

WITNESS FEES:

Expert Witness Fees for State Witnesses are properly chargeable under certain circumstances.

4-9
March 31, 1934.

Miss Agnes Mae Wilson
Prosecuting Attorney
Grundy County
Trenton, Missouri



Dear Miss Wilson:

This department is in receipt of your letter and enclosure dated March 24, 1934. Your letter states as follows:

"I shall be very grateful if you will give me an opinion upon the following question. Is a county liable for expert witness fees in criminal cases?"

"I am enclosing a statement of facts in a particular case to which the above question is pertinent."

Your enclosure reads in part as follows:

"Jerald Beverlin has been convicted on three charges and is now serving sentences amounting to thirteen years. These were important cases to the community and particularly to the merchants of this city as every time we filed a charge against him, he would furnish bond and break into another store until we had five cases against him and one or two others we had not filed. Ratel was suspected of being his partner in more than the Cisco case, and we feel he should be prosecuted. But now we are confronted with the objection of the county court to paying for the expert testimony which I consider necessary if he is to be tried. The amount of the fees of both Capt. Pettit and B. T. Andrews, St. Joseph, in the Beverlin case, including witness fees, travel and the preparation of exhibits was about \$122.00. Our County Court in the past has paid for the analysis of liquor and for expert testimony in liquor and forgery cases when necessary, but they objected to these fees. They have, however, paid them grudgingly, but object to paying such fees in the Ratel case."

Section 4, Article II, of the Constitution of Missouri sets out the purpose of government, the natural rights of persons and reads as follows:

"That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government and when government does not confer this security, it fails of its chief design."

Article X, Section 13 of the Constitution of Missouri dealing with municipal and county indebtedness states in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * *

Section 3826 R. S. Mo. 1929, provides when the State shall pay the costs in criminal cases and reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs,

unless in the event of conviction, the same can be made out of the defendant."

Section 3827 R. S. Mo. 1929, provides when the county is to pay the costs, and reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3828 R. S. Mo. 1929, provides when the costs are to be paid by either state or county and reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the cost shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3830 R. S. Mo. 1929, provides when the costs are to be paid by the county and reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Section 3841 R. S. Mo. 1929, provides when the clerk is to make out fee bills, and reads as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof,

he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 3842 R. S. Mo. 1929, sets out the duty of the Prosecuting Attorney and Judge in regard to fee bills, and reads as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 3850 R. S. Mo. 1929, provides only for the costs of three witnesses to establish any one fact, and reads as follows:

"The judge and prosecuting attorney shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact, nor with the costs of witnesses unnecessarily summoned and not examined, but the costs of such surplus or unnecessary witnesses shall, in the discretion of the court, be taxed against the party or attorney causing them to be summoned."

Section 11776 R. S. Mo. 1929, provides for the allowance of fees of witnesses and reads as follows:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their

services rendered in discharging the duties imposed upon them by law as are hereinafter provided, * * * * ."

Section 11798 R. S. Mo. 1929, provides fees for witnesses and reads in part as follows:

"Witnesses shall be allowed fees for their services as follows: * * * * ."

Section 2962 R. S. Mo. 1929, provides for the form and execution of contracts by counties, towns, etc., and reads as follows

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Laws of Missouri 1933, page 340, provides for a County Budget Law. Section 2 provides for the classification of expenditures and reads in part as follows:

"The court shall classify proposed expenditures in the following order.

"Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

Section 5 provides the classes of expenditures and reads as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 3: Expense of conducting circuit court and election, not to include the salary of any officer

or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 3 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.* * * *

The Court in State ex rel. Keek et al. v. Seibert, Auditor 32 S. W. 670, 1. c. 674 states as follows:

"For many years this court in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed, except such as the law in terms allows. Shed v. Railroad Co. 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State v. Hill, 72 Mo. 512; Thompson v. Elevator Co., 77 Mo. 520, Williams v. Chariton Co., 85 Mo. 646. This is the rule elsewhere. Crofut v. Braudt 58 N. Y. 108, and cases cited; City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; State v. Oliver, 116 Mo. 188, 22 S. W. 637. At common law no recovery of costs was allowable, and, when statutes were passed allowing costs, they were always strictly construed. Crofet v. Braudt, supra; Kneass v. Bank, 4 Wash. C.C. 106, Fed. Cas. No. 7,876,; Hart v. Fitzgerald, 2 Mass. 509. The right to costs being thus purely statutory, such right can have no existence, except the statutes authorizing the item or items can be directly pointed out * * * * *

