mation of the criminal act as charged, and as showing the intent of the prisoner, was put in evidence by the prosecution. The accused having been made a witness in her own behalf, it was declared that her version of the conversation was competent, being a part of acts in themselves competent evidence and as showing the motive causing the same.[25] Dying declarations exonerating the prisoner, when so remote as not to be considered part of the *res gestæ*, are incompetent.[26]

The mere declarations of an assignor, when no part of the *res gestæ*, are inadmissible to prejudice his assignee's title, whether the same are made prior or subsequent to the assignment.[27] Though in case of vendors, the declarations are admissible to show fraudulent transfer when made prior to parting with title, and are part of the *res gestæ*;[28] but declarations are incompetent when made subsequently to the time of sale.[29]

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[25] Mack v. State, 48 Wis. 271.

[26] Moeck v. People, 100 Ill. 242; Merrill v. State, 58 Miss. 65. As to dying declarations under the rule of *res gestæ*, see State v. Draper, 65 Mo. 335; s. c., 27 Am. Rep. 287; Binns v. State, 57 Ind. 46; s. c., 26 Am. Rep. 48; Reg. v. Bedingfield, 14 Cox Crim. Cas. 341; s. c., 28 Eng. Rep. (Moak's notes) 587, and note 594; Arch. Crim. Prac. & Plead. (Pom. notes, 8th ed:) 428-435 and notes. In Williams v. State, 10 Tex. Ct. App., Crim. Cas. 528, the response of the deceased made immediately after the infliction of the death wound, and while he was dying, in answer to the inquiry by witness: "What is the matter with you?" saying, "Jack Williams shot me," was held a part of the *res gestæ*, being clearly interwoven with the principal transaction. Warren v. State, 9 Tex. Ct. App. 619; s. c., 35 Am. Rep. 745; Field v. State, 57 Miss. 474; s. c., 34 Am. Rep. 476, note 479; Wharton on Homicide, sec. 767.

[27] Truax v. Slater, 86 N. Y. 630; Coyne v. Weaver, 84 N. Y. 386; Peck v. Crouse, 46 Barb. 151; Kimball v. Huntington, 10 Wend. 675; s. c., 25 Am. Dec. 590; Newlin v. Lyon, 49 N. Y. 661. But see Miller v. Bingham, 29 Vt. 82.

[28] Fisher v. True, 38 Me. 534.

[29] Kennedy v. Divine, 77 Ind. 490; Burnham v. Brennan, 74 N. Y. 597; Blakeslee v. Rossman, 44 Wis. 553; Ohio Coal Co. v. Davenport, 37 Ohio St. 194; Dodge v. Stanhope, 55 Md. 113; McCormicks v. Fuller, 56 Iowa, 43.

THE COMPENSATION OF EXPERTS.

The law relating to the compensation of experts is somewhat unsettled, and the cases are not numerous in which the subject has been considered. This very fact, however, lends additional interest to the subject, and the question is one of great importance. In some of the States the law expressly provides that when a witness is summoned to testify as an expert he shall be entitled to extra compensation. Such a provision may be found in the laws of Iowa, of North Carolina, and of Rhode Island. They are as follows:

Iowa.—Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed, and the degree of learning or skill required."[1]

North Carolina.—"Experts when compelled to attend and testify, shall be allowed such compensation and mileage as the court may in its discretion order."[2]

Rhode Island.—"In addition to the fees above provided, witnesses summoned and testifying as experts in behalf of the State before any justice of the Supreme Court, trial justice, or coroner, may be allowed and paid such sum as such justice of the Supreme Court, trial justice, or coroner, may deem just and reasonable: *Provided*, that the allowance so made by any trial justice or coroner, shall be subject to the approval of a justice of the Supreme Court."[3]

But, on the other hand, the State of Indiana has enacted the following provision: "A witness who is an expert in any art, science, trade, profession or mystery, may be compelled to appear and testify to an opinion as such expert, in relation to any matter, whenever such opinion is material evidence, relevant to an issue on trial before a court or jury, without payment or tender of compensation other than the *per diem* and mileage allowed by law to witnesses, under the same

[1] Code of 1873, sec. 3814. See Snyder v. Iowa City, 40 Iowa, 646.

[2] Laws of 1871, ch. 139, sec. 13. See State v. Dollar, 76 N. C. 626.

