

CRIMINAL COSTS:

Complaining witness in a misdemeanor before a justice of the peace on a charge of careless and reckless driving is not liable under Section 3444, R. S. Mo. 1929 for costs where defendant is acquitted but costs must be paid by the county.

May 23, 1938



Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated May 19, 1938 for an official opinion from this department which request is as follows:

"Will you kindly give this office your opinion on the following question:

"A" files a sworn complaint before a Justice of the Peace charging "B" with careless and reckless driving of an automobile on the highways of this State. The Prosecuting Attorney files his information and the case is tried before a jury and the defendant is acquitted. Who is liable for the costs, the complaining witness or the County?

I will thank you for your promptness in this matter."

Section 3444, R.S. Mo. 1929 reads as follows:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of

a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing complaint."

This section sets out certain misdemeanors which require the justice of the peace to enter the name of the complaining witness on his docket as a prosecutor, and further sets out that in such cases the prosecutor, that is the complaining witness, shall be adjudged to pay the costs in case of an acquittal. The section further states that in any other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter a judgment for costs against the complaining party. This section further says that in other

cases of acquittal the costs shall be paid by the county except when the prosecution was commenced complaint and the prosecuting attorney declines to file an information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint.

This Section 3444, supra, only applies to personal offenses and not public offenses. In the case of State of Missouri, Respondent, v. Nettie Flick, Defendant; Otto Drum et al., Appellants, 167 Mo. App. 6, l.c. 7, the court held:

"It is provided in section 5095, R. S. Mo. 1909, that no indictment for trespass not amounting to a felony, except for petit larceny, or for libel or slander, shall be preferred unless endorsed by the name of the prosecutor. Section 5057 makes the terms and restrictions as to endorsement of witnesses in cases of indictment, applicable to an information. And so does section 5063; and it makes the prosecuting witness, in such cases, liable for the costs if the prosecution fails. A prosecution for keeping a bawdyhouse is not one of the offenses where the prosecuting witness must be endorsed on the indictment, and hence he does not become liable for costs. (State v. Bean, 21 Mo. 267; State v. Raymond, 86 Mo. App. 537.)

Section 5380 provides that every person who shall institute a prosecution to recover a fine, penalty or forfeiture, shall be adjudged to pay the costs if the defendant is acquitted. This section does not apply to a public offense such as keeping a bawdyhouse. (State v. Lavelle, 78 Mo. 104; State v. Huiatt, 31 Mo. App. 302.)"

Sections 5095, 5057 and 5063, R.S. Mo. 1909, respectively, are now Sections 3542, 3504 and 3510, R.S. Mo. 1929, which designates the procedure of assessing the costs under grand jury indictments pertaining to misdemeanors and not upon informations.

Section 3446, R.S. Mo. 1929 reads as follows:

"All proceedings upon the trial of misdemeanors before justices of the peace shall be governed by the practice in criminal cases in courts of record, so far as the same may be applicable, and in respect to which no provision is made by statute."

Under this section the rule as set out in *State v. Flick*, supra, should be followed in interpreting Section 3444, supra, which applies to the procedure of assessing costs of trials in the justice courts.

In the case of *City of Greenville v. Farmer*, 195 Mo. App. 209, l.c. 213, the court said:

"* * * *Section 5380 provides that every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same. This section would seem to come nearer the case in hand than any so far mentioned; but it has been held that it applies only to offenses personal and not public and in cases where the informant is the person injured. (See, *State v. Lavelle*, 78 Mo. 104; *State v. Huiatt*, 31 Mo. App. 302.)"

Section 5380, R.S. Mo. 1909 is now Section 3829, R.S.

Mo. 1929. Section 3829, R.S. Mo. 1929 reads as follows:

"Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same."

Careless driving, under which your defendant was tried, is not a personal offense as set out in Section 3444, supra, but is a public offense. In the case of State ex rel. Frans E. Lindquist, Relator, v. John P. Butler, Judge, Respondent, 133 Mo. App. 566, an original proceeding by mandamus was issued against the defendant who was judge of the twelfth judicial circuit to approve and certify a certain bill of costs. In that case at l.c. 568 and 569 held:

"The controversy, if any, the respondent having filed no brief or argument, arises upon a construction of sections 2778 and 2836, Revised Statutes 1899. The first section reads as follows: 'When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case

of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge* or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint.'

The second reads as follows: 'If, upon the trial of any indictment or information, the defendant shall be acquitted or discharged, and the prosecutor or prosecuting witness shall be liable to pay the costs according to law, judgment shall be rendered against such prosecutor for the costs in the case, and in no case shall the same be paid by either the county or State.'

The language of section 2778 is plain to the effect, that, in prosecutions for petit larceny, the injured party, or as otherwise designated, the prosecuting witness, is not liable for the costs of the proceeding wherein the defendant is discharged. Section 2836 is not in conflict with section 2778. Construed together, the former is

merely directory. That is, in case the defendant is acquitted or discharged, judgment shall be rendered against the prosecutor wherein he is liable for the costs according to law, i.e., under section 2778, or in all cases not amounting to a felony and except for petit larceny. And the negative language in section 2836, viz., 'and in no such case shall the same be paid by either the county or State' merely refers to cases where the prosecutor is liable for the costs according to law, i.e., section 2778.

It follows, therefore, that it was the duty of the respondent judge, to approve of said fee bill, and it is ordered that a peremptory writ of mandamus be issued commanding him to do so. All concur."

Sections 2778, R.S. Mo. 1899 referred to in the above case is now Section 3444, R.S. Mo. 1929, and Section 2836, R.S. Mo. 1899 referred to in the above case is now Section 3833, R.S. Mo. 1929.

Section 3833, R.S. Mo. 1929 reads as follows:

"If, upon the trial of any indictment or information, the defendant shall be acquitted or discharged, and the prosecutor or prosecuting witness shall be liable to pay the costs according to law, judgment shall be rendered against such prosecutor for the costs in the case, and in no such case shall the same be paid by either the county or state."

According to the ruling in the case of State ex rel. Lindquist v. Butler, supra, the county is liable for the costs even taking into consideration Section 3833, supra, where the charge on which the defendant was acquitted, was a misdemeanor and did not come within the offenses set out in Section 3444, supra, wherein said section it said the prosecutor shall be adjudged to pay the costs in case of an acquittal.

CONCLUSION

In view of the above authorities, it is the opinion of this department that when a complaining witness swears to a complaint before a justice of the peace charging the defendant with careless and reckless driving of an automobile on the highways of this state, he is charging a public offense and not a personal offense.

It is also the opinion of this department that after the complaining witness has filed a complaint on a public offense, the judge shall not be compelled to enter his name as a prosecutor under Section 3444, supra, and after the prosecuting attorney has filed an information, under the complaint, in case of an acquittal, the complaining witness is not liable for the costs but must be paid by the county.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
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