

3949.

COURT COSTS—MAY NOT BE ASSESSED AGAINST DEFENDANT FOR COSTS IN FIRST TRIAL WHEN JURY DISAGREED IN FELONY CASE ALTHOUGH SUBSEQUENTLY CONVICTED ON LATER INDICTMENT.

SYLLABUS:

1. *Where a person is indicted for a felony and is tried but the jury disagrees and such person is re-indicted and convicted on the later indictment, the costs accruing in the first trial may not be legally assessed against the defendant.*

2. *Where a person is indicted for a felony in one county but secured a change of venue to another county where he is convicted and sentenced to pay a fine, such fine shall be paid into the County Treasury of the County where the trial was conducted.*

COLUMBUS, OHIO, February 16, 1935.

HON. ARLO CHATFIELD, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

“I herewith submit for your formal opinion a question concerning the liability for costs in criminal cases and also a question of the disposition of fines in criminal cases, wherein a change of venue has been granted.

The following is a statement of the facts pertaining to my questions: In the fall of 1931, some thirty indictments were returned by the Grand Jury of Vinton County, against A, B, and C. Some of these indictments were joint, some of them several, none of which included all three at the same time. Trial was had in one case, involving two of the defendants jointly, for making false entries in the books and records of a bank, under Section 710-172. The Jury in this trial disagreed. Following this a new indictment was returned by a later Grand Jury, charging the same two defendants in three counts, one of which was identical with that on which the trial was had, and the Jury had disagreed.

In the new indictment a motion for change of venue was made and granted, and the case assigned to Fairfield County. On trial being had after a series of prolonged legal disputes, the defendants were both convicted on each of the three counts in the indictment. Fines of \$500.00 and costs were imposed upon each of the two defendants on each of the three counts. Although error proceedings were started by the defendants, they have since been withdrawn, and now they wish to conform with the sentence and judgment of the Court.

A dispute has arisen as to whether or not the expenses of the former trial, in Vinton County, should be taxed as costs in the case in which convictions were had, it being the contention of the writer that the cause number of cases does not control the assessment of costs, but rather the identity of the prosecution. I refer specifically to the opinion of your predecessor, reported in 1927, O. A. G. Number 786.

Of these thirty indictments, nine or ten charged the same offenses as were charged in the indictment, under which convictions were had in Fairfield County, following the election of the Prosecutor to proceed upon the later indictment. Upon conviction in Fairfield County, said cases were automatically quashed, but in the meantime some costs had been incurred in those cases, such as filing, bonds, applications for discharge, stenographers' fees, etc.

The question arises, whether or not the costs in such cases as were auto-

matically quashed, by the election of the Prosecutor, are to be considered in assessing the costs of the case on which conviction was had, where the court assessed a fine against the defendants and required the defendants to pay the costs.

My second question involves a disposition of fines. The Clerk of Courts of Fairfield County refuses to pay the fines collected from the defendants to the Clerk of Courts or Treasurer of Vinton County, from which latter county said case was sent to Fairfield County on a change of venue.

We have the anomalous situation in which Vinton County admittedly must pay such fees or costs as jurors and other incidental expenses as to insure Fairfield County from incurring or expending any money whatsoever in the cost of prosecution in the trial of said case, and at the same time, the claim is made, that any fines collected and paid, as a result of said prosecutions belong to Fairfield County. This situation is illustrated by the fact that Vinton County is required by Fairfield County to pay some \$250.00 jury fee, alone, and at the same time Fairfield County claims the right to hold the \$300.00 in fines, which it has collected, and a \$500.00 fine in another case of like nature against another defendant.

It is the theory of the writer that the legislature, in enacting the law concerning changes of venue, did not intend or contemplate that one county should bear the expenses of a prosecution and another county reap the benefits of the same prosecution. The change of venue was ordered on a motion made by the defendants, not by the prosecution, and the defendants were found to be entitled to a change of venue. We are unable to understand why this fact should throw the burden of expenses upon our county, after convicting and establishing the case of the State, without at the same time giving the Treasury of Vinton County any benefits that may be derived as a result of said conviction.

SUMMARY

The defendants in the above case asked for a change of venue from Vinton County where they were indicted, and the court ordered a change of venue to Fairfield County, where the defendants were tried and convicted of three felonies. The fines imposed amounting in the aggregate of about \$3000.00 were paid to the Clerk of Courts of Fairfield County, and Fairfield County claims a right to retain those fines in its Treasury, while Vinton County claims that it is the duty of the Clerk of Fairfield County to return those fines to Vinton County, from which the cases were transferred.

The writer understands, of course, that under the change of venue, Fairfield County would be entitled to be reimbursed by Vinton County, for any actual costs incurred in the trial of those counts, but contends that the fines should be returned to it, and that the judgment of the Court pronounced against the defendants, of paying a fine and the costs, whether accruing in Fairfield County or Vinton County, includes all the costs that were made, in relation to the mistrial in Vinton County, and the conviction in Fairfield County, under the new indictment which had been found by the Grand Jury in Vinton County, including in one of its counts, the exact original claim, lodged against the defendants in the first trial."

Relative to your first question I call your attention to Section 13437-31, General Code, which reads as follows:

"If there be pending against the same defendant two or more indictments or informations for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and upon trial being had upon one of them, the remaining indictment or indictments or informations shall be quashed."

