January 1942

Contracts—Contingent Fee for Fact Witness

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COMMENT ON RECENT DECISIONS

CONTRACTS—CONTINGENT FEE FOR FACT WITNESS—[Federal].—An attorney and an accountant brought suit to recover $1,000 in fees for services rendered in the trial of a suit by the defendant. Before that trial the attorney for the defendant informed the plaintiffs that he wished their help and that if the case should be won he would ask for $75,000 in addition to the fees already agreed upon, of which the plaintiffs would get 10 per cent to be divided between them. Neither of the plaintiffs took any part in the trial except to testify to facts which they had previously learned as agents and attorneys of the defendants. The district court allowed the fees, and the defendant appealed. Held, reversed. The contract was invalid. Any agreement to pay an ordinary witness compensation in addition to that provided by law is void as contrary to public policy and as lacking in consideration. Alexander v. Watson. 1

It has been held that attorneys should avoid testifying in behalf of their clients except when their testimony is essential to the ends of justice 2 or merely concerns formal matters. 3 The better practice is for the attorney to withdraw from the case as soon as it is apparent that he will have to testify. 4 However, if he does testify, his testimony is not incompetent, and the fact that he is retained in the case goes only to the weight of his testimony. 5 Of course, when he has definitely and completely severed his professional connections with the party in the case, he is not disqualified. 6

While the foregoing refers to the attorney in the role of an ordinary wit-
ness, the rule appears to be the same when he testifies as an expert wit-
ness with or without a contingent fee.7

The fee to be paid to ordinary fact witnesses in the state and federal
courts is fixed by law.8 Contracts for payment of contingent fees in excess
of the prescribed amount are held invalid as lacking consideration and
against public policy.9 However, if the witness resides outside the juridic-
tion of the court's process it has been held that there is consideration for
the contract to pay him a reasonable amount in excess of the statutory
fee.10 But contracts to compensate the witness for loss of time are invalid,
since they, if permitted, might be used by witnesses to extort unreasonable
fees for their testimony.11

In accordance with these rules the court rightly found that, since the
plaintiffs had severed their professional connections with the defendant and
testified only as to facts which they had acquired during their employment
by the defendant, the plaintiffs were not experts but ordinary fact witnesses
and that their contract for witness fees in excess of those required by law
was invalid. R. R. N., Jr.

   Clifford v. Hughes (1910) 139 App. Div. 730, 124 N. Y. S. 478. For the
distinction between fees for expert or opinion testimony which can be re-
quired under ordinary subpoena and fees to compensate experts for extra
services, see Comment (1941) 27 WASHINGTON U. LAW QUARTERLY 583, 585.

   §601; R. S. Mo. 1939 §13420; Ill. Revised Statutes, 53, §65.

   App. 424, 296 Pac. 905; Dodge v. Stiles (1857) 26 Conn. 463; Walker v.
   Cook (1889) 32 Ill. App. 561; Bohmer v. Foval (1894) 55 Ill. App. 71;
   Burchell v. Ledford (1928) 226 Ky. 155, 10 S. W. 908; Sherman v.
   Burton (1911) 165 Mich. 293, 130 N. W. 667; Quirk v. Muller (1894) 14
   Mont. 467; Sweeney v. Hunter (1808) 5 N. C. (1 Murph.) 181; Lyon v.
   Hussey (1894) 82 Hun. 15, 31 N. Y. S. 231; Cowles v. Rochester Folding
   Box Co. (1904) 81 App. Div. 414, 80 N. Y. S. 811, 119 N. E. 468 (Aff. 179
   N. Y. 87); Clifford v. Hughes (1910) 139 App. Div. 730, 124 N. Y. S. 478;
   In re Certain Lands (1911) 128 N. Y. S. 999 (Aff. In re New York 97
   N. E. 1103); Perry v. Dicken (1884) 105 Penn. 83, 51 Am. Rep. 181; In re
   Ramschael's Estate (1904) 24 Pa. Super. 262; Bowling v. Blum (Texas
   1899) 52 S. W. 97; Wright v. Corbin (1937) 190 Wash. 260, 67 P. (2d)
   868; Pool v. Sacheverel (1720) 1 P. Wms. 675, 24 Eng. Rep. 565. See Note,
   16 A. L. R. 1457.

   v. Williams (1906) 37 Colo. 193, 85 Pac. 844; Keown & McEvoy Inc. v.
   Verlin (1925) 253 Mass. 374, 149 N. E. 115, 41 A. L. R. 1319; State ex rel.
   Spillman v. First Bank of Nickerson (1925) 114 Neb. 423, 207 N. W. 674,
   Prentice (1893) 86 Wis. 210; Thatcher v. Darr (1921) 27 Wyo. 452, 199
   Pac. 938, 16 A. L. R. 1442; Willis v. Peckham (1820) 1 Brod. & B. 515,

11. Wright v. Somers (1906) 125 Ill. App. 256; Moor v. Adam (1816)