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Note and Comment

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THE COMPENSATION OF MEDICAL WITNESSES

THE power to compel testimony is inherent in every court, for without it justice could constantly be thwarted. Generally all persons may be compelled to give evidence that is relevant to the matter in controversy. If, therefore, a person who has been duly summoned as a witness at a particular trial absents himself therefrom, without just cause, or attending, refuses to give evidence or to answer questions when directed so to do by the court, he is liable to punishment for contempt.¹ But there are limitations upon the general rule, some based upon principles of legal policy and some upon statutory enactment. In regard to some of these the law is well settled, but in regard to others there is still considerable conflict in judicial opinion. The question, for example, of whether or not the physician is bound, in obedience to process and for the compensation provided by law for ordinary witnesses, to attend at a trial and give evidence, is one upon which, in some of its phases, the courts that have reviewed the matter are not in entire harmony. All agree that the physician, like the ordinary witness, is bound to obey the command of a subpoena to the extent of reporting in court, and further that he must give evidence as to competent facts connected with the controversy that are within his own knowledge. As to such facts he testifies as an ordinary witness. But when he is summoned for the purpose of securing his opinion as an expert upon a given state of facts, as an aid to the court and jury, may he properly refuse to furnish that opinion in the absence of a provision for adequate professional compensation? Different answers to this question have been made by different courts. In some cases the question has assumed this form: Can the medical expert be compelled, for the ordinary witness fees, to attend a trial, listen to the evidence adduced therein, and give his opinion in answer to hypothet-

¹ Best on Evidence (9th Ed.), § 125.

ical questions? And in others this: Can testimony as to scientific results, obtained by special preparation and experiment, be compelled? As will be seen, there is comparative unanimity in judicial opinion as to the proper course where the question arises under either of the last two forms.

The opinion has been freely expressed by text writers, and to a limited extent has been held by courts, that the expert witness, the medical witness, for example, who is brought into the case solely for the professional aid that he will give to court and jury, is entitled to professional compensation for his opinion upon assumed facts, and that he will not be held guilty of contempt for refusing to give such opinion unless such compensation is provided. It is the claim of those holding this view that the knowledge of the professional man is his property, and that he cannot be compelled to contribute it, even for the public good, without adequate compensation; that when the physician, for example, is asked to give an opinion in court upon assumed facts, he is called upon to act in a professional capacity, just as much as he is when summoned by a patient to diagnose a case; that the public duty which rests upon every citizen to appear and give testimony in judicial proceedings, when properly subpoenaed, is fully met by the expert witness when he appears and announces his readiness to give his professional opinion, if adequately paid. When the physician is once put upon the stand as a skilled witness, says Professor Ordranax in his work upon *The Jurisprudence of Medicine*, "his obligation to the public ceases, and he stands in the position of any professional man consulted in relation to a subject upon which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property that he cannot be compelled to bestow them gratuitously upon any party. * * * * On the witness stand, precisely as in his office, his (the physician's) opinion may be given or withheld at pleasure, for a skilled witness cannot be compelled to give an opinion or committed for contempt if he refuses to do so."²

The leading American case in which this doctrine is endorsed, is probably that of *Buchman v. State*, which arose in Indiana in 1877.³ In this case a practicing physician who had been subpoenaed to give evidence as an expert in behalf of the defendant in a criminal proceeding, was committed as for contempt by the trial court because of his refusal to give a professional opinion upon the witness stand without being compensated therefor. The majority of the reviewing court held that, although a physician may be required to attend as a

² Ordranax's *Jurisprudence of Medicine*, §§ 114, 115.

³ *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75.

witness and testify to facts within his own knowledge for the compensation provided by law for the ordinary witness, he cannot be compelled to testify as to his professional opinion for such compensation, and that his refusal to give expert testimony unless adequately compensated therefor is not a contempt. "It would seem, on general principles," said the court, "that the knowledge and learning of a physician should be regarded as his property, which ought not to be extorted from him, in the form of opinions, without just compensation." It is suggested in this opinion that "if physicians or surgeons can be compelled to render professional services, by giving their opinions on the trial of criminal causes, without compensation, then an eminent physician or surgeon may be compelled to go to any part of the state at any and all times, to render such service, without other compensation than such as he may recover as ordinary witness fees." It should be noted that the decision in this case was prompted to some extent by a provision in the state constitution to the effect that "particular services" shall not be demanded without just compensation. It had theretofore been held by the Supreme Court of the state that an attorney was under no obligation to perform gratuitous service, under the appointment of a court, in the way of defending a pauper arrested upon a criminal charge, the holding being based upon this clause of the constitution.⁴ In *Buchman v. State*, the court argued that if the services of a lawyer in defending a criminal under an appointment by the court are to be regarded as "particular services" and hence as services for which a just compensation must be provided, then the services of the physician who is summoned to aid the court and jury by furnishing an expert opinion must be regarded as "particular." "Is not his medical knowledge," said the court, "his capital stock? Are his professional services more at the mercy of the public than the services of a lawyer? When a physician testifies as an expert, by giving his opinion he is performing a strictly professional service. * * * * The purpose of his service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper conclusion from facts otherwise proved. Is not this also the province and business of an attorney? Are not the services of each equally 'particular?'" But the opinion of the court in *Buchman v. State* did not stand unchallenged. A vigorous dissent by BIDDLE, C. J., in which NIBLACK, J., concurred, was filed in the subsequent case of *Dills v. State*.⁵ The rule in Indiana upon this subject, doubt-

⁴ *Blythe v. State*, 4 Ind. 525; *Webb v. Baird*, 6 Ind. 13.

