

NOTES

Criminal Costs Assessment in Missouri— Without Rhyme or Reason

INTRODUCTION

For all their prolixity in other matters, legal writers have been strangely silent regarding the assessment of costs of criminal proceedings in Anglo-American courts. Serjeant Sayer's treatise, *The Law of Costs*,¹ first published in 1768 and confined to British usage, seems to be the only study of this subject in legal literature, and its emphasis is civil costs. But while legal authors have been reluctant to discuss this aspect of the law, novelists have not. Some of the most famous writers of fiction have had their say about the high price of justice. Fielding complained of the:

difficulty which obstructs the prosecution of offenders; namely, the extreme poverty of the prosecutor. . . . [T]he whole [cost of prosecution] amounts to an expense which a very poor person, already plundered by the thief, must look on with such horror . . . that he must be a miracle of public spirit if he doth not rather choose to conceal the felony, and sit down satisfied with his present loss. . . .²

Dickens imagined the honorable practitioner, inveighing against Chancery, warning his clients, "Suffer any wrong that can be done you, rather than come here!"³

Although Dickens may have been justified in some of the barbs he hurled at the courts,⁴ for centuries the law had been steadily moving toward a more equitable apportionment of costs. Holdsworth

1. SAYER, *THE LAW OF COSTS*, says in the introduction to his second edition (1777), at v-vi:

There is no Part of the Law, of which the Knowledge is so frequently useful, as that which relates to Costs. The Objects of different Causes are in many Respects different: But Costs are a very considerable Object in every Cause, and in many the principal. It is consequently the Duty of every Person concerned in the Management of a Cause, to procure, if the Nature of the Case will admit thereof, Costs for his Client; or, if that cannot be done, to deliver his Client, if this be possible, from the Payment of Costs. No Man can discharge this Duty, in the Manner a conscientious, or even a prudent Man, would wish to discharge it, unless he has a complete and accurate Knowledge of the Law relative to Costs.

2. 13 FIELDING, *WORKS* 112 (Croscup & Sterling private ed. 1902).

3. DICKENS, *BLEAK HOUSE* 2 (Bradbury & Evans ed. 1853).

4. HOLDSWORTH, *CHARLES DICKENS AS A LEGAL HISTORIAN* 81 (1928).

notes that costs in civil cases were allowed to certain claimants from the time of the late thirteenth century.⁵ The Statute of Marlborough,⁶ the Statute of Gloucester⁷ and a few other early statutes⁸ allowed costs to the victors in enumerated cases.

Mr. Fielding's complaint, however, had more substance. Until the 1770's, the private complainant was obliged to bear the costs of a criminal prosecution.⁹ Perhaps swayed by Fielding's arguments or influenced by his suggestions,¹⁰ Parliament belatedly set about remedying the situation in the late eighteenth century. The first important legislation on the subject was in 1778, allowing the prosecuting witness to recover his costs without regard to his affluence, or lack of it, even though the trial resulted in a verdict of acquittal.¹¹ The act now in effect in Great Britain grants courts of assize or quarter sessions the discretionary power to order the county to pay the costs of the prosecution, and, if the accused is acquitted, the costs of the

5. 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 537 (1924).

6. 1267, 52 Hen. 3, c. 6 (regarding maliciously trumped up suits against a tenant who allegedly deprived his lord of wardship).

7. 1275, 6 Edw. 1, c. 1, § 2 (allowing costs to a successful plaintiff in certain real actions).

8. An Acte Agaynst delaye of execution uppon Writts of Error & to geve Costs, 1487, 3 Hen. 7, c. 10 (charging costs against the unsuccessful party on a writ of error); An Acte that the Defendaunt shall recover Costs ageinste the Pleyntif, if the Pleyntif be nonsuited, or if the verdicte passe ageinste him, 1531, 23 Hen. 8, c. 15; An Acte whereby the Defendant maye recover his Costes beinge wrongfully vexed, 1565, 8 Eliz., c. 2 (both allowing costs to successful defendants in certain specified actions and courts).

9. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 498 (1883).

10. He wished the Crown or some other governmental authority to bear the cost of criminal prosecutions:

Now, how very inconsiderable would be the whole cost of this suit [a criminal case], either to the country or the nation, if the public to whom the justice of peace gives his whole labour on this head gratis, was to defray the cost of such trial . . .; the sum would be so trivial that nothing would be felt but the good consequences arising from such a regulation. 13 FIELDING, *op. cit. supra* note 2, at 112.

It should be noted that Mr. Fielding was a barrister and at one time a Justice of the Peace for the county of Middlesex and the City of Westminster.

11. An act for the payment of costs to parties, on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny, or other felony, 1778, 18 Geo. 3, c. 19. There had been an earlier act which allowed the judge, in his discretion, to award costs to a prosecutor, depending on his financial condition, in cases where the accused was convicted. An act for the better preventing thefts and robberies, and for regulating places of publick entertainment, and punishing persons keeping disorderly houses, 1752, 25 Geo. 2, c. 36, § 11.

defense.¹² If the case results in conviction, the court may, again in its discretion, order the defendant to pay all or any part of such costs.¹³

In Missouri, as in England and all other American jurisdictions, liability for costs is a peculiar creature of statutory enactment; at common law, no costs were recoverable.¹⁴ Because of their statutory origin, the laws relating to awards for costs are strictly construed,¹⁵ and no one may recover them unless he can point to a statute expressly authorizing it.¹⁶

12. Costs in Criminal Cases Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48, § 1.

13. Costs in Criminal Cases Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48, § 2.

14. *Cramer v. Smith*, 350 Mo. 736, 739, 168 S.W.2d 1039, 1040 (1943); *Ex parte Nelson*, 253 Mo. 627, 628, 162 S.W. 167 (1913); *State ex rel. Keck v. Seibert*, 130 Mo. 202, 217, 30 S.W. 670, 674 (1895); *State ex rel. Howser v. Oliver*, 116 Mo. 188, 191, 22 S.W. 637, 638 (1893); *Hoover v. Missouri Pac. Ry.*, 115 Mo. 77, 81-82, 21 S.W. 1076, 1077 (1893); *Houts v. McCluney*, 102 Mo. 13, 16, 14 S.W. 766 (1890); *State ex rel. Clinton County v. Hannibal & St. J. R.R.*, 78 Mo. 575, 577 (1883); *Thompson v. Union Elevator Co.*, 77 Mo. 520, 521 (1883); *Steele v. Wear*, 54 Mo. 531, 534 (1874); *State ex rel. Miller v. Daily*, 45 Mo. 153, 155 (1869); *City of Greenville v. Farmer*, 195 Mo. App. 209, 211, 190 S.W. 406 (1917); *Lucas v. Brown*, 127 Mo. App. 645, 650, 106 S.W. 1089 (1908); *St. Louis & G. Ry. v. Cape Girardeau & T.B.T. Ry.*, 126 Mo. App. 272, 275, 102 S.W. 1042 (1907); *Veidt v. Missouri, Kan. & Tex. Ry.*, 109 Mo. App. 102, 103, 82 S.W. 1122 (1904); *Wilson v. Ruthrauff*, 87 Mo. App. 226, 228 (1901); *Baldwin v. Boulware*, 82 Mo. App. 321, 324 (1900); *State ex rel. Houser v. Oliver*, 50 Mo. App. 217, 222 (1892); 14 AM. JUR. *Costs* § 107 (1938); 20 C.J.S. *Costs* § 435 (1940).

15. *Cramer v. Smith*, *supra* note 14; *Ex parte Nelson*, *supra* note 14; *State ex rel. Keck v. Seibert*, *supra* note 14; *State ex rel. Stewart v. Wofford*, 116 Mo. 220, 223, 22 S.W. 486, 487 (1893); *Thompson v. Union Elevator Co.*, *supra* note 14; *Shed v. Kansas City, St. J. & C.B. R.R.*, 67 Mo. 687, 690 (1878); *Gordon's v. Maupin*, 10 Mo. 352, 353 (1847); *City of Greenville v. Farmer*, *supra* note 14; *Lucas v. Brown*, *supra* note 14; *Veidt v. Missouri, Kan. & Tex. Ry.*, *supra* note 14; *Baldwin v. Boulware*, *supra* note 14; *State v. Duestrow*, 70 Mo. App. 311, 315-16 (1897); *State ex rel. Houser v. Oliver*, 50 Mo. App. 217, 222 (1892); *Ring v. Vogel Paint & Glass Co.*, 46 Mo. App. 374, 377 (1891); *In re Green*, 40 Mo. App. 491, 492 (1890); *Ford v. Kansas City, St. J. & C.B. R.R.*, 29 Mo. App. 616, 616-17 (1888); *In re Murphy*, 22 Mo. App. 476, 478 (1886); 14 AM. JUR. *Costs* § 107 (1938); 20 C.J.S. *Costs* § 435 (1940).

16. *Cramer v. Smith*, *supra* note 14; *Ex parte Nelson*, *supra* note 14; *State ex rel. Clarke v. Wilder*, 197 Mo. 27, 32, 94 S.W. 499, 500 (1906); *State ex rel. Suter v. Wilder*, 196 Mo. 418, 433, 95 S.W. 396, 400 (1906); *State ex rel. Keck v. Seibert*, *supra* note 14; *State ex rel. Stewart v. Wofford*, *supra* note 15; *City of St. Louis v. Meintz*, 107 Mo. 611, 615, 18 S.W. 30, 31 (1891); *Steele v. Wear*, 54 Mo. 531, 534 (1874); *State v. Ball*, 158 S.W.2d 182, 183 (Mo. Ct. App. 1942); *City of Greenville v. Farmer*, *supra* note 14; *Lucas v. Brown*, *supra* note 14 at 650, 106 S.W. at 1089-90; *St. Louis & G. Ry. v. Cape Girardeau & T.B.T. Ry.*, 126 Mo. App. 272, 275, 102 S.W. 1042 (1907); *Wilson v. Ruthrauff*, 87 Mo. App. 226, 228 (1901); *Baldwin v. Boulware*, *supra* note 14; *Ring v. Vogel Paint & Glass Co.*, *supra* note 15; *In re Green*, *supra* note 15; *Ford v. Kansas City, St. J. & C.B. R.R.*, *supra* note 15 at 617; 14 AM. JUR. *Costs* § 107 (1938); 20 C.J.S. *Costs* § 435 (1940).

An attempt to go beyond this broad statement and form general rules applicable to the costs in criminal cases in the United States would be a lost pursuit. The surprising lack of commentary on this subject is caused neither by a dearth of criminal cases, nor by unequivocal statutory provisions. Despite the great increase in crime in recent years, antiquated statutory provisions of pre-Civil war vintage, compounded by piecemeal enactments and amendments without repeal, are still in effect in many of the states. And yet in Missouri, which is not untypical, most of the cases were heard before the turn of the century. A partial explanation for the paucity of case law is found within the subject itself—the cost of appeal. Also, courts in practice have not adhered to the statutory mandates.

It is the purpose of this note to analyze, and, as far as possible, reconcile the outdated and contradictory statutes dealing with liability for costs of criminal cases in Missouri, with a view toward clarifying where possible, but in any event, noting inconsistencies in both the statutes and in their application. To a lesser extent, proposals are made, but it is hoped that the analysis and criticism make necessary changes self-evident. Consideration will also be given to the various methods by which a private prosecutor may avoid liability for costs and by which a convicted party may satisfy any assessment of costs against him.

