

**Costs, in Criminal Prosecutions. Criminal Prosecutions,
Costs in.**

The costs in criminal prosecutions begun without probable cause, may be assessed against the complainant, by following Section 9612, Revised Codes of 1907.

November 16, 1915.

Hon. H. L. Wolfe,
County Attorney,
Malta, Montana.

Dear Sir:

I acknowledge receipt of your favor of the 7th instant, wherein you request opinion of this department upon the question of compelling a prosecuting witness to pay the costs of an examination, and setting forth a statement of facts showing that a citizen of your county has preferred charges against another citizen of said county, charging him with the crime of grand larceny, and that upon the preliminary examination the court found that the arrest and charges leading to such arrest were without probable cause. You do not, however, state whether or not the court followed out the provisions of Section 9612, by certifying in the minutes that the prosecution was malicious or without probable cause and ordered the prosecutor to pay the costs of the action, or to give the security therein provided for.

“Statutes imposing liability for costs or designated items of costs, under circumstances prescribed by the statutes * * * on the prosecutor * * * have been universally held constitutional.”

11 Cyc, 268.

In a Kansas case, wherein one Keefer had been charged in the District Court of Chatauqua County with a certain crime, the case was taken on change of venue to Elk County, and verdict rendered finding the defendant not guilty; that the prosecution was instituted without probable cause and from malicious motives; and stating the name of the prosecuting witness. The court pronounced judgment on the verdict that the prosecuting witness pay all the costs of said action, taxed at \$1,053.40; that he be committed to the jail of Elk County until such costs are paid, or until he executed a good and sufficient bond. The case was appealed to the Supreme Court of Kansas and the judgment affirmed.

See in re Appeal of Lowe (Kan.) 26 Pac. 749.

This case was carried to the Supreme Court of the United States upon the ground that the judgment of the state court was in contravention of the fourteenth amendment of the Constitution of the United States. In passing upon the questions raised, the court say:

"Whether the question of probable cause for the prosecution, as affecting a question of costs, should be tried and determined by the court or jury, and with or after the main question of the guilt of the defendant, is a matter of convenient practice, not of constitutional right. * * * And there is nothing in the statute * * * to countenance the theory that the prosecutor has not the right to be heard at the trial, before the jury upon every question which was to be determined by their verdict. * * * The conclusion is that the proceeding by which judgment was rendered against the plaintiff, was due process of law.

Lowe v. Kansas, 163 U. S. 85.

You are, therefore, advised that if the court, in its judgment acquitting the defendant, certified in the minutes that the prosecution was malicious or without probable cause, and ordered the prosecutor to pay the costs of the action, or to give satisfactory security as therein provided, and the prosecutor does not pay the costs, or give security therefor, the court may, as provided in Section 9613, enter judgment against him for the amount thereof, and the same be enforced.

Yours very truly,
J. B. POINDEXTER,
Attorney General.