

GAYLORD v. COPES.

(Circuit Court, E. D. Louisiana. November 25, 1881.)

I. PLEADING—PRESCRIPTION—WHEN NOT AVAILABLE AGAINST DEBT.

The exception of prescription will not avail against a debt in a case where a debt was paid in stolen bonds of a railroad company, and by reason of the theft the payee had been evicted, his title failing, and his bonds rejected

On Exceptions to Petition.

Plaintiff alleged that on the ninth of August, 1865, defendant, being indebted to plaintiff, gave him in payment thereof five first-mortgage construction bonds of the Vicksburgh, Shreveport & Texas Railroad Company; that in May, 1879, in a certain suit of *Jackson v. Vicksburgh, Shreveport & Texas R. Co. and others*, which had been brought on behalf of all the holders of similar bonds issued by said company, it was finally decided by the supreme court of the United States (*Vicksburgh, S. & T. R. Co. v. Jackson*, 99 U. S. 513,) that certain of said bonds, those given by the defendant to plaintiff among the number, were not genuine obligations of said railroad company, and had never been issued, but had been carried off by persons belonging to, or taking advantage of, a raid upon the town of Monroe, Louisiana, during the late war, and that neither the persons so taking them, nor their transferees, had acquired any title thereto. Plaintiff thereupon tendered the bonds back to defendant, and demanded the payment of the original amount of the debt for which defendant gave the bonds, which defendant refused. Defendant pleaded the prescription of five and ten years.

Kennard, Howe & Prentiss, for plaintiff.

H. N. Ogden, for defendant.

PARDEE, C. J. The exception of prescription in this case is submitted on the allegations of the petition. The allegations of the petition show that the bonds in question were given in payment of a debt; that they were stolen; and that by reason thereof the petitioner has been evicted, his title failing, and his bonds being rejected. This eviction is charged as taking place in 1879. On this state of facts, the prescription of five or ten years is not acquired. Rev. Civil Code, 2659. See *Babin v. Winchester*, 7 La. 470.

The exception, therefore, should be overruled. On the trial, should such a different state of facts be shown as to justify the exception of prescription, it can be renewed.

CAVENDER v. CAVENDER.

(Circuit Court, E. D. Missouri. February 2^d, 1882.)

1. COSTS—CLERK'S FEES.

The clerk may collect his costs as they accrue, irrespective of the final result.

2. SAME.

A transcript of a record on appeal, or writ of error, is only a *copy*, and the clerk can charge therefor only 10 cents per folio.

3. SAME—EXPENSES.

For binding or express charges the clerk may charge the *reasonable, actual* cost to him.

4. SAME.

The clerk cannot tax costs for drawing a bond and its approval when it was drawn by counsel and approved by the court.

5. SAME—FOLIO, WHAT.

An original entry, distinct from all others, though less than a folio, (100 words,) is to be charged as a full folio. Appellant must pay costs incident to his appeal.

Motion to retax clerk's costs for a transcript, on appeal to the supreme court. The clerk had collected 15 cents per folio for a transcript, and a like rate for an appeal bond drawn by the attorneys, and also a fee for approval of the bond in open court by the judges.

Lucien Eaton, for the motion.

M. M. Price, clerk, *pro se*.

TREAT, D. J. The clerk has a right to demand payment of his costs as they are earned, without waiting for the final determination of the suit on appeal or otherwise. This, as has been repeatedly decided in this circuit, rests on the controlling fact that he must answer to the United States for fees earned, as if collected; and, consequently, if he chooses to give credit therefor, he is none the less answerable than if the cash were received. Hence he has a legal right to exact payment for work done as it progresses, and is not bound to forward or deliver the results of his work until they are paid for.

1. Has the clerk the right to charge 15 cents per folio for transcripts of a record, or only 10 cents per folio? The only provision of the United States Statutes under which this class of clerical work falls is in these words: "For a copy of any entry or record, or of any paper on file, for each folio, 10 cents." There are other provisions as to the original entries for which 15 cents per folio are chargeable. Rev. St. § 828.