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The Assessment and Collection of the Costs of a Criminal Prosecution in Wyoming

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It is a strange method of enforcing the law to say that an officer has broken the law, and that we will punish him by excusing another wrongdoer. This makes society the ultimate loser. It would seem that a better way to safeguard our constitutional rights would be to provide adequate sanctions against the officer or official who obtains the evidence through unlawful means, and trust that the courts which administer the law are of such caliber that they will no more be inclined to turn their heads at a violation of this kind than any other violation of the laws of the country.

HAROLD E. MEIER

THE ASSESSMENT AND COLLECTION OF THE COSTS OF A CRIMINAL PROSECUTION IN WYOMING

Several states, including Wyoming, have enacted statutes which allow the court to assess certain costs in a criminal prosecution if the defendant is found guilty. At common law, costs as such were unknown in criminal cases,[1] therefore the basis for such assessment is statutory, and there can be no liability for costs of prosecution in the absence of such authorization.[2]

A number of jurisdictions have advanced reasons why the costs of prosecution should be assessed against the guilty party. An Arkansas Court pointed out that the imposition of these costs is not intended as part of the punishment, but it is a means of forcing the guilty to bear the expense of their prosecution, rather than forcing the county or state to bear such expense.[3] The Wyoming Supreme Court apparently agrees with the Arkansas Court, for it said in *Arnold v. State*:[4]

> If we concede as we are inclined to do, that there is merit in the philosophy that a convicted criminal should not be completely relieved from paying certain items of the overall expense incident to his being successfully prosecuted, that is a matter for legislative rather than judicial determination. . . .

At an earlier day Justice Stone of the Alabama Court took a somewhat different view. He compared the liability for costs with such duties as serving on a jury or posse.[5]

There are two statutes in the State of Wyoming governing the assess-

1. Saunders v. People, 63 Colo. 241, 165 Pac. 781 (1917); Jenkins v. State, 22 Wyo. 34, 134 Pac. 260 (1913), reh. denied, 135 Pac. 749.
2. State v. Reed, 65 Mont. 51, 210 Pac. 756 (1922).
3. Edwards v. State, 12 Ark. 122 (1850).
4. ..... Wyo. ....., 306 P.2d 368, 377 (1957).
5. Lee v. State, 75 Ala. 29 (1883). "Certain duties are cast on all citizens for the welfare of society; to serve on juries, to work the public roads, to testify as witnesses, to act as a posse comitatus, when thereto lawfully summoned, and when a citizen, by his own misconduct, expose himself to the punitive powers of the law, the expense incident to his prosecution and conviction, each and all of these may result in subjecting the defaulter to a money liability."

ment and collection of the costs of prosecution. The first of these includes a provision that ". . . in all cases of a conviction the court shall render judgment against the defendant for the costs of prosecution."[6] The second of these statutes provides for imprisonment for failure to pay such costs of prosecution.[7]

The main problem confronting the courts in applying the statute is the meaning of the phrase "the costs of prosecution." The decisions disclose a variety of judicial interpretations. The Wyoming Supreme Court has considered this phrase in several cases. In *Nicholson v. State,*[8] the jury failed to agree upon a verdict and a mistrial was declared in the first proceedings. The defendant was tried again and the jury found him guilty. The judge then imposed the costs of both trials upon the defendant. The Supreme Court considered this a proper assessment because the significant date for the assessment of the costs of prosecution was at the time of final judgment when all prosecution ceases, and that time was at the end of the second trial. In that case the claim was not made that particular items were wrongfully assessed, but that the total taxation of the costs of the first trial was wrongfully assessed. Thus the case did not present to the Supreme Court the issue of individual items of cost.

The Wyoming Supreme Court placed another significant limitation upon the definition of the phrase "costs of prosecution," in the recent case of *State v. Faulkner.*[9] In that case a criminal information was filed against the defendant charging forty-seven counts of embezzlement. The jury found the defendant guilty of only one count, nevertheless the lower court assessed the entire cost of presenting the evidence on each and every count in the information.