I. LIABILITY OF STATE OR COUNTY FOR COSTS

That facet of cost assessment which has the least direct impact on individual citizens is the area of public liability for the charges of a criminal prosecution. Nevertheless, the development of public liability represents a most important reversal of philosophy regarding the administration of criminal justice which cannot be ignored. Though at the present time it is the most basic aspect of the law in this field, this was not always true. In the earliest days of the common law in England, and for many years, the complainant was forced to assume the entire financial burden of a prosecution. Parliament's first effort at easing this burden offered only qualified relief and was foredoomed to failure. The act was sterile from the outset, authorizing the justice before whom a case was tried to certify the costs to the county for payment only if the accused had been convicted and only when the complainant was, in the opinion of the court, unable to pay the fees himself.¹⁷ Recognizing that the statute was ineffective and did not

17. An act for the better preventing thefts and robberies, and for regulating places of publick entertainment, and punishing persons keeping disorderly houses, 1752, 25 Geo. 2, c. 36, § 11. The purpose of this act is evidenced by its enacting clause: "That whereas many persons are deterred from prosecuting persons guilty of felony, upon account of the expence attending such prosecutions, which is a cause of the encouragement of thefts. . . ."

fulfill its intended purpose, Parliament soon removed the restrictions.¹⁸ Justices were authorized to charge the costs against the county in any bona fide criminal case without regard to the outcome of the case or the resources of the accuser.¹⁹

In Great Britain, the county as a governmental unit was always charged with these costs, never the Crown.²⁰ American jurisdictions

18. An act for the payment of costs to parties, on complaints determined before justices of the peace out of sessions; for the payment of the charges of constables in certain cases; and for the more effectual payment of charges to witnesses and prosecutors of any larceny, or other felony, 1778, 18 Geo. 3, c. 19, § 7. The inadequacies of prior statutes were recognized in the enacting clause:

And whereas the said recited acts . . . have been a great encouragement towards bringing offenders to justice, in all such cases as are within the purview of the said statutes; but nevertheless it has been found by experience, that the said herein-before recited statute . . . , with regard to prosecutors, directs the court to consider the circumstances of such prosecutor, and also gives him relief only where the offender is convicted: And whereas it is just and reasonable, and may tend in future to the prevention of crimes, or to the due prosecution of all offenders against the laws, that every prosecutor to conviction, . . . should be allowed his reasonable expences, and also, in case he be poor, a reasonable satisfaction for his trouble and loss of time; and that such allowance should be made to prosecutors as aforesaid, even though the person so accused be acquitted, provided it shall appear to such court, before whom the said prisoner shall have been tried, that there was a reasonable ground of prosecution, and that the prosecutor hath *bona fide* prosecuted. . . .

19. *Ibid.* The statute read, in part:

That, from and after the passing of this act, it shall and may be in the power of the court before whom any person has been tried and convicted of any grand or petit larceny, or other felony, or before whom any person has been tried and acquitted of any grand or petit larceny, or other felony, in case it shall appear to the said court that there was a reasonable ground of prosecution, and that the said prosecutor hath *bona fide* prosecuted, to order, upon the prayer of the said prosecutor, the treasurer of the county, riding, or division, in which the offence shall have been committed, or shall have supposed to have been committed, to pay unto such prosecutor such sum of money as to the said court shall seem reasonable, not exceeding the expences which it shall appear to the court the prosecutor was *bona fide* put unto in carrying on such prosecution, making, in case the said prosecutor shall appear to the court to be in poor circumstances, a reasonable allowance to such prosecutor for trouble and loss of time. . . .

20. See State *ex rel.* Miller v. Daily, 45 Mo. 153, 155 (1869), in which the court says:

While, at common law, clerks and prothonotaries might in general insist upon their fees for services to individuals, they receive [*sic*] nothing from the king. The king neither paid nor recovered costs, and in many of the States the rule is partially retained. In most of the western States all that is allowed to clerks for their services in criminal cases, where there is no conviction, is a small annual allowance from their respective counties; while

are not so solicitous of the sovereign, however. In state courts, either the state or the county in which the crime was committed may be assessed,²¹ and the real conflict arises over which political unit is liable for the costs of a particular case.

In Missouri, if an accused is acquitted and a private prosecutor is not taxed for accrued costs,²² either the state or the county may be

in Missouri everything is paid by the State or county, except the prisoners' costs upon conviction.

21. Inquiry into the reasons for imposing liability for costs on lesser governmental units must, to some extent, be speculative. At first glance one might think that since the criminal justice system was (and is) state-wide and since crimes are conceptually offenses against the state, the non-recoverable costs of operating the system would be borne by the state as a whole out of her general revenues. On the other hand, many of the officials who operated the system at the time it evolved were elected or appointed locally, or on a territorial basis. The latter condition still obtains to a considerable extent.

Perhaps the most important single reason for placing the cost of administering as many governmental activities as possible on local units of government was scarcity of capital. State government in the middle third of the nineteenth century was small-scale government. Neither the numbers of people nor their liquid resources was adequate to permit state governmental handling of many activities which we now assume would be appropriately handled at that level. See VIOLETTE, *A HISTORY OF MISSOURI* 229 (1918). That capital scarcity was an impelling factor in shaping those of our legal institutions which were aimed primarily at encouraging and implementing economic growth, see HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 46 (1960). For a statement of the difficulties encountered in comparing the contributions of citizens to the costs of government in France and in the United States in the 1840's, see DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 227-35 (Vintage ed. 1960).

Illustrations are numerous, but two will suffice. (1) In spite of great and prolonged efforts to secure funds for internal improvements from the national government, the funds obtained were thought inadequate to undertake all the necessary programs. Consequently, to avoid the necessity of making politically inexpedient allocations, the entire fund was divided among the administrative units for each county to be used for local internal improvements of importance. II Mo. Terr. Laws 1824-36, at 382. (2) As another reflection of capital scarcity, the obligation of citizens to contribute to the expenses of government could often be met by providing services in lieu of money. Many items which we now pay from general taxation—fire protection, road building—could be paid for by performing a certain number of days' work within a specified period of time. Mo. REV. STAT. §§ 1-62, at 544-52 (1835). See DE TOCQUEVILLE, *op. cit. supra* at 231 n.14, for a recognition generally in this country of the substitution of services for taxes. Obviously, administration of such a system required local rather than state control.

The lesson to be drawn from this is that there was an attitude, a predisposition, an expectation that many of the costs of operating a government would be borne locally—indeed, administered locally. In Missouri locally meant on a county level. Thus the decision to allocate some of the non-retrievable costs of criminal prosecution to the counties is not so inexplicable as it superficially appears: it was, instead, a natural reflection of the times.

22. For liability of the private prosecutor for costs, see *infra* pp. 105-18.

held liable for them.²³ The burden of costs also may fall upon either the state or the county when a party unable himself to pay the costs is convicted.²⁴ This uncertain system of assessment has presented numerous problems.

When trial results in *conviction*, the state is held liable for costs: in all capital cases . . . and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years . . . if the defendant shall be unable to pay them. . . .²⁵

When the defendant is *acquitted*, the state must pay costs, "in all capital cases, and those in which imprisonment in the penitentiary is the *sole* punishment for the offense. . . ."²⁶ Thus, if the defendant is charged with a capital offense or an offense for which imprisonment in the penitentiary is the sole punishment, the state is clearly liable for costs on acquittal or on conviction if the defendant is unable to pay them himself.

On the other hand, the county is liable for costs when the defendant is acquitted "in all other trials on indictments or information" than those for which the state is liable²⁷—that is, the county is liable in all non-capital cases and those in which imprisonment in the penitentiary is not the sole punishment.²⁸ The county must also pay the costs of a

23. Mo. REV. STAT. § 550.040 (1959). Discussion of costs liability herein does not include costs which are specially adjudged against one party or the other, irrespective of the outcome of the case. See, e.g., Mo. REV. STAT. § 545.710 (1959), respecting continuances; see also State *ex rel.* Selleck v. Gordon, 254 Mo. 471, 162 S.W. 629 (1914).

24. Mo. REV. STAT. §§ 550.020, 550.030 (1959). See generally 20 C.J.S. *Costs* §§ 441, 442 (1940).

25. Mo. REV. STAT. § 550.020 (1959). (Emphasis added.) KELLEY, CRIMINAL LAW AND PRACTICE § 1231 (3d ed. 1913).

26. Mo. REV. STAT. § 550.040 (1959). (Emphasis added.) KELLEY, *op. cit.* *supra* note 25. *Accord*, State v. Ball, 158 S.W.2d 182, 183 (Mo. Ct. App. 1942), wherein the court said:

[I]n no event is the State responsible for costs in a misdemeanor case. A misdemeanor is prosecuted in the name of the State of Missouri but the costs are taxed against the defendant, if he is convicted, or against the city or county, or the prosecuting witness, as the case may be, if the defendant is acquitted.

27. Mo. REV. STAT. § 550.040 (1959).

28. *Ibid.* See State *ex rel.* Tudor v. County Court, 40 Mo. App. 503 (1890); State *ex rel.* Spurlock v. Holladay, 67 Mo. 299, 300 (1878), in which the court, after refusing to hold the state liable for costs after a *nolle prosequi* was entered on a charge of assault with intent to kill, said:

convicted defendant who "is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs. . . ."29

When the jury is instructed on included offenses carrying a sentence of less than death or imprisonment in the penitentiary, the application of these rules gives results which superficially seem inconsistent. On analysis, however, the scheme of cost taxation in cases of acquittal vis-à-vis conviction of a lesser included offense evinces a logical, almost sophisticated system. The defendant in *State ex rel. Simms v. Carpenter*³⁰ pleaded guilty to a crime carrying a lesser penalty than the capital offense for which he was indicted. Charged with murder, the accused entered a plea of guilty to manslaughter, was fined and sentenced to three months in the county jail. The defendant was insolvent, and a controversy arose as to whether the state or county was liable for costs. The Missouri supreme court charged the county, since it would have been liable if an insolvent defendant had been indicted for this kind of crime in the first place.³¹ The court in so holding, said:

[W]hen the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. *This was the sentence that established the character of the offense, and made the costs a charge against the county.*

Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. *It is the conviction and sentence in such case which establishes the grade of the offense . . . and not the allegations contained in the indictment.*³²

However, if the defendant is acquitted in the same type of case, it is the state, not the county, which must bear the costs. In a first degree murder case,³³ instructions were also given on fourth degree manslaughter, which was not punishable by a penitentiary sentence.

The defendant, had he been convicted, might have been punished either by imprisonment in the penitentiary, or by imprisonment in the county jail, or by both fine and imprisonment in the jail, or by fine alone. . . . As imprisonment in the penitentiary was not the "*sole punishment*" for the offense . . . it follows that the State was not liable for the costs. . . . (Emphasis added.)

29. Mo. REV. STAT. § 550.030 (1959).

30. 51 Mo. 555 (1873). *But see* *State v. Arnold*, 100 Tenn. 307, 47 S.W. 221 (1898).

31. Mo. REV. STAT. § 550.030 (1959).

32. 51 Mo. at 556-57. (Emphasis added.)

33. *State ex rel. Timberman v. Hackmann*, 302 Mo. 273, 257 S.W. 457 (1924).

On acquittal, the Missouri supreme court held the state liable for costs, since the information was for the capital offense of first degree murder. The court held:

[I]t cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute is speaking of certain offenses, and says if the defendant is acquitted of such offenses, then the state shall pay the costs. It (the statute) says nothing about what might occur during the trial. *It is dealing with the issues made by the pleadings.* In this case the pleading upon the part of the State makes the issue that defendant is guilty of murder in the first degree. His plea of not guilty puts that charge in issue. Upon such issue it cannot be said that the State can refuse to pay the costs.³⁴

Thus it appears that in Missouri, if the defendant is acquitted, the charge in the information or indictment determines the liability for costs, while if an insolvent defendant is convicted, it is the grade of the offense and the sentence imposed which determine who is liable.

Such interpretations are not necessarily inconsistent, and, indeed, there are justifiable reasons for the difference in treatment if any statutory scheme (assuming one exists) is to be fulfilled. In trials for most felonies or graded offenses, if the evidence tends to show that the defendant could be convicted of a lesser included offense, Missouri courts must give instructions on that offense.³⁵ With such a requirement, if cost liability were determined by the minimum punishment capable of being imposed for conviction of the least serious of the included crimes, the costs in a criminal case would seldom, if ever, devolve upon the state when the defendant was acquitted. For whenever instructions were given relating to lesser included offenses, the county would be liable for costs on acquittal if the sentence for any one of these was less than confinement in the penitentiary.³⁶

On the other hand, if an insolvent defendant is convicted of a lesser included offense (for which the county would have been liable for costs had the defendant been so indicted originally), there is no just reason for burdening the state with costs merely because there was no conviction of the crime originally charged in the indictment or information.

These cases must be differentiated from the situation in which defendant is charged with a crime for which alternative punishments may be imposed. When these alternatives differ not only in type of

34. *Id.* at 279, 257 S.W. at 458. (Emphasis added.)

35. See Mo. REV. STAT. §§ 545.130, 556.220, 556.230 (1959); *accord*, State *ex rel.* Timberman v. Hackmann, 302 Mo. 273, 257 S.W. 457 (1924); State v. Barham, 82 Mo. 67 (1884); State v. Banks, 73 Mo. 592 (1881); State v. Robinson, 73 Mo. 306 (1880); State v. Bryant, 55 Mo. 75 (1874); State v. Matthews, 20 Mo. 57 (1854); State v. Tate, 12 Mo. App. 327 (1882).

