

**Note from the Attorney General's Office:**

1947 Op. Att'y Gen. No. 47-2270 was overruled by 1959 Op. Att'y Gen. No. 59-692.

2270

COURTS, CLERK OF—SHOULD CHARGE AND COLLECT FOR SERVICES PRIOR TO SEPTEMBER 12, 1947 IN PENDING PROCEEDINGS, FEES PRESCRIBED BY SECTIONS 2900, 2901 AND 2901-1. G. C. AS IN FORCE AND EFFECT PRIOR TO THAT DATE—SERVICES PERFORMED SEPTEMBER 12, 1947 AND SUBSEQUENTLY—CLERK SHOULD CHARGE FEES PRESCRIBED BY SAID SECTIONS AS AMENDED AND EFFECTIVE ON THAT DATE.

## SYLLABUS:

The clerk of courts should charge and collect, for services rendered prior to September 12, 1947 in then pending proceedings, the fees prescribed by Sections 2900, 2901 and 2901-1 of the General Code as in force and effect prior to that date. Said clerk should charge and collect, for services rendered on September 12, 1947 and subsequent thereto, in proceedings that are pending on that date, the fees prescribed by said sections as amended and effective on aforesaid date.

Columbus, Ohio, September 25, 1947

Hon. Frank T. Cullitan, Prosecuting Attorney, Cuyahoga County  
Cleveland, Ohio

Dear Sir:

Your request for my opinion reads:

“I have been requested by Leonard F. Fuerst, Clerk of Courts of Cuyahoga County, to ask your opinion as to the duty of the Clerk in the following situation:

The Legislature at its last session enacted Senate Bill 127, the provisions of which increased various items of costs to be charged and collected. The Act goes into effect on September 12, 1947. In these circumstances the question arises:

Are the new cost rates to be charged and collected in all pending cases, or only in the cases filed on and after September 12, 1947?”

By virtue of Amended Senate Bill No. 127 Sections 2900, 2901 and 2901-1 of the General Code were amended to read as therein set forth. This bill was filed in the office of the Secretary of State on June 13, 1947,

and hence, as noted in your inquiry, became effective as a law September 12, 1947.

Section 2900, General Code, as now in force and effect provides in part as follows:

“For the services hereinafter specified, when rendered, the clerk shall charge and collect the fees provided in this and the next following section and no more: \* \* \*”

Then is enumerated certain services and the amount to be charged in each instance for their rendition. Section 2901, General Code, contains a further enumeration of services.

Section 2901-1, General Code, provides in part:

“For the following services when rendered the clerk shall charge and collect the fees provided in this section and no more, namely: \* \* \*”

Then also follows several specified services and the charges to be made therefor.

An examination of Sections 2900, 2901 and 2901-1 of the General Code, as they heretofore existed, discloses that the sole purpose served by the amending of the same was to increase in some instances the fees to be charged and collected by the clerk. It is most pertinent to note that when the General Assembly amended these sections it made no reference whatever therein to their being inapplicable to pending proceedings. Hence it becomes important to consider the significance of Section 26, General Code, which reads:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

This section will be adverted to later herein.

Consideration will now be given to the definition and nature of “costs.”

In this connection the following statement is found in 14 Am. Jur., Costs, Section 2, to-wit:

“‘Costs’ are statutory allowances to a party to an action for his expenses incurred in the action. They have reference only to the parties and the amounts paid by them; or as otherwise defined, they are the sums prescribed by law as charges for the services enumerated in the fee bill \* \* \*.”

It appears to be well established that at common law costs were unknown and were not recoverable *eo nomine* by either party. As stated in *Farrier v. Cairns*, 5 Ohio 45, “They are given only by statute, and may be changed, or entirely taken away, at the will of the legislature.”

I have been unable to find any case in this state that is directly dispositive of the question you have asked. However, quite in point is the following in 14 Am. Jur., Costs, Section 4, to-wit:

“As a general rule, the law as it exists *at the time of the judgment which terminates the action*—the time at which the right to have costs taxed accrues—rather than the law as it existed at the time when the action was commenced governs the question whether costs may be allowed in an action as well as the determination of the method of their computation. *A party has no vested right to costs until after a judgment has been rendered.* Consequently, the legislature may, at any time during the progress of a suit, modify or change a statute regulating the allowance of costs without violating the constitutional inhibition against impairing the obligation of contracts. This rule stated has been applied to costs on appeal, and in condemnation proceedings, and to an attorney’s fee taxed as part of the costs. Of course, where there is some provision in connection with the new legislation which clearly saves or excepts therefrom costs in pending actions, costs in such suits will be governed by the law as it existed before the new legislation was enacted. But in the absence of any saving clause, a new law changing a rule of practice is regarded as applicable to all cases then pending.” (Emphasis added.)

See also 20 C. J. S., Costs, Section 3 et seq., which is to the same general effect.

Section 26, General Code, aforementioned, is a rule of legislative interpretation and is to be construed as a part of an amended act, unless such amendment otherwise expressly provides. *State, ex rel. Andrews, v. Zangerle*, Aud., 101 O. S. 235. It is quite plain that, with respect to any action that may be pending in a court, Sections 2900, 2901 and 2901-1

cannot conceivably relate to the *remedy*. It is equally plain that the *substantive rights* of any party in a pending proceeding cannot possibly be affected by reason of said sections as they heretofore existed or as amended. Consequently the application of said Section 26 as a rule of construction is not here involved.

A number of cases dealing with statutes controlling costs are cited in an annotation in 96 A. L. R. 1428. Mentioned therein is *Gardenshire v. McCombs* (1853) 1 *Sneed* (Tenn.) 83 which involved a statute that was enacted after the commencement of an action whereby full costs were given. In considering the effect of said statute the court said:

“This act prescribes a new rule as to costs in this particular action. There is nothing in the act restricting its operation to cases arising after its passage; on the contrary, it is alike applicable in its terms, to all judgments rendered in this species of action, after the law took effect, irrespective of whether the suit may have been commenced before or after the passage of the act.”

In *Steward v. Lamoreaux* (1857) 5 *Abb. Pr.* (N. Y.) 14 it was held:

“The right to costs, as to the recovery of the same, and as to their rate and amount, and as to the items to be allowed, are to be controlled by the statutes in force at the time of the taxation, that being the time at which the right to costs accrues.”

In view of the foregoing, and in specific answer to your inquiry, it is therefore my opinion that the clerk of courts should charge and collect, for services rendered prior to September 12, 1947 in then pending proceedings, the fees prescribed by Sections 2900, 2901 and 2901-1 of the General Code as in force and effect prior to that date. Said clerk should charge and collect, for services rendered on September 12, 1947 and subsequent thereto, in proceedings that are pending on that date, the fees prescribed by said sections as amended and effective on aforesaid date.

Respectfully,

HUGH S. JENKINS,  
Attorney General.