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Federal Civil Procedure - Fees and Costs - Witness Fees - Rejection of the 100-Mile Rule for Taxing Travel Costs

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In following the minority rule, and in effect rejecting the harsh majority view, the New York court is following the trend it has established in considering other types of contempt.[16]

North Dakota did not discuss the publisher's intent in the only Supreme Court case on contempt by publication.[17] In *State v McGahey*[18] contempt was not found since there was no intent to defy a court order It is submitted that North Dakota should follow the rule laid down in the principal case making intent a prerequisite to the finding of a contempt of court by publication. The contrary approach would unduly restrain a responsible press.

ALAN GRINDBERG

FEDERAL CIVIL PROCEDURE—FEES AND COSTS—WITNESS FEES—REJECTION OF THE 100-MILE RULE FOR TAXING TRAVEL COSTS—After directing a verdict for the defendant, the court assessed as costs against the plaintiff full travel expenses for witnesses, three from Saudi Arabia, called by the defendant from outside the judicial district. On re-trial the jury found against the plaintiff, and the trial court reduced the costs to $16 each for the witnesses (eight cents a mile each way for 100 miles) [2] While no statute or rule expressly limits mileage for witnesses from outside the district to be taxed as costs, a 100-mile limitation has been considered implicit in the Federal Rules of Civil Procedure.[3] The Court of Appeals *held*, four judges dissenting, that the long-standing limitation on taxation of travel costs from without the district to no more than 100 miles from the place of trial is supported

16. See People v. Court of Oyer and Terminer, 101 N.Y. 245, 4 N.E. 259 (1886) (Juror not guilty of contempt for innocently disobeying court order) *In re* Rotwein, 291 N.Y. 116, 51 N.E.2d 669 (1943) (Attorney not guilty of contempt as he had acted without intent to assail the dignity of the court) Spector v. Allen, 281 N.Y. 251, 22 N.E.2d 360 (1939) (No contempt as disobedience had not been shown to be willful).

17. State v. Nelson, 29 N.D. 155, 150 N.W 267 (1914).

18. 12 N.D. 535, 97 N.W 865 (1903)

1. Farmer v. Arabian Am. Oil Co., 176 F Supp. 45 (S.D.N.Y. 1959), *rev'd*, 277 F.2d 46 (2d Cir. 1960), *cert. denied*, 364 U.S. 824 (1960).

2. Farmer v. Arabian Am. Oil Co., 31 F.R.D. 191 (S.D.N.Y. 1962).

3. Barnhart v. Jones, 9 F.R.D. 423 (S.D. W Va. 1949) See 6 MOORE FED. PRAC. 1363 (2d ed. 1953).

neither by statute nor reason, and the original trial court was within its sound discretion in taxing full costs against the plaintiff. *Farmer v Arabian American Oil Co.*, 324 F.2d 359 (2d Cir 1963) [4]

The Federal Rules of Civil Procedure[5] allow costs as of course to the prevailing party unless the court directs otherwise, making taxation of costs a matter within the equitable discretion of the court.[6] However, recoverable expenses generally have been held to exclude amounts paid to witnesses for travel beyond the effective limits of a subpoena.[7] Statute expressly restricts the subpoena power of the courts.[8]

Normally, the appellate court will not interfere with a trial court award of costs unless discretion has been abused.[9] In the instant case, the appellate court did interfere and ruled the lower court on re-trial had abused its discretion in disallowing costs originally taxed against the plaintiff.[10]

The majority said that 28 U.S.C. § 1821 (1958) now provides clear authorization for allowance of actual travel expenses for witnesses who come from afar and that 28 U.S.C. § 1920 (1958)[11] gives power to tax costs without "a shadow of a suggestion" that the court's authority to issue a subpoena has anything to do with what constitutes a recoverable disbursement for a witness.[12] The great bulk of authority supports the 100-mile rule,[13] but a few recent district court decisions have rejected it.[14]

