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WITNESS WITHIN REACH OF PROCESS—OTHER THAN EXPERT WITNESS—UNLAWFUL FOR MUNICIPALITY, PARTY TO SUIT WHERE ATTENDANCE OF WITNESS DESIRED, TO PAY OR AGREE TO PAY WITNESS ANYTHING IN ADDITION TO STATUTORY WITNESS FEE—NO CONSIDERATION WHERE ADDITIONAL PAYMENT REPRESENTS ONLY COMPENSATION FOR WITNESS' EXPENSES AND LOSS OF TIME.

SYLLABUS:

Where a witness other than an expert witness is within the reach of process, it is unlawful for a municipality, party to a suit in which the attendance of such witness is desired, to pay or agree to pay such witness anything in addition to his statutory witness fee, even though such additional payment represents only compensation for the witness' expenses and loss of time.

Columbus, Ohio, December 21, 1943.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I acknowledge receipt of your communication requesting my opinion upon certain questions raised by your examiner in connection with the operation of the Cleveland Transit System. The examiner's letter reads as follows:

> 'In connection with the examination of the records and accounts of the City of Cleveland, particularly those of the Cleveland Transit system, we note that in many cases the city has subpoenaed witnesses to testify on behalf of the city in court. The city has reimbursed such persons for loss of wages or salary incurred on account of being required to appear in court. Or in some cases where such witnesses are not wage earners payments have been made from the city treasury for their services as witnesses. All of such payments have been made in lieu of or in addition to the fees which the statutes provide for to be paid to witnesses.
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> In many cases accidents involving vehicles including street cars and buses belonging to the city result in lawsuits being filed in court against the city. In such cases the persons who witnessed the accident would be required to testify in court. Such persons may be passengers on the city's vehicles or a bystander. A large number of such persons are employed and their appearance in court would cause them to lose a substantial amount of wages. They have no personal interest in the outcome of the case and feel that they have been done an injustice in being required to testify, often after a long wait. A witness who feels this way about the litigant who subpoenas him is liable to be of greater benefit to the other party to the suit.

We find that the Cleveland Railway Company followed the practice of making payments to witnesses as described above. Since the city took over the operation of the system, the said practice has been continued.

The attorneys for the city and the transit system wish this question to be submitted in three parts as follows:

1. Are payments such as those described above legally justified in the case of witnesses testifying in court in suits concerning purely governmental matters?

2. Are such payments legally justified in cases involving public service enterprises not operated as utilities, such as stadiums, markets, cemeteries and airports?

3. Are such payments legally justified in cases involving municipally owned and operated public utilities?

I have not found any decisions of the Ohio courts bearing on the questions raised, but do find an abundance of authority in other jurisdictions.

In the footnotes to the case of Thatcher v. Darr (Wyo.), 16 A. L. R. p. 1443, the general question of the validity of an agreement to pay a witness something more than the statutory fees is discussed at considerable length and many cases cited. The rule is there laid down as follows:

"The courts hold that it is part of the duty of every citizen to give his services in testifying in any court proceeding when he is properly summoned to performance of that duty, and that it is against public policy for him to attempt to exact any compensation beyond what is provided by statute for such service. Therefore, any agreement which he may exact from the person desiring his testimony, to compensate him for his time or services beyond the statutory fees, is unenforceable. This is sometimes put upon the ground that the promise to pay is without consideration to support it, because the promise to testify is merely to perform what the law requires, which cannot furnish a consideration. But the majority of the cases put the ruling upon the ground that such a contract is against public policy."

Citing:

Dodge v. Stiles (1857), 26 Conn. 463

Walker v. Cook (1889), 33 Ill. App. 561

Boehmer v. Foval (1894), 55 Ill. App. 71

Wright v. Somers (1906), 125 Ill. App. 256

Cowles v. Rochester Folding Box Co. (1903), 81 App. Div. 414, 80 N. Y. Supp. 811

Clifford v. Hughes (1910), 139 App. Div. 730, 124 N. Y. Supp. 478

Sweany v. Hunter (1808), 5 N. C. (1. Murph.) 181

Ramschasel's Estate (1904), 24 Pa. Super. Ct. 262

Pool v. Sacheverel (1720), 1 P. Wms. 475, 24 Eng. Reprint, 565

In the case of Dodge v. Stiles, 26 Conn. 463, which appears to be one of the leading cases in this country, it was held that where the statute prescribes the fees to which witnesses are entitled, any attempt, directly or indirectly, to secure more, is against the "language and policy of the law". The court says:

> "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would be room for oppressive conduct and for corruption. Witnesses knowing that their testimony was indispensable would, under one pretense or another, make terms for their testimony, and such as might be induced to represent their testimony as important would be tempted to barter their oaths at the expense of truth and justice."