[3] Pub. Statutes (1882) p. 733, sec. 15.

rules and regulations by which he can be compelled to appear and testify to his knowledge of facts relevant to the same issue."[4]

In the absence of all statutory provision authorizing it, the compensation of experts, beyond the regular witness fees, is not a necessary disbursement, and can not be taxed as a part of the costs. It is considered as having been incurred for the party's own benefit, and is no more a disbursement in the cause than the fees paid to an attorney.[5]

The Effect of Making Extra Compensation.—It is undoubtedly the practice in all important cases, for the parties calling experts, or professional witnesses, to pay them an additional compensation. And it is not considered contrary to the policy of the law that these witnesses should be specially feed. For if special compensation was not made or permitted, the testimony of such witnesses could not be procured without great pecuniary loss, and perhaps could not be secured at all. While the question as to the amount paid, or agreed to be paid, in such cases, can not affect in the least the regularity of the trial, yet it is stated that it may, perhaps, properly affect the credit of the witness with the jury.[6]

Experts Need not Make a Preliminary Examination of Facts Unless Special Compensation is Made.—An expert can not be compelled to make any preliminary investigation of the facts involved in a case, in order to enable him to attend on the trial and give a professional opinion. For instance, if the State desires the opinion of medical experts as to the cause of death, it can not compel them to make a post-mortem examination of the body of the deceased, for the purpose of qualifying him to express an opinion as to what was the cause of death.[7] And it has been said that an expert can not be required to attend during the entire trial, for the purpose of attentively considering, and carefully listening to the testimony, in order that he may be qualified to express a deliberate opinion upon such testimony.[8] In all such cases special compensation should be made.

[4] 4 Indiana Revised Statutes 1881, p. 94, sec. 504.

[5] Mack v. City of Buffalo, N. Y. Ct. App., Dec., 1881, 13 Reporter, 251. And see Haynes v. Mosher, 15 How. Pr. 216.

[6] See People v. Montgomery, 13 Abb. Pr. (N. S.) 207, 240.

[7] See Summers v. State, 5 Tex. Ct. App. 374.

[8] See People v. Montgomery, 13 Abb. Pr. (N. S.) 220.

Whether Special Compensation Must be Made to Experts Testifying as Such.—There can be no doubt that professional men are not entitled, in this country, to claim any additional compensation when testifying as ordinary witnesses to facts which happened to fall under their observation.[9] But another question arises, when they are summoned to testify as to facts of science with which they have become familiar by means of special study and investigation, and to express opinions based upon the skill acquired from such research, as to conclusions which ought to be drawn from certain given facts. Whether they can be compelled to testify in such cases when no other compensation has been tendered than the usual fees of witnesses testifying to ordinary facts, is a point upon which the cases are not in harmony. In this country the cases are so nearly balanced, that the question must be regarded as still an open one. But in England it seems to be settled that additional compensation is required. The practical importance of the question requires that the subject be examined somewhat at length.

Opinions of Writers on Medical Jurisprudence as to Additional Compensation.—And before examining the decisions of the courts, attention is called to the opinions of the writers on Medical Jurisprudence. For while these opinions can not be regarded as authoritative, they are important, and entitled to the respectful consideration of the profession and the courts. In Ordonaux's Jurisprudence of Medicine,[10] that learned and distinguished writer says: "It is evident that the skill and professional experience of a man are so far his individual capital and property that he can not be compelled to bestow it gratuitously upon any party. Neither the public any more than a private person have a right to extort services from him, in the line of his profession, without adequate compensation. On the witness-stand, precisely as in his office, his opinion may be given or withheld at pleasure; for a skilled witness can not be compelled to give an opinion, nor committed for contempt if he refuse to do so. Whoever calls for an opinion from him in chief, is under obligation to remunerate him, since he

[9] Snyder v. Iowa City, 40 Iowa, 646. And see Buchman v. State, 59 Ind. 1.

[10] Secs. 114, 115.

has to that extent employed him professionally; and the expert, at the outset, may decline giving his opinion until the party calling him either pays, or agrees to pay him, for it. When, however, he has given his opinion, he has now placed it among the *res gestæ*, and can not decline repeating it or explaining it on cross-examination. Once uttered to the public ear of the court, it passes among the facts in evidence."

