COSTS:

State is not liable for costs where a conviction or acquittal was had on a graded felony.

May 12, 1938

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Mr. Claude T. Wood,
Prosecuting Attorney,
Pulaski County,
Waynesville, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated March 16, 1938, for an official opinion from this office which request is as follows:

> "You will probably recall the above entitled case as the one in which you did some work and which you planned to help me try had the defendant not escaped from jail.
>
> I am enclosing herewith a fee bill on same, together with a letter from the State Auditor and a copy of the information. This is, I believe, self-explanatory.
>
> Under date of March 27, 1937, you furnished me with an official opinion holding that #4461 (the habitual criminal act) was applicable to a prosecution under #7786 (a) (larceny of motor vehicle). This being the case, and you will note from the information that the defendant is charged under both above sections, it would seem to me that the ruling of the state auditor in connection with this fee

> bill must be erroneous. You will note that the auditor refuses to pay this fee bill for the reason the crime charged is not punishable 'solely by imprisonment in the penitentiary'. But since the defendant is charged under the two above sections, as I understand it, he would have to be either acquitted or given 25 years in the penitentiary. A copy of the information was sent to the auditor with the fee bill."

Section 3826, R.S. Mo. 1929 reads as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."* * * * * *

Under this section, Curtis Locke may be apprehended and convicted and still the state would not be liable for the costs for the reason the defendant will be able to pay the costs. According to the information in your case, the charge is larceny of an automobile under Section 4065, R.S. Mo. 1929, which reads as follows:

> "Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing an automobile or other motor

> vehicle, by imprisonment in the penitentiary not exceeding ten years;"
> * * * * * * * * * * *

It is also brought under Section 4461, R.S. Mo. 1929 which reads as follows:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceed-

ing five years."

This section is commonly called the "second offense act" and should not be confused with the "habitual criminal act". Section 4428, R.S. Mo. 1929, which is the "habitual criminal act" only provides for a life sentence on the last or fourth conviction and each of his previous convictions must be for a crime committed with a pistol or deadly weapon.

According to the fee bill, the return states that the cause was continued generally and does not show a conviction or an acquittal.

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

> "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."

This section should be strictly construed. In the case of State ex rel. Clarke, v. Wilder, Auditor, 197 Mo. 27, the court said:

> "1. No costs can be taxed in any court except such as the statute in terms allows.
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> 2. Even if the State Auditor in his return to the alternative writ of mandamus gives an insufficient reason for not paying the fee bill in a

> criminal case, if he was justified in not allowing such fees because the statutes do not allow them to be charged against the State, the writ of mandamus compelling him to pay them cannot go.
>
> 3. Where imprisonment in the penitentiary is not the sole punishment that may be inflicted upon a boy under sixteen years of age charged with murder in the second degree, the State is not liable for costs upon his acquittal."

In your case there was not a conviction or acquittal according to the information on the fee bill.

Section 4065, R.S. Mo. 1929, provides for punishment of not exceeding ten years in the pentitentiary, but Section 7786, R.S. Mo. 1929 which was enacted in the section Extra Session of 1921, assessed the punishment for larceny of an automobile at imprisonment for a term of twenty five years in the state penitentiary down to a fine or county jail sentence or both.

It is true that in most felony cases where the original charge provides only and solely for a penitentiary offense, the state must pay the costs on an acquittal or conviction if the defendant is unable to pay the costs, but under Section 7786, supra, the punishment in the case of larceny of an automobile is a graded felony. It has been held that where the information by the charge itself is punishable by imprisonment solely in the penitentiary and the defendant is acquitted, the state is liable for the costs even though the court instructed on a lesser offense such as manslaughter in the first degree murder charge. It was so held in State ex rel. Timberman, Sheriff, v. Hackmann, State Auditor, 257 S.W. 457. In your case the only charge set out was a graded felony under Section 7786, supra, and the second offense charge in the information only went to the punishment. The jury could have found him guilty under Section 7786, supra,

and not under the second offense Section 4461, supra, and assess a jail sentence or fine, or both.

