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## Courts Power to Compensate Attorneys

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## CONSTITUTIONAL LAW

### COURT'S POWER TO COMPENSATE ATTORNEYS

Relators were attorneys appointed to defend a pauper, by the Knox Circuit Court, where the cause had been venued from Pike County. The trial court made allowances for relator's services, and upon a petition for mandamus, ordered the Knox County Auditor to issue warrants, payment of which was refused for want of funds. This action was to mandate the Knox County Council to appropriate funds to pay the warrants. The mandate was proper.<sup>1</sup>

The court in the principal case declared invalid a provision of the County Reform Act of 1889,<sup>2</sup> which provided that no court may validly obligate its county beyond the unexpended sum appropriated "for the purpose of the court and for the purpose for which the obligation was incurred." The effect of the statute was to restrict<sup>3</sup> expenditures to the fund appropriated by the County Council, thereby jeopardizing the accused defendant's right to counsel<sup>4</sup> and attorney's right to compensation for his services.<sup>5</sup>

A conviction is invalid if the pauper criminal defendant was not offered, and if desired, provided adequate counsel;<sup>6</sup> the court has the duty, and power coequal with that duty,<sup>7</sup> to appoint an attorney,<sup>8</sup> but

<sup>1</sup> Knox County Council v. State *ex rel* McCormick, 29 N. E. (2d) 405 (Ind. 1940).

<sup>2</sup> IND. STAT. ANN. (Burns 1933) §26-527.

<sup>3</sup> It was argued that the statute does not invade the "inherent power" of the court, but is a reasonable and valid restriction delegated to a local representative body. But since the right to restrict is the right to destroy and since power emanates from the constitution to the judiciary, it cannot be made a matter of legislative discretion. Knox County Council v. State *ex rel* McCormick, 29 N. E. (2d) 405, 411 (Ind. 1940).

<sup>4</sup> IND. CONST. Art. I, § 13. This provision or a similar one is found in every state constitution, and in the U. S. CONST. AMEND. VI.

<sup>5</sup> IND. CONST. Art. I, § 21. This provision is found only in the Indiana Constitution. Lack of such a provision elsewhere is a principal reason why the courts of only two other states, Iowa and Wisconsin, allow compensation to council appointed for pauper criminal defendants, unless authorized by statute. *Hall v. Washington County*, 2 G. Greene 473 (Iowa 1854); *County of Dane v. Smith*, 13 Wis. 654 (1861) (that personal services are included in the Constitutional provisions that private property shall not be taken for public use without just compensation). The majority view requires attorneys to give their services gratuitously as an obligation of the profession in return for certain privileges they possess. *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 122 (1911), 36 L. R. A. (N.S.) 377 (1912). The Indiana court long ago discarded this theory, describing the privileges as "empty honors" and "odious distinctions." *Webb, Auditor, v. Baird*, 6 Ind. 13, 16, 17 (1854).

<sup>6</sup> *Powell v. State*, 287 U. S. 45, 84 A. L. R. 527 (1932); *Sanchez v. State*, 199 Ind. 235, 157 N.E. 1 (1927).

<sup>7</sup> See *Gordan v. Board of Comm'rs*, 52 Ind. 322, 324 (1876). Early decisions rely on what is called "inherent power" of the court as authority to appoint counsel. *Webb v. Baird*, 6 Ind. 13 (1854). "Reference is made frequently to the inherent power of the courts,

the court cannot compel an attorney to serve without compensation;<sup>9</sup> therefore, the court must have the power, *ex necessitate*, to provide for the attorney's compensation. Otherwise the appointment would fail, unless the attorney would serve gratuitously, and it would be impossible to carry on the prosecution constitutionally. Clearly, to this extent the County Reform Act is unconstitutional, and the cases supporting it are expressly overruled.<sup>10</sup>

The court did not determine whether in case of change of venue the trial court or the court from which the case was venued should fix and allow the attorney's compensation. That issue was not properly before the court since the appeal was not directly from the order which allowed the fees, but was in the nature of a collateral attack upon that order.<sup>11</sup> There are two pertinent statutes. One, passed in 1905, provides that attorney's compensation be "settled and allowed by the judge of the court from which the change of venue was first granted."<sup>12</sup> The other, a 1913 act, provides that on change of venue the costs of the trial shall be audited and allowed by the court to which the case is venued.<sup>13</sup> The court states that since the latter act is general it need not be construed as repealing the former, which is specifically in reference to attorney fees. The court indicates there is no objection to the legislature prescribing how compensation shall be fixed and allowed. Thus it seems that the Act of 1905 should control. Yet it would be more consistent with the court's reasoning had it found that the trial court, as an adjunct of the judicial power to appoint such attorneys and do all things necessary to perform the judicial function, also has the power to fix the compensation. The trial court is in a better position to determine the reasonable value of

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but we recognize that, in strictness, courts have no inherent powers. The courts and the whole legal system exist only at the will of the sovereign. The courts have only such powers as delegated at the will of the sovereign,—in this country the sovereign people." Fansler *Some Public Reactions to Procedural Methods* (1941) 16 Ind. L. J. 277. This statement by Judge Fansler, who wrote the opinion in the principal case, was made about three months after the case was decided. In the opinion he gave no hint of this idea, but did refrain from using "inherent power" in any of the court's conclusions.