So in Beck's Medical Jurisprudence the eminent author, in considering this subject, comments as follows: "If the duties on which I have enlarged are important to the community, in promoting the proper administration of justice, ought not the individuals engaged in them to receive adequate compensation? I advert to this, not only because it is just in principle, but because it would remove all imputation of volunteering in criminal cases. No one can refuse being a witness when legally summoned; every one, I presume, may decline the dissection of a dead body, or the chemical examination of a suspected fluid; and yet there is not, I believe, an individual attending on any of our courts, who is not paid for his time and services, with the exception of such as are engaged in these investigations. * * * * It is quite time that the medical profession in this country should rouse itself to a demand of its just rights "[11]

American Cases Favoring Extra Compensation.—The earliest of the American cases upon this subject seems to have arisen in the District Court of the United States for the District of Massachusetts, in 1854. The question came up before Sprague, J., in the following manner. During a trial upon an indictment, a motion for a *capias* was made by the district attorney, for the purpose of bringing in a witness subpœnaed to act as an interpreter of some German witnesses, but who had refused or neglected to attend. In answer to this application, the court said: "A similar question has heretofore arisen, and I have declined to issue process to assist in such cases. When a person has knowledge of any fact pertinent to the issues to be tried, he may be compelled to attend as a witness. In this all stand upon an equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art or profession, would subject the same individual to be called upon in every cause in which any question in his department of knowledge is to be solved. Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district to give his opinion in every trial in which a medical question should arise. This is so unreasonable that nothing but necessity can justify it. The case of an interpreter is analogous to that of an expert. It is not necessary to say what the court would do if it appeared that no other interpreter could be obtained by a reasonable effort. Such a case is not made as the foundation of this motion. It is well known that there are in Boston many native Germans and others skilled in both the German and English languages, some of whom, it may be presumed, might without difficulty be induced to attend for an adequate compensation."[12]

The question came before the Supreme Court of Indiana in 1877 in Buchman v. State,[13] the statute above noted not having been enacted, and that court held that while a physician or surgeon could be required to attend as a witness to facts without other compensation than that provided by law for other witnesses, yet he could not be required to testify as to his professional opinion without the compensation of a professional fee. In the opinion of the court, the professional knowledge of an attorney or physician is to be regarded in the light of property, and his professional services are no more at the mercy of the public, as to remuneration, then are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. "When a physician testifies as an expert, by giving his opinion, he is performing," says the court, "a strictly professional service. To be sure he performs that service under the sanction of an oath. So does the lawyer when he performs any service in a cause. The position of a medical witness, testifying as a medical expert, is much more like that of a lawyer than that of an ordinary witness, testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid the court or jury in arriving at a proper con-

[11] 2 Beck's Medical Jurisprudence, 20, 921.

[12] In the matter of Roelker, 1 Sprague, 276.

[13] 59 Ind. 1.

clusion from facts otherwise proved." The court then goes on to say that if physicians or surgeons can be compelled to render professional services by giving their opinions on the trial of causes without compensation then an eminent physician or surgeon may be compelled to go to any part of the State at any and all times, to render such service, without other compensation than is afforded by the ordinary witness fees. And this the court does not think he can be compelled to do. This conclusion is based both upon general principles of law and the Constitution of the State, which provides that "no man's particular services shall be demanded without just compensation."

The latest case in which this subject has been considered seems to be the case of the United States v. Howe, recently decided in the United States District Court for the Western District of Arkansas.[14] In this case, which was a prosecution for murder, a physician summoned as an expert, being sworn, refused to testify unless first paid a reasonable compensation for giving the result of his skill and experience. The court declined to regard this refusal as a contempt of court. The distinction was sustained between a witness called to depose to a matter of opinion depending on his skill in a particular profession or trade, and a witness called to depose to facts which he saw. When he has facts within his knowledge, the public have a right to those facts; but the skill and professional experience of a man are so far his individual capital and property that he can not be compelled to bestow them gratuitously upon any party. That the public can not, any more than a private person, extort services from a person in the line of his profession or trade without adequate compensation.

