land near New Orleans, made in 1791, if not originally of an official character, has become so by its repeated recognition by the authorities of the United States in dealing with lands affected thereby, and, being among the records of the land office at New