36. Mo. REV. STAT. § 550.040 (1959).

punishment but also in degree, cost liability depends not merely upon acquittal or conviction, but, if there is a conviction, the determining factor becomes the *type* of sentence imposed. For example, if defendant is charged with and convicted of a crime for which the sentence may be either imprisonment in the penitentiary *or* in the county jail, and he is sentenced to the penitentiary, the state must pay the costs if the defendant is unable.³⁷ Whereas, if defendant is sentenced to the county jail, fined, or both, the county is liable for costs if he is unable to pay them.³⁸ However, if the defendant is acquitted, the burden of costs will always devolve upon the county or the private prosecutor, never upon the state, since the case is not one in which "imprisonment in the penitentiary is the *sole* punishment for the offense."³⁹

There is no apparent logical reason to justify the existence of such a super-sophisticated system. What is the basis for assessing the costs sometimes to the state, other times to the county, determined by the penalty imposed? And, even worse, for holding the county liable in all cases resulting in acquittal of a defendant charged with a crime for which he might have been sentenced *either* to the penitentiary *or* the county jail?

A special cost provision applies to trials in juvenile courts. Section 211.281 provides:

The costs of the proceedings in any case in the juvenile court may, in the discretion of the court, be adjudged against the parents of the child involved or the informing witness. . . . All costs not so collected shall be paid by the county.⁴⁰

These juvenile courts have exclusive criminal jurisdiction over acts committed by persons under the age of seventeen.⁴¹ Since the enactment of the juvenile code in 1957,⁴² the provision of Section 550.020 imposing liability on the state in case an indigent "is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years . . .," is rendered completely obsolete.⁴³

37. Mo. REV. STAT. § 550.020 (1959).

38. Mo. REV. STAT. § 550.030 (1959).

39. Mo. REV. STAT. § 550.040 (1959). (Emphasis added.)

40. Mo. REV. STAT. § 211.281 (1959).

41. Mo. REV. STAT. §§ 211.021, 211.031 (1959).

42. Mo. Laws 1957, p. 642.

43. Prior to and immediately following the turn of the century, juveniles convicted of felonies were sentenced to the reformatory, state training school or county jail in lieu of the penitentiary. See, *e.g.*, Mo. REV. STAT. § 2381 (1899),

On the whole, the provisions charging costs to governmental units, though seemingly lacking a logical premise, are relatively consistent and present few problems as compared with those charging costs to the defendant or private prosecutor.⁴⁴

II. LIABILITY OF DEFENDANT FOR COSTS

In Great Britain, although the procedural aspects differ somewhat from current American practice, a convicted defendant may be charged with the full amount of costs incurred in the trial of his case.⁴⁵ English law, for example, requires an affirmative showing that the defendant has means to pay before costs may be assessed against him,⁴⁶ contrary to United States usage, and an order to pay may be discharged on appeal upon evidence of lack of means.⁴⁷ It has also been held in Britain that there is no authority to order imprisonment for costs if the defendant against whom they have been assessed fails or refuses to pay them.⁴⁸ Missouri law is radically different.

repealed Mo. Laws 1909, p. 449; Mo. REV. STAT. § 1529 (1909), repealed Mo. Laws 1915, p. 209. See KELLEY, *op. cit. supra* note 25, § 15.

The case of *State ex rel. Clarke v. Wilder*, 197 Mo. 27, 94 S.W. 499 (1906) was based on this type of provision. A juvenile was acquitted of second degree murder. Because of the juvenile commitment practice discussed above, he would have been imprisoned in the county jail instead of the penitentiary had he been convicted. The court, therefore, held the county liable for costs on acquittal, since "imprisonment in the penitentiary was not the *sole* punishment for the offense which he [the juvenile] was charged. . . ." *Id.* at 33, 94 S.W. at 500. (Emphasis added.)

The decision in *Wilder* was valid as a strict interpretation of the predecessor of § 550.040, the acquittal section. However, the very wording of this statute, devoid of the unique provisions for juvenile crimes contained in the corollary law, § 550.020 pertaining to cost liability upon conviction, is incongruous.

Today, however, the *Wilder* case is of only historical interest, and the provisions relating to juveniles in § 550.020 are mere surplusage, lacking any vitality. For all the provisions calling for imposition of a lesser degree of punishment on minors tried in the circuit court have been repealed. And although in certain instances, "in the discretion of the judge of the juvenile court," children fourteen years or older may be bound over for prosecution "under the general law" (Mo. REV. STAT. § 211.071 (1959)), they are then tried as adults, and, upon conviction, sentenced accordingly.

44. After a criminal case has been decided, the clerk must tax all costs which have accrued in the case (§ 550.140). If the clerk fails to tax the costs properly, he is liable for treble damages (§ 550.180). The prosecuting attorney and judge must then certify the amount of costs due (§§ 550.190, 550.220). For other procedural steps by court officers after trial relative to taxation of costs, see §§ 550.130-310. See also Appendix, *infra*.

45. Costs in Criminal Cases Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48, §§ 2, 6(1)(a), 15.

46. *Rex v. Pottage*, [1922] 17 Cr. App. Rep. 33 (semble).

47. *Rex v. Howard*, [1910] 6 Cr. App. Rep. 17.

48. *Rex v. McCluskey*, [1921] W.N. 71.

Subject to exceptions for insolvency, a convicted defendant in Missouri must pay the costs of his case or be jailed for nonpayment. And even in cases of insolvency, liability for costs is only postponed, and they may be collected if and when the defendant becomes financially able to pay them.

Courts have rarely discussed the reasons for charging a convicted defendant. Perhaps the philosophy behind this policy is so obvious that no discussion is necessary. However, because of constitutional restraints on imprisonment for debt,⁴⁹ it would seem that costs must be a part of the penalty imposed on conviction.⁵⁰ At least one case has made this explicit.⁵¹ Another court has noted that justice requires a defendant to bear the financial impact of his wrongdoing, if for no other reason than to aid in the process of reformation.⁵² Since the accused need not pay anything at all before he is adjudged guilty, liability for costs imposed after conviction as a part of the punishment does not deny him a fair trial.⁵³

49. MO. CONST. art. I § 11, which states, "That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law."

50. See *Ex parte Chambers*, 221 Mo. App. 64, 290 S.W. 103 (1927). Cf. *Ex parte Crenshaw*, 80 Mo. 447 (1883).

51. See State *ex rel.* Hopkins v. Justices of Buchanan County Court, 41 Mo. 254 (1867), in which the court held that anyone convicted or pleading guilty is "required by the judgment of the court to suffer the penalty imposed by law." Continuing, it said:

The judgment for costs in every criminal case where there is a conviction necessarily follows as a part of the punishment inflicted. The conviction of the defendant is the evidence fixed by the statute for determining his liability to pay the costs of prosecution.

52. See State v. McO'Blenis, 21 Mo. 272, 274-75 (1855), in which the court, discussing costs liability, said:

At common law, the state neither recovered nor paid costs in criminal cases. Each party was liable for his or her own expenses. In a civil action . . . the object of the suit is the reparation of the injury done to the plaintiff, not the reformation of the defendants. Public prosecutions are carried on for a different purpose. The reformation of the offender is one of the motives of prosecutions for offences. Justice, therefore, requires that each delinquent should be liable for his own offences. . . .

53. In discussing this problem, the court in State v. Wright, 13 Mo. 243, 244-45 (1850), said:

We . . . content ourselves with reiterating what seems to have been the comparatively unobjected and undisturbed coterminous [*sic*] and continuous exposition of those, and similar declarations in the American constitutions; namely, that the State had performed its duty when its legislation had furnished the forum and machinery through which those guaranties could be enforced, without requiring a farthing in *advance* of the "impartial trial," which has been guarantied to every citizen. If such impartial trial shall result in a verdict to the effect that the citizen has offended "against

Briefly stated, Missouri rules hold a defendant liable for all court costs upon conviction;⁵⁴ upon acquittal he is liable only for costs specially adjudged against him.⁵⁵ Refinement of these basic rules by judicial decision has resulted in defendants being held liable for costs when convicted of a lesser included offense,⁵⁶ and in each of jointly indicted defendants being held accountable only for his own costs.⁵⁷ A convicted party must pay costs even though granted an unconditional pardon by the governor.⁵⁸

A convicted defendant is liable to imprisonment⁵⁹ "until the sentence is fully complied with and all costs paid, . . ."⁶⁰ and from the time of final conviction all his real and personal property is bound for payment of fines and costs, and may be levied against by execu-

the peace and dignity of the State," we are not prepared to say, even on the score of public policy, that he should not be made, if able, to bear the expense of the trial to which he had subjected her.

54. MO. REV. STAT. § 550.010 (1959); KELLELY, *op. cit. supra* note 25, § 1230. See generally 20 C.J.S. *Costs* § 437 (b) (1940). For items of costs of prosecution for which defendant may be held, see generally, Annot., 65 A.L.R.2d 854 (1959), and Appendix, *infra*.

Section 550.010, buttressed by the legislative history of the predecessors of § 550.020, demands the almost unbelievable conclusion that a defendant convicted of a capital crime must pay the costs of the trial resulting in his conviction. 1 Wag. Stat. ch. 38 § 2 (1870), a predecessor of § 550.020, stated:

The costs shall be paid by the State in all capital [*sic*] cases in which the defendant shall be convicted, and *shall be unable to pay them*; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. (Emphasis added.)

See also *State v. Carpenter*, 51 Mo. 555 (1873).

55. See *State ex rel. Spurlock v. Holladay*, 67 Mo. 299 (1878); *State v. Brigham*, 63 Mo. 258 (1876); *State v. Butler*, 118 Mo. App. 587, 95 S.W. 310 (1906); *State v. Barker*, 63 Mo. App. 535 (1895). See also MO. REV. STAT. § 545.710 (1959), relating to continuances. *Cf.* *State v. Krueger*, 69 Mo. App. 31 (1896).

56. *State v. Williams*, 92 Mo. App. 443 (1902). See also state-county liability for costs of defendant convicted of lesser included offense in text accompanying notes 30-32 *supra*.

57. *State v. McO'Blenis*, 21 Mo. 272 (1855); identical fee bill sustained on evidentiary grounds, 27 Mo. 508 (1858).

58. *State v. Jacobson*, 348 Mo. 258, 266, 152 S.W.2d 1061, 1066 (1941); *State v. McO'Blenis*, 21 Mo. 272, 276 (1855); *Playford v. The Commonwealth*, 4 Pa. 144, 145 (1846); *Duncan against The Commonwealth*, 4 S. & R. 449, 450 (Pa. 1818).

59. *Ex parte Secrest*, 326 Mo. 837, 841, 32 S.W.2d 1085, 1087 (1930). But note that the statute title, MO. REV. STAT. § 546.830 (1959), refers only to misdemeanors—"Imprisonment for misdemeanor."

60. MO. REV. STAT. § 546.830 (1959). Such a provision is "a part and parcel of every sentence to a fine" in Missouri. *Ex parte Secrest*, *supra* note 59; *Ex parte Parker*, 106 Mo. 551, 555, 17 S.W. 658, 660 (1891). Judgments failing to so provide are defective, but not nullities. *State v. Deck*, 262 S.W. 712 (Mo. 1924); *State v. Nistendirk*, 204 S.W. 1111 (Mo. Ct. App. 1918); *State v. Lynes*, 194 Mo. App. 184, 185 S.W. 535 (1916).

tion.⁶¹ However, if the convicted person is the head of a household he may invoke the statutes⁶² exempting a certain amount of personal property from attachment and execution.⁶³

A. *Methods of Discharging Liability*

There are two alternative methods by which a prisoner may discharge his liability for a fine and court costs: (1) Payment or (2) Commutation or substitution of a term of imprisonment in lieu of monetary liability. After serving a prerequisite period of time, a party imprisoned for costs (and in certain instances, for fine and costs) may then invoke the oath of insolvency.⁶⁴ This results in his release from prison but does not satisfy his financial obligation for the debt. If the oath of insolvency is not taken and the full term of imprisonment is served, the defendant's financial obligation is discharged to the extent of the amount paid or commuted.

1. *Payment*

Payment is the most normal and least complicated method of discharge. However, payment cannot be made to satisfy the obligation for the fine if some other means of discharging the costs is anticipated. If payment is to be used to discharge only one part of the obligation for fine and costs, it must first be applied to satisfy the costs.⁶⁵

2. *Commutation*

Commutation is a "change of one punishment known to the law for another and different punishment also known to the law."⁶⁶ It is not a conditional pardon, but a substitution of one type of punishment

61. Mo. REV. STAT. §§ 546.860, 546.870 (1959). Cf. *Hicks v. McCowan*, 144 Mo. App. 544, 129 S.W. 76 (1910). A lien is thereby imposed on the property of the criminal. *McKnight v. Spain*, 13 Mo. 534 (1850). See also Mo. REV. STAT. § 479.240 (1959).

