

Opinion No. 158.

**Counties—Claims—Expert Testimony
—Crime and Criminal Procedure
—County Commissioners—State
Employees—Federal Employ-
ees—Inquest—County
Coroner.**

HELD: 1. Expert witnesses, as such, are entitled only to regular witness fees. However, the state and county may secure the services of experts in the detection and prosecution of crime.

2. The fact that a physician or bacteriologist is paid a salary by the federal or state government, does not preclude him from rendering profes-

sional services in his private capacity to the county.

3. That where an inquest is held the coroner is authorized to engage the services of an expert to make analysis but he is not authorized to do so when no inquest is held.

August 22, 1935.

Miss Frances C. Elge
County Attorney
Helena, Montana

You have submitted to us a letter from the Board of County Commissioners of Lewis and Clark County, in which the commissioners request the opinion of this office concerning the legality of several claims presented to them for payment.

Three of such claims were presented by physicians for \$50.00 each as fees for testifying as "expert witnesses" in the case of the State of Montana v. Walter S. White, which the letter describes as a "murder case, but was tried on an insanity charge." Another claim is one presented by Dr. B. A. Thompson for \$400.00, in the same case, which is itemized as follows: "Mental examination of White \$100.00; and \$300.00 as assistant to county attorney covering period from December 29, 1934 to January 3, 1935, services being at the rate of \$75.00 per day." All of these claims were approved by the county attorney before being presented to the board.

The board also asks for our opinion upon the legality of four claims presented by Fred Stimpert, referred to as "an employee of the State of Montana," which claims were approved by the county attorney and the county coroner, and are as follows: "Analysis of stomach and contents of Gwendolyn Salisbury, \$75.00; examination of clothes and personal effects of Charles Bruce to determine whether or not blood spots was his blood, \$200.00; examination of blood of John Cing for purpose of determining cause of death, \$50.00; analysis of stomach and contents of Edward Johnson, \$50.00."

The board's final question is: "Has the county attorney and county coroner the authority to employ such ex-

perts, and designate the amount of payments to be made?"

It seems that the office of the State Examiner has questioned the validity of the above claims and while the facts stated in regard to them are very meager, we make the following observations which may be helpful to the board and to the State Examiner, concerning these matters.

In regard to the claims referred to for giving expert testimony, we find the general rule to be: "In criminal trials the government attorney may not employ experts under a contract to pay compensation in excess of the regular witness' fees in the absence of statutory authority therefor;* * *" (70 C. J. 77.) Our legislature has said: "An expert is a witness and receives the same compensation as a witness." (Section 4947 R. C. M. 1921.)

In Board of Com'rs. of Larimer County v. Lee, 32 Pac. 841, the Court of Appeals of Colorado, pointed out: The general rule is "that the professional witness, 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 business walks of life. Summers v. State, 5 Tex. App. 365; Ex parte Dement, 53 Ala. 389; State v. Teipner, 36 Minn. 535, 32 N. W. Rep. 678."

It is clear then that in this state the law does not authorize the payment by the county of more than the fees prescribed by Sections 4936 and 4942 R. C. M. 1921, to expert witnesses as such.

But we do not mean to imply that the state may not avail itself of the services of experts in the detection and prosecution of crime and that such experts are not entitled to compensation for their services. Thus, if the question of the defendant's sanity is in issue, the prosecution may em-

ploy experts to examine the defendant and the cost of such examination is a proper charge against the county. (Section 4952 R. C. M. 1921; 15 C. J. 563.)

In *Allegheny County v. Watt*, 3 Pa. 462, 465, the distinction was graphically pointed out: "Had the plaintiff (the physician) * * * attended merely as a witness, though as an expert, he would have been entitled to nothing; for as the law provides no compensation for witnesses summoned by the coroner, they must give their attendance gratis. * * * But he was not called as a witness. * * * The coroner might have compelled him to swear to his opinion on a superficial view of the body; but he could not have compelled him to touch it, or do the more nauseous and dangerous work of opening it. * * * When his duty requires * * * (the coroner) to disinter a body, for instance, he cannot be expected to do it with his own hands, or by hands paid for with his means. * * * To the taking of every inquisition *super visum corporis* * * * a post mortem examination is indispensable; and as the fees of the coroner would be inadequate * * * either the public purse must pay for it, or the administration of public justice must suffer for want of it. And why should not the county pay for it?"

So with the claim of Dr. Thompson referred to above, this office has held that such expenses necessarily incurred by the county attorney in criminal cases, are proper charges against the county. (See opinion of Attorney General Galen, 2 Opinions of Attorney General, page 5; opinion of Attorney General Ford, 8 Opinions of the Attorney General, page 270; see also *Langdon v. Koster*, 157 Cal. 39, 106 Pac. 209; *Washoe County v. Humboldt County*, 14 Nev. 123; *McKenna v. McHaley*, 62 Ore. 1, 123 Pac. 1069; *Los Angeles Warehouse Co. v. Los Angeles County*, 33 Pac. (2) 1058.)

In *Washoe County v. Humboldt County*, supra, it was held that when the county attorney found it necessary to have a survey of the premises where a murder was committed, in order to properly present the case to the jury, the county commissioners were authorized to allow a reasonable compensation for such survey. The

court said: "Any important fact which tends to establish either the guilt or innocence of a human being upon trial for his life should always be procured if within the reach of the court, and presented to the jury, regardless of expense to the county."