⁵ *Dills v. State*, 59 Ind. 15.

less as a result of the decision in *Buchman v. State*, has since been changed by statute.⁶

Two cases arising in United States courts apparently recognize the rule as promulgated in *Buchman v. State*. Upon motion of the district attorney *In the Matter of Roelker*⁷ for a *capias* to bring in a witness who had been subpoenaed to act as an interpreter, JUDGE SPRAGUE in denying the motion said that a similar question had theretofore arisen as to experts, and that he had declined in such cases to issue process to arrest. "When," continued the court, "a person has knowledge of any fact pertinent to an issue to be tried, he may be compelled to attend as a witness. In this all stand upon equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every case in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district and give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it." In *United States v. Howe*,⁸ JUDGE PARKER declined to regard the refusal of a physician to testify as an expert unless paid a reasonable compensation in advance as a contempt of court, holding "that there was a wide distinction between a witness called to depose to a matter of opinion depending on his skill in a particular profession or trade and a witness who is called to depose to facts which he saw."

The foregoing, so far as the writer has observed, are the only opinions by American courts that support the proposition that the medical expert may demand, as a matter of right, the payment of professional fees as a condition precedent to his giving an opinion in court based upon an assumed state of facts. But it should be noted that expressions have been used by some of the English courts that would seem to justify the practice. For example, MAULE, J., in *Webb v. Page*⁹ said: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice and that of a man who is selected by a party to give his opinion on a matter with

⁶ It is now provided by statute in that state that "a witness who is an expert in any art, science, trade, profession or mystery may be compelled to appear and testify to an opinion, as such expert, in relation to any matter, whenever such opinion is material evidence, relevant to an issue on trial before a court, without payment or tender of compensation other than the *per diem* and mileage allowed by law to witnesses, under the same rules and regulations by which he can be compelled to appear and testify to his knowledge of facts relevant to the same issue." Burns' Indiana Statutes (1901), Vol. I, § 512.

⁷ *In the Matter of Roelker*, Sprague, 276.

⁸ *United States v. Howe*, U. S. Dist. Ct. W. D. Ark., 12 Cent. L. J. 193.

⁹ *Webb v. Page*, 1 C. & K. 23.

which he is peculiarly conversant from the nature of his employment in life. The former is bound as a matter of public duty to speak to a fact which happens to have fallen within his knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation." In *Clark v. Gill*, Wood, V. C., said "that he had been informed by a very eminent common law authority that professional men were very clearly entitled to receive compensation for their time before they were sworn, and that they might refuse to give their evidence until payment had been made."¹⁰ While not bearing directly upon the phase of the question under discussion, it may be noted that in some of the English courts the doctrine has been recognized that the medical witness is entitled to extra compensation on account of loss of time. In *Severn v. Olive*,¹¹ the question being as to whether the expense of experiments made for the purpose of getting evidence upon a point in dispute that was new to scientific men, could be allowed upon the taxation of costs, the court held that "no allowance ought to be made for the expense of experiments, nor for the time of scientific witnesses unless they were medical men, such as physicians and surgeons." In this case, as given in Moore's Reports,¹² LORD CHIEF JUSTICE DALLAS said: "It does not appear to me that the expenses incurred in making experiments ought to be allowed; nor ought there to be any compensation to those scientific witnesses who were employed in making them, *quasi* loss of time, as such allowance appears to be confined to medical men and attorneys only." MR. JUSTICE RICHARDSON said in this case that it was quite clear that persons in the legal and medical professions only were entitled to an allowance for loss of time during their attendance as witnesses. While these statements, so far as they refer to physicians, are perhaps in the nature of *dicta*, they indicate the attitude of these courts in regard to compensation to physicians while serving as expert witnesses. But there are *dicta* by English judges that point in a different direction. For example, in *Lonergan v. Royal Exchange Assurance*,¹³ TINDAL, C. J., said that "the general rule has been that where a witness attends under a subpoena, none receive any allowance for loss of time except medical men and attorneys." But he added, "If that rule were to undergo revision, I cannot say it would stand the test of examination. There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions."

¹⁰ *Clark v. Gill*, 2 Week. Rep. 652, 1 Kay & Johns. 19, 23 L. J. Rep. (N. S. Equity) 711.

¹¹ *Severn v. Olive*, 3 Brod. & Bing. 72.

¹² *Severn v. Olive*, 6 J. B. Moore, 235.

¹³ *Lonergan v. Royal Exchange Assurance*, 7 Bing. 725, 731.

And in the same case PARK, J., said: "In *Moore v. Adam*, it was stated that upon process in this country, allowance for time is only made to medical men and attorneys; a rule which appears to be hard and partial; for time to a poor man is of as much importance as to an attorney." GASELEE, J., also referred to the rule as a harsh one. It has been suggested that the English decisions upon the subject have probably been influenced by the statute of 5 Eliz. Ch. 9, which enacts that the witness must "have tendered to him according to his countenance, or calling, his reasonable charges."¹⁴ And it may be added that, under the English practice of the present day, the scales of allowances to witnesses recognize and provide for different allowances to witnesses in different classes.¹⁵

The weight of authority in the United States at the present time is undoubtedly in favor of the proposition that the expert medical witness is not entitled to compensation in addition to that provided by law for the ordinary witness, when he is called upon in court simply for his opinion as an expert upon assumed facts, and that a refusal to answer unless compensated upon a professional basis will render him guilty of contempt. The reasoning upon which this conclusion is based, is summarized in the following paragraphs.

It is the general policy of the law that all persons who enjoy the protection to person and property that our institutions afford, should render in return therefor, without regard to social position or business or professional rank, such public duties as the law imposes. It is necessary to the orderly and effective administration of justice in our courts that every citizen when summoned to public duties therein should make such personal sacrifices as the proper performance of such duties requires. But while these principles have generally been recognized, it has been claimed, as hereinbefore shown, that they cannot properly be enforced to the extent of compelling the expert medical witness to give to a court and jury his opinion as an expert without professional compensation, as such a course would be the taking from him of his property without adequate compensation, which the law will not sanction. The answer to this argument, which finds ample support in the authorities, is that knowledge of itself is not, strictly speaking, property. The expert speaks from the abundance of his knowledge that he has acquired by study, experiment, experience or in any other way; the ordinary witness speaks from his knowledge that he has acquired by being present at the time of the transaction that is the subject-matter of inquiry or through some of the ordinary avenues of information. The opinion of the former

¹⁴ See *Ex parte Dement*, 53 Ala. 389, 391.