American Cases Denying the Right to Extra Compensation.—A different conclusion to that reached in the foregoing cases was arrived at in the Supreme Court of Alabama in 1875, in *Ex parte* Dement.[15] The prisoner on trial was charged with murder, and the physician, after testifying that he had seen the deceased after he had received the wounds which the prosecution asserted had produced death, was asked to state the nature and character of the wound received and its probable effect. This he declined to do, upon the ground that "he had not been remunerated for his professional opinion, nor had compensation for his professional opinion been promised or secured." A fine was thereupon imposed upon him for contempt of court. A motion to have the fine set aside upon the ground that the court could not compel him to testify as a professional expert, until compensation for his professional opinion had been first made or secured, having been overruled, the case was taken on appeal to the Supreme Court, which affirmed the ruling. In their decision, after an examination of the authorities, the court say: "It will be noticed that it has not been adjudged in any of the cases cited, that a physician or other person examined as an expert is entitled to be paid for his testimony as for professional opinions. The reports contain nothing to this effect. The English cases only indicate, and it is implied by the decision of Judge Sprague (In the matter of Roelker[16]), that persons summoned to testify as experts, ought to receive compensation for their loss of time. And it is to be inferred that the judges delivering some of the opinions thought the time of such a witness ought to be valued, in the language of the English statute, 'according to his countenance and calling.' But it is not intimated by any of them, that a physician, when testifying, is to be considered as exercising his skill and learning in the healing art, which is his high vocation; or that a counselor at law, in the same situation, is exerting his talents and acquirements in professionally investigating and upholding the rights of a client. If this were so, each one should be paid for his testimony as a witness, as he is paid by clients, or patients, according to the importance of the case and his own established reputation for ability and skill. But in truth he is not really employed or retained by any person. And the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the court to pronounce a correct judgment."

In 1879, the question came before the Court of Appeals in Texas, in Summer v. State.[17] In this case, the defendant being

[14] 12 Cent. L. J. 193.
[15] 53 Ala. 389.
[16] Sprague's Decisions, 276.
[17] 5 Texas Court of App. 374.

on trial for murder, the State called a medical practitioner, one Dr. Spohn, who testified that he had attended the deceased, and had made a *post mortem* examination, but declined to state the cause of his death. In his testimony he said: "I found the deceased breathing, but unconscious; had a contusion upon the left side of the head, but no exterior evidence of fractured skull; removed the patient to town and attended him until the next day, when he died; after death, made a *post mortem* examination, but I decline to state the cause of the man's death, as my knowledge was obtained by professional skill and from the deductions of experience, which I consider my own property, and which the county of Nueces has persistently refused to pay for. I have no knowledge of the actual cause of the man's death, save through the *post mortem* examination alluded to." The trial court sustained this refusal to disclose the knowledge thus acquired, upon the ground that not having been paid, he could not be compelled to testify as to the same. But the Court of Appeals viewed the matter in a different light, and expressed itself as follows: "The court may compel a physician to testify as to the result of a *post mortem* examination; and it is to be regretted that a member of a profession so distinguished for liberal culture and high sense of honor and duty should refuse to testify in a cause pending before the courts of his country, involving the life or liberty of a fellow-being and the rightful administration of the laws of a common country. Dr. Spohn has doubtless been misled, in taking the position he did, by the misconceptions of certain writers on medical jurisprudence." The court then refers to *Ex parte* Dement, and concludes as follows: "A medical expert could not be compelled to make a *post mortem* examination unless paid for it; but an examination having already been made by him, he could be compelled to disclose the result of that examination."

Extra Compensation Allowed in England.—In Betts v. Clifford,[18] Lord Campbell declared that a scientific witness, or expert, was not bound to attend upon being served with a subpœna, and that he ought not to be subpœnaed. If the witness, however, knew any question of fact, he might be compelled to attend; but he could not be compelled to attend to speak merely to matters of opinion. The same distinction was also taken in Webb v. Page,[19] which was a case in which a witness had been called by the plaintiff to testify as to the damage sustained by certain cabinet work, and the expense necessary to restore or replace the injured articles. The witness having demanded compensation, Mr. Justice Maule said: "There is a distinction between the case of a man who sees a fact, and is called to prove it in a court of law, and a man who is selected by a party to give his opinion on a matter on which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his own knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation; there is no such necessity for his evidence, and the party who selects him must pay him." According to these cases, therefore, an expert is under no obligation to testify as to matters of opinion, at least in civil cases. If his testimony is desired, the party desiring it must first render him such compensation as his services are worth. It is also to be noticed that, in England, it has been held, in civil cases at least, that a professional man, even though called to testify to facts and not to opinions, is entitled to extra compensation on the higher scale allowed under the statute of Elizabeth,[20] which provides that the witness must "have tendered to him, according to his countenance or calling, his reasonable charges." In a case decided in 1862, the expenses of an attorney, called as a witness, but who did not give professional evidence, were allowed by the Master, on the higher scale allowed professional witnesses. This allowance was held proper on motion to show cause, and Mr. Chief Justice Erle said: "We do not approve of the rule which is said to prevail in criminal cases, that if a surgeon is called to give evidence not of a professional character, he is only to have the expenses of an ordinary witness. We think the Master was quite right in allowing the expenses of this witness on the higher scale."[21] So, also, in Turner v.

