

4861.

JUSTICE OF THE PEACE—MAY NOT RECOVER COSTS WHERE PERSON BOUND OVER TO GRAND JURY AND IS NOT INDICTED—NO RECOVERY FROM STATE IN PROHIBITION CASES.

SYLLABUS:

1. *There is no way by which a justice of the peace may be paid for his services as an examining magistrate, either in misdemeanor or felony cases, where the grand jury fails to indict a person who has been charged with a crime before such magistrate, except in misdemeanor cases wherein the complainant, as provided by Section 13432-20, General Code, has been required by the justice of the peace to be liable for the costs in the event that the complaint is dismissed.*

2. *A justice of the peace who hears and determines a misdemeanor case for a violation of the prohibition laws of the state commenced by a law-enforcing officer and for which the magistrate fails to receive his fees because the prosecution fails, cannot collect them from the state.*

COLUMBUS, OHIO, January 6, 1933.

HON. CHARLES S. LEASURE, *Prosecuting Attorney, Zanesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter which reads as follows:

“I have a matter up before me to decide in regard to how the fees of a justice of the peace court are collected in certain criminal matters which I have been unable to answer. The specific inquiry is this. An individual was charged with a felony in a justice of the peace court and was bound over to the grand jury. The grand jury failed to indict. Is there any means by which the justice of the peace is entitled to collect his fees and those of his constable. As I understand the provisions of law, the justice cannot require the security of costs in felony cases.

I also should like to know from what source the justice would receive his fees in cases where individuals are charged with misdemeanors and such individuals are bound over to the grand jury and no indictment is returned.

A specific section of law gives jurisdiction to justices of the peace to try liquor cases and that jurisdiction is coextensive with the county. Another section of law also provides that where an officer of the law, such as constable, the sheriff or the prosecuting attorney files the affidavit, the justice cannot require security of costs. In such a case which is filed by one of these three officers on a liquor charge and the defendant is acquitted, is there any provision of law whereby the justice can receive his fees, cover both the court costs and his constable's fees. An opinion upon these questions would be greatly appreciated.”

At common law costs in criminal cases were unknown and it is a rule of law amply supported by authority that costs in criminal cases cannot be taxed against the state in the absence of statute. See *Wilson vs. Fussell*, 60 Ark. 194; *State vs. Borg*, 153 Atl. 374 (N. J.); *In re Pierce*, 156 Atl. 137 (Ver.); *Fairmount Creamery Co. vs. Minn.*, 275 U. S. 70, 73, 74; 15 C. J. 317, 324, 328.

Since costs are the creature of statute, the same cannot be allowed to or

against any party to a criminal proceeding except as authorized by statute. While in our code of criminal procedure authority is given for taxing costs in all criminal proceedings against the defendant when he is convicted (Sections 13451-9, 13454-2 and 13455-3, General Code), there is no direction to tax costs against the state on the failure of a criminal prosecution except as provided by Section 13459-6, General Code. Section 13459-6 reads in part as follows:

"If the judgment be reversed, the plaintiff in error shall recover from the defendant in error all court costs incurred to secure such reversal, including the cost of bills of exceptions and transcripts."

The legislature, in Sections 13455-7 and 13455-8, General Code, has authorized the state to pay the costs of prosecution whenever a person convicted of a felony fails to pay the costs either in part or in whole. However, before the state is authorized to pay such costs, the clerk of the court of common pleas of the county in which the indictment was found must issue a writ of execution against the property of the convicted person and the same must be returned by the sheriff showing a want of property upon which to levy.

The legislature has also authorized the county commissioners to make an allowance to justices of the peace in lieu of their fees where, in felony cases, the state fails to secure a conviction and, in misdemeanor cases, when the defendant proves insolvent.

Section 3019, General Code, reads as follows:

"In felonies wherein the state fails, and in misdemeanors wherein the defendant proves insolvent, the county commissioners, at the first meeting in January, shall make an allowance to justices of the peace and constables, in the place of fees, but in no year shall the aggregate allowance to such officer exceed the fees legally taxed to him in such causes, nor in any calendar year shall the aggregate amount allowed such officer and his successor, if any, exceed one hundred dollars. If there be a successor, said amount shall be prorated on the basis of lost fees."