Stewart Rapalje on the Law of witnesses, page 531, paragraph 307, states in part as follows:

"As a general rule witnesses are not compensated for loss of time, merely, but the case of an expert witness would seem to differ from that of an unprofessional witness called simply to depose to matters of fact. The expert is summoned to speak to a matter of opinion, depending on his skill in a particular profession or trade; the ordinary witness is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge; but the expert is under no such obligation, and is

selected by the party to give his opinion merely; and he is entitled, therefore, to demand a compensation for loss of time."

In the case of *People v. Montgomery*, 13 Abb. (N.Y.) Pr. N. S. 207 l. c. 239, the court states as follows:

"Upon these facts we do not see that the calling of Dr. Hammond as a witness, and the payment to him of a sufficient sum to secure his attendance at the court, during the trial, was in any respect an irregularity or did any wrong to the prisoner. It seems to us that the district attorney was acting in the line of his duty as a public prosecutor in securing the attendance of a proper medical witnesses of high repute, to meet the distinguished medical experts which he knew the prisoner expected to call on his side. The question at issue on the trial was chiefly a medical one, in respect to which the opinions of medical men would be likely to exert a great, if not a controlling influence. The witnesses who had testified before the county Judge, and those who had acted on the commission, were among the most distinguished members of their profession upon the particular questions involved on the trial. Those witnesses the prisoner was expected to call on the trial, and the district attorney would, it seems to us, under the circumstances of the case, have been derelict in his duty to the people of this county, if he had not taken the requisite steps to secure the attendance of witnesses of equal distinction and consideration in their profession, on the part of the people."

The court further states:

"A witness meets the requirements of a subpoena if he appears in court when required to testify and give impromptu answers to such questions as are then put to him. He cannot be required, by virtue of the subpoena to examine the case, to use his skill and knowledge to form an opinion, nor to attend, hear and consider the testimony given, so as to be qualified to give a deliberate opinion on a question of science arising upon such testimony; hence, a professional witness called as an expert

may be paid for his time, services and expenses; and the question what amount is paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial, though it may, perhaps, affect his credit with the jury. It is not improper for the district attorney to procure the attendance of skilled witnesses in appropriate cases, for a special compensation.* * * * *

The Court in *Peltzer v. Gilbert*, 260 Mo. 500 l. c. 504, states as follows:

"The administration of public justice is not only a necessary object of government, but one of the highest for which it is organized. The protection of life and conservation of peace and good order in the state cannot remain in abeyance. The payment of taxes is the price the citizen pays for his security. Section 4, Article II, of the Constitution declares that: 'To give security to these things is the principal office of government, and when government does not confer this security it fails of its chief design.' It would be a burlesque upon the law--a just and indefensible reproach upon our institutions--if crimes should go unpunished, persons accused of murder would remain untried for want of power in the officials of the county where the alleged crime was committed to pay out of the public funds the expenses reasonably necessary to establish the facts.

In the case of *State ex rel. Dalton v. Hill*, 72 Mo. 512, the court had under consideration the question whether the Judge and the Prosecuting Attorney could be compelled to certify for payment a bill of fees for witnesses summoned by the defendant in a criminal case. The court states:

"The number of witnesses set out in the alternative writ, and referred to in the return as unnecessary and not examined, is seventy-five, whose fees aggregated \$771.70. The statute under which was taxed the bill of costs containing the fees of witnesses who were examined, was that of March 28, 1874. Sec. 25 of that Act provides: 'The judge and the circuit court or prosecuting attorney shall in no case tax

the state or county with more than the cost of three witnesses to establish any one fact.' Laws of 1874, page 27, Section 25. How many witnesses were examined, and whose fees were certified for payment by the judge, does not appear; but it does appear and stand admitted by the demurrer, that they were not to exceed six facts constituting the defense of the defendant, and if so, leaving out of the question the witnesses who were examined, eighteen witnesses, even if examined, were all who were necessary and all whose fees could, prima facie, under the law quoted, have been certified to the auditor for payment.
* * * * *