[18] Warwick Lent Assizes, 1858.

[19] 1 Car. & K. 25.

[20] 5 Eliz., c. 9.

[21] Parkinson v. Atkinson, 31 L. J. (N. S.) C. P. 199.

Turner,[22] the same principle was applied by the vice-chancellor in the case of a barrister. The theory seems to be that the time of professional men is more valuable than the time of non-professional men, and that they should be compensated accordingly. It has been suggested that the rule is a hard one,[23] and it may be considered doubtful whether it can stand the test of examination.

Special Compensation to Experts Employed by the State in Criminal Cases.—And in the absence of express statutory provision authorizing it, it has been the practice in many of the States, in criminal cases, to make a proper compensation to the experts summoned by the government. As lawyers who are employed by the government to assist in the prosecution of the criminal, receive a special compensation, so the experts receive a special compensation; and this is allowed under certain statutory provisions authorizing the allowance of accounts for necessary services and expenses.

Special Compensation to Experts Summoned for the Defense, Paid out of the Public Treasury.—The Supreme Court of Massachusetts, in 1870, had its attention called to the right to allow the prisoner's counsel, in the case of an indictment for murder, to tax as a part of the costs, to be paid out of the public treasury, extra compensation to the experts employed by him, as a part of the necessary expenses of the trial, and as such to be allowed under the statutes referred to in the preceding section. As the question is an important one, we quote from the decision, allowing such taxation, as follows:

"Whenever the prosecuting officer thinks the interests of justice require it, we do not doubt that he is authorized, by the statutes above mentioned, to employ experts to make proper investigations for ascertaining the truth of a case, and that it is proper for him in some capital cases to enable the prisoner's counsel to make similar investigations, and to procure the attendance of experts at the trial, if the prisoner is not able to do so; and the court is authorized to allow a reasonable compensation to such experts for their services, both for attending the trial and for their prior investigations. This is not on the ground that the statute has given to a prisoner the right to such aid at the expense of the public treasury, but on the ground that it is for the interest of the Commonwealth, in the case then before the court, that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner in a case where he is exposed to so great a penalty. * * * * We do not think the prosecuting officer of the court would be authorized to allow the charges of all such persons as the prisoner would have a right to employ as experts at his own expense, without regard to their character, or to the need of employing them in the case. But the assent of the prosecuting officer should be obtained beforehand to the employment of such experts as may be selected and agreed upon, or, in case of his refusal to assent, application should be made to the court to appoint the experts. This would be the more proper course of proceeding, if the prisoner desires to have the experts called by him paid out of the public treasury." [24]

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22 5 Jur. (N. S.) 839.

23 See Lonergan v. Royal Exchange Assurance, 7 Bing. 725, 727; Collins v. Godefroy, 1 Barn. & Adol. 930.

24 Attorney-General, Petitioner, 104 Mass. 537.

MORTGAGE OF SEVERAL PARCELS OF REAL ESTATE—VALIDITY OF SALE OF SALE OF ONE.

PRYOR v. BAKER.

Supreme Judicial Court of Massachusetts (Worcester), October, 1882.

Where distinct parcels of land situate in different towns are embraced in a single mortgage deed, by the conditions of which the mortgagee is entitled, in default in the payment of the sums secured thereby, to "sell the granted premises, or such portions thereof, as may remain subject to this mortgage," a sale for breach of conditions of one parcel is valid, although the other parcels were not advertised and sold at the same time. Whether subsequent sales of the remaining parcels would be valid, *quære*.

D. Manning, Jr., for plaintiff; *Verry & Gaskill*, for defendants.

DEVENS, J., delivered the opinion of the court:

The defendant, Lovell Baker, was the mortgagee by virtue of a single deed of three distinct parcels of land situate, respectively, in the towns of Rutland, Millbury and Leicester, in the county of Worcester. By the conditions of his mort-