¹⁵ See Vols. 1 and 2, *Yearly County Court Practice for 1905*, pp. 779, 780.

becomes a fact in the case for the consideration of the jury just as the facts testified to by the latter are for their consideration. The knowledge of the expert is not property that is taken from him when he is compelled by the court to give his opinion any more than the knowledge as to the facts of the ordinary witness is property that is taken from him when he is compelled to testify to the facts. Abstract knowledge is not property, but the right to use knowledge, or the use of knowledge for the accomplishment of a particular result, may be property. The right to practice medicine, for example, is a property right, and the application of medical knowledge for the relief of a patient would be the exercise of a property right. But the medical expert when called upon to aid court and jury by his opinion simply, he not having been required to reach his conclusion by special study, preparation or experiment, is not asked to exercise a property right. To require the medical expert to testify to his opinion simply, is no more the taking of his property than it would be to require him to testify to the facts if he happened to know them.

These views are directly supported in *Dixon v. People*,¹⁶ in which the court uses the following language: "It is not exactly accurate to say that the mere abstract knowledge, acquired in the study of a special employment, is of itself property. It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. For instance, if the appellant had been required to answer a question put to him with a view of prescribing a remedy for the relief of * * * the plaintiff in the suit in which he was called to testify as a witness, then it might be said, if he was not offered any compensation, that he was deprived of a property right. But where a physician is asked a hypothetical question, and is called upon to give his opinion upon the facts stated in the hypothetical question, while he is testifying as a witness in court, he is not thereby required to practice his healing art. He is merely making a statement, not for the purpose of effecting a cure, or relieving a patient, but for the purpose of enabling the court and the jury to understand correctly a case which is before the court. There is no infringement here of a property right." The court also says that when a physician is required to answer a hypothetical question which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order and in promotion of the public good. "It is the duty of the ordinary witness and of the expert witness to testify as to facts within their knowledge which bear upon the decision of controversies in court. Such duty devolves upon each as a citizen and [also] in

¹⁶ *Dixon v. People*, 168 Ill. 179.

view of the protection which he receives from the laws of the country in the matter of his personal liberty and in the matter of the protection of his property. This duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge." These views also find support in the cases cited below.¹⁷

The argument that the expert medical witness is entitled to extra compensation on account of loss of time, is answered by the suggestion that such a loss is a sacrifice that every witness must make as an aid to the due administration of justice. The hardship in his case is no greater relatively than in the case of the man in some other calling. The pecuniary sacrifice, if measured, as in justice it should be, by the protection received from an orderly and intelligent administration of the laws, should be greater in the case of the man who has much to protect than in the case of the one who has little. Men of large interests need large public protection, and their contribution to the upholding of that system of laws by which their rights are guarded, should be correspondingly great. Furthermore, the interruption to regular business ordinarily is relatively no more serious in the case of the professional man who is summoned as an expert than it is in the case of the man who is called from the more humble walks of life. The former returns to waiting patients or clients who in place of his services have received the attention of able partners or assistants; the latter returns to his work perhaps to find his opportunity gone by reason of his enforced absence. It may be said, moreover, in this connection, that if the physician is entitled to professional compensation when called as an expert, because of loss of time, he should be entitled to the same compensation when called upon to testify to facts as an ordinary witness. There is loss of time in the one case as well as in the other, and yet it would not be claimed that as an ordinary witness he would be entitled to professional fees. It may be suggested further that in the absence of explicit statutory provisions upon the subject, there would be great practical difficulty in determining as to the amount of compensation

¹⁷ *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611; *Co. Commissioners v. Lee*, 3 Col. App. 177; *Summers v. State*, 5 Texas App. 365, 32 Am. Rep. 573. In this case it was held that a physician who had made a *post-mortem* examination could be compelled to testify concerning its results and his opinions derived therefrom in the absence of a provision for professional compensation. Upon the trial the witness had declined to state the cause of death on the ground that his knowledge was obtained by professional skill and from the deductions of experience which he considered his own property. The reviewing court said in this case that "a medical expert could not be compelled to make a *post-mortem* examination unless paid for it; but an examination having already been made by him, he could be compelled to disclose the result of that examination."

to be allowed and in discriminating in the matter of compensation between different kinds of experts.

The above reasoning is fully supported by authority. "Loss of time," says the court in *Dixon v. People*¹⁸ "as a ground for claiming extra compensation for services as a witness applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testimony of an expert witness who is acquainted with the facts about which he testifies and an expert witness who is called upon to give his opinion in reply to a hypothetical question without any knowledge of facts. Manifestly the witness who goes to court and testifies as to the facts of which he knows, is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion." "The professional witness," says the court, in *County Commissioners v. Lee*,¹⁹ "in the discharge of his duty as a good citizen is like any other person, whether he be laborer, merchant, broker, manufacturer or banker, compellable to attend in obedience to process and to testify as to what he may know, whether it be observed facts or accumulated knowledge acquired by study and experience. The rule is a sound one and commends itself to our judgment. It is apparently nothing but a question of relative value, and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active walks of life." An important case upon this phase of the subject is that of *Ex parte Dement*, to which reference has already been made. In the course of the opinion the court uses the following language, which is significant in this connection: "The same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouses, the broker from 'change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal. And if in a prosecution of an individual for murder, it was proved that his supposed victim had, a short time before his death, drunk something which he had received from the accused, and a chemist had analyzed the liquid and testified what substances it contained, and a physician was summoned

¹⁸ *Dixon v. People*, 168 Ill. 179, 189. See, also, *North Chicago St. R. R. Co. v. Zeiger*, 182 Ill. 9.