The leading case in this State upon the power of a county court under the present Constitution to contract a debt for any purpose in excess of its revenue for the current year is Book v. Early 87 Mo. 246, in which it was said:

"The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12 (Missouri Constitution) supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.* * * *"

The Earl case supra, was subsequently followed in Kansas City, Fort Scott and Memphis Railroad Co., v. Thornton, 152 Mo. 570, wherein the court says (l. c. 575):

"The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, en-

generated recklessness and extravagance in the management of the public business and constantly oppressed the tax-payers, these were the evils that section 11 and 12 of Article X of the Constitution were intended to remedy, first, by limiting the rate of taxation, and second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year.* * * * *

CONCLUSION.

In the light of these sections and these cases we are of the opinion that an expert witness cannot be placed in the same category as an ordinary witness, in-so-far as compensation and duty to depose to matters of fact are concerned. It is true that as a general rule witnesses are not compensated for loss of time, but it must be remembered that the unprofessional witnesses is called simply to bear witness to matters of fact, while the expert is summoned to speak to a matter of opinion depending on his skill in a particular profession or trade. It is further true that a witness is bound as a matter of public duty to testify to the fact which has occurred within his knowledge, but it cannot be said that an expert is under such an obligation. The latter party is merely selected to give his opinion, and is, therefore, entitled to demand compensation for any loss of time while engaged in the capacity of an expert.

We are of the opinion that Section 11776 R. S. Mo. 1929, supra, providing for the allowance of fees, and Section 11798 R. S. Mo. 1929, supra, setting out the fees of witnesses should be strictly construed. Our courts have for many years, in obedience to strict statutory construction, persistently maintained that no

costs could be taxed except such as the law in terms allows. Although this is the law, we find nothing in our statutes which can be construed as to prevent the procuring and employing of expert witnesses to assist the prosecution. In fact our Missouri Constitution, Art. II, Section 4, supra, declares in part: "To give security to these things is the principal office of government, and when government does not confer this security it fails of its chief design." We may even go further and say that a prosecuting witness is derelict in his duty to the people if he does not take the requisite steps to procure the attendance of skilled witnesses in appropriate cases for a special compensation. As the court so well stated in Peltzer v. Gilbert, supra, "It would be a burlesque upon the law--a just and indefensible reproach upon our institutions--if crimes should go unpunished, persons accused of murder would remain untried for want of power in the officials of the county where the alleged crime was committed to pay out of the public funds the expenses reasonably necessary to establish the facts."

We are also of the opinion that in order to carry out the spirit and comply with the county budget law as contained in the laws of Missouri, 1933, and as specifically provided for in Section 2, class 3, and section 5, class 3, supra, the latter class stating in part, "expense of * * * * *witnesses if properly paid by the county," it is necessary that the prosecuting attorney obtain the approval of the county court before he engage such expert witnesses. We do not lose sight of the desirability of obtaining expert witnesses to combat crime but to permit a prosecuting officer, to employ expert witnesses without the approval of the county court would be in direct contravention of the county budget law and Article X, Section 12 of the Missouri Constitution. As the Court stated in Kansas City, Fort Scott and Memphis R. S. C. v. Thornton, supra, and Book v. Earl supra, in which it was said "The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system* * * *".

We are therefore of the opinion that the court should be guided in the light of Section 4, Article II of the Missouri Constitution, supra, in ruling upon the desirability of engaging expert witnesses, and that it will then be the duty of the prosecuting attorney to proceed by contract to employ such expert witnesses in the name of the county and with the final approval of the court as set out in section 2982, R. S. Mo. 1929 supra. We are further of the opinion that section 3850 R. S. Mo. 1929, supra, and as discussed in State ex rel. Dalton v. Hill, supra, applies also to expert witnesses and that the court and prosecuting attorney, "shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact."

Respectfully submitted,

APPROVED

Attorney General

WM. ORR SAWYERS,
Assistant Attorney General.

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