The Supreme Court held this to be an improper assessment of costs. The court observed that had there been forty-seven different trials the defendant would have had to pay only the costs of prosecution of the case in which he was found guilty; therefore, where all those counts were permissively joined in a single information, the assessed costs should bear the same proportion to the total costs that the "guilty" verdict bears to the total counts in the information at the beginning of the trial.

The court suggested two exceptions to the rule cited above. First, an exception might be made in situations in which the several offenses charged grow out of the same acts or transactions, and secondly, in all

6. Wyo. Comp. Stat. § 9-105.
7. Wyo. Comp. Stat. § 9-108. "A person committed to jail for non-payment of fine or costs or both, may be imprisoned therein until such imprisonment, at the rate of one dollar ($1.00 a day) equals the amount of such fine or costs, or both, as the case may be or the amount shall otherwise be paid, or secured to be paid, when he shall be discharged." As originally enacted this statute contained a 60 day limitation upon imprisonment, however this limitation was excluded from the statute in 1891.
8. 24 Wyo. 347, 157 Pac. 1013 (1916).
9. 75 Wyo. 104, 292 P.2d 1045 (1956).

cases in which a verdict of "guilty" or "not guilty" (or a judgment of dismissal) are based on substantially the same evidence. These two exceptions, however, present a difficult problem of administration to the courts. Whether particular evidence utilized in convicting the accused in one crime would be the same evidence necessary to convict the defendant of another crime arising out of the same transaction is a question requiring close scrutiny of the evidence, and in the case of jury trial, requires the judge to determine how the minds of the jury sifted the evidence. The judge would also be required to determine whether a certain piece of evidence could be utilized as convicting evidence on one count of the information, and the same piece of evidence then be utilized to declare the accused not guilty on another count of the same information in all cases in which a verdict of "guilty" and "not guilty" (or a judgment for dismissal) are based substantially on the same evidence.

In *Arnold v. State*[10] the court made a distinction between costs of prosecution and the general expense of running a court system. In determining the items included within the "general expense" of running a court system, the Wyoming court followed the definition laid down by the United States Circuit Court of Appeals, Eight Circuit, in *Gleckman v. United States*.[11] According to the case, jury fees, jury mileage, jury bailiffs' fees and expenses are included among the general expenses of maintaining the system of courts and the administration of justice. Such expenses are an ordinary burden of government, and in the absence of statute to the contrary may not be taxed against a convicted defendant as costs of prosecution. Other holdings of Federal courts are to the same effect,[12] and several states have reached the same result.[13]

The constitutionality of Section 9-105 was first questioned in the case of *Jenkins v. State*.[14] The Supreme Court dismissed the issue quite summarily, stating that the constitutionality of these statutes had been uniformly upheld. Other states are in accord with this holding, provided that the cost statute was in existence at the time of the rendition of the judgment.[15]

Despite the confident opinion of the Supreme Court in the *Jenkins* case[16] that "the constitutionality of these statutes has been uniformly upheld," the recent Wyoming case of *Arnold v. State*[17] raises several important considerations which render that conclusion open to serious doubt.

10. ____ Wyo. ____, 306 P.2d 368 (1957).
11. 80 F.2d 394, 403 (8th Cir. 1935).
12. United States v. Wilson, 193 Fed. 1007 (C.C.S.D.N.Y. 1911); United States v. Murphy, 59 F.2d 734 (D.Ala. 1932).
13. People v. Kennedy, 58 Mich. 372, 25 N.W. 318, 320 (1885); State v. Morehart, 149 Minn. 432, 183 N.W. 960 (1921); Saunders v. People, 63 Colo. 241, 165 Pac. 781, 782 (1917).
14. 22 Wyo. 34, 134 Pac. 260 (1913), reh. denied, 135 Pac. 749.
15. State v. Dorland, 106 Iowa 40, 75 N.W. 654 (1898); Stout v. State, 91 Tenn. 405, 19 S.W. 19 (1892); State v. Hill, 72 Mo. 512 (1880).
16. Supra note 8.