There is no question but that Section 4065, R. S. Mo. 1929 was repealed by Section 7786, R.S. Mo. 1929 and it was so held in State v. Liston, 318 Mo. 1222. In that case the court held at l.c. 1232 as follows:

> "In his motion for a new trial, appellant attacked the State's instruction numbered 1, on the ground that it misdirected the jury as to the range of punishment prescribed for the offense charged. This complaint must be sustained. Section 3329 of the Revised Statutes of 1919, on which this prosecution is based, provides that any person convicted of this offense shall 'be punished in the manner prescribed by law for stealing property of the nature or value of the article so embezzled, * * *' Section 3313 deals with three different classes of property in fixing the punishment for grand larceny, and, in the first of such classifications, says that the stealing of an automobile or other motor vehicle shall be punished 'by imprisonment in the penitentiary not exceeding ten years.' Obviously, the trial court followed this statute, as the instruction complained of so advised and so directed the jury as to the range of punishment in this case. Section 29 of the Motor Vehicle Act of 1921 provides that any person who shall be convicted of feloniously stealing any motor vehicle, or any part thereof, of a value of $30 or

> more, 'shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1000) or by both such fine and imprisonment.' (Italics ours.) Moreover, Section 31 of said act provides that all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of said act are repealed, and the repeal of such laws is properly referred to and covered by the title of said act. (Laws 1921, 1 Ex. Sess., pp. 76, 105, 106.) Thus, it plainly appears that the jury was improperly instructed as to the range of punishment for this offense, as prescribed by law at the time in question, and that appellant was thereby deprived of a substantial right; that is, the right to have the jury consider a less severe punishment than the minimum punishment fixed by the instruction mentioned. In this connection, it should be noted that the jury assessed appellant's punishment at the lowest mark fixed by said instruction."* * * * *

Section 3313, R.S. Mo. 1919 is now Section 4065, R. S. Mo. 1929 under which you assume you filed your information. Section 29, Motor Vehicle Act of 1921 is now Section 7786, R.S. Mo. 1929.

It is true that if the jury found the defendant guilty of larceny of a motor vehicle under the "second offense act" the verdict must be for imprisonment for a term of twenty

five years in the penitentiary and no less. It has been repeatedly held that the "habitual criminal act" or "second offense act" is not part of the charge but for the purpose of additional punishment. In the case of State v. Collins, 180 S.W. 866, l.c. 867, the court said:

> "Loose and misleading language sometimes used in opinions which have dealt with the statute prescribing punishment in cases of second convictions seemingly is the basis of appellant's error. This statute creates no offense, and in no manner authorizes a conviction on a charge of being an habitual criminal, or anything else. It is not even a part of the article on 'Offenses,' but is incorporated in the article on 'miscellaneous Provisions and Definitions.' It only prescribes a punishment, and provides that in case of a second conviction the penalty shall be severer 'because by his persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment.' People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; State v. Moore, 121 Mo. 519, 26 S.W. 345, 42 Am. St. Rep. 542, and cases cited. As said in People v. Raymond, 96 N.Y. loc. cit. 39:
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> 'The first offense was not an element of or included in the second and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense. That only is punished.'
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> The punishment is merely enhanced from the

> character of the criminal and is inflicted for the last offense committed. Howard v. State, 139 Wis. loc. cit. 532, 121 N.W. 133; McIntyre v. Commonwealth, 154 Ky. 149, 156 S.W. 1058; Commonwealth v. Hughes, 133 Mass. 496. In some jurisdictions it is not even necessary to charge the previous conviction, this being considered only by the court in passing sentence. State v. Hudson, 32 La. Ann. 1052."* * * * * *

Also in the case of State v. Citius, 56 S.W. (2d) 72, l.c. 73, the court said:

> "* * * * * Sections 4461 and 4462, R.S. Mo. 1929 (Mo.St.Ann. Sections 4461, 4462), form what is commonly called the Habitual Criminal Act. These statutes do not create an offense nor authorize a conviction upon the charge of being an habitual criminal. They only provide that, in case of a second conviction, the penalty to be imposed upon the defendant shall be more severe 'because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment.' State v. Collins, 266 Mo. 93, 180 S.W. 866, loc. cit. 867, citing and quoting People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401, and other cases. Under this statute no conviction can be had and no punishment assessed, unless the jury first finds the defendant guilty of the particular offense charged."* * * * * * * * * *

CONCLUSION

In conclusion will say it is the opinion of this department that in view of the fact that a conviction was not obtained on a felony in compliance with Section 3826, R.S. Mo. 1929, and an acquittal was not returned in compliance with Section 3828, supra, under a charge solely punishable with a term in the penitentiary, the state is not liable for the costs in this case.

It is also further the opinion of this department that if a conviction had been obtained resulting in a jail sentence or fine, even though the information charged larceny of a motor vehicle under the "habitual criminal act" or "second offense act", the state would not be liable for the reason that the offense as charged was a graded felony and the "second offense act" or "habitual criminal act" was not a part of the offense but for the purpose of added punishment. We are basing our opinion in this respect on State v. Collins, supra, and State v. Citius, supra.

It is further the opinion of this department that Section 4065, supra, has not only been repealed by implication by the latter enactment of Section 7786, R.S. Mo. 1929, but was so held in the case of State v. Liston, supra.

Respectfully submitted

W. J. BURKE
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APPROVED:

J. E. TAYLOR
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