

COSTS: INFORMATION CHARGES CRIME UNDER SECTION 4151 R. S. MO. 1929, ** STATE NOT LIABLE FOR COSTS IN THE CASE CHARGED UNDER SECTION 4151, R. S. MO. 1929.

March 23, 1935.

3-21

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion from this department which reads as follows:

"This office is in receipt of a fee bill from the Circuit Court of Douglas County, Missouri, in the amount of \$625.70 and this office requests an opinion of the Attorney General of Missouri as to whether the State of Missouri is liable for the costs in this case.

"An information was filed in the Circuit Court of Douglas County, Missouri, on September 12th, 1934, charging the defendants with the crime of stealing timber. Apparently this information is brought under Section 4151 R. S. Mo. 1929 and said information filed on said date and furnished by the Circuit Clerk of Douglas County is in words and figures as follows, to-wit:

INFORMATION IN THE CIRCUIT COURT.

State of Missouri, County of
Douglas SS.

"The State of Missouri,	In the Circuit
vs.	Court of Doug-
Tom Baney, John Burchett,	las County,
Ed Roberts, Earl Woods,	Missouri,
Burl Baney.	

At the September
Term, 1934.

John M. Bragg, Prosecuting Attorney within and for the County of Douglas, in the State of Missouri, informs the Court upon his oath, that Tom Baney, John Burchett, Ed Roberts, Earl Woods and Burl Baney, on the ____ day of May, 1933 in said County of Douglas, did then and there unlawfully and feloniously enter upon certain lands belonging to Minnie B. McKinney, to-wit, the south one-half of Section 26, and Section 27, and Section thirty-four all in Township 27, Range 11, Douglas County, Missouri, and did then and there on the aforesaid day, unlawfully and feloniously commence cutting down and distroying certain oak trees and pine trees standing and growing on said lands and at divers times and on divers days between that day and the ____ day of September 1933 did unlawfully and feloniously continue to enter upon said lands and cut down and distroy the Oak trees and Pine trees then and there standing and growing upon said lands aforesaid, and that seventy five oak trees and twenty five pine trees, standing and growing on said lands of the value of \$200.00, the property of Minnie B. Minney, then and there unlawfully and feloniously did cut down, distroy and carry away; Against the peace and dignity of the State.

JOHN M. BRAGG

Prosecuting Attorney.

_____, Prosecuting Attorney, makes oath and says that the facts stated in the foregoing information are true according to his best information and belief.

Subscribed and sworn to before me this 13th day of September, A. D. 1934.

Noel Sutherland, Circuit Clerk
by W. I. Barker, Deputy Circuit
Clerk.

" On September 19th, 1934, defendant Ed Roberts was tried by a jury in said court and a verdict of 'Not Guilty' was returned by the jury. It is stated by the Circuit Clerk of Douglas County that the court only instructed the jury on a minimum sentence of two years in the State Penitentiary and did not instruct

the jury that if they found the defendant guilty they could assess a punishment in the county jail not less than six months or by fine not less than \$300.00. On the 14th day of January, 1935, the Prosecuting Attorney of Douglas County entered a nolle prosequi as to the other defendants and the case was dismissed and the Circuit Clerk of Douglas County thereupon certified the fee bill to this office for payment.

"It is apparent that this information was filed under Section 4151 R. S. Mo. 1929 and not under Section 4076 R. S. Mo. 1929, and therefore we request an opinion as to whether the State of Missouri or the County of Douglas is liable for the costs in this case in view of the fact that the instruction by the Court to the jury on the punishment was for minimum sentence of two years in the State Penitentiary."

I.

INFORMATION SUBMITTED CHARGES
CRIME UNDER SECTION 4151, R. S.
Mo. 1929.

Section 4151, R. S. Mo. 1929, reads as follows:

"Any person who shall unlawfully enter upon any lands belonging to this state, saline, seminary, school or swamp lands belonging to any county, or lands belonging to any corporation, person or persons, and shall cut down or destroy, or cause to be cut down or destroyed, any tree or trees standing or growing thereon of the value of thirty dollars, or any person who shall induce, assist, aid or abet any other person so to do, shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the state penitentiary for a period of not less than two years, or by imprisonment in the county jail not less than six months, or by fine not less than three hundred dollars."

The information in question clearly follows the language of the above section and plainly charges the defendants with a violation of the provisions thereof. That the Prosecuting Attorney must have intended to charge the defendants under the provisions of Section 4151, supra, is evidenced by the fact that he followed the direction of Section 4155, R. S. Mo. 1929, in drawing the information, which section applies to informations drawn under Section 4151 but not to those drawn under Section 4076, R. S. Mo. 1929, and it is therefore the opinion of this office that the information charges the defendants with a crime under Section 4151, supra.

II.

STATE NOT LIABLE FOR COSTS OF A CASE CHARGED UNDER SECTION 4151, R. S. MO. 1929.

The punishment prescribed by Section 4151, supra, upon a conviction of the offense charged in the information is by imprisonment in the State penitentiary for a period of not less than two years or by imprisonment in the county jail for a period of not less than six months or by fine of not less than three hundred dollars.

Section 3828, R. S. Mo. 1929, provides:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

In the case of State ex rel. Tudor v. The Platte County Court, 40 Mo. App. 503, loc. cit. 506, the Court said:

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been ac-

quitted. The nolle prosequi amounted to an acquittal in the sense of the statute.

"In all capital cases in which the defendant is convicted, and all cases in which the defendant may be sentenced to the penitentiary, and he in either case be unable to pay the costs, the state shall pay them, except such as he incurs. Revised Statutes, 1879, section 2093. So, if the defendant be acquitted in a capital case or in a case where the punishment is solely in the penitentiary the state shall pay the costs. Section 2095. 'And in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them, or it shall be otherwise provided by law.' Section 2095. In this case the punishment may be either imprisonment in the penitentiary or by fine and imprisonment in the county jail (section 1259), and it is therefore not a case 'in which imprisonment in the penitentiary is the sole punishment for the offense' which, by the terms of section 2095, is the prerequisite to the state's liability where the defendant is acquitted. The state, therefore, is not liable for relator's costs."

The fact that the Court failed to instruct the jury that if they found the defendant guilty they could assess his punishment by imprisonment in the county jail not less than six months or by fine of not less than three hundred dollars would not make the case one in which the imprisonment in the penitentiary was the sole punishment for the offense. But such failure was mere error on the part of the trial judge which would have entitled the defendant to a new trial if he had been convicted. State v. Hurt, 285 S. W. 796.

In view of the above, it is the opinion of this department that the State of Missouri is not liable for the costs in the case where the defendant is acquitted of a

crime under the provisions of Section 4151, supra, although the judge failed to instruct the jury that the defendant could be punished other than by imprisonment in the penitentiary, and that the county in which the information was filed would be liable for said costs except when the prosecuting attorney shall be adjudged to pay them or it is otherwise provided by law.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLN:afj