62. Mo. REV. STAT. §§ 513.435, 513.440 (1959). See also § 513.475 providing for the homestead exemption.

63. *Betterton v. O'Dwyer*, 124 Mo. App. 306, 101 S.W. 628 (1907).

64. Persons convicted of a misdemeanor in the St. Louis Court of Criminal Correction or the circuit court of the City of St. Louis and fined therefor, may not avail themselves of any of the laws for the relief of insolvents confined on criminal process. Mo. REV. STAT. § 551.150 (1959). If sentenced by the court of criminal corrections to incarceration at hard labor for inability to pay a fine and costs, the prisoner is credited at the rate of one dollar per day as applied to his debt to the state or county. Mo. REV. STAT. § 479.280 (1959). Such imprisonment for nonpayment of a fine and costs may not exceed six months. *Ibid.*

65. See *Ex parte Secrest*, 326 Mo. 837, 841, 32 S.W.2d 1085, 1087 (1930). See also, Mo. REV. STAT. § 546.840 (1959).

66. *Ex parte Janes*, 1 Nev. 319, 321 (1865); see *Ex parte Parker*, 106 Mo. 551, 17 S.W. 658 (1891).

for another, and is presumed to be for the culprit's benefit.⁶⁷ The power of commutation, acting on the original sentence of the court, alleviates and modifies the sentence, and the force of the sentence as modified sends the convicted party to jail or prison.⁶⁸

In Missouri there are two distinct methods of commuting criminal fines or fines and costs—one depending upon the initiative of the prisoner,⁶⁹ the other operating automatically in case of his inaction.⁷⁰

a. By Request

Upon *request* of a person imprisoned for nonpayment of a fine, the court in which the trial was held, or the judge in vacation, "shall sentence him to imprisonment for a limited time, in lieu of the fine";⁷¹ after the term thus imposed, the remaining obligation for costs may be discharged by payment or by invoking the oath of insolvency.⁷² The "limited time" provision apparently allows the judge full discretion in determining the sentence. There is no mention in the statute or the cases construing it of any requirement that the prisoner be *unable* to pay the fine in order to request commutation. Indeed, the possible solvency of the prisoner is expressly provided for in that the liability for costs remaining after imprisonment for the fine may be discharged either by taking the oath of insolvency or by paying the costs.⁷³

In a magistrate court, if a prisoner requests commutation of a fine⁷⁴

67. *Ex parte* Webbe, 322 Mo. 859, 30 S.W.2d 612 (1929). See also *Ex parte* Parker, *supra* note 66 at 555, 17 S.W. at 660, wherein the court says that commutation is a method whereby the court "may change your punishment into imprisonment for a fixed period, *not pardon you*, or give you a *less punishment*, but simply a *different punishment* which you can undergo."

68. *Ex parte* Collins, 94 Mo. 22, 6 S.W. 345 (1887); see *Ex parte* Lime v. Blagg, 244 Mo. 1, 131 S.W.2d 583 (1939); *Ex parte* Parker, *supra* note 66. The commutation does not annul the sentence of the court, but is *pro tanto* an affirmance of it with a modification. *Ex parte* Collins, *supra*.

69. MO. REV. STAT. §§ 543.270, 546.840 (1959).

70. MO. REV. STAT. § 221.180 (1959).

71. MO. REV. STAT. § 546.840 (1959).

72. *Ibid.* See *Ex parte* Secrest, 326 Mo. 837, 32 S.W.2d 1085 (1930).

73. *Ibid.* A special provision relating to violators of the Fish and Game Laws of Missouri provides that if the convicted party fails to pay the fine and costs, he is to be imprisoned one day for each two dollars of the fine, and not more than twenty days for the costs. MO. REV. STAT. § 252.130 (1959).

74. In *Ex parte* Parker, 106 Mo. 551, 17 S.W. 658 (1891), defendant applied to a magistrate for commutation of a fine to imprisonment, but failed to mention costs. Although the statute at that time provided only for commutation of the fine, the court intimated that had the prisoner requested costs commutation it would have been granted. However, since the defendant made no mention of costs and the justice of the peace made no order respecting them, but merely commuted the fine to imprisonment, the defendant was still liable for costs, which had to be discharged by payment or compliance with the law for relief of insolvents. Soon

or fine and costs⁷⁵ imposed on conviction of a misdemeanor, the magistrate may commute them to imprisonment in the county jail. The imprisonment so imposed is for a term "not exceeding one day's imprisonment for every two dollars of such fine and costs, nor less than one day's imprisonment for every ten dollars of such fine and costs."⁷⁶ However, before this method of commutation may be invoked there is a statutory requirement that the convicted party "shall be unable to pay any fine and costs assessed against him. . . ."⁷⁷ Thus, only insolvent prisoners are entitled to relief under this section.

b. By Operation of Law

The final method of commutation is by operation of law and results from inaction on the part of a prisoner convicted by a court of competent jurisdiction and sentenced to pay a fine and court costs. If he neither pays the fine, expresses his intention of invoking the oath of insolvency, nor *requests* commutation, as a matter of course his fine and costs are commuted to hard labor at the rate of one dollar per day.⁷⁸ Persons so sentenced may be released from confinement and fully discharged from financial liability after serving three-fourths of the term "in an orderly and peaceable manner."⁷⁹ The statute has no prerequisite of insolvency, so even a wealthy prisoner may elect to satisfy his debt by working at hard labor.

The statute providing for this automatic commutation further states that, "no prisoner shall be required to work over twenty days for the costs assessed against him."⁸⁰ Although this provision might be interpreted literally so as to permit this twenty day maximum to satisfy the financial obligation for costs, it seems more sensible to interpret the section *in pari materia* with the provisions for the oath of insolvency, and that interpretation will be followed for purposes of this note.⁸¹ If, then, the prisoner wishes to relieve himself of the financial obligation for costs by working at hard labor, he will be required to serve out the fine, with no maximum limit on the length of the sentence. However, he shall not "be *required* to work over

thereafter the legislature amended the section to include costs commutation. MO. REV. STAT. § 543.270 (1959). Even today it appears quite likely that if defendant mistakenly requests a magistrate to commute only the fine, overlooking the costs, he will still be held liable for costs after serving the commuted sentence.

75. MO. REV. STAT. § 543.270 (1959).

76. *Ibid.*

77. *Ibid.*

78. MO. REV. STAT. § 221.180 (1959).

79. *Ibid.* However, this section has no application to the City of St. Louis. *In re* Thomas, 306 S.W.2d 336 (Mo. Ct. App. 1957). See note 64 *supra*.

80. MO. REV. STAT. § 221.180 (1959).

81. MO. REV. STAT. § 546.850, ch. 551 (1959).

twenty days for the costs,"⁸² and after incarceration for the fine at the rate of one dollar per day, he may spend a maximum of twenty days additional in prison, invoke the oath of insolvency and be released from confinement for nonpayment of costs.⁸³ But if the prisoner's estate is insufficient to cover costs, the liability to pay them remains even after discharge.⁸⁴ Of course, the miscreant would be permitted to absolve himself completely from the obligation to pay costs by working them off at the rate of one dollar per day, with no maximum limit on the time to be served.

3. Oath of Insolvency

The main provision in the chapter, "Relief of Insolvents Confined on Criminal Process" states:

Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same.⁸⁵

This poorly-drafted statute presents two important interpretation problems. The first is the use of the disjunctive "or" and later the conjunctive "and" between the words "fine" and "costs" in different parts of the statute. If this section were read literally, upon nonpayment of the fine *or* of the costs the prisoner would have to spend one day in jail or prison for each two dollars of the fine *and* costs. Under this interpretation, if the defendant were fined twenty dollars and ten dollars costs were assessed against him, and he paid the costs but was unable to pay the fine, or, after the fine was commuted he was unable to pay costs, he would have to spend fifteen days in jail or prison—ten for the fine, five for the costs—before taking the insolvents' oath for the undischarged liability. However, the more sensible interpretation of the statute would be to compute the required period of confinement on a basis of two dollars per day for only the amount being discharged by the oath—whether fine, costs or both⁸⁶—and

82. MO. REV. STAT. § 221.180 (1959). (Emphasis added.)

83. MO. REV. STAT. ch. 551 (1959).

84. MO. REV. STAT. § 551.100 (1959).

85. MO. REV. STAT. § 551.010 (1959).

86. The disjunctive *or* in the first clause of § 551.010 also raises the question of whether by taking the oath the prisoner may be discharged from imprisonment for nonpayment of the fine *and* costs. Broadly construing this statute in favor of the defendant, the author has, for purposes of this note, assumed that utilization of such an alternative by an insolvent is permitted.

this interpretation is used for purposes of the examples which follow.

The second problem arises when interpreting the provisions establishing the alternative periods of confinement prerequisite to taking the oath. The first of these requires "one day for every two dollars of such fine and costs"; the other, "twenty days' actual imprisonment for the nonpayment of costs." Again, by reading these alternatives literally, it seems that either of the two methods may be used to obtain discharge for nonpayment, whether of fine, costs or both. Thus, one might argue that if a person were fined one hundred dollars and fifty dollars costs, and paid the costs but was unable to pay the fine, or was unable to pay either the fine or the costs, he still might choose the latter period, that is, "twenty days' actual imprisonment for the nonpayment of costs," and then invoke the oath of insolvency in order to be released from jail or prison and discharged from the obligation of immediate payment of the fine or fine and costs. However, in light of the legislative history of the statute, such a far-fetched, though literally valid interpretation of this section will not be considered.⁸⁷

87. The provisions for the relief of insolvents committed on criminal process have had a see-saw legislative history in Missouri. MO. REV. STAT. § 5, at 411 (1825) provided for the discharge of the fine and costs obligation:

[T]he attorney prosecuting for and on behalf of the state, in such county, may, by and with the advice and consent of the circuit court, discharge from imprisonment any person convicted of an offence below the grade of felony, and holden only for the payment of fine and costs, who hath no property or means of satisfying the same. *Provided*, That before any such person shall be discharged, he shall take the oath and surrender his property and effects, as required by law, in the case of insolvent debtors [Mo. REV. STAT. §§ 1-20, at 445-52 (1825)], and the property and effects, which may be surrendered, shall be first applied to the payment of the fine and costs for which he was imprisoned.

The impact of the law remained unchanged in 1829 by the provisions of 2 Terr. Laws 162, ch. 111, § 1, stating that:

The provisions of an act, entitled an act, for the relief of insolvent debtors, . . . shall from henceforth, extend to all persons in custody or confinement for any fine or costs imposed by the judgment or decree of any court of record in this State, for the breach of any of the penal laws thereof. . . .

However, the 1829 act was repealed in 1831 by 2 Terr. Laws 211, ch. 166, § 1. Section 2 of the act was the replacement, providing for commutation of the fine to a term of imprisonment upon request of the convicted. This provision was essentially the same as Mo. REV. STAT. § 546.840 (1959), and left the legislative books void of any relief for nonpayment of costs. Mo. REV. STAT. § 32, at 496 (1835), filled the gap left in 1831 by providing that:

Whenever any person shall be detained for the costs of a criminal prosecution he shall be permitted to take the benefit of the laws for the relief of insolvent debtors [Mo. REV. STAT. §§ 1-40, at 327-34 (1835)], on making application for that purpose, and conforming to the provisions of such laws.

Mechanics of the Oath

In order to obtain relief by taking the oath of insolvency, the convicted defendant must be unable to pay the financial obligation for which the oath is invoked.⁸⁸ The oath may be taken if the prisoner is unable to pay both the fine and costs, the fine alone, or, after having served a prison sentence originally imposed or imposed in lieu of a fine, the costs alone. However, the oath may not be taken for costs alone after the fine has been paid.⁸⁹

Following the interpretation of the statute adopted above, the prisoner, before taking the oath, must first endure imprisonment of "one day for every two dollars of such fine and costs," or fine, or costs to be discharged by the oath, with a maximum of "twenty days' actual imprisonment for the nonpayment of costs."⁹⁰ This incarceration is a necessary prerequisite to taking the oath, but does not satisfy the monetary liability.⁹¹

After serving the necessary time in prison, the insolvent must then file a petition in which he agrees to forfeit all his property except the wearing apparel of himself and his family.⁹² This provision was early construed very broadly to be *in pari materia* with Sections 513.435 and 513.440, exempting certain property owned by the head

Thus the deficiency of the 1831 amendment was remedied. However, now only the *fine* could be commuted, not the costs; and only the *costs* could be satisfied by the oath of insolvency.