¹⁹ *County Commissioners v. Lee*, 3 Col. App. 177, 180.

to prove what effect they would have when taken into the stomach of a living man and what would be the symptoms of such effect, no court would be excusable in exonerating the physician from giving such evidence solely on the ground that it would be a professional opinion for which he had not been paid, or received a promise of payment. In so testifying he would not be practicing the healing art; he would, like the merchant, or the lawyer, or the mechanic, before referred to, be deposing only to things which he had learned in the course of his occupation or profession, or of the preparation for it, and the disclosure of which to the court would conduce to a correct understanding of a cause before it. His testimony would concern the administration of justice. And of him, as of other witnesses, it could be justly 'claimed by the public, as a tax paid by him to that system of laws which protects his rights as well as others.' The decisions of courts concern the property, reputation, liberty or lives of men, and are carried into execution as the judgments of the law. Every individual, high or low, is subject to them. It is, therefore, of vital public interest that the tribunals which pronounce these judgments shall have power to coerce the production of any relevant evidence existing within the sphere of their jurisdiction, requisite to prevent them from falling into error."²⁰ In *Main v. Sherman County*, recently decided by the Supreme Court of Nebraska (see note 20), the court suggests that the rule putting the medical expert upon a plane with other witnesses, when he testifies to an opinion simply, is not so oppressive as it might appear at first glance, and continues: "The benefits of civil government of necessity carry with them certain duties more or less onerous to the citizen. It not infrequently happens that the citizen is compelled to serve the state at a pecuniary loss. When an officer armed with a warrant commands the assistance of a citizen in making an arrest, the latter, however valuable his time, is not permitted to stand and bicker for fees; when called to

²⁰ *Ex parte Dement*, 53 Ala. 389, 396, 397, 25 Am. Rep. 611. See, also, *Minn. v. Teipner*, 36 Minn. 535, 32 N. W. Rep. 678; *Finn v. Prairie County*, 60 Ark. 204, 29 S. W. Rep. 459, 27 L. R. A. 669, 46 Am. St. Rep. 168; *County Com'rs v. Lee*, 3 Colo. App. 177, 32 Pac. Rep. 841; *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573; *Main v. Sherman Co.* (Neb. Sup. Court, June 8, 1905), 103 N. W. Rep. 1038.

If a professional witness desires to raise the question as to the payment of professional compensation as a condition precedent to his giving expert testimony, he should do so at once and before he has testified at all as to professional matters. In *Wright v. People*, 112 Ill. 540, a physician had testified as to the condition of a patient and was then asked if a blow described in the question would or would not be likely to produce upon the person receiving it a condition like or similar to that in which he found the patient. On error it was held that his refusal to answer unless he was first paid or had secured to him his professional fee was improper because he had without objection stated the condition of the patient, and for that reason he "could not, under any rule of law, refuse to state what would cause the symptoms he discovered to exist."

serve as a juror, a citizen will not be heard to complain that the compensation fixed by law is inadequate. As to compensation in such matters, the scale is fixed without regard to calling or countenance, and the common laborer and the man of large affairs, rich and poor, learned and unlearned are on equal footing."

But a different question arises when the medical expert is called upon to make special preparation for his examination as a witness, such, for example, as a chemical analysis, or scientific tests, or a *post-mortem* examination. There is also a different question when the expert is required to attend the trial day after day and thereby prepare himself for giving his opinion. Where special preparation is demanded, the medical expert in making it is acting in a professional capacity, and for such services is entitled to professional compensation. And he cannot be compelled to make such preparation unless a reasonable compensation for his time and services is forthcoming. As to this doctrine there is no controversy.²¹

Where special services by the expert or special investigations by him are necessary in order that he may be prepared to testify, the proper public official, even in the absence of a statute upon the subject, may undoubtedly bind the county therefor, if the case be a public one; and in a civil case the matter may be the subject of a private arrangement, provided it be free from improper conditions and influences.²²

The question of the fees of a medical expert for special services in preparation for his testimony at a coroner's inquest naturally falls under this head, and may properly be discussed in this connection. And first it should be suggested that this matter is one that has been very generally provided for by statutory enactment. Many of the provisions upon the subject are collected in the note.²³ From an exam-

²¹ See *Ex parte Dement*, 53 Ala. 389, 397, 25 Am. Rep. 611; *Finn v. Prairie County*, 60 Ark. 204, 29 S. W. Rep. 459, 27 L. R. A. 669, 46 Am. St. Rep. 168; *People v. Montgomery*, 13 Abb. Pr. N. S. 207; *Summers v. State*, 5 Tex. App. 374, 32 Am. Rep. 573; *St. Francis Co. v. Cummings*, 55 Ark. 419.

²² *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. Rep. 141; *Brown v. Travelers Life and Accident Ins. Co.*, 26 App. Div. Rep. (N. Y.), 544. But an agreement would be void as against public policy that should provide that a physician who is bound to give his best judgment upon a question and who does not hold himself out as the agent of one of the parties, should be paid for his services in proportion to the amount recovered. *Thomas v. Caulkett*, 57 Mich. 392.

²³ Although the statute in Arkansas does not expressly authorize the coroner to summon a physician and order an autopsy, it has been held that if such a course is necessary in order to ascertain the truth in regard to the death of a person, he may properly do so, and that the county is liable for a reasonable compensation for the services. *St. Francis Co. v. Cummings*, 55 Ark. 419, 18 S. W. Rep. 461. In Connecticut the physician called by the coroner is entitled to the sum of five dollars for an external examination only and to the sum of twenty-five dollars for an autopsy. General Statutes of Conn. (1902), § 4853. In California "coroners * * * may summon a surgeon or physician to inspect

ination of these it will be apparent that in most jurisdictions the physician or surgeon when summoned to appear before the coroner, is entitled to fees other than those provided for ordinary witnesses, but that, in order to be entitled to such fees, he must be summoned to give his opinion as a medical man for the guidance of the jury, and usually to give his opinion after preparing himself so to do either by an inspection of the body of the deceased or by a *post-mortem* examination. If called upon, like the ordinary witness, to testify to facts simply, he would not be entitled to extra compensation. The theory upon which this legislation is based is, ordinarily, that special services are necessary in order that the physician may be prepared to give an opinion as to the manner and cause of death that may be of aid to the jury, and that it is only just that compensation should be provided for such services. But in the absence of a statute expressly providing for special compensation to the physician summoned by the coroner, and who under the order of the coroner has performed services that he may be prepared to testify intelligently, the physician would undoubtedly have a claim against