In your request you refer to an opinion to be found in Opinions of the Attorney General for 1927, Vol. II, page 1379. The syllabus of that opinion reads as follows:

"Where a person charged with a felony was extradited and bound over to the grand jury, indicted at the following session thereof and then re-indicted for the same crime at the next session of the grand jury, so that there were pending against the same defendant two or more indictments for the same criminal act, upon election and trial being had upon one of them resulting in the conviction and sentence of the accused for a felony, the sum paid by the county commissioners for the arrest and return of the convict as authorized by Section 2491, General Code, is, by the terms of Section 13722, General Code, a proper item in the bill of costs made in such prosecution."

In the present situation there were various indictments pending against the defendants for the same offense when the Prosecuting Attorney elected to proceed upon the later three indictments which resulted in the conviction of the defendants. Consequently by virtue of this election the previous indictments were quashed. It is significant to note that the two defendants were tried upon the previous indictments and the Jury disagreed. Your first inquiry presents the question of whether or not certain costs which occurred in the trial of the case in which the Jury disagreed may be taxed against the defendants who were convicted in Fairfield County. Section 13455-3, General Code, reads as follows:

"Upon sentence of a person for a felony, the clerk shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made *in such prosecution*, including the sum paid by the county commissioners, duly certified by the county auditor, for the arrest and return of the convict on the requisition of the Governor, or, on the request of the Governor to the President of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal." (Italics the writer's.)

It would appear that any costs which do not have a direct relationship to the conviction in Fairfield County should not be taxed as costs against the defendants. In the 1927 opinion *supra*, the then Attorney General held that the costs of the arrest and return of a person charged with a felony might legally be taxed as costs if such person were convicted, even though previous indictments were quashed by virtue of the election of the Prosecuting Attorney under a statute similar to Section 13437-31, General Code, *supra*. It is also significant to note that Section 2491, General Code, provides as follows:

"When any person charged with a felony has fled to any other state, territory or country, and the governor has issued a requisition for such person, or has requested the president of the United States to issue extradition papers, the commissioners may pay from the county treasury to the agent designated in such requisition or request to execute them, all necessary expenses of pur-

suing and returning such person so charged, or so much thereof as to them seems just."

However, the costs which were allowed in the 1927 opinion do seem to have a direct relationship to the conviction or possible conviction in that case.

Your inquiry relates to certain costs such as filing and stenographers' fees. Since the first trial resulted in a disagreement and a subsequent election by the Prosecuting Attorney to proceed under the later indictments, it would be difficult to conclude that the costs in the present case should be allowed under the provisions of Section 13455-3, General Code, supra. I do not think that these costs which occurred in the first case should be taxed as costs against the defendants since they have no direct relationship to the subsequent conviction.

I come now to your second question as to whether or not the fines in question should be paid by Fairfield County to Vinton County. In this connection I call your attention to Section 13427-3, General Code, which reads as follows:

"The reasonable expense of the prosecuting attorney incurred in consequence of such change of venue, the fees of the clerk and the sheriff and of the jury shall be allowed and paid out of the treasury of the county in which said cause originated, as in other cases provided."

As stated in your letter Vinton County, by virtue of the above section, will have to pay certain costs of the proceedings to Fairfield County. Section 13454-4, General Code, reads as follows:

"Unless otherwise required by law, an officer who collects a fine shall pay it into the treasury of the county in which such fine was assessed, within twenty days after the receipt thereof, to the credit of the county general fund. The treasurer shall issue duplicate receipts therefor, and the officer making the collection shall deposit one of said receipts with the county auditor."

While this section appears in the new Criminal Code under the heading "Execution of Sentence for Misdemeanor," it would seem that it would likewise be applicable to felonies, since no similar statute appears under the heading "Execution of Sentence for Felonies". The language of the statute is clear and in the present situation it would appear that the fine must be paid into Fairfield County. It is significant to note that Section 13427-1, General Code, provides as follows:

"If it appear to the court, by affidavit or evidence in open court, that a fair and impartial trial cannot be had in the county where a cause is pending, such court shall order that the accused be tried in any county of the state; and thereupon the clerk of the court of the county in which the cause is pending shall make a certified transcript of the proceedings in the case, which, with the original indictment or information, he shall transmit to the clerk of the court of the county to which said case is sent for trial, *and the trial shall be conducted as if the cause had originated in the latter county.* The prosecuting attorney of the county in which the cause originated shall take charge of and try said cause, and the court to which said cause is sent may on application appoint one or more attorneys to assist the prosecuting attorney in such trial, and allow such attorney such compensation as it deems reasonable. (Italics the writer's.)

While it is true that it will work a certain amount of hardship upon Vinton County if Fairfield County is permitted to retain these fines, nevertheless it would seem that the remedy, if any, would rest with the legislature.

In view of the above and in specific answer to your inquiry, it is my opinion that:

1. Where a person is indicted for a felony and is tried but the jury disagrees and such person is re-indicted and convicted on the later indictment, the costs accruing in the first trial may not be legally assessed against the defendant.

2. Where a person is indicted for a felony in one county but secures a change of venue to another county where he is convicted and sentenced to pay a fine, such fine shall be paid into the County Treasury of the County where the trial was conducted.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3950.

APPROVAL, BONDS OF CITY OF SHAKER HEIGHTS, CUYAHOGA COUNTY,
OHIO, \$17,550.00.

COLUMBUS, OHIO, February 16, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3951.

APPROVAL, BONDS OF WILLOUGHBY RURAL SCHOOL DISTRICT, LAKE
COUNTY, OHIO, \$8,000.00.

COLUMBUS, OHIO, February 16, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

3952.

APPROVAL, BONDS OF COAL RURAL SCHOOL DISTRICT, JACKSON
COUNTY, OHIO, \$4,035.03.

COLUMBUS, OHIO, February 16, 1935.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.