It was the legislative intent to leave the status of the law unchanged in 1845, Mo. REV. STAT. ch. 138, § 29 (1845), being verbatim Mo. REV. STAT. § 32, at 496 (1835), *supra*. Actually, however, the convict seeking relief from costs was left remediless, for the provisions relating to imprisonment for debt had been abolished. Mo. REV. STAT. ch. 78, § 1 (1845).

This legislative void was soon filled, and by 1855 an entire chapter was devoted to the relief of insolvents confined on criminal process. The act provided relief for "any person detained in prison for the payment of any fine and costs, or costs." Mo. REV. STAT. ch. 82, § 1 (1855). The relief was patterned after the repealed section concerning the debtor's oath, reworded to apply to criminal fines and costs. As of yet there was no prerequisite period of incarceration before taking the oath. The prisoner was required to make application, "offering to deliver up, for the payment of such fine and costs, or costs, all his property (wearing apparel for himself and family excepted,) and praying to be permitted to take the benefit of this act." *Ibid*.

In the General Statutes of 1865, ch. 218, § 1, the relief for insolvents was again limited to costs alone. But in Mo. REV. STAT. § 2078 (1879), the relief was extended to "fine or costs," and the prerequisite term in prison was added. The provision is verbatim Mo. REV. STAT. § 551.010 (1959) and has remained in force unchanged since 1879.

88. Mo. REV. STAT. § 551.010 (1959).

89. *Ex parte* Secrest, 326 Mo. 837, 32 S.W.2d 1085 (1930).

90. Mo. REV. STAT. § 551.010 (1959).

91. *In re* Lorkowski, 94 Mo. App. 623, 627, 68 S.W. 610, 611 (1902).

92. Mo. REV. STAT. § 551.020 (1959).

of a family from attachment and execution, and thus from levy for fine and costs of a criminal conviction.⁹³ The insolvent must also furnish an inventory of his assets and liabilities,⁹⁴ swearing to its truthfulness and that no transfer has been made to evade payment of costs.⁹⁵ After the prisoner has complied with these provisions, and various ministerial acts required of court officers have been done,⁹⁶ the prisoner must be discharged.⁹⁷

Any surplus of the prisoner's property remaining after payment or discharge of fine and costs is refunded to him.⁹⁸ But if the prisoner's estate at the time of discharge is not great enough to satisfy the obligation, all the property he thereafter acquires is liable to execution for payment of the outstanding liability.⁹⁹

4. Parole Provisions

Before a miscreant may be paroled, he must "pay or give security for the payment of all costs that may have accrued in the cause. . . ."¹⁰⁰ However, if he is insolvent, the state or county must pay the costs and

93. *Betterton v. O'Dwyer*, 124 Mo. App. 306, 101 S.W. 628 (1907) (dictum). This case includes a concise legislative history of the growth of the criminal oath of insolvency from the old debtors' oath. See also note 62 *supra*. Homestead property probably also is exempt.

94. Mo. REV. STAT. § 551.030 (1959).

95. Mo. REV. STAT. § 551.040 (1959). This provision sets forth the only oath to be taken by those who invoke the so-called "oath of insolvency." It is anomalous that within the oath itself there is no affirmation of insolvency or inability to pay. This section provides:

An affidavit in the following form shall be annexed to said petition [for relief] and inventory [of the estate], and shall be sworn to and subscribed by such person, in the presence of such judge or clerk, who shall certify the same:

I do swear (or affirm) that the inventory of my estate, which is annexed to my petition, and herewith delivered, is in all respects just and true; and that I have not, at any time or in any manner whatsoever, disposed of or made over any part of my estate, for payment of the costs (or fine and costs) for which I am detained in prison.

96. Mo. REV. STAT. §§ 551.050, 551.070 (1959).

97. Mo. REV. STAT. § 551.080 (1959).

98. Mo. REV. STAT. § 551.130 (1959). This provision apparently is inserted for the benefit of those who believe their estate to be insufficient for the amount being discharged by the oath, but when the estate is liquidated it is in excess of the amount for which the prisoner was liable. Otherwise this section would be meaningless in view of the prerequisite to the oath of an inability to pay.

99. Mo. REV. STAT. § 551.100 (1959). See also § 550.270. The continuing liability even after discharge imposed upon the petitioner is subject to the exemptions of §§ 513.435, 513.440 and probably the homestead exemption. See notes 62 and 93 *supra*.

100. Mo. REV. STAT. § 549.150 (1959).

the prisoner must be released "without . . . being required to serve any time in jail for nonpayment of fine or costs."¹⁰¹ For the insolvent prisoner this is one of the most valuable provisions thus far analyzed. For although release from imprisonment without payment of costs "shall not relieve such person from liability for the same,"¹⁰² and he is still liable for their payment, there is no penalizing prerequisite term of incarceration as in the normal provisions for release of insolvents. However, if the parolee becomes able to pay, "it shall be the duty of the court to require said costs to be paid before granting a discharge."¹⁰³

B. Theoretical Combinations of Methods of Discharge

In the case of a person liable for court costs and fine imposed for a criminal violation, the alternative methods of obtaining discharge may be coupled, resulting in nine possible combinations which might be invoked by the prisoner to gain his freedom. The prisoner's total possible alternatives are: (1) Payment of the fine and costs; (2) Commutation of the fine and costs to imprisonment; (3) Commutation of only the fine to imprisonment and payment of the costs; (4) Commutation of only the fine to imprisonment and invocation of the oath of insolvency for the costs; (5) Taking the oath of insolvency for the fine and costs after enduring the prerequisite term of incarceration; (6) Payment of the fine and taking the oath of insolvency for the costs; (7) Payment of the costs and invoking the oath of insolvency for the fine; (8) Payment of the fine and commutation of the costs; (9) Commutation of the costs and invocation of the oath of insolvency for the fine.

A further breakdown is afforded if the two different types of commutation are considered separately—the one depending upon the initiative of the prisoner to move the court into commuting,¹⁰⁴ the other occurring as a statutory substitution of imprisonment for the fine and costs if there is no action taken by the prisoner or the court.¹⁰⁵ Except as otherwise noted, in this discussion both types will be treated under the general heading, "commutation."

Of the nine potential combinations which the prisoner might theoretically invoke, the following have express legislative or judicial approval:

1. Payment of the fine and costs, the most usual method.¹⁰⁶
2. Commutation to or substitution of imprisonment in lieu of the

101. *Ibid.*

102. *Ibid.*

103. *Ibid.*

104. MO. REV. STAT. §§ 543.270, 546.840 (1959).

105. MO. REV. STAT. § 221.180 (1959).

106. See MO. REV. STAT. § 546.830 (1959).

fine *and* costs to satisfy the prisoner's obligation.¹⁰⁷ At the expiration of the term the prisoner is discharged with all debts to society paid. It is noteworthy that the oath of insolvency is not invoked by utilization of this method of satisfaction.

3. Upon petition of the prisoner, commutation of the fine alone to imprisonment.¹⁰⁸ At the expiration of this term, the prisoner has fulfilled the obligation imposed by the fine, but is still liable for the costs, which must then be paid.¹⁰⁹

4. Commutation of the fine alone to imprisonment, as above, leaving liability for costs. If the prisoner is insolvent, he may then be released from imprisonment, but not from his financial liability for costs, by spending the additional prerequisite time in prison and then invoking the oath of insolvency.¹¹⁰ This poor man's oath has no effect on the liability for the fine, which has already been satisfied by the prison term imposed in lieu of the fine.

5. Invocation of the insolvents' oath for fine and costs. In order fully to utilize the oath, the prisoner may prefer not to petition for commutation of the fine or fine and costs to imprisonment. Instead, he may remain imprisoned one day for each two dollars of the fine and costs, with a maximum of twenty days' imprisonment for the costs.¹¹¹ This incarceration of itself does not satisfy the obligation to pay,¹¹² but it is a prerequisite to the prisoner's right to discharge upon compliance with the remaining provisions relating to insolvent persons. Use of this alternative takes full advantage of the oath of insolvency to obtain release from imprisonment, but the liability to pay both the fine and the costs continues, to the extent that the prisoner's estate is insufficient to cover the total financial obligation and they remain unpaid.¹¹³

The Missouri supreme court disallowed the use of the following method to obtain discharge from imprisonment:

6. The prisoner may not tender a fine, refuse to pay costs, and then claim discharge by invoking the oath of insolvency to suffice for the costs.¹¹⁴

The remaining potential alternative methods of discharge have been given no legislative consideration and have not been the subject of

107. MO. REV. STAT. §§ 221.180, 543.270 (1959).

108. MO. REV. STAT. § 546.840 (1959). See also note 74 *supra* for a discussion of the application of § 543.270 in the case of *Ex parte* Parker, 106 Mo. 551, 17 S.W. 658 (1891).

109. MO. REV. STAT. § 546.840 (1959).

110. *Ibid.* See generally MO. REV. STAT. § 546.850, ch. 551 (1959).

111. MO. REV. STAT. §§ 546.850, 551.010 (1959).

112. *In re* Lorkowski, 94 Mo. App. 623, 627, 68 S.W. 610, 611 (1902).

113. MO. REV. STAT. § 551.100 (1959).

114. *Ex parte* Secrest, 326 Mo. 837, 32 S.W.2d 1085 (1930).

litigation in Missouri courts. In the absence of approval or condemnation, these alternatives will be interpreted in light of more general legislative and judicial precedents relating to criminal costs.

7. Although a prisoner cannot pay the fine and then take the oath of insolvency for the costs,¹¹⁵ there appears to be no reason why the converse should not be allowed, that is, payment of the costs and the taking of the oath of insolvency for the fine.¹¹⁶ This conclusion seems reasonable in light of the basic legislative policy, which is a strong desire to collect the actual assessed costs in money, after which there is a notable leniency toward the disposal of the liability for the fine other than by collection. Indeed, there are valid reasons for this "costs first" policy, for court costs are actual amounts expended in carrying on the litigation—true liabilities which, if not paid by the defendant, must be borne by the public via the state or county. Such costs, then, should certainly be paid before the fine, which is only a penalty imposed for an infraction of the law and which may be satisfied otherwise than by seizure of assets.

Use of the two remaining alternatives seems to be precluded since there are no provisions relating to commutation of criminal costs alone to a period of incarceration.¹¹⁷ Costs are commuted only in conjunction with the fine. Therefore, it is doubtful that Missouri courts would permit:

8. Commutation of the costs to imprisonment and payment of the fine; or

9. Commutation of the costs to imprisonment and invocation of the oath of insolvency to obtain release from imprisonment for nonpayment of the fine.

This "non-commutation of the costs alone" interpretation also leads to the conclusion that in cases of sentences providing only for a term

115. *Ibid.*

116. The writer concedes that in numerous sections dealing with the relief of insolvents confined on criminal process the legislature chanced to mention the alternative applications of the oath while specifically dealing with other matters and that none of these mention the fine apart from the costs. See, *e.g.*, Mo. REV. STAT. (1959): § 551.020, "fine and costs, or costs"; § 551.040, "costs (or fine and costs)"; § 551.080, "costs, or fine and costs"; § 551.100, "costs and expenses"; § 551.130, "all fines and costs, or costs and expenses." *But see* § 551.010, "fine or costs." See also note 86 *supra*. In light of this statutory vagueness, the writer has broadly construed the provisions for relief of insolvents in favor of the prisoner by permitting the oath to be taken for the fine alone. *Cf.* 326 Mo. at 839, 32 S.W.2d at 1087.

117. All commutation statutes refer either to fine *and* costs, see text accompanying note 107 *supra*; or only the fine, see text accompanying note 108 *supra*.

in jail or prison, the defendant may discharge his liability for costs only by payment or by the invocation of the oath of insolvency, and not by commutation.¹¹⁸

C. A Theoretical Application

There are important conceptual, procedural and practical differences between that imprisonment which is imposed in commutation of a fine, and that which is a prerequisite to the taking of the oath of insolvency. In cases of commutation, detention is *in lieu* of the fine and costs,¹¹⁹ or of the fine only,¹²⁰ and at the expiration of the sentence that part of the liability so commuted is satisfied. But in cases in which the oath of insolvency is taken, the imprisonment is not a means of satisfying the financial obligation for the fine and costs, but is merely a prerequisite to the taking of the oath.¹²¹ The requirements of Section 551.010 do not purport to provide a substitute for payment, but only a basis for computing the period of incarceration after which a prisoner may obtain discharge by compliance with the remaining provisions relating to release of insolvents.