The provisions of Section 3019 cannot be construed as covering the situations presented by your inquiry, since the allowance authorized by the provisions of that section can be made only to the extent and in the manner provided therein. See 15 C. J. 324.

The only statute which provides that the costs of prosecution shall include the fees due a justice of the peace as an examining magistrate in criminal cases is Section 3016, which reads as follows:

"In felonies, when the defendant is convicted, the fees of the various magistrates and their officers, the witness fees and interpreter's fees shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto; in minor state cases, which have come to the court of common pleas through said magistrate's courts, the fees above enumerated shall be inserted in the judgment of conviction and when collected the same shall be disbursed by the clerk of courts to the persons entitled thereto, except that in both felonies and minor state cases, said clerk shall pay the witness and interpreter's fees into the county treasury, monthly.

In all cases when recognizances are taken, forfeited and collected,

the amount recovered shall be paid into the county treasury, and if no conviction is had, such costs shall be paid by the county upon the allowance of the county auditor."

It is apparent from the provisions of that section that a justice of the peace, as an examining magistrate, is entitled to his fees only upon the indictment and conviction of the person bound over by the justice of the peace and then only on the payment of the costs by the person so convicted.

The legislature in Section 13432-20, General Code, has provided that a justice of the peace may require a complainant in a misdemeanor case to be liable for the costs of prosecution in the event the complaint is dismissed. Section 13432-20 reads as follows:

"When the offense charged is a misdemeanor, the magistrate or court before issuing the warrant, may require the complainant, or if he consider the complainant irresponsible, may require that he procure a person, to be liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable, and such court or magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of an officer authorized to make arrests when in the discharge of his official duty, or other person or officer authorized to assist the prosecuting attorney in the prosecution of offenders."

The provisions of this section amply protect a justice of the peace in the matter of the costs of prosecution in misdemeanor cases where he acts either as an examining magistrate or in those cases where jurisdiction to hear and render final judgment has been conferred upon him. The phrase "if the complaint be dismissed" in Section 13432-20 can and should be construed to include misdemeanor cases wherein a grand jury fails to return an indictment in a transcript case against a person bound over by an examining magistrate, since the failure to return an indictment in such a case is a determination of the criminal proceedings instituted before the justice of the peace and is, in effect, a dismissal of the complaint filed with the justice of the peace. This conclusion finds support in the provisions of Section 13433-18, General Code, which provides that the costs of the examining magistrate shall be included in the transcript forwarded to the clerk of the court in which the accused is to appear in those cases where the defendant is bound over by the examining magistrate. Section 13433-18 reads, in part as follows:

"In cases where the defendant is held to answer, a transcript of the proceedings, including a copy of the complaint, with any recognizance taken in the case, shall be forwarded forthwith to the clerk of the court in which the accused is to appear. Such transcript shall contain an itemized account of the costs that have accrued."

There is no statute authorizing the taxing of the costs of an examining magistrate against the state where a grand jury fails to indict a person bound over by a justice of the peace acting as an examining magistrate, either in a misdemeanor or felony case. The mere fact that no compensation is provided for or allowance made in those cases wherein the accused is not indicted by a grand jury after being bound over by a justice of the peace is one of the

burdens which attaches to the office of a justice of the peace and which is assumed when a person is elected thereto. This is so even though the services performed in criminal proceedings by a justice of the peace as an examining magistrate are required by statute. The fact that a justice may not receive compensation for certain services rendered is not unique to the law. According to Taft, Chief Justice of the Supreme Court of the United States, in the case of *Tumey vs. State of Ohio*, 50 A. L. R. 1243, at p. 1250:

“For hundreds of years the justices of the peace of England seemed not to have received compensation for court work.”

I am, therefore, of the opinion in answer to your first and second inquiries that there is no way by which a justice of the peace may be paid for his services as an examining magistrate, either in misdemeanor or felony cases, where the grand jury fails to indict a person who has been charged with a crime before such magistrate, except in misdemeanor cases wherein the complainant, as provided by Section 13432-20, General Code, has been required by the justice of the peace to be liable for the costs in the event that the complaint is dismissed.

