

**Costs—Prosecuting Witness—Assessment—Misdemeanors
—Preliminary Examination.**

Under Section 12330, R.C.M., 1921, when a prosecution for misdemeanor is had before a justice of the peace, the prosecuting witness may be assessed with costs if the court certifies in the minutes that the prosecution was malicious or without probable cause. Said section does not apply, however, to preliminary hearings, and there is no authority for the assessment of costs to the prosecuting witness in preliminary hearings.

Walter R. Knaack, Esq.,
County Attorney,
Shelby, Montana.

February 27, 1930.

My dear Mr. Knaack:

You have requested an opinion on the question of whether in prosecutions for misdemeanors a justice of the peace may assess the prosecuting witness the costs in the case where defendant was acquitted by a jury?

Section 12330, R.C.M. 1921, reads as follows:

"When the defendant is acquitted, either by the court or by the jury, he must be immediately discharged; and if the court certify in the minutes that the prosecution was malicious or without probable cause, it may order the prosecutor to pay the costs of the action, or to give satisfactory security by a written undertaking with one or more sureties to pay the same within thirty days after the trial."

The above statute is authority for the imposition of costs upon the prosecuting witness in misdemeanor cases tried in a justice court when the conditions specified therein exist, and the proper action has been taken as therein specified. The word, "prosecutor," as used in this section, means the prosecuting witness. (See Opinions of Attorney General, Volume 6, page 273.)

You have inquired if the costs may be imposed upon the prosecuting witness if the justice discharges the defendant upon a preliminary hearing. There is no provision for such action unless preliminary examinations are within the scope of Section 12330, *supra*.

In the opinion rendered by former Attorney General Poindexter, above referred to, it was held that under said section the complaining witness could be assessed with the costs if the defendant was discharged upon the preliminary hearing, and the justice found that the arrest and charges leading thereto were without probable cause. The opinion merely assumed the applicability of said section to all criminal proceedings in a justice court, and did not attempt any explanation of the conclusion stated. In my judgment the said opinion is in error insofar as it applies said section to preliminary hearings.

At common law, costs, as such, were unknown. The recovery of them depended upon the provisions of the statute upon the subject. If they are not expressly allowed they cannot be recovered. The rule applies as well to criminal as to civil cases. (*State vs. Stone*, 40 Mont. 88.)

Section 12330 is a part of the laws relating to the trials of criminal cases of which the justice courts have jurisdiction to try. It applies only when the defendant has been "acquitted" by the court or the jury in such cases. A preliminary hearing is in no sense a trial, and the discharge of the defendant upon such examination is not an acquittal, nor is it a bar to the finding of an indictment or the filing of an information for the same offense. It is apparent that the statute is applicable only to those proceedings where the defendant is on trial in a justice court for an offense within the jurisdiction of such court to try, so that the decision of the court or jury, if in favor of the defendant, amounts to a finding of "not guilty," a final determination of the case, and a bar to a further prosecution.

The State of Oregon had a similar statute, except that it provided for the imposition of costs when the defendant was "found not guilty by the justice or jury." It was held that the statute did not apply in cases of preliminary hearings. (*MacDonald vs. Cruzen*, 2 Ore. 259.)

As a preliminary hearing is not such a procedure as is embraced within the meaning of Section 12330, and as there is no other statute to which the justice court can point as authorizing the imposition of costs upon the prosecuting witness in such hearings, it follows that under the rule hereinabove mentioned, no such costs can be imposed. To the extent that the opinion hereinbefore mentioned holds that said

section is applicable to preliminary hearings it is, in my opinion, in error and is overruled.

Very truly yours,
L. A. FOOT,
Attorney General.