That the imprisonment required before taking the oath of insolvency is not a substitute for financial discharge is evidenced by the provision that, even after the prisoner is released, "the estate, property and effects of such petitioner at the time of his discharge, and all he shall thereafter acquire, shall be liable to execution for the payment of such costs and expenses."¹²²

Thus it is obvious that whether the prisoner pays, relies upon commutation, takes the oath of insolvency or utilizes some combination of these methods to obtain discharge from imprisonment for fine and costs is of great importance to him in terms of both time and money. In any given case, the "best" method of obtaining discharge depends to a great extent upon the size of the prisoner's estate, not to mention the relative value placed by the prisoner on his property as compared with his freedom.

In order to give any meaning to the oath of insolvency provisions in the following analysis, the value of the prisoner's non-exempt estate must be assumed to be less than the amount being discharged by the oath in the given situation. Such an assumption not only permits a more realistic analysis, but is actually required by statute.¹²³

118. *Ibid.*

119. MO. REV. STAT. §§ 221.180, 543.270 (1959).

120. MO. REV. STAT. § 546.840 (1959). See also note 74 *supra*.

121. *In re Lorkowski*, 94 Mo. App. 623, 627, 68 S.W. 610, 611 (1902).

122. MO. REV. STAT. § 551.100 (1959).

123. See MO. REV. STAT. § 551.010 (1959), which states that a person may invoke the oath of insolvency for the fine or costs only "if he be unable to pay the same."

Since the court is usually given discretion—either complete or limited—in cases of commutation, an exact computation of the length of the commuted sentence is not always possible. When the court has complete discretionary control of the ratio to be used in computing the fine, a ratio of one day of imprisonment for each four dollars of liability has been used. The use of this arbitrary, but not unreasonable figure will be noted whenever a computation is based upon it. When the court is given limited discretion in computing the length of the prison term to be substituted for payment, the range of the commuted sentence will be noted in the examples.

For purposes of this discussion, let it be assumed that a defendant is found guilty of a crime, fined \$1,000 plus \$200 court costs, and is interested in knowing all the available alternatives for discharging his obligation and the ramifications of each. Only the methods of discharge discussed above¹²⁴ which have been or probably would be deemed legitimate will be considered.

1. Payment of the full \$1,200 for the fine and costs is the quickest way to discharge the liability, and impedes the personal freedom of the miscreant the least. However, the prisoner's financial situation often will not permit such a settlement. (FORFEITURE: Property, \$1,200; Freedom. 0.)

2. The method of discharge least consumptive of property is commutation to or substitution of confinement for both fine and costs. If the fine and costs were imposed by a magistrate and the prisoner is *unable to pay*, the magistrate may commute, basing the commutation on the statutory ratio of from \$2 to \$10 per day, resulting in a term of from 120 to 600 days.¹²⁵ However, if both the prisoner and the court take no action, confinement at hard labor will be substituted for the fine and costs, with the length of the term computed on a ratio of one day of imprisonment for every one dollar of fine and costs, amounting to a total of twelve hundred days in prison.¹²⁶ If the sentence is served in an orderly and peaceable manner, the prisoner may be released after serving three-fourths of the full term,¹²⁷ or nine hundred days. (FORFEITURE: Property, 0; Freedom, 120 to 1,200 days.)

3. Commutation of the fine by the court¹²⁸ (using the assumed \$4 per day basis) and payment of the \$200 costs offers a somewhat inexpensive and not too time-consuming alternative for discharge. (FORFEITURE: Property, \$200; Freedom, 250 days.)

124. See *supra* pp. 96-98.

125. MO. REV. STAT. § 543.270 (1959).

126. MO. REV. STAT. § 221.180 (1959).

127. *Ibid.*

128. MO. REV. STAT. § 546.840 (1959).

4. The prisoner with less than \$200 of non-exempt property in his estate may prefer to have the court commute the fine¹²⁹ and then invoke the oath of insolvency for the costs. The commuted term (using the assumed \$4 per day basis) would be 250 days. After serving this term, the prisoner would have to endure an additional twenty days incarceration as a prerequisite to the taking of the insolvents' oath.¹³⁰ This alternative may not be used if the prisoner is solvent, for the oath of insolvency provisions stipulate that the prisoner be unable to pay.¹³¹ Even without this prohibition, however, there would be no reason for a solvent person to invoke the oath, since his forfeited estate would still have to pay the full amount and an additional twenty days imprisonment would be added to the sentence. (FORFEITURE: Property, all non-exempt to the extent of \$200; Freedom, 270 days.)

5. Assuming that the \$4 per day commutation ratio is applied, there is no situation in which it would benefit any prisoner in terms of either time or money to invoke the oath of insolvency for both the fine and costs.¹³² This method of discharge would require both 520 days incarceration (500 days for the \$1,000 fine, at \$2 per day; twenty days for costs) and forfeiture of \$1,200. Again, the prisoner must be unable to pay before utilizing this provision. (FORFEITURE: Property, all non-exempt to the extent of \$1,200; Freedom, 520 days.)

6. If the non-exempt estate of the prisoner is less than \$1,000 but more than \$200, he would be able to pay the \$200 costs and take the oath of insolvency for the fine.¹³³ Five hundred days imprisonment must be endured before the poor man's oath is taken (a prerequisite to the oath is incarceration of one day for each two dollars of fine), after which his property is liable to the extent of \$1,000. This alternative is less satisfactory in all cases than 4 above. (FORFEITURE: Property, \$200 for costs, then all non-exempt to the extent of \$1,000; Freedom, 500 days.)

In all of these situations, it is noteworthy that only in case of payment or commutation is the liability *discharged*. So, if the prisoner has non-exempt funds, he would never profit by invoking the oath of insolvency, even if this were not precluded by law. However, that is not to say that the oath of insolvency is a never-to-be-desired method of discharge. Indeed, for the truly insolvent prisoner, the poor man's oath is a boon which may halve the period which he might otherwise spend in prison discharging his liability (by the substitution of imprisonment for the fine and costs at the rate of one dollar per day, as

129. *Ibid.*

130. MO. REV. STAT. §§ 546.850, 551.010 (1959).

131. MO. REV. STAT. § 551.010 (1959).

132. See note 86 *supra*.

133. See note 116 *supra*.

prescribed by statute). However, so long as the policy of a court is to commute the fine on a basis of two dollars per day or more, the prisoner has everything to gain in terms of both time and property by *requesting* commutation rather than by invoking the oath of insolvency. At the expiration of the term of confinement, then, if he has the money he may pay the costs or, if insolvent, he may take the oath (after an additional twenty days of imprisonment) and then be discharged.

D. An Application in Practice

Although the preceding discussion of alternative methods of discharge in a given situation was complete, the analysis was, to some extent unrealistic in that the value of the prisoner's non-exempt estate was constantly varied. Since the monetary worth of his estate is of utmost importance in determining the *best* method or combination of methods to use in obtaining discharge, particular attention in this section will be given to the amount of property which the prisoner possesses.

The value placed by the prisoner on his property in relation to his freedom is of great importance. However, no judgments on this point have been made for purposes of the examples. Not only would they be of little practical value, they would also intimate that there is an absolute mathematical relation, which, of course, simply does not exist. Nevertheless, in any concrete situation, this factor is liable to be controlling and should not be overlooked.

1. The Solvent Defendant

It is a matter of human experience that, except for small periods of time or the rare occasion when a principle is involved, an individual's interest in preserving his freedom almost always outweighs his interest in property. For the solvent defendant, then, payment of the fine and costs is the quickest method of discharge and least impedes personal freedom.

However, because of surrounding circumstances or the peculiar whims of the convicted party, he may prefer incarceration to forfeiture of his property, even though his estate is financially solvent. In such a case he may request the court to commute the fine to imprisonment.¹³⁴ After serving the term imposed, the prisoner may pay the costs and be discharged with all liabilities satisfied. This solvent prisoner cannot take advantage of the commutation provisions peculiar to the magistrate courts, however, for insolvency is a prerequisite.¹³⁵ If the prisoner is completely passive and neither pays nor requests commutation, but simply remains in jail or prison, the

134. MO. REV. STAT. § 546.840 (1959).

135. MO. REV. STAT. § 543.270 (1959).

statutory substitution of imprisonment for the fine and costs will be effected as a matter of course, on the basis of one day's hard labor for each one dollar of fine and costs.¹³⁶ On good behavior, however, the prisoner may obtain release after serving three-fourths of the term imposed.¹³⁷ Because his estate is solvent, this type person is also precluded from taking the poor man's oath to obtain release from jail or prison.¹³⁸

2. *The Insolvent Defendant*

When a truly insolvent defendant convicted of a crime is fined and made liable for court costs, methods of discharge other than payment become more than mere theoretical applications of unused remedies. The method chosen by the miscreant in this situation is of utmost importance to what is probably the prisoner's most valuable asset—his freedom. However, the possibility of having property acquired in the future liable to execution is a consideration which will be given some weight even by the impoverished. Such is the liability which obtains when, by the oath of insolvency, the prisoner is released from jail or prison but the financial obligation remains undischarged.

A general rule of thumb applicable to all cases in which the prisoner is insolvent is: Request that monetary liability be commuted to imprisonment whenever possible. Adherence to this rule will result in the smallest amount of financial liability and the shortest period of incarceration in all cases where the ratio of commutation is two dollars per day or more.

The insolvent convicted in a magistrate court should request commutation of both fine *and* costs.¹³⁹ The magistrate will commute on the basis of one day of imprisonment for each two dollars to ten dollars of the fine and costs, at his discretion.¹⁴⁰ After serving the term imposed, the prisoner is released with all debts to the state paid.

Upon request of the prisoner convicted in a court other than a magistrate court, the judge "shall sentence him to imprisonment for a limited time, in lieu of the fine. . . ."¹⁴¹ After this term is served, liability for the fine is discharged, but the obligation to pay costs remains. If the prisoner is solvent he may then pay them. To satisfy this obligation the insolvent may then spend one day in jail or prison for each two dollars of costs, up to a maximum of twenty days, after

136. Mo. REV. STAT. § 221.180 (1959).

137. *Ibid.*

138. See generally Mo. REV. STAT. ch. 551 (1959).

139. This caveat will prevent a happening similar to that in the case of *Ex parte Parker*, 106 Mo. 551, 17 S.W. 658 (1891). See note 74 *supra*.

140. Mo. REV. STAT. § 543.270 (1959).

141. Mo. REV. STAT. § 546.840 (1959).

which the oath of insolvency may be taken to obtain release.¹⁴² His estate is then liable for the costs.

If the convicted defendant neither pays nor requests commutation, imprisonment at hard labor at the rate of one dollar per day for fine and costs will be imposed as a matter of course.¹⁴³ The prisoner may be discharged after serving three-fourths of the sentence with good behavior.¹⁴⁴ The informed insolvent would never reasonably select this method of satisfying the debt, since he would be discharged much sooner by requesting commutation of the fine to confinement, and then either paying the costs or invoking the oath of insolvency for them; paying the costs and invoking the oath of insolvency for the fine; invoking the oath of insolvency for both fine and costs; or, if convicted in a magistrate court, requesting commutation of both fine and costs. Of course, the use of any one of the first three alternatives will subject the prisoner's non-exempt estate to liability for the amount of the obligation "discharged" by the oath of insolvency. But for the typical penniless insolvent this liability is neither too real nor prohibitive.

The two remaining alternative methods of relief are usually thought to be peculiarly applicable to insolvent prisoners. However, if we are justified in assuming that judges with complete discretion in commuting fines will use a basis of a least two dollars per day of confinement, then neither is of any practical value in terms of shortening the period of imprisonment or minimizing the monetary liability. There are quicker and less expensive means of obtaining discharge than either of these two provide.

The least undesirable use of either of these two methods would be in the case of a prisoner who is not completely penniless. If misguided or uninformed he may pay the costs and, after enduring the prerequisite term of imprisonment at the rate of two dollars per day for the amount of the fine, take the oath of insolvency for the fine and be discharged.¹⁴⁵ However, he is still monetarily liable for the full amount of the fine. If, on the other hand, the prisoner had requested commutation of the fine to incarceration and then paid the costs, he would be better situated in all ways. The term of confinement, assuming a four dollar per day commutation ratio, would be halved, and the imprisonment would be in lieu of and completely satisfy the fine. On discharge in this instance, the prisoner's estate is free from all liabilities, while in the former case the estate is liable now and *in futuro* to the extent of the fine.