The first consideration raised is that of the relation that costs of prosecution should bear to the sentence of imprisonment and the fine imposed by the court. In order to understand the situation, it is necessary to consider the *Arnold* case in some detail.

Arnold was tried and convicted in the District Court of Carbon County. That court assessed against the convicted defendant as costs of prosecution, the witness fees paid to two witnesses, amounting to $57.60, service for two court bailiffs at $5.00 per day for 4½ days totalling $46.00, and mileage and per diem paid to all jurors on the jury panel and for trial jurors who served on petit jury during the trial of that criminal action, these jury fees amounting to $801.10. Thus the total assessment of costs came to $904.70. The trial judge imposed a jail sentence for a term of less than six months, and a fine of only $100, yet he evidently found no disproportionate relation between the sentence and fine so imposed and assessment of $904.70 as costs of prosecution. The trial court did not wish to impose a jail sentence in excess of 6 months, yet according to Wyoming Compiled Statutes § 9-108, this party, if he is unable to pay the costs of prosecution, is subject to incarceration, at the rate of one dollar ($1.00) per day, until the imprisonment equals the amount of such fine or costs. This would mean an additional imprisonment of two and one-half years beyond the six month sentence!

In another recent Wyoming case, *State v. Alexander*,[18] the District Judge for Laramie County assessed costs of prosecution against the defendent amounting to $6,435.56. This large assessement of costs of prosecution raises the prospect of an interesting situation: Had defendant allowed the judgment to stand without having appealed it, and had he lived long enough to serve out his penitentiary sentence of 45 to 65 years, and had he been released from the penitentiary a very old and very poor man, who had not as yet paid the costs of prosecution assessed against him at the trial, he could be met at the penitentary gate by the Sheriff of Laramie County, who could cause him to be incarcerated for an additional 18 years.

In addition to the inhumanity of proceeding in this way, such an incarceration would at first blush appear to be an imprisonment for debt and unconstitutional in violation of Article I, Section 5 of the Wyoming Constitution.[19] However, the courts of other jurisdictions having constitutional provisions similar to that of Wyoming have held that such imprisonment is not an unconstitutional imprisonment for debt. The Washington Court reasoned that:

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17. ..... Wyo ....., 306 P.2d 368 (1957).
18. State v. Alexander, ... Wyo. ....., 324 P.2d 831 (1958).
19. Wyo. Const., art. I, § 5. "No person shall be imprisoned for debt except in case of fraud."

> These costs are cast upon him as a penalty. They do not constitute strictly and simply a debt in the technical sense of the word any more than the fine imposed upon a party convicted of assault and battery.[20]

Similar conclusions have been reached in Alabama[21] and Idaho.[22] Both of these courts took the attitude that the provision referring to imprisonment for debt only has application to debts arising out of contract. Other jurisdictions have allowed a defendant to be incarcerated for failure to pay the costs of prosecution where there was some statutory authorization for such imprisonment. The Iowa court has scrutinized closely the legislative intent involved in assessing costs of prosecution under their liquor code,[23] and under their motor vehicle code,[24] but it did not base its decisions upon constitutional grounds. The Missouri court has discussed the statutory construction, and the legislative intent involved in its statute allowing the assessment of costs of prosecution, and it has limited it by strict statutory construction.[25]

The second ground of doubt in connection with the off-hand holding in *Jenkins v. State*,[26] that the constitutionality of costs of prosecution statutes "has been uniformly upheld," involves the issue of whether such imposition and collection of costs of prosecution directly or indirectly deprives the defendant of his right to trial by jury.

In *Arnold v. State*[27] Justice Harnsberger addressed himself to this point in referring to the assessment of jury and bailiffs fees:

> The right to jury trial in Wyoming is inviolate and may not be hampered either directly or indirectly. . . . No one can say with authority what measure of influence would be exerted in certain circumstances by the prospect that should an accused be convicted upon jury trial, he would be required to pay all expenses entailed in providing him with a jury when by pleading guilty he could avoid such payment. Conceivably that might be such a deterrent as would move an innocent person to plead guilty in some cases and induce him to forego his constitutional right of trial by jury.