the body or hold a *post-mortem* examination thereon," but there is no direct provision as to compensation. Penal Code of Cal. (1901), § 1512. In Colorado it is provided that "in the * * * * inquisition by a coroner, where a jury shall deem it requisite, he may summon one or more physicians or surgeons to make scientific examination, and he may allow in such a case a reasonable compensation, subject to the confirmation of the board of county commissioners." Mills' Stat. of Col. (1891), 884. It has been held that it is the duty of the physician or surgeon so summoned to obey the summons, and that he cannot be required, as a prerequisite to his receiving compensation, to show that the jury took action under the section. He need not make an investigation as to the action of the jury, as he has a right to rely upon the official act of the coroner. *Com'rs of Pueblo Co. v. Marshall*, 11 Col. 84. In Florida the physician's fee for attending a coroner's inquest and making a *post-mortem* examination is ten dollars, to be paid by the state. *Rev. Statutes of Fla.* (1892), p. 912. In Georgia "if the coroner and the majority of the jury shall believe that the ends of justice can only be attained by a thorough *post-mortem* examination, the coroner may employ a competent and impartial physician to make such examination, and the physician so employed shall be paid out of the county treasury such sum, not exceeding twenty dollars, as may be agreed to by the coroner and jury." *Georgia Code*, Vol. 3, (1895), § 1266. In counties having a population of 40,000 or more, a physician to the coroner with a fixed salary is appointed, § 1267. In Idaho "coroners * * * * may summon a surgeon or physician to inspect the body and give a professional opinion as to the cause of the death." *Idaho Penal Code* (1901), 5775. Although no provision for compensation is made in this statute, it has been held that a reasonable charge for such services is a proper claim against the county, to be allowed by the county commissioners. And although the statute does not expressly provide for an autopsy, the physician summoned may make one, if it is necessary in order to enable him to form a professional opinion as to the cause of death, and the reasonable value of his services therefor is a legitimate claim against the county. *Fairchild v. Ada County*, 6 Idaho 340, 55 Pac. Rep. 654. The statutory provision in Washington is similar to that in Idaho, and doubtless would be construed in the same way. *Ballingers' Ann. Codes and Statutes of Wash.*, Vol. 1, § 529. In Indiana, it is provided that when a surgeon or physician is required to attend an inquest and make a *post-mortem* examination, "the coroner shall certify such service to the board of county commissioners, who shall order the same paid out of the county treasury." *Burns' Statutes of Indiana* (1901), Vol. 3, 7955. The following statutes pro-

the county for reasonable compensation for such services, though he would not, in most jurisdictions, have a claim for extra compensation as a witness simply. In other words, the physician summoned by the coroner simply to testify at an inquest would only be entitled to ordinary witness fees, in the absence of a statute providing for extra fees, unless under the holding of the courts where the case arises, he would be entitled to extra compensation on the ground of his being an expert, but for special work done for the inquest, under the regular order of the proper authority, he would be entitled to reasonable compensation, even in the absence of a statutory provision upon the subject, and the county, which ordinarily is responsible for the administration of the criminal law within its borders, would be liable therefor. The reason is not far to seek. It is the duty of the coroner, recognized and enforced by the common law, to ascertain the truth, if possible, in regard to the case under investigation,

vide for a reasonable compensation to physicians and surgeons who may be summoned by coroners, to be allowed by a designated agency, in some cases a limit being placed upon the amount that can be allowed, while in other cases there is no limit: Code of Iowa (1897), § 529, (It has been held that a physician is not bound to accept the amount allowed him for his services, by the designated agency, but that if the amount allowed is not reasonable, he may recover a reasonable compensation for his services from the county. *Moser v. Boon Co.*, 91 Iowa, 359); General Statutes of Kansas (1901), § 1775; The Kentucky Statutes (Carroll) (1899), p. 326; Rev. Laws of Louisiana (Wolff) (1897), § 660; Rev. Statutes of Maine (1903), p. 984, § 12; Poe's Pub. Gen. Laws of Maryland (1904), p. 531; Rev. Codes of So. Dak. (1903), p. 162, § 913; Rev. Stat. of Utah (1898), § 1230; Va. Code (1904), Vol. 2, § 3947; Code of W. Va. (1899), 1006, § 9; Gen. Stat. of N. J. (1709-1895), Vol. 1, p. 900, § 15; Rev. Codes of N. Dak. (1899), § 2022; New Hampshire Laws 1903, Ch. 134, § 13. In Missouri, Mississippi and Vermont a sum not exceeding ten dollars may be allowed. Missouri Rev. Stat. (1899), § 6652; Miss. Code (1892), § 824; Vermont Statutes (1894), § 5388. Six dollars per day and ten cents per mile for traveling are allowed in Minnesota, but it is provided that if it is made to appear that the "post-mortem examination was attended by great and unusual difficulties," such further sum as in the opinion of the board of county commissioners is a just and fair compensation for the services rendered may be allowed. Minn. General Laws (1901), p. 279. A somewhat similar provision is found in Pennsylvania and North Carolina. Pepper & Lewis' Digest, Vol. 1, p. 928; N. C. Revisal of 1905, § 2775. In Rhode Island, the compensation is fixed at five dollars and in Oklahoma at five dollars per day and five cents per mile for traveling. General Laws of R. I. (1896), p. 1028, § 9; Rev. & Ann. Statutes of Okla. (1903), Vol. 1, p. 436, § 119. It is provided in Tennessee that the fee of the physician summoned by the coroner shall not exceed that of the coroner, and that it shall be allowed in the bill of costs. Code of Tenn. (1896), § 7281. In Michigan provision is made for securing "the attendance at an inquest of a competent physician or surgeon for the purpose of making a post-mortem examination, and of testifying as to the result of the same, the compensation to be audited and allowed by the board of supervisors of the proper county. 3 Mich. Comp. Laws (1897) (11821). In Massachusetts "if a medical examiner. * * * considers it necessary to have a physician present as a witness at an autopsy, he shall be paid \$5 for his services." Mass. Rev. Laws, 1902, Vol. 1, p. 361, § 9, l. 15. In Wyoming, it is provided that "any physician or surgeon who may be called upon to testify as an expert before a coroner, or other officer, shall be entitled to a fee of \$5 for half a day or less and for more than half a day \$10, and when called upon to make a post-mortem examination, shall be entitled to a fee of \$30; provided, that the post-mortem be actually made." Rev. Stat. of Wyo. (1899), § 4299.