In the same opinion the court uses this language which appears to emphasize one of the reasons for the general condemnation of such practice:

> "There is a reason why witness fees should be fixed by law and at a moderate sum, lest poor suitors should be unable to seek redress, and witnesses be tempted to lean toward wealth and power."

In the case of Wright v. Somers, 125 Ill. App. 256, the court held:

> "A contract to pay a fact witness for his loss of time occasioned by reason of his having to testify is against public policy and void."

In the course of the opinion the court said:

> "If a witness who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor who desires to call him as to the value of his testimony, and then call upon the courts to enforce the contract thus made, the tendency to evil consequences is apparent. Such a ruling leans toward the procurement of perjury; toward

> the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts."

The court also said:

> "We cannot affirm this judgment. The contract on which it is based is against public policy. If affirmed, it would give ground for witnesses to extort unreasonable fees for their testimony; and might make it impossible for a poor suitor to obtain his rights."

To the same effect is the case of State ex rel. v. First Bank of Nickerson (Neb.), 207 N. W. 674; 45 A. L. R. 1418, where the court held:

> "Our statutes having fixed the amount to be paid matter-of-fact witnesses residing within the jurisdiction of the court and subject to its process, for their attendance at trial therein, a special contract to pay such witnesses more than the regular witness fee is illegal, contrary to public policy, and void."

Speaking of the general character of an agreement of this sort, the court said:

> "Its tendency is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangement is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein."

It is true that all of the above cases arise in actions seeking to enforce contracts to pay a witness something in addition to fees as fixed by the statute, but the general condemnation of such contracts voiced by the courts as being contrary to public policy, tending to pervert justice and bring the courts into disrepute, must certainly lead to a condemnation of the practice and to the conclusion that it is unlawful; for certainly a practice that is contrary to public policy cannot be said to be lawful, even though it violates no positive statutory law.

"Unlawful" does not necessarily mean contrary to some statute or to the common law, but in other than criminal matters means unauthorized by law. State v. Chenault, 20 N. M. 181; State v. Savant, 115 La. 226.

Section 286, General Code, relating to the examination of public offices by your bureau, provides in part as follows:

"If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs, for the recovery of the same and shall prosecute, or cause to be prosecuted the same to final determination. * * *

The term 'public money' as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials shall be liable therefor."

This statute clearly contemplates the institution of actions for recovery of money illegally expended by municipal officials, from such officials as well as from those to whom it has been paid. In State ex rel. v. Maharry, 97 O. S. 272, the court, referring to Sections 274, 286, et seq., held:

"1. All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law. * * *

4. These statutes are comprehensive enough to warrant actions against either public officers, former public officers or private persons."

The court says at page 276 of the opinion:

"What is the paramount purpose of these statutes? It is to protect and safeguard public property and public moneys. Finally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril; * * *"

These cases which I have cited holding the payments to a witness to be unlawful all assume that the witness is within the reach of process and that it is a part of his duty to the state and the proper administration

of justice to appear when subpoenaed and give his testimony. There is authority for the proposition that if the witness is not subject to the process of the court, a contract to compensate him for attending and testifying will be upheld. Gaines v. Molen (1887), 30 Fed. 27; Lincoln Mountain Gold Min. Co. v. Williams (1906), 37 Colo., 193, 85 Pac. 844; Nickelson v. Wilson (1875), 60 N. Y. 362; Armstrong v. Prentice (1893), 86 Wis. 210, 56 N. W. 742; Thatcher v. Darr (Wyo.), 16 A. L. R. 1442.

The jealousy with which the law guards the purity of its courts, and seeks to keep its procedure above reproach, is reflected in the provision of Section 12827, General Code, which reads as follows:

> "Whoever, with intent to corrupt a witness, or to influence him in respect to the testimony he is about or may be called upon to give in an action or proceeding pending, or about to be commenced, either before or after he is subpoenaed or sworn, offers, promises or gives to him or to any one for him, any valuable thing, shall be fined not more than five hundred dollars and imprisoned not more than sixty days."

Note that the statute contemplates two possible offenses: (1) to "corrupt" a witness, and (2) to "influence" him. The law does not say "*corruptly* to influence", but merely to "influence", which might consist only in keeping him in the humor to tell "the whole truth".

The three questions submitted appear to me to involve precisely the same principle and the answer is necessarily the same. In this opinion I am not dealing with questions arising out of the employment or compensation of expert witnesses.

Accordingly, and in specific answer to your inquiry, it is my opinion that where a witness other than an expert witness is within the reach of process, it is unlawful for a municipality, party to a suit in which the attendance of such witness is desired, to pay or agree to pay such witness anything in addition to his statutory witness fees, even though such additional payment represents only compensation for the witness' expenses and loss of time.

Respectfully,

THOMAS J. HERBERT,
Attorney General.