Witnesses--Power to Compel Expert Testimony

J. W. S. Jr.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Evidence Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol51/iss1/13

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
1902) § 740. Nevertheless, adoption of the majority view may be justified on the policy considerations noted. To do so suggests many perplexing problems, however, for instance, if the claim for injury to property be assigned and recovery had by the assignee prior to suit for personal injury, will the judgment be res judicata?

B. H. W., II.

Witnesses—Power to Compel Expert Testimony.—A real estate expert who had appraised property for a prior owner not a party to the present action, upon being questioned regarding his opinion as to the value of the property by the taxpayer in a tax certiorari proceeding, stated he did not wish to participate in the case and refused to accept a fee, when called as an expert for plaintiff. The trial court sustained the witness in his refusal to testify as to any matter asked him in his professional and not in his lay capacity, and certiorari was granted on this point. Held, that a witness may not, against his will, be compelled to give his opinion as an expert. Judgment affirmed. People ex rel. Krauskaar v. Thorpe, 296 N. Y. 224, 72 N. E. (2d) 165 (1947).

This holding aligns New York with Indiana, Buchanan v. State, 59 Ind. 1 (1877), New Jersey, Hull v. Plume, 131 N. J. L. 511, 37 A. (2d) 53 (1944). and Pennsylvania, Pennsylvania Transit Co. v. Philadelphia, 262 Pa. 439, 105 Atl. 630 (1918); Moran v. Pittsburgh-Des Moines Steel Co., 15 U. S. L. Week 2563 (W. D. Pa. 1947) in following the doctrine of Webb v. Page, 1 Car. & K. 23 (N. P. 1843), distinguishing between one who sees a fact and is called on in a court of justice to testify as to it and one selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment. The reasoning on which this so-called “liberal” view is based is clearly enunciated in Stanton v. Bushmore, 112 N. J. L. 115, 117, 169 Atl. 721 (1934), stating that “neither justice nor public policy forbids that the expert shall retain such knowledge and skill free from disclosure other than by his voluntary act. This is true whether disclosure be sought for compensation for the exercise of his skill, or in the expression of his professional judgment privately, or as a witness in a court of justice.” The decisions involve and the proposition is asserted only as to one called as an expert witness in behalf of a private litigant. A state or the United States may compel a citizen to testify as an expert in criminal trials or other causes involving the public interest. See
Pennsylvania Transit Co. v. Philadelphia, 262 Pa. 441. The instant case is exceptional in that the immunity claimed was absolute and not contingent upon payment of a fee. Characteristically the cases have involved witnesses who were asserting that they were entitled to expert fees as a condition to testifying.

In that setting, the refusal to compel testimony has been supported by the argument that it is purely a matter of bargain between the litigant and the expert whether the expert shall testify, with the amount of the compensation fixed by the bargain and the expert liable for any breach of contract. This reasoning is generally rejected. A leading case for the contrary majority view, Dodge v. Stiles, 26 Conn. 463, 466 (1857), disallows the argument on the ground that "witnesses... would be tempted to barter their oaths at the expense of truth and justice." Wigmore lists numerous other considerations in support of the majority rule, 8 Wigmore, Evidence (3d ed. 1940) § 2203. By far the greater number of jurisdictions take the view that an expert may be compelled to testify to facts within the field of his special competence, without extra compensation although it may have required professional study, skill, or learning to equip himself, See (1919) 2 A. L. R. 1576; Wigmore, Evidence § 2203; Rogers, Expert Testimony (3d ed. 1941) 537, limiting the rule, however, to opinions which he can give without detailed preparation for the individual case which if involved, will entitle him to extra compensation. (1919) 2 A. L. R. 1576; (1935) 70 C. J. 41; Wigmore, Evidence § 2203. West Virginia accepts the majority view. The Supreme Court of Appeals has cited with approval Dodge v. Stiles, supra, and stated that "an expert witness may be compelled to testify as to matters of a professional opinion, or to matters to which he has gained special knowledge by reason of his special training and experience; but... an expert performing services to qualify himself at the request of a party to an action, is entitled to compensation above the ordinary witness fees for the reasonable value of the time and labor spent in preparation." Ealy v. Shetler Ice Cream Co., 108 W. Va. 184, 150 S. E. 539 (1929). Cf. Alexander v. Watson, 123 F. (2d) 627 (C. C. A. 4th, 1942). As a practical matter it would seem that a litigant compelling an expert to testify in his behalf would definitely not be assured of a friendly attitude on the part of the witness nor a favorable response to questioning, and that it would seem safer not to rely on a power of compulsion but to contract privately beforehand with a capable expert...
who is willing to testify and who knows the nature of the testimony he will be required to give. Many experts, including the very best qualified, would indeed be motivated by personal and professional ethics to give the same quality of testimony without regard to financial benefits received; but this means only that the litigant with a weak case would buy the always available services of the other type of technically qualified witness whom he would ordinarily not dare to summon, whereas those of the highest probity would find their services used compulsorily and without compensation where no dilution of truth was required.

J. W. S., Jr.