<sup>9</sup> *Castro v. State*, 196 Ind. 385, 147 N.E. 321 (1925); *Webb, Auditor v. Baird*, 6 Ind. 13 (1854). Later cases followed the *Webb* case and in addition ordered attorney's compensation by statutory authority. *State ex rel Board of Comm'rs v. Miller*, 107 Ind. 39, 7 N.E. 758 (1886). Because of these statutes none of the former cases went as far as the principal case in declaring, that power to fix and allow compensation arises out of the courts judicial function and constitutional duties.

<sup>9</sup> *Blythe v. State*, 4 Ind. 525 (1852); IND. CONST. Art. I, §21.

<sup>10</sup> *Board of Comm'rs of Miami Co. v. Mowbray*, 160 Ind. 10, 66 N.E. 46 (1903); *Board of Comm'rs of Vigo Co. v. Moore*, 93 Ind. App. 180, 166 N.E. 779 (1929).

<sup>11</sup> *Knox County Council v. State ex rel McCormick*, 29 N.E. (2d) 405, 414 (Ind. 1940); *In re Board of Comm'rs of Vigo Co. v. State*, 136 Ind. 53, 35 N.E. 603, 22 L. R. A. 398 (1893).

<sup>12</sup> IND. STAT. ANN. (Burns 1933) § 9-1314.

<sup>13</sup> IND. STAT. ANN. (Burns 1933) § 2-1417.

the services in the court and community where they were rendered than is the court of another county which had nothing to do with the trial. It seems preferable, it being agreed that the county from which the case was venued should ultimately bear the cost, to rule that the trial court has the power to fix and allow attorney's compensation as part of the costs of the change of venue just as all other costs of the trial are audited and allowed.<sup>14</sup> This solution, which was attempted by the trial court in the principal case, carries out the power of the court to its logical conclusion, and conveniently adopts a practical procedure already in common use.

W. M. B.

## EVIDENCE

### BLOOD-GROUPING TESTS IN EVIDENCE

Plaintiff sued defendant for maintenance of her child alleging that defendant was the father. The defendant denied paternity and secured a court order requiring the plaintiff and child to submit to blood-grouping tests for comparison with defendant's blood. Order affirmed. By authority of Fed. Rules Proc. 35 (a) the court may order blood tests since blood-grouping is a part of physical condition.<sup>1</sup>

It is accepted by medical authorities that blood-grouping tests can in certain cases disprove parentage.<sup>2</sup> But, the tests can be used only negatively; i.e., to show non-parentage.<sup>3</sup> When the blood groups of one parent and the child are known, the blood group of the unknown parent must fall into certain classes. If the putative parent's blood does not come within one of these classes he is excluded from possible parentage, but if it does come within one of the classes he, among the thousands of others in that class, might be the parent. With use of the latest tests the average chances of ascertaining non-paternity are about one in three.<sup>4</sup>

<sup>14</sup> This procedure was approved in *State ex rel Board of Comm'rs of Allen Co. v. Miller*, 107 Ind. 39, 7 N.E. 758 (1836), where a statute similar to IND. STAT. ANN. (Burns 1933) §2-1417 was followed and the attorney's compensation allowed like other costs.

<sup>1</sup> *Beach v. Beach*, 114 F (2d) 479 (App. D.C. 1940). Rule 35 (a) FED. RULES CIV. PROC. provides, "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

<sup>2</sup> No authority today disputes the fundamental doctrines of blood-grouping. There may be scientific controversies over advances and refinements that have no application here. Wiener, *Determining Parentage* (1935) 40 *Scientific Mo.* 324; Landsteiner, *Forensic Application of the Serologic Individuality Tests*, *Jour. of Amer. Med. Assn.* (Oct. 6, 1934) 1041; 1 WIGMORE, EVIDENCE (3d ed. 1940) § 165a.

<sup>3</sup> *Flippen v. Meinhold*, 156 Misc. 451, 282 N.Y. Supp. 444 (N.Y. City Cts. 1935) (Plaintiff's request for blood test to obtain further proof of defendant's paternity refused).

<sup>4</sup> In 1900 Landsteiner recognized the existence of four basic blood-groups—O, A, B and AB. In 1927 Landsteiner and Levine reported two additional groups, M and N. By using both tests