and if, in the course of the inquiry, it becomes necessary, in his judgment, to employ a physician to make an autopsy as an aid in ascertaining the cause of death, he would be justified in making the order. By the imposition of the duty upon him, the coroner, as is said in *St. Francis County v. Cummings*, cited below, "is authorized to do all things whatsoever reasonably necessary to discharge that duty." In considering this subject, the Supreme Court of Pennsylvania in *County of Northampton v. Innes*, cited below, says: "In this enlightened age, a coroner who would consign to the grave the body over which he had held an inquest, without availing himself of the lights which the medical science has placed within his reach, would, in most cases, fall short of what his official duty requires. A thorough examination, aided by professional skill, is in general absolutely necessary to the proper administration of justice. * * * * There can be no doubt of the duty of the coroner to require such aid as was given in this case; and it seems equally clear that his powers are commensurate with his duties. He is the officer of the law, and his contract in this respect is binding on the county."²⁴

But it has been held that where the fee for the services of a physician in connection with an inquest has been fixed by statute, that compensation must govern.²⁵ The common law power of the coroner to bind the county for the services of a physician in making a *post-mortem* in connection with an inquest has been denied in Texas. "A *post-mortem* examination at a coroner's inquest," says the Supreme Court of that state, "is frequently necessary for the detection and punishment of crime. It does not seem just to impose this duty without compensation upon a learned and enlightened profession, whose custom it is not to refuse the calls of charity. But they must look to the legislature for relief. We can only declare the law as we find it; and as it now stands, we think there is no provision for their compensation."²⁶

If the physician summoned by the coroner is at the time employed by the county to treat the poor of the county asylum, this fact would

²⁴ *St. Francis County v. Cummings*, 55 Ark. 419, 18 S. W. Rep. 461; *Allegheny County v. Watts*, 3 Penn. St. 462; *County of Northampton v. Innes*, 26 Penn. St. 156; *County of Allegheny v. Shaw*, 34 Pa. St. 301; *Commissioners of Pueblo County v. Marshall*, 11 Col. 84, 16 Pac. Rep. 837; *Gaston v. Marion County*, 3 Ind. 497; *Greene v. Monroe County*, 72 Miss. 306. This matter is now regulated by statute in Indiana, but the discussions in the following cases throw light upon the subject: *Stevens v. Board of Commissioners of Harrison County*, 46 Ind. 541; *Jameson v. Board of Commissioners of Bartholomew County*, 64 Ind. 524; *Dearborn County v. Bond*, 88 Ind. 102; *Dubois County v. Wertz*, 112 Ind. 268, 13 N. E. Rep. 874.

²⁵ *Greene v. Monroe County*, 72 Miss. 306.

²⁶ *Fears v. Nacogdoches County*, 71 Texas, 337, 9 S. W. Rep. 265; *Frio County v. Earnest*, — Texas —, 16 S. W. Rep. 1036. Subsequent to these decisions, compensation was provided by the legislature. See *Laws of Texas*, 1893, p. 155.

not prevent his recovering for making a *post-mortem* examination of the body of one of the paupers who came to his death under circumstances that made a *post-mortem* proper, for the reason that a general engagement to treat the poor of the county asylum would not contemplate special public services in connection with an inquest.²⁷

In his employment of medical or surgical skill at the inquest, the coroner is not confined in his selection to physicians residing within the county. If in his judgment the ends of justice will be better subserved by the employment of non-resident skill, it is his duty, under the law, to employ such skill, for the law requires of him to use the best means at his command for the discovery of the truth. A reasonable compensation to the non-resident physician so employed will be a valid claim against the county.²⁸ It is also held in the cases last cited that the fact that the inquest was instigated and the expert employed through the exercise of outside and improper motives, would not, in the absence of notice to the claimant, be a defense to a suit for reasonable compensation.

Sometimes the statute provides that the duties usually performed by a coroner in connection with inquests may, under specified conditions, devolve upon some other official, as, for example, upon a justice of the peace. Under such circumstances, the substituted official would have the authority of the coroner in the matter of binding the county for the expense of medical services in preparation for, and in connection with, the inquest.²⁹

It will be apparent from a reading of the cases upon the subject that have been cited, that the bill of a physician for a *post-mortem* examination, made under the order of a coroner, and for his services in connection with the inquest, is usually a charge against the county in which the case arises. Ordinarily it cannot properly be allowed as a claim against the estate of the deceased. Such examinations and such services are made and rendered, as a rule, for the purpose of aiding the authorities in the enforcement of the criminal laws, and are for the benefit of the general public; those interested in the estate are concerned only as members of the community at large. The charges for such services should be paid by the public, and if no provision for payment has been made by law, they cannot for that reason be collected out of the estate of deceased, for the estate cannot properly be made to pay for services that are

²⁷ *Lang v. Board of Commissioners of Perry County*, 121 Ind. 133, 22 N. E. Rep. 667.

²⁸ *Jameson v. Board of Commissioners of Bartholomew County*, 64 Ind. 524; *Board of Commissioners of Bartholomew County v. Jameson*, 86 Ind. 154.