The letter from the board states: "The Examiners also are of the opinion that a federal employee, receiving pay from the government such as Dr. B. A. Thompson, is not entitled to charge any witness fees at all."

It is true that under Section 4936 R. C. M. 1921 "no officer of the United States" may receive any per diem when testifying in a criminal proceeding, but we do not understand Dr. Thompson's claim, as itemized above, to be for his services as a witness. If the Federal government permits him to engage in private practice in addition to his regular duties, we know of no provision of law inhibiting the county or state from availing itself of his professional services as a practicing physician. It is our opinion that the board, in the exercise of its sound discretion, would be authorized to allow Dr. Thompson's claim, if properly signed and acknowledged.

In regard to the other claims submitted, we understand that Mr. Stimpert is a bacteriologist employed by the State Board of Health as Director of the State Hygienic Laboratory. We find no provision in the law requiring either the State Board of Health or Mr. Stimpert to furnish such services nor do we know of any reason why Mr. Stimpert, as a private practicing bacteriologist, may not render such services, and, in a proper case, receive compensation therefor from the county.

Section 12383 provides: "* * * He (the coroner) must summon and examine as witnesses every person who, in his opinion, or that of any of the jury, has any knowledge of the facts, and may summon a surgeon or physician to inspect the body, and give a professional opinion as to the cause of the death." Section 4952 declares that "the accounts of the coroner of the county for such services as are provided by law" are county charges.

The letter from the commissioners does not inform us whether or not an inquest was held in each case in which

Mr. Stimpert was employed. In those cases in which an inquest was held, we think that the coroner was authorized to engage Mr. Stimpert's services and that his claim for compensation under the statutes above cited, is a proper one against the county.

"It is very clear, we think, that it was the intent and purpose of these statutory provisions, to clothe the coroner of the county, whenever he should be notified that the dead body of any person, supposed to have come to his death by violence or casualty, was within his county, with the necessary power to properly enquire, and if possible ascertain, how, in what manner and by whom such person came to his death, and whether any one was guilty of said death, and the degree of guilt. The welfare of society and the interests of public justice alike demand, that such an enquiry or inquest should be thorough and complete, to the end, that, if the death has been caused by a criminal agency, the guilty may be discovered, and receive merited punishment, and the innocent may, perhaps, be freed from unjust suspicion. We think, therefore, that these statutory provisions should be liberally construed, with a view to the accomplishment of the end desired, and in such manner as to enable the coroner, where the death of a human being has apparently been caused by criminal agency, to employ such scientific means, and persons skilled therein, as may be necessary to ascertain the cause of such death. It is well known, that, where the death has been caused by the use of poison, the presence and character of the poison used can be ascertained by a chemical analysis of the contents of the stomach of the dead body, when all other means to that end would probably fail. This being so, and keeping in view the ends to be accomplished by the proper exercise by the coroner, of the powers necessarily incident to the discharge of the duties imposed on him by law, namely, the ascertainment of the cause, the manner and the agency by means of which such violent or casual death has ensued, and the degree of guilt attributable to such agency, it seems to us, that the statutory provisions above cited and quoted ought to be so construed, in the interest of

justice and humanity, as that the coroner may be thereby authorized to employ such medical or surgical skill as may be necessary, in his judgment, in the particular case, and to charge his county with the payment of the reasonable expense thereof. * * *

"As the supposition was that the death was caused by poison, it may be regarded as certain, that, without such an analysis of the contents of the stomach of the decedent, the post mortem examination and inquest held by the coroner, in the discharge of his official duty, would have been, at most, an empty and unavailing form. By his employment of the appellant, the coroner secured not only the appellant's analysis of the stomach, but also his personal presence as a witness, whenever it was desired, in *Bartholomew County*," (*Jameson v. The Board of Commissioners of Bartholomew County*, 64 Ind. 524.)

See also *Board of County Commissioners v. Jameson*, 86 Ind. 154; *Hill v. Mowry*, 7 R. I. 167, but see *Doremus v. Mayer et al.*, 6 Daly (N. Y.) 121.

In those cases in which no inquest is held, this office has repeatedly said that the expenses incurred by the coroner in investigations, are not a proper charge against the county (see opinion No. 109, addressed to you on May 24, 1935) and, therefore, the coroner is not authorized to employ the services of an expert in such cases.

Regarding the claims submitted by Mr. Stimpert, however, we think they may properly be allowed by the board even if no inquests were held since the board's letter states that the claims were approved by the county attorney, and, for the reasons given earlier herein, it is our opinion that the county attorney is authorized to engage the services of such an expert in assisting him in the detection of crime.

To summarize then, it is our opinion:

1. That the county may not pay fees in excess of those allowed by Sections 4936 and 4942 R. C. M. 1921, to "expert witnesses" but that the claims of such persons (detectives, physicians, psychiatrists or bacteriologists) for professional services rendered at the request of the county attorney, are a proper charge against the county.

2. The fact that a physician or bacteriologist is paid a salary by the federal or state government, does not preclude him from rendering professional services in his private capacity to the county.

3. That where an inquest is held the coroner is authorized to engage the services of an expert to make analysis but he is not authorized to do so when no inquest is held.