

THORN vs. CLENDENIN ET AL.

Where a writ of error is sent to the clerk of a Circuit Court, commanding him to send up to this court a transcript, &c., he has no right to withhold the same until his fees for making it out are paid, but must obey the writ.

The law of costs and fees is statutory, and no provision is made for paying the clerk his fees in advance of his return in such case.

On Rule for Contempt.

In this case, Thorn presented to this Court a motion for a rule upon Gordon N. Peay, Esq., clerk of the Circuit Court of Pulaski county, to show cause why he should not be attached for contempt for failing to return a writ of error.

The mover stated that, on the 18th February, 1851, he sued out of this court a writ of error to the clerk of the Pulaski Circuit Court, returnable to the present term of this court in the

case of himself against Clendenin et al., to bring up for review the judgment therein rendered against him; which writ was in the usual form, commanding him, &c.

That, a few days before making the motion, the mover, by attorney, called on the said clerk for said transcript, and requested that it be returned and filed with the writ of error, &c. That the clerk had, in all things, obeyed the command of said writ so far as to make out the transcript, &c., and endorse a formal return upon the writ; but said clerk peremptorily refused to return and send up, or to deliver to the mover to be returned and sent up, said transcript, writ and return, until his costs therefor should be first paid; and still retained, and refused to return the same on that ground alone, he, the mover, refusing to pay said costs until the transcript, &c., should be returned. Prayer for rule as above stated.

The clerk, responding to the rule, admitted that the attorney of Thorn delivered to him such a writ of error; that he had made out such transcript, and that he had refused to deliver the same on the demand of such attorney; and for cause why he should not deliver said transcript, stated that he had, in several instances, made out lengthy transcripts, by order of attorneys, and delivered them to the attorneys, or to the clerk of this court, and the attorneys and parties had failed to have the same filed in this court: whereby respondent had lost his fees for such transcripts. For these reasons, and as he was advised that he was not required or bound by law to deliver any transcript until his legal fees in respect thereof were paid; and as said Thorn was insolvent, and a non-resident, and his said attorney refused to pay such fees, respondent did refuse, and still refused, to deliver the same—disclaiming all contempt, &c.

CUMMINS, for the motion.

Mr. Justice SCOTT delivered the opinion of the Court.

The showing of the clerk is insufficient. When the writ of error goes down, its command must be obeyed. If there be hard-

ships growing out of the facts that the clerks have to wait for the fees allowed by law for the making out and certifying of the transcripts until the determination of causes in this court, and sometimes from the failure of the party or his attorney to file the transcripts in this court after they have been made out and certified in pursuance of an appeal or in obedience to a writ of error, the remedy is with the Legislature, who may provide readily against them if it should be deemed proper. Our entire law of costs and fees is, in substance, statutory. The common law did not professedly allow any, the amercement of the vanquished party being his only punishment.

The writ of attachment must issue to bring up the body of the clerk of the Pulaski Circuit Court, to be dealt with for contempt.
