

1954

# Earle Cecil Barber v. Frank E. Moss et al : Brief of Respondents

Utah Supreme Court

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Frank E. Moss; William J. Cayias; Counsel for Respondents;

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Case No. 8180

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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EARLE CECIL BARBER,

Plaintiff and Appellant,

— vs. —

FRANK E. MOSS, County Attorney of  
Salt Lake County; ALVIN KEDDING-  
TON, County Clerk of Salt Lake County;  
SHARP M. LARSEN, County Treasurer  
of Salt Lake County; and DAVID P.  
JONES, County Auditor of Salt Lake  
County,

Defendants and Respondents.

**FILED**  
NOV 15 1954

**BRIEF OF RESPONDENTS**

Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

Throughout this Brief, Appellant will be referred to as "plaintiff," and Respondents will be referred to as "defendants," All italics are ours.

STATEMENT OF FACTS

The Statement of Facts, as set out in the Brief of Appellant, are undisputed. As indicated in the Statement of Facts, the only question involved in this appeal is whether or not plaintiff is entitled to witness fees for the entire number of days for which he was held as a material witness.

As a matter of simplification and clarification, the points set out for argument in the Brief of the appellant will be maintained herein, and argument submitted under each point as raised by the appellant.

## STATEMENT OF POINTS RELIED ON

### POINT I.

UNDER THE LAW OF THE STATE OF UTAH, A PERSON COMMITTED TO JAIL BECAUSE OF INABILITY TO FURNISH A SURETY BOND IS NOT ENTITLED TO WITNESS FEES FOR EACH DAY OF CONFINEMENT.

## ARGUMENT

### POINT I.

UNDER THE LAW OF THE STATE OF UTAH, A PERSON COMMITTED TO JAIL BECAUSE OF INABILITY TO FURNISH A SURETY BOND IS NOT ENTITLED TO WITNESS FEES FOR EACH DAY OF CONFINEMENT.

Attention of the court is respectfully called to the origin of payment of witness fees. It is well recognized that from the very beginning of the common law when any witnesses were required to appear and testify in a criminal proceeding, that they were not entitled to compensation as a matter of right. Every competent citizen was required to appear and testify in a criminal proceeding. It was a duty imposed by the common law and there was no provision for payment. It is only in fairly recent times that statutes have been enacted to provide for compensation when witnesses are required to testify in a criminal proceeding.

A statute covering payment of witness fees now exists in the Utah Code Annotated, 1953, and of course has been in our statutes for many years. The pertinent applicable statutes are 21-5-2 and 4, Utah Code Annotated, 1953.

These statutes are quoted herein for the information of the court:

“21-5-2. Witness and jurors fees in criminal cases—  
Daily report of attendance — Every witness in a criminal case subpoenaed for the state, or for a defendant by order of the state, and every juror, whether grand or trial, shall, unless temporarily excused, *in person report daily to the clerk* his attendance at court from the time of his appearance to the date of his discharge, and *no per diem shall be allowed for any day upon which attendance is not so reported.*”

(Italics ours)

“21-5-4. Witness fees and mileage. — Every witness legally required or in good faith requested to attend upon a city or district court or a grand jury is entitled to \$6 per day for each day in attendance and twenty cents for each mile actually and necessarily traveled in going only; provided, that in case of a witness's attending from without the state in a civil case, mileage for such witness shall be allowed and taxed for the distance actually and necessarily traveled within the state in going only.”

Special attention is directed to the pertinent Utah statute 21-5-2 which provides that every witness shall, unless temporarily excused, report daily to the clerk his attendance at court. The latter portion of that statute provides that in order for any witness to be paid he shall be required to report his attendance to the clerk for each day that he expected to be paid.

The court's attention is respectfully called to the case of *Burtenshaw v. Bountiful Irrigation Company*, 90 Utah 196, 61 P. 2d 312, in which the court said:

“It is settled in this state that the prevailing party is entitled to tax as costs the statutory per deim for witnesses subpoenaed in good faith and *actually attending* the trial.” (Italics ours)

The court's attention is also respectfully called to the matter of *Smith v. Nelson*, 23 Utah 512, 65 Pac. 485, wherein this court said:

“Under our statute, as we construe it, a witness subpoenaed and in *actual attendance* \* \* \* is entitled to his fees \* \* \* (Italics ours)

The following paragraph is also extracted from the case of *Smith v. Nelson* above cited:

“It is further insisted that the court erred in allowing witness fees for witnesses who were at the same time in attendance upon court in several other cases in which the plaintiff was a party. Under our statute (section 994, Rev. St.) as we construe it, a witness subpoenaed and in actual attendance in several cases at the instance of the same plaintiff is entitled to his fees in each case, although the suits are pending at the same time and place. Other jurisdictions have ruled likewise on this subject. 5 Enc. Pl. & Prac. 139; *Willink v. Reckle*, 19 Wend. 82; *Flores v. Thorn*, 8 Tex. 377; *Robison v. Banks*, 17 Ga. 211; *Vence v. Speir*, 18 How. Prac. 168; *Dorrell v. Johnson* 17 Pick. 263; *McHugh v. Railway Co.*, 41 Wis. 79; *Hicks v. Brennan*, 10 Abb. Prac. 304; *Eames v. Black*, 72 Me. 263.”

We must admit that there is some conflict between the authorities as to whether a witness who is detained in custody for future appearance may recover witness fees for the entire period of detention. With respect to cases which have arisen in connection with this subject, the majority of jurisdictions hold that there can be no recovery. See 58 American Jurisprudence, Paragraph 885.

The courts hold that statutes authorizing payment of a witness while attending court did not extend this doctrine to the time while a witness is forcibly detained awaiting for the trial to take place, It would appear that this rule would be the applicable one under our statutes.

First of all, our statute indicates that in order for a witness to obtain compensation he must report his attendance at court each day to the clerk of the court. The cases above cited also indicate that he can be paid only for those days on which he actually attends court. Based upon the above cases and the Utah Statute cited, it is the position of the respondents that the plaintiff is entitled to witness fees for the days that he actually attended court and reported his attendance to the clerk of the court. For the remainder of the time that he was detained awaiting hearing on the matter, it is the position of respondents that there can be no allowance made for witness fees to the plaintiff, for the period of time that he was in custody but not in actual attendance of the court and for days when he did not report his attendance to the clerk of the court.

## CONCLUSION

It is respectfully submitted that this court should affirm the decision of the District Court in and for Salt Lake County, State of Utah, and dismiss the appeal of the appellant.

Respectfully submitted,

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