142. MO. REV. STAT. §§ 546.850, 551.010 (1959).

143. MO. REV. STAT. § 221.180 (1959).

144. *Ibid.*

145. See note 116 *supra*.

Finally, the least desirable of all methods of discharge, except satisfaction by imprisonment at the rate of one dollar per day, is the invocation of the oath of insolvency to obtain discharge for both the fine and the costs.¹⁴⁶ This method necessitates a prerequisite period of incarceration for the fine at the rate of two dollars per day, with up to twenty days imprisonment added for costs. Then the prisoner must take the oath of insolvency and forfeit his non-exempt estate toward satisfaction of the fine and costs. But, since his estate is certain to be less than the sum of the fine and costs, he remains liable for the unpaid amount. More reasonable alternatives, depending upon the financial status of the prisoner's estate are, for the wholly insolvent, requesting commutation of the fine and then taking the oath of insolvency for the costs; and, for the partially insolvent, requesting commutation of the fine and payment of the costs; or, for the wholly or partially insolvent convicted in a magistrate court, requesting commutation of both the fine and the costs.

Conclusion

This super-sophisticated, but highly artificial scheme for the release of prisoners incarcerated for fines, costs or both stands in need of substantial revision. Though not violating the constitutional prohibition against imprisonment for debt, these carryovers from the pre-Civil War era approach cruel and unusual punishment. As in the other areas of assessment of criminal costs, the purposes, seldom explicit, are never fulfilled.

Assuming, but not recommending, that the present scheme is maintained, the legislature should set up three basic provisions for release of defendants, one to deal with discharge by payment, one with discharge by commutation, and one with discharge by the oath of insolvency. Within each provision, subdivisions should cover permissible modes of discharging fines prior to or in conjunction with the discharge of costs. Needless provisions which should never be utilized because of their disadvantageous consequences should be eliminated. And even more important, ratios of commutation should be changed so that they align more realistically with the facts of modern economic life.

III. LIABILITY OF PRIVATE PERSONS

As was pointed out earlier, prior to statutory instruction to the contrary, all costs in criminal cases in Great Britain had to be borne by the prosecuting witness.¹⁴⁷ The change, when it came, was com-

146. See note 86 *supra*.

147. See text accompanying notes 9 & 10 *supra*.

plete,¹⁴⁸ and for a while the county paid costs in all criminal prosecutions grounded on bona fide complaints.

Retreating from this position somewhat, Missouri currently charges the complainant in certain specified cases which result in acquittal. As in most areas of the law in this field, the philosophy behind the rules is either muddled or lost in history, and the courts have been unable to agree on the basic rationale. At least one case has held that, just as in defendant liability, the imposition of costs "is in the nature of a penalty imposed by the criminal code, for ill-advised petty prosecutions, as well as a means of protection to the community against burdens of taxation unnecessarily created."¹⁴⁹ In other discussions of the matter, courts have emphasized that prevention of unfounded prosecutions whose only purpose is to torment the accused is the real reason for imposing this liability, not punishment of a well-meaning but misguided accuser.¹⁵⁰

No considerations, however, can override the primary object of the criminal law, the prevention of crime and the punishment of offenders. That is, even though a prosecutor may eventually be adjudged liable for costs, there is no requirement that he post security for their payment before a complaint may be recognized.¹⁵¹

148. See text accompanying note 11 *supra*.

149. *State v. Lavelle*, 78 Mo. 104, 106 (1883).

150. *State ex rel. Smith v. Hodges*, 53 Mo. App. 532 (1893). *Accord*, *State v. Bowling*, 14 Mo. 508, 510-11 (1851), in which the court said:

It seems to us, one object was to prevent unnecessary or unfounded prosecutions for the trespasses of [sic] persons or to the property of persons, by requiring a prosecutor to be endorsed, so that the petit jury might make him pay the costs if there was no cause originally for the prosecution.

At this date, it was discretionary with the jury, upon acquittal of the defendant, whether the county or the prosecuting witness should pay the costs. Mo. Rev. STAT. art. II, § 10 (1845), similar to the present provisions of § 550.090 (1959), relating to assessment in magistrate courts. The court continued in an excellently reasoned opinion:

If this were not the object why would the fact of the indictment being found after the information of two of the grand jury or of a public officer in the discharge of his duty, do away with the necessity of endorsing a prosecutor's name on the indictment? The names of two grand jurors or of a public officer, give at once the impression to the court, that the indictment was founded on some real injury—some actual violation of the law—and therefore, no prosecutor was required. *Id.* at 511.

151. *State v. Bowling*, *supra* note 150 in which the court, in denying the need for posting of bond by a complainant, said:

The person and the rights of a person are regarded by our law alike whether such person be a poor and insolvent man or a rich one.

The rights of the poor in regard to property may be few, for they have little, but however few they be they are as sacred and demand as much attention of the law officers of our government, when brought properly before them, as the rights of the owner of millions.

No matter what the underlying reasons for imposing liability on the complainant, it has been admitted that some kinds of cases, by their very nature, are so closely connected with the public welfare that policy demands that no costs be charged to the complainant regardless of the outcome of the trial.¹⁵² Subject to the rules discussed below, once an indictment is found in cases of this type, the prosecuting witness is released once and for all from any possible liability for costs.

In Missouri, the complaining witness¹⁵³ is never liable if the defendant is convicted,¹⁵⁴ and is liable only in certain specified cases which finally result in discharge or acquittal. It is extremely difficult to state general rules regarding prosecutor liability. Section 550.080 is perhaps the broadest statute relating to costs charged against a complainant, but, ironically, that section itself imposes no liability. It merely provides that when a defendant is acquitted, judgment is to be rendered against the prosecutor for costs if, and only if, "the prosecutor or prosecuting witness shall be liable to pay the costs according to law. . . ."¹⁵⁵

To determine whether in particular situations a prosecutor is liable for costs, it is necessary to examine the more detailed provisions establishing such liability in the light of the facts of the cases.

A. *Liability for Dismissal Before Trial*

If the accused party is charged with a felony, the complaining witness will be held liable for costs if no indictment is found¹⁵⁶ or if the

152. *State v. Huiatt*, 31 Mo. App. 302, 307 (1888).

153. The terms private prosecutor, prosecutor, complaining witness and prosecuting witness are generally used interchangeably herein, with the notable exception of the discussion of § 545.280. See text accompanying notes 164-68 *infra*. These terms refer only to private citizens, not to prosecuting attorneys or other public officials acting in their official capacities. See §§ 545.050, 545.280, 550.090, specifically exempting public officials from liability.

154. However, the prosecutor may be held liable if defendant is convicted at the trial level but the conviction is reversed on appeal or the defendant is acquitted at a subsequent trial. See notes 196-202, *infra*.

155. MO. REV. STAT. § 550.080 (1959). In *State ex rel. Lindquist v. Butler*, 133 Mo. App. 566, 113 S.W. 668 (1908), the court held that § 550.080 (then Mo. REV. STAT. § 2836 (1899)):

is merely directory. . . . And the negative language in § 2836, viz., "and in no such case shall the same be paid by either the county or state," merely refers to cases where the prosecutor is liable for the costs according to law. . . . *Id.* at 569, 113 S.W. at 669. *Cf. State v. Leidy*, 115 Mo. App. 62, 64, 90 S.W. 759 (1905).

156. MO. REV. STAT. § 550.060 (1959); see *State v. French*, 118 Mo. App. 15, 93 S.W. 295 (1906).

accused is discharged by the officer¹⁵⁷ taking his examination.¹⁵⁸ If the accused is charged with a misdemeanor to be heard in a magistrate court, and prosecution is commenced by complaint, the complaining witness is liable for costs if the prosecuting attorney declines to file an information.¹⁵⁹

B. Liability in Cases of Acquittal or Failure of Prosecution

Prosecution of all crimes, whether felonies or misdemeanors, must be initiated either by indictment or information in Missouri.¹⁶⁰ When the prosecution is by *indictment* based on complaint, the name of the complaining witness must be included¹⁶¹ if the accused party is charged with "any trespass against the person or property of another, not amounting to a felony, except for petit larceny [or] . . . disturbance of the peace of a person, or for libel or slander. . . ."¹⁶² In these cases, "If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."¹⁶³

When the prosecution is instituted by *information*, Section 545.280 provides the basis for charging costs against the complaining witness. Before imposing liability, however, the statute differentiates by definition two categories of complaining witnesses: (1) the "prosecuting witness," a comprehensive term defined as including every party who makes an affidavit upon which an information is based; and (2) the "prosecutor," a much narrower term, referring only to those prosecuting witnesses who are the affiants at whose request the information is filed or who verify¹⁶⁴ the information, "in all cases in which by law an indictment is required to be indorsed by a prosecutor. . . ."¹⁶⁵ After indulging in this exercise in definitions, however, the legislature

157. This function is performed by the magistrate.

158. MO. REV. STAT. § 550.070 (1959).

159. MO. REV. STAT. § 550.090 (1959).

160. MO. REV. STAT. § 545.010 (1959). "[E]xcept in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. . . ." MO. CONST. art. I, § 17.

161. It is not necessary that there be a complaining witness in these cases, but if there is, he is held liable for costs in case of failure of prosecution. Indictments for offenses listed in this section may also be "preferred upon the information and testimony of one or more grand jurors, or some public officer in the necessary discharge of his duty." MO. REV. STAT. § 545.050 (1959).

162. MO. REV. STAT. § 545.050 (1959).

163. *Ibid.* When indictments are preferred by public officers or grand jurors in the discharge of their duty, no costs liability attaches.

164. See MO. REV. STAT. § 545.240 (1959).

165. MO. REV. STAT. § 545.280 (1959). Indorsement requirement in prosecutions instituted by indictment is covered by § 545.050. See note 161 *supra* and text accompanying note 162 *supra*.

in fixing liability for costs renders the differentiation meaningless, merging the two categories by stating that:

in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such *prosecuting witness* or *prosecutor* shall be liable for the costs in the case not otherwise adjudged by the court. . . .¹⁶⁶

Normal statutory construction leads to the logical conclusion that, whatever the crime charged, if the prosecution fails for any reason, the "prosecutor" or "prosecuting witness" is liable for costs. However, such an interpretation leaves unanswered the question of why the legislature bothered to distinguish "prosecutor" from "prosecuting witness" in the first place.

Comparing cases of liability based on the *method* of instituting prosecution with cases based on this section, answers the question but does not justify the poor and misleading draftsmanship. If the plain meaning of Section 545.280 were applied in taxing costs for prosecutions instituted by *information*, the complaining witness¹⁶⁷ would have to pay all costs in any case in which defendant was acquitted regardless of the crime charged. By contrast, in cases of prosecution instituted by *indictment*, the prosecuting witness is liable for costs only on failure to convict a party accused of one of those offenses specifically enumerated in Section 545.050.¹⁶⁸

The disparity is easily seen. If *A*, a private citizen, accuses *B* of larceny, and *B* is prosecuted by *indictment* and acquitted, *A* would not be charged with any costs. However, if the same charge were brought by *information* based on *A*'s affidavit and *B* were acquitted, *A* would be liable for costs.

To permit such a result would be to foster a distinction based merely on procedural technicalities. Missouri courts, aware of the inconsistency, have read Section 545.280 so as to obtain a more just though technically unauthorized result by construing Section 545.280 as being *in pari materia* with Section 545.050. This section provides for cases in which the complaining witness' name must be included on indictments.¹⁶⁹ That more just, equitable and reasonable results

166. MO. REV. STAT. § 545.280 (1959). (Emphasis added.) "[B]ut the prosecuting attorney shall not be liable for costs in any case."

167. The "prosecutor" or "prosecuting witness" of § 545.280.

168. See text accompanying note 162 *supra*.

169. The first time the Missouri appellate courts were called upon to construe this section was in *State v. Huiatt*, 31 Mo. App. 302 (1888). Basing its decision on § 545.280 (then MO. REV. STAT. § 1768 (1879)), the court held that in a prosecution instituted by *information*, a private prosecutor would not be held liable on acquittal of defendant unless liability would be imposed had the suit been instituted by *indictment*. The court said:

follow from this interpretation is not denied.¹⁷⁰ However, the rule of *in pari materia* is merely an interpretative device to aid in the construction of admittedly ambiguous statutes and should not be used to

It is to be observed and kept in mind that while this section makes the prosecuting witness liable for the costs in event of an acquittal, it is only in cases in "which, by law, an indictment is required to be indorsed by a prosecutor." . . . [H]ad it [the prosecution] been instituted by indictment, the name of the prosecutor would not have been required to be indorsed on it. *Id.* at 306.