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4. *Petition for cert. filed*, 32 U.S.L. WEEK 3307 (U.S. Feb. 3, 1964) (No. 804).
5. FED. R. CIV. P 54(d).
6. United States v. Bowden, 182 F.2d 251, 252 (10th Cir. 1950).
7. Vincennes Steel Corp. v. Miller, 94 F.2d 347, 350 (5th Cir. 1948) Kirby v. United States, 273 F 391, 396 (9th Cir. 1921) (citing cases from 2d, 3rd, 4th, 6th, 7th and 8th Cirs.) Commerce Oil Ref. Corp. v. Miner, 198 F Supp. 895 (D.R.I. 1961).
8. FED. R. CIV. P 45(e)(1). This rule limits service of a subpoena outside a judicial district to within 100 miles of the place of trial.
9. Syracuse Broadcasting Corp. v. Newhouse, 319 F.2d 683 (2d Cir. 1963), Utah v. United States, 304 F.2d 23, 27 (10th Cir. 1962) Euler v. Waller, 295 F.2d 765 (10th Cir. 1961) T. & M. Transp. Co. v. Shattuck Chem. Co., 158 F.2d 909 (10th Cir. 1947) See MOORE, *op. cit. supra* note 3, at 1308.
10. Farmer v. Arabian Am. Oil Co., 324 F.2d 359, 365 (2d Cir. 1963).
11. "A judge or clerk of any court of the United States may tax as costs the following· (3) Fees and disbursements for printing and witnesses."
12. *Supra* note 10, at 362.
13. *E.g.*, Reynolds Metals Co. v. Yturbide, 258 F.2d 321, 335 (9th Cir. 1958), *cert. denied*, 358 U.S. 840 (1958). Kemart Corp. v. Printing Arts Research Labs. Inc., 232 F.2d 897 (9th Cir. 1956), Spiritwood Grain Co. v. Northern Pac. Ry. Co., 179 F.2d 336 (8th Cir. 1950) (dictum), Lee v. Pennsylvania R. R. Co., 93 F Supp. 309 (E.D. Pa. 1950).
14. Bennett Chem. Co. v. Atlantic Commodities Ltd., 24 F.R.D. 200 (S.D.N.Y.

The minority in the instant case contended 28 U.S.C. § 1821 (1958) provides only that a witness shall recover his full statutory fees and has no relationship to the eventual recovery of fees as costs by the prevailing party In addition, the minority noted that an Admiralty rule,[15] formulated by the Supreme Court, explicitly espouses the 100-mile limitation on taxation of costs, and the majority decision creates a different rule for costs in civil cases from that in Admiralty [16]

Under English practice, costs have included essentially all reasonable items of expense, at times greatly exceeding the actual sum in dispute.[17] Though the English system purportedly tends to discourage unfounded litigation,[18] proponents of American practice claim the English system also tends to deter justice by creating fear of being saddled with an opponent's legal expenses.[19]

If the purpose of the 100-mile rule is to protect impecunious litigants, it may, on occasion, have considerable merit. In the instant case, it would have protected an individual from bearing the costs of a wealthy corporation that could better have borne them. On the other hand, where a party with limited means must bring witnesses from great distance, the rule prevents him from having costs taxed against a losing litigant that might better afford the expense. If the discretion of the courts can in reality provide a safeguard against unreasonable costs being taxed, there seems to be adequate basis for rejection of the 100-mile rule.

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SALES—CONDITIONAL SALES—RECOVERY OF DEFICIENCY—Defendant purchased a combine from the plaintiff under a

1959) Maresco v. Flota Mercante Grancolombiana, 167 F Supp. 845 (E.D.N.Y. 1958) Bank of America v. Loew's Int'l Corp., 163 F Supp. 924 (S.D.N.Y. 1958).

15. ADMIRALTY RULE 47, 28 U.S.C. (1958), states. "Traveling expenses of any witness for more than one hundred miles to and from the court or place of taking the testimony shall not be taxed as costs."

16. *Supra* note 10.

17. See Goodhart, *Costs*, 38 YALE L.J. 849, 850 (1929), MOORE, *op. cit. supra* note 3, at 1302.

18. See Goodhart, *supra* note 17, at 872.

19. See Moore, *op. cit. supra* note 3, at 1304.