²⁹ *Board of Commissioners of Dubois County v. Wertz*, 112 Ind. 268, 13 N. E. Rep. 874. See, also, *Stevens v. Harrison County Commissioners*, 46 Ind. 541.

essentially public. And if a statute has fixed the fees to be charged for such services, the party rendering them will be confined to the statutory fees, unless the law provides for extra compensation under exceptional circumstances. Nor can the expenses of an autopsy made for scientific purposes be properly preferred as a claim against the estate of the deceased, for the object in view is benefit to the medical profession and not to those interested in the estate. Undoubtedly the personal representative of an estate could bind it for such services, if they were rendered upon his request in his representative capacity.³⁰ It should be noted that the foregoing doctrine has in one or two states been somewhat changed by statute. The code of Alabama, for example, provides that "any surgeon or physician, who, being duly subpoenaed, attends a coroner's inquest, examines the body, and gives a professional opinion thereon, is entitled to receive five dollars, with one dollar additional for each mile he may be compelled to travel attending such inquest, to be collected out of the estate of the deceased, if solvent, and if insolvent, to be paid out of the county treasury."³¹ The Nebraska statute upon the subject is somewhat unusual. It provides for a fee to the physician of ten dollars for making a *post-mortem* examination under the direction of the coroner, "to be paid out of any goods, chattels, lands and tenements of the slayer (in case of murder or manslaughter), if he hath any, otherwise by the county, with mileage or distance actually traveled to and from the place of viewing the dead body."³² In Oregon the coroner is required "to subpoena and examine as witnesses every person, etc., etc., * * * and also a surgeon or physician who must in the presence of the jury inspect the body and give a professional opinion as to the cause of the death or wounding."³³ It will be noticed that the physician is obliged to attend, inspect the body and give his professional opinion, and that no direct provision for compensation is made. However, he may present his claim for services to the coroner, and it is the duty of that official to return it as a part of the expenses of the inquest, when the county court of the county, sitting for the transaction of county business, may pass upon the claim. Its act in such a matter is judicial, and its award must be regarded as just compensation, although its decision may be reviewed. It has been held that the claimant must acquiesce in

³⁰ In support of above statements, see *Smith v. McLaughlin*, 77 Ill. 596; *Greene v. Monroe County*, 72 Miss. 306.

³¹ Code of Alabama (1896), Vol. 2, 4936.

³² Comp. Statutes of Nebraska, Ch. 28, 3483, Sec. 7.

³³ *Bellinger and Cotton's Ann. Codes & Statutes of Oregon*, Vol. 1, § 1685.

this mode of procedure, and that he cannot bring an action against the county upon such a claim.³⁴

When the medical expert is called upon to serve in a contested case, he is not as a rule brought in by the subpoena, as is the ordinary witness, but he comes as the result of an agreement with an interested party in regard to his compensation. It has become a very general practice for a party who is advised by his attorney that the services of a physician in connection with the preparation and trial of the case are necessary, to contract for such services, which usually include preliminary investigations and experiments, if necessary, attendance at court during the trial, and the giving of expert testimony upon the trial. While such a contract, so far as it provides for preliminary investigations and continuous attendance at the trial, will be upheld, if free from improper and champertous qualities,³⁵ there is certainly some doubt as to its validity when made to secure simply the testimony of the expert where the expert is obliged like the ordinary witness to appear and testify for the compensation fixed by law, if regularly summoned. In *Collins v. Godefroy*,³⁶ LORD TENNERDEN, C. J., said: "If it be a duty imposed by law upon a party regularly subpoenaed, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration. We think that such a duty is imposed by law; and on consideration of the statute of Elizabeth, and of the cases which have been decided on the subject, we are all of opinion that a party cannot maintain an action for compensation for loss of time in attending a trial as a witness."³⁷ But whether or not an agreement of this kind is valid, it is one that is constantly made and one that frequently turns the expert into an advocate for the party calling him. Nothing has contributed so much to the discrediting of expert testimony as the practice of putting the services of the expert upon a professional basis in regard to compensation and permitting the matter to be one of contract between the expert and the litigant. In theory the expert acts in a quasi-judicial capacity, as an aid to court and jury, and it goes without saying that, so acting, he should be free to give his candid opinion, uninfluenced by contract relations with either party. But in practice, in many cases, he is upon the plane of the paid advocate, feeling it to be his duty to the party who has employed him to sustain, if possible,

³⁴ *Pruden v. Grant County*, 12 Ore. 309, 7 Pac. Rep. 308.

³⁵ See *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. Rep. 141; *Brown v. Travelers Life and Accident Ins. Co.*, 26 App. Div. Rep. (N. Y.), 544; *Lewis v. Blye*, 79 Ill. App. 256.

³⁶ *Collins v. Godefroy*, 1 B. & Ad. 950.

³⁷ See, also, *Walker v. Cook*, 33 Ill. App. 561; *Dodge v. Stiles*, 26 Conn. 463; *Smith v. McLaughlin*, 77 Ill. 596.

a predetermined theory of prosecution or defense. It is needless to add that this is subversive of justice and demoralizing in the extreme. And yet there is much to be said in favor of some plan that shall give to the expert a larger compensation than that provided by law for the ordinary witness. If the medical expert, for example, be a recognized authority in some department of medical science that must contribute frequently to the solving of questions in court, he ought not in justice to be obliged to respond to the frequent demands upon his time in connection with litigation, without something like adequate returns. And compensation ought to be provided in such a way and under such safeguards that no one would think of discrediting his testimony as having been influenced by a consideration or of regarding him as having acted in any other capacity than that of *amicus curiae*. Legislative attempts at regulation have been made, but as a rule they furnish only a partial solution of the difficulty. The principal provisions upon the subject will be found in the note.³⁸ A reading of them will show that the purpose

³⁸ Iowa. "Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court with reference to the value of the time employed and the degree of learning or skill required, but such additional compensation shall not exceed four dollars per day while so employed." Iowa Code (1897), § 4661. It has been held that, under this statute, in order that a physician who has testified may be entitled to extra compensation, it must affirmatively appear that he has been called as an expert to testify within the field specified in the statute. It is not sufficient to show simply that the physician was called as a witness. *Snyder v. Iowa City*, 40 Iowa, 646.

