

Osborn v. United States.

OSBORN v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 77. October Term, 1875.—Original motion in the cause made in October Term, 1876.—Decided November 27, 1876.

When the judgment is silent as to costs in this court, neither party recovers his costs here; but each must pay, if not already paid, whatever fees are properly chargeable to him according to law and practice.

When the clerk has no security for fees due to him from a party entitled to a mandate he may withhold the mandate until his fees are paid, or he is otherwise satisfied in that behalf.

The rules relating to taxation of costs amended.

THE judgment in this case was entered at October Term, 1875. The case is reported in 91 U. S. 474. At October Term, 1876, motion was made for an order upon the clerk to issue a mandate. The case is stated in the opinion.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

At the January Term, 1831, a rule of practice was adopted (No. 37), § 3 of which was as follows:

“In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal (except for want of jurisdiction) or affirmance, one copy of the record shall be taxed against the plaintiff; which charge includes the charge for the copy furnished him. In cases of reversal and dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.” 5 Pet. 724.

In 1858 the rules were changed under the supervision, as we see by the files of the court of Chief Justice Taney.

The following are §§ 3, 4, 5 and 6, of Rule 10, as then adopted:

“3. The clerk shall furnish copies for the printer, shall supervise the printing, and shall take care of and distribute the printed copies to the judges, the reporter, and the parties, from time to time, as required.

“4. In each case the clerk shall charge the parties the legal fees for but the one manuscript copy in that case.

“5. In all cases the clerk shall deliver a copy of the printed record to each party; and in cases of dismissal, reversal, or affirmance with costs, the fees for the said manuscript copy of the record

Cases Omitted in the Reports.

shall be taxed against the party against whom costs are given, and which charge includes the charge for the copy furnished him.

“ 6. In cases of dismissal for want of jurisdiction, each party shall be charged with one-half the legal fees for a copy.” 21 How. viii.

Under this rule the practice has always prevailed for the clerk to charge each party one-half the fees of the manuscript copy furnished the printer. A charge was made against the appellee in this case in accordance with this construction of the rule. In theory, at least, each party pays the clerk his fees for services in his behalf as the service is rendered. If afterwards costs are adjudged to him, he recovers from his adversary what he has thus paid, or is liable for if not paid.

The judgment in this case is silent as to costs in this court, consequently neither party recovers his costs here, but must pay, if he has not already, whatever is properly chargeable to him according to law and the practice. The long practical construction which has been given to this rule, without objection having been made to the court, renders it probable that it has received the construction it was intended to have. One-half the copy of the printer was, therefore, properly charged by the clerk to the appellee. As the clerk has no security for his fees charged to the appellee, we think it not improper in this case for him to withhold the mandate, when asked for by that party, until such fees are paid or he is in some manner satisfied in that behalf.

The motion made by *Edward S. Brown*, therefore, in behalf of the United States, is *Denied*.

Mr. Edward S. Brown for the motion. *Mr. Assistant Attorney General Smith* opposing.

At the last term, after our judgment in this case, we amended § 6 of Rule 10, so as to read as follows:

“ In all cases of dismissal for want of jurisdiction the fees for the copy shall be taxed against the party bringing the cause into court, unless the court shall otherwise order.”

To make the rule conform as a whole to this amendment, we now amend § 4, so that it will read as follows:

“ In each case fees shall be charged in the taxable costs for but one manuscript copy of the record, and that shall be to the party bringing the cause into court, unless the court shall otherwise direct.”