Your third inquiry raises the question as to whether a justice of the peace who hears and determines a misdemeanor case for which he fails to receive his fees because the prosecution fails, can collect them from the state where the proceeding was instituted by a law-enforcing officer and is for a violation of the prohibition laws of the state.

Section 13432-20, General Code, which authorizes the imposition of the costs of prosecution on a complainant in a misdemeanor case by requiring the complainant to be liable for the costs in case the complaint is dismissed, has no application to prosecutions instituted by officers or persons whose duty it is to make arrests or who are authorized to assist the prosecuting attorney in the prosecution of offenders.

Section 6212-25 also provides that no bond or security for costs shall be required of the commissioner of prohibition, his deputy or inspectors in making complaints for the violation of the state prohibition law. See also Section 13424-27.

As previously stated herein, the liability of the state for costs in a criminal proceeding is one imposed by statute and unless the legislature has expressly provided that the state shall be taxed with the costs of prosecution where the defendant is acquitted, there can be no liability for such costs. The only compensation which justices of the peace in most criminal proceedings receive are the fees allowed and earned by them on the conviction of the accused. See Sections 1746 and 3022.

This fact has been held to be sufficient ground for the disqualifying of a justice of the peace from hearing a misdemeanor case if the fees allowed as costs and collected from the defendant only on his conviction constitutes a direct and substantial pecuniary interest in the outcome of the case. See *Tumey vs. State, supra*. However, the disqualification of the justice of the peace from hearing and determining a misdemeanor case on that ground is said to be waived when timely objection is not made by the accused. See *Tari vs. State*, 117 O. S. 481.

There is no statute which requires the state to pay the costs due a justice of the peace in a misdemeanor case when the defendant is acquitted on a charge of violating the prohibition laws of this state. That fact was responsible for the rule of law laid down in the case of *Tumey vs. State, supra*.

There has been no statute enacted or amended in respect to the payment

of the costs of prosecution in misdemeanor cases involving a violation of the prohibition laws of this state where the prosecution fails, since the decision in the Tumey case, *supra*. Thus, where the fees of a justice of the peace in such a case cannot be collected because of the acquittal of the accused, there can be no valid claim against the state in favor of such justice of the peace for such fees.

The legislature has provided that justices of the peace in certain misdemeanor cases shall be paid for their services where the defendant is acquitted or after conviction is unable to pay the costs of prosecution. See Sections 896-14, 897-3 and 1454, General Code. However, as previously stated herein, there is no statute imposing upon the state liability for the costs of prosecution in prohibition cases where the defendant is acquitted.

In view of that fact and inasmuch as costs cannot be required to be advanced or secured by a person authorized by law to prosecute cases before a justice of the peace, I am of the opinion that there is no way by which such magistrate can be paid for his services in misdemeanor cases involving a violation of the prohibition laws of this state where the prosecution instituted by such officer fails.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4862.

SALARY REDUCTION—DEPUTY CLERK BOARD OF ELECTIONS—
BASED ON ACTUAL SALARY—NOT SUBJECT TO REDUCTION
DURING HIS TERM OF OFFICE.

SYLLABUS:

1. *The reduction of salary provided for election officers under Amended House Bill No. 2 of the 89th General Assembly, third special session, is, so far as a deputy clerk of a county board of elections in a county of less than 150,000 population is concerned, to be computed on the basis of the salary fixed by the board of elections for such clerk under authority of section 4785-15, General Code, and not on the basis of the maximum salary set up in said section for such a deputy clerk.*

2. *The salary of a deputy clerk of a board of elections may not be reduced during his term of office.*

COLUMBUS, OHIO, January 6, 1933.

HON. RUSSELL M. WILHELM, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“The following question has been presented to this office by the local Board of Elections, requesting an opinion from your office:

STATEMENT OF FACTS.

General Code, Section 4785-15 provides that the Deputy Clerk of