Could not this argument be applied to the costs of prosecution, as well as to the costs of juries and bailiffs? If a defendant were faced with a strong case of circumstantial evidence against him, and the prosecution were prepared to call a long list of witnesses to testify, thereby greatly increasing the costs, then, in the words of the opinion," Conceivably that might be such a deterrent as would move an innocent person to plead

20. Colby v. Backus, 19 Wash. 347, 53 Pac. 367 (1898).
21. Lee v. State, 75 Ala. 29 (1883); Ex parte John Hardy, 68 Ala. 303 (1880).
22. State v. Montroy, 37 Idaho 684, 217 Pac. 611 (1923).
23. State v. Van Klaveren, 208 Iowa 867, 226 N.W. 81 (1927).
24. State v. Gillman, 202 Iowa 428, 210 N.W. 435 (1926).
25. Ex parte Chambers, 221 Mo.App. 64, 290 S.W. 103 (1927).
26. 22 Wyo. 347, 157 Pac. 1013 (1916).
27. ..... Wyo. ....., 306 P.2d 368, 377 (1957).

guilty in some cases and induce him to forego his constitutional right to trial by jury."[28]

Another argument against imprisonment for failure to pay the costs of prosecution involves the right of the accused to due process of law.[29]

Courts have placed themselves in a dilemma regarding the costs of prosecution. Some courts hold that it is not a debt but is merely a compensatory measure. Other courts, however, maintain that it is part of the penalty which he must pay and he will stand committed until it is paid.[30] When these costs of prosecution are placed in the category of penal provisions (which penalty could be so extreme as to prevent the accused from resorting to a court to determine his rights) then there may be a violation of due process of law.[31]

If the number of witnesses which might be called and the amount of possible costs so great, that in comparing the possible costs to penalties, it is so great as to prevent the accused from asserting his right to determine his guilt or innocence before a court of law it may amount to a violation of due process.

Due Process of Law has been defined as:

> Due process of law in each particular case means, such an exercise of the powers of the government as the maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[32]

Under the Wyoming statutes involving costs of prosecution there appear to be no such safeguards for individual rights. There is no rational relationship between the costs of prosecution which may be imposed, and the severity of the crime. For example, the courts are not authorized to impose costs in a trial for a speeding violation which could amount to many hundreds of dollars if several witnesses were required to prove the case. When viewed in the light of a punishment these costs seem so totally unfair in relation to the crime as to shock the minds of ordinary men. The court itself would not be justified in declaring the statutes unconstituional in violation of due process, until such time as a judgment for costs of prosecution, authorized by statute, imposed costs so excessive and so unusual, and so disproportonate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.[33]

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28. Ibid.
29. U.S. Const., Amend. XIV, § 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
30. Ex parte Converse, 45 Nev. 93, 198 Pac. 229 (1921).
31. Ex parte Young, 209 U.S. 123, 28 Sup.Ct. 441 (1908).
32. Cooley, Cooley's Constitutional Limitations, 741 (8th ed. 1927).
33. People v. Magoni, 73 Cal.App. 78, 238 Pac. 112 (1925).

When we consider the disproportion between punishments and the costs of prosecution which Wyoming district judges have been willing to assess, even as they have been trimmed down by the *Arnold* case, another possible constitutional infirmity appears. There is a serious danger that an assessment under these statutes might amount to a cruel and unusual punishment.[34] When a court assesses a judgment for costs of prosecution in a simple assault and battery case, which could require the accused to be incarcerated for an additional three years beyond the six month actual jail sentence, this seems a cruel and unusual punishment.