Louisiana. "Witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and to state the results thereof, shall receive additional compensation, to be fixed by the court with reference to the time employed and the degree of learning or skill required." Act. 19, 1884, p. 25, Wolff's Rev. Laws (1897), p. 930.

It is also provided in Louisiana, by the Code of Practice, that "Experts * * * shall be entitled to receive such compensation for their services as the court may determine, according to the nature of the case, and such compensation shall be included in taxed costs." Garland's Rev. Code of Practice of La. (1894), § 462.

Minnesota. "The judge of any court of record in this state before whom any witness is summoned, or sworn and examined, as an expert in any profession or calling, may, in his discretion, allow such fees or compensation as, in his judgment, may be just and reasonable." Minn. Stat. (1894), § 5547.

This statute has been construed to apply to witnesses "called to testify to an opinion founded on special study or experience in any profession or calling, or to make scientific or professional examination in some matter connected with the issues involved in the case, and then state the results,—and not to cases where a witness, skilled in some profession or calling, is called upon to testify as to facts within his personal knowledge, although he may have acquired his knowledge of the facts while in the ordinary practice of his profession, and although his professional skill may have enabled him to observe such facts more intelligently and narrate them more correctly." *LeMere v. McHale*, 30 Minn. 410, 15 N. W. Rep. 682. It is held in *State v. Teipner*, 36 Minn. 535, that this provision has "reference to an allowance to be made after the witness has been summoned and dismissed without being sworn and examined, or after he has been sworn and examined, and not before."

Ohio. "When in the examination or trial of any person accused of the commission of

has generally been to leave the matter of compensation to the discretion of the court, the maximum amount to be allowed in some instances being fixed by the statute. But excepting in the statute of one state, that of Michigan, no attempt has been made to prohibit a private agreement with the expert as to compensation. The Michigan statute, which is given in the note,³⁹ is the latest legislative

crime, or upon inquiry before the grand jury, it shall appear to the prosecuting attorney * * * * to be necessary to the due administration of justice to procure examination by chemical or other experts, or the testimony of expert witnesses, the county commissioners may, upon the certificate of the prosecuting attorney, or his assistant, that such services were, or will be, necessary to the due administration of justice, allow and pay such expert such compensation for his services as the court approves and as the commissioners may deem just and proper." 1 Bates' Anno. Stat., Ed. 4 (1903), p. 640, § 1302-1. [95 v. 282, April 28, 1902.]

Rhode Island. "Any justice of either division of the Supreme Court sitting in chambers, may, in any case, civil or criminal, on motion of any party therein, at any time before the trial thereof, appoint one or more disinterested skilled persons, whether they be residents or non-residents, to serve as expert witnesses therein, provided that the reasonable fees of such experts, according to the character of the service to be performed, to be fixed by such justice, shall be, by the party moving for such appointment, paid to the clerk of such division at such time as such justice shall prescribe, and the amount so paid shall form part of the costs in such case."

"In criminal cases, in the discretion of the court, on request of the defendant, expert witnesses may be furnished for such defendant at expense of the state." Gen. Laws of R. I. (1896), p. 835, § 15.

South Carolina. "Physicians and surgeons bound over, or summoned by the state to testify as experts in any case in the courts of general sessions * * * * shall receive as compensation therefor * * * * the sum of five dollars in addition to the fees provided by law to be paid to other witnesses in such cases, provided that the circuit judge before whom the case is tried shall certify that the testimony of such expert is material." S. C. Stat. at Large (1905), No. 457.

Vermont. "In state cases extra compensation may be allowed to expert witnesses only in case they have been previously selected, and their production ordered, by a judge of the Supreme Court, to prevent a failure of justice. And such compensation shall be fixed by the court before whom the trial is had." Vt. Stat. (1894), p. 956, § 5395.

And it is provided further that "Any person in the employ of the state on a stated salary, who shall be summoned at the expense of the state to testify as an expert in any cause, civil or criminal, shall receive only the ordinary witness fees." Pub. Acts (1898). No. 49, § 1.

³⁹ Sec. 1. "No expert witness shall be paid, or receive as compensation, in any given case, for his services as such a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, and any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not to exceed one year, or both, in the discretion of the court, and may further be punished for contempt."

Sec. 2. "No more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide: *Provided*, the court trying such case may, in its discretion, permit an additional number of witnesses to testify as experts."

Sec. 3. "In criminal cases for homicide, where the issues involve expert knowledge or opinion, the court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial, and the compensation of such person or persons shall be fixed by the court and paid by the county where indictment was

expression upon the subject to which the attention of the writer has been called, and it is especially significant in that it makes it a misdemeanor for the expert to receive, or for any person to pay the expert, a larger amount than has been awarded by the court, a substantial penalty being provided. This statute is further significant in that it provides for a limit upon the number of experts that may be called and for the appointment by the court in homicide cases of one or more experts, not exceeding three, to investigate and testify at the trial, their compensation to be fixed by the court and paid by the county. The statute must certainly commend itself to the public and to jurists as containing corrective provisions that may well be followed in other jurisdictions. So far as the writer knows, it has not as yet received judicial construction. It is to be hoped that the rather ambiguous provision of the fourth section will not serve to defeat or narrow its purpose.

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found, and the fact that such witness or witnesses have been so appointed shall be made known to the jury. This provision shall not preclude either the prosecution or defense from using other expert witnesses at the trial."

Sec. 4. "This act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion." Public Acts of Michigan (1905), p. 242.

This legislation originated in the Michigan State Bar Association. See Report of Committee on Medical Expert Testimony in Proceedings of the Sixteenth Annual Meeting of Michigan State Bar Association, 1895, p. 72-77, in which the statute is explained, the principal cases upon the subject cited, and the bibliography of the subject given.