The irony of the fact that the court did not advert to the statutory language which holds the "prosecuting witness *or* prosecutor" liable for costs on acquittal is partially explained, partially heightened by the fact that the court, in its decision, *misquoted* the section so as to hold, upon acquittal, "such prosecuting witness" liable for costs. Either purposely or, more probably, inadvertently, the court omitted the phrase "or prosecutor" in the sentence assessing costs liability. In fact, however, the decision resulted in holding *only* the prosecutor, and not all prosecuting witnesses, liable for costs upon failure of prosecution. This anomalous decision does nothing to clarify the interpretation of the statute. See also *State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311, 314 (1889), where the same error was made in the analysis of cost liability.

Eleven years after the *Huiatt* case, the court of appeals in *Cowan v. Jones*, 79 Mo. App. 222 (1899) applied a similar rationale. After discussing § 545.050 (then Mo. REV. STAT. § 4095 (1889)), relating to the necessity of indorsing indictments in particular cases, the court held that § 545.280 (then Mo. REV. STAT. § 4063 (1889)):

merely applies the rule above stated [relating to indictments] to informations upon affidavits by making the affiant a prosecuting witness and prosecutor "in all cases in which by law an indictment is required to be indorsed by a prosecutor," and charging him as such for costs "in case the prosecution should fail from any cause, or the defendant shall be acquitted." It is perfectly evident therefore that unless the charge in the information under review belongs to the class of offenses wherein the prosecutor is made liable for costs under section 4095 [§ 545.050 (1959)], he is not liable under section 4063 [§ 545.280 (1959)]. *Id.* at 225.

In effect this court inserted the conjunctive *and* in place of the disjunctive *or* in the statute, and asserted in dicta that, upon acquittal of defendant, the "prosecuting witness and prosecutor" is liable for costs of a proceeding instituted by information. See *State v. Jablousky*, 169 Mo. App. 238 (1912).

A different approach, but with the same result, was taken by the court in *State v. Flick*, 167 Mo. App. 6, 150 S.W. 1119 (1912). The rationale involved the use of a third statute, § 545.240 (then Mo. REV. STAT. § 5057 (1909)). The court construed the statutes as follows:

1) Section 545.050 (1959) (then Mo. REV. STAT. § 5095 (1909) provides for the situations in which the indictment must be indorsed by the prosecutor;

2) Section 545.240 (1959) (then Mo. REV. STAT. § 5057 (1909)) makes the terms and restrictions as to indorsement of witnesses in cases of indictment applicable to an information;

3) "And so does section 5063 [§ 545.280]; and it makes the prosecuting witness, in such cases, liable for the costs if the prosecution fails." The court then concludes, "A prosecution for keeping a bawdyhouse is not one of the offenses where

frustrate their plain meaning.¹⁷¹ Neither does the interpretation adopted by the judiciary solve all problems, for why then does Section 545.280 say that if prosecution fails “such *prosecuting witness* or *prosecutor* shall be liable for the costs”? No interpretation really explains this section, since it seems that the legislature simply included the term “prosecuting witness” inadvertently and had no intention of imposing liability on a complaining witness simply because one *method* of instituting suit was used rather than another.¹⁷²

C. Liability of the “Injured Party”

Another disparity in statutes which leads to incongruous results appears by comparing Section 545.050,¹⁷³ referring to prosecutor’s liability in courts of record, with Section 550.090,¹⁷⁴ which specifically applies only to his liability in magistrate courts. By the provisions of both statutes, costs are imposed on the complaining witness only in cases of acquittal or failure of prosecution when the crime charged is

the prosecuting witness must be indorsed on the indictment, and hence he does not become liable for costs.” *Id.* at 7, 150 S.W. at 1120.

The result in this case does not follow logically from the premises, for § 545.280 does not merely subject the same complaining witnesses to liability upon failure of prosecution that § 545.050 does. Hence it does not follow that because there is no requirement that the prosecuting witness’ signature be indorsed on the information, no liability attaches upon failure of prosecution.

170. In attempting to impose some sort of rationale on the apparently groundless statutory scheme relating to costs assessment against the complaining witness, it is interesting to note that the cases in which liability is imposed on acquittal of the accused—*viz.*, peace disturbance, libel, slander and trespasses less than felonies—are by and large crimes for which there exist concurrent *civil* remedies. It is also obvious that these are the types of offenses which most likely would be prosecuted for the sake of vindication rather than by “a sense of duty to the public welfare.” Furthermore, irrespective of motive, the enumerated offenses are not usually very serious crimes, and thus the public interest in prosecuting and convicting is not substantial.

171. *State v. Fremont Lodge of Loyal Order of Moose*, 151 Ohio St. 19, 84 N.E. 2d 498 (1949).

172. Although the interpretation problems of § 545.280 discussed in note 169 *supra*, are present in the statute as originally enacted (Mo. Laws 1877 § 11, at 356), the legislative intent not to impose additional liability for instituting prosecution by information is evidenced by the immediately preceding section of the same act, which reads:

The trial and all proceedings upon any information filed under the provisions of this act shall be governed by the law and practice applicable to trials upon indictment for misdemeanors [*sic*] so far as such law and practice can be made applicable thereto. . . . Mo. Laws 1877 § 10, at 356.

173. MO. REV. STAT. (1959), dealing with prosecutions instituted by indictment. Applied to informations by § 545.280.

174. All prosecutions before magistrates are by information. MO. REV. STAT. § 543.020 (1959).

disturbance of the peace,¹⁷⁵ libel,¹⁷⁶ slander or trespass against the person or property of another not amounting to a felony, except for petit larceny.

When the case is tried in a magistrate court, formerly a justice of the peace court,¹⁷⁷ liability attaches to the private prosecutor upon failure of prosecution only when the offense charged is one of those listed and only when the prosecutor is the "injured party."¹⁷⁸ Thus, since magistrate courts have concurrent original jurisdiction with circuit courts over misdemeanors,¹⁷⁹ the complainant would be wise to attempt to have the case tried in a magistrate court if he is not the injured party, and the defendant is charged with one of these offenses.¹⁸⁰ For if the accused is acquitted, the prosecutor will not be liable for costs in the magistrate court case because he is not the "injured party."¹⁸¹ However, if the same party were to complain of the same offense, allegedly committed by the same defendant, and the case were tried in a circuit court,¹⁸² he would be liable for costs on acquittal.¹⁸³

175. In *State v. Wood*, 128 Mo. App. 642, 107 S.W. 431 (1908), the court of appeals reversed costs awarded against the prosecuting witness on acquittal of defendant, holding that the disturbance of the peace of another is not interference with the property or person of the one disturbed and so costs could not accrue against the prosecutor. The 1889 statute on which this decision was based was subsequently revised to include specifically disturbance of the peace.

176. In *Cowan v. Jones*, 79 Mo. App. 222 (1899), a prosecution for libel, the court of appeals held the prosecutor not liable for costs on acquittal of defendant because libel was not a "trespass against the person or property of another," but a different species from trespass in a corporeal sense, the usual and ordinary meaning of the term. The 1889 statute on which this decision was based was subsequently revised to specifically include libel and slander.

177. The terms "justice" and "justice of the peace" were amended to include and refer to "magistrate." Mo. Laws 1945 § 27, at 757, supplanting Mo. REV. STAT. § 3834 (1939), repealed by Mo. Laws 1945 § 1, at 841. See generally Mo. Laws 1945 § 1, at 1079.

178. Mo. REV. STAT. § 550.090 (1959). As to who is the "injured party," see discussion in text accompanying notes 184-92 *infra*.

179. Mo. REV. STAT. § 543.010 (1959). See, *e.g.*, *State v. Lavelle*, 78 Mo. 104 (1883).

180. Indeed, it is the rare exception for a circuit court to try a misdemeanor originally. One instance would be on return of a true bill by a grand jury.

181. Mo. REV. STAT. § 550.090 (1959). In other cases of acquittal in the magistrate court:

[I]f the magistrate or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the magistrate shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor. . . . *Ibid*. See generally, 14 AM. JUR. *Costs* § 108 (1938); 20 C.J.S. *Costs* § 440 (1940).

182. Another disparity in statutes appears by comparing § 550.090 with § 550.100, the latter referring to liability in the St. Louis Court of Criminal Cor-

Litigation has not established any stable rules for determining when a person is an "injured party" within the purview of Section 550.090, and thus liable for costs on discharge or acquittal of the accused by a magistrate court.

In *State v. Lavelle*,¹⁸⁴ Charles Lavelle filed an affidavit in a justice of the peace court charging Davis with wilfully disturbing the peace of "the family of one William Lavelle." The defendant Davis was acquitted and the justice taxed the costs of the case against the informant, Charles Lavelle. On appeal, the Missouri supreme court reversed on grounds that the affidavit alleged an offense not against the informant, but against the family of William Lavelle; and since it was not the informant, but the family of William Lavelle which was the injured party, the informant Charles should not be held liable for costs. The relationship of Charles Lavelle to the family of William Lavelle was not stated in the opinion of the court and apparently did not influence the decision. However, the fact that Charles Lavelle was a minor child justifies a conclusion that there was some close relationship between the two Lavelles.

Ten years later, in *State ex rel. Smith v. Hodges*,¹⁸⁵ a justice of the peace court acquitted a school teacher charged by a father with assault and battery on his minor son. The father was held liable for costs as a private prosecutor. The court interpreting Section 550.090 said:

This section is not quite clear. If it was designed to make the prosecutor liable for costs only in such cases wherein the trespass is committed against *his* person or property, it would so state, instead of saying the person or property of *another*. The use of

rection, where, "if the defendant be acquitted," the complaining witness is liable for costs. This provision does not limit the crimes for which liability attaches, as do §§ 545.050, 550.090, and the judicial interpretation of § 545.280. On the other hand, liability in the court of criminal correction obtains only upon "acquittal," *not* upon "discharge" or failure of prosecution.

183. *But see State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311 (1889), a case originating in the magistrate court, wherein the court based its decision on an interpretation of § 550.090, construing it to be *in pari materia* with §§ 545.050 and 545.280. Such an analysis, it is submitted, is erroneous, and would result in holding non-injured parties liable for costs upon dismissal in a magistrate's court, contrary to the explicit mandate of § 550.090. See text accompanying notes 184-92, *infra*. See also *State ex rel. Smith v. Hodges*, 53 Mo. App. 532 (1893), which explicitly held, at 534, that in a magistrate proceeding:

The question of costs . . . must be determined by the statutory provision applicable to prosecutions originating before justices of the peace [now magistrates], which is different from those applicable to prosecutions originating in courts of record. The question, therefore, is governed exclusively by section 4358 [§ 550.090 (1959)]. . . .

184. 78 Mo. 104 (1883).

185. 53 Mo. App. 532 (1893).

the word another excludes the view that the property or person must *necessarily* be that of the prosecutor, but it includes the view that it necessarily must be that of some other person than the accused.¹⁸⁶

The court noted that the "injured party," within the purview of the statute, is "one who prosecutes the offender, not in the sole interest of the community, but for the vindication of his own personal or property rights,"¹⁸⁷ and that the father fitted this description.

The *Hodges* case, then, did not follow the decision in *Lavelle*, if it is assumed that Charles Lavelle was not prosecuting "in the sole interest of the community," but rather had a personal motive for prosecuting the disturber of the family of William Lavelle. The mystery of this apparent inconsistency in Missouri decisions is heightened by the fact that *Lavelle* was decided in the supreme court and *Hodges* in the court of appeals. A contention that the court of appeals was unaware of the earlier case is refuted by the fact that the *Hodges* opinion referred to dicta in *Lavelle* regarding the purpose of the statute.¹⁸⁸

The court of appeals in *State v. Wood*,¹⁸⁹ decided in 1908, though referring to *Lavelle* for other propositions, relied on *Hodges* and held that a father who prosecuted defendants for wilfully disturbing the peace of his minor son was the "injured party" within the meaning of the statute.¹⁹⁰ The *Wood* case, while citing *Hodges*, nevertheless did not adopt its sweeping language regarding the identity of an injured