Courts of other jurisdictions have met this objection by stating that it is no part of the penalty for the offense, but is instead merely a means of compelling obedience to the judgment of the court. If the defendant refuses to pay he is not sentenced to a term in prison; he sentences himself to the incarceration. The duration of his imprisonment is in his own control,[35] and by payment he can at any time secure his release.[36] These jurisdictions consider it a proper means of collection of the costs of prosecution, and do not regard it as part of the punishment. They term it a necessary means employed to carry out the judgment of the court, and a partial renumeration to the state of the funds expended in the prosecution of the convicted criminal.[37]

In summary, several possible grounds of unconstitutionality have been mentioned arising out of these two Wyoming statutes which allow the assessment and collection of costs of prosecution. Justice Harnsberger in *Arnold v. State*[38] has suggested that it may be an indirect violation of the right to trial by jury, a right which is inviolate in Wyoming. Because of the lack of any rational relationship between the gravity of the crime and the costs of prosecution which might be imposed for the most insignicant crime, there lies a possible violation of the due process clause. And finally, there is the possibility that it may be a cruel and unusual punishment for a person to be forced to remain incarcerated long after his prison term is fulfilled.

The Supreme Court of Wyoming has pointed out that it is a matter for legislative rather than judicial determination, to determine the limitation which should be placed upon costs of prosecution.[39] One state, Illinois, has completely abolished the statute allowing incarceration for non-

34. U.S. Const., Amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
35. Hart v. Norman, 92 Misc. 185, 155 N.Y.S. 238 (1929).
36. Gordan v. Johnson, 126 Ga. 584, 55 S.E. 489 (1906).
37. State v. Montroy, 37 Idaho 684, 217 Pac. 611 (1923); Colby v. Backus, 19 Wash. 347, 53 Pac. 367 (1898).
38. ..... Wyo. ....., 306 P.2d 368, 377 (1957).
39. ..... Wyo. ....., 306 P.2d 368, 377 (1957). "If we concede as we are inclined to do that there is merit in the philosophy that a convicted criminal should not be completely relieved from paying certain items of the overall expense incident to his being successfully prosecuted, that is a matter for legislative rather than for judicial determination, bearing in mind that courts may ultimately be required to pass upon the constitutionality of any such legislative action."

payment of costs of prosecution, and has replaced it with legislation which specifically prohibits the imposition of such prison sentences for failure to pay costs:

> No person shall by any court be committed to the penitentiary, to the reformatory for women, or to any other state institution for the recovery of a fine or costs.[40]

In view of the serious doubt as to the constitutionality of Sections 9-105 and 9-108, and the grave consequences they may produce if they are constitutional, it is submitted that the Wyoming legislature should either repeal these cost statutes, or repeal or limit the imprisonment statute. On the whole it would seem preferable to allow Section 9-105 to stand and to repeal Section 9-108.

JOHN R. SMYTH

TERMINATION OF PARENTAL RIGHTS

Wyoming is one of the few states which has enacted a statute conferring on the courts the power to sever the parent-child relationship in a special proceeding, styled "Judicial Termination of Parental Rights." The Wyomiing statute[1] is a progressive piece of legislation, closely patterned after the Standard Juvenile Court Act, prepared by the National Probation and Parole Association.[2] Wisconsin was one of the earliest states to adopt such a proceeding.[3] The California juvenile court law has a similar section.[4] The Wyoming Youth Council proposed the legislation with the view toward establishing ". . . clear judicial authority for the final termination of parental rights in cases of non-support for more than one year without just cause, abandonment, abuse or neglect. Thus, in flagrant cases of unfit parents, the children may be placed in permanent adoptive homes; the taxpayers are relieved of a financial burden; and there are both humane and economic benefits."[5] Termination of parental rights as comprehended by the draftsmen of the Wyoming statute must be distinguished from the common usage of the phrase. For example, statutes which dispense with consent of the parents in adoption proceedings where abandonment is proven, have been spoken of as "terminating parental rights." The effect of an adoption decree is said to "terminate parental rights." Emancipation of a minor child through attainment of majority or marriage is referred to as such a "termination." The new statute, however, envisages a possible severance of all the rights of a parent without regard to the happening of any subsequent fact (such as attainment of

40. Ill. Rev. Stat. Chap. 38, § 802 (1951).

1. Wyo. Comp. Stat. § 58-701 (Supp. 1957).
2. Ibid.
3. Wis. Stat. § 48.40 (1955).
4. Cal. Welfare and Institutions Code § 775 et seq.
5. Report of the Wyoming Youth Council (1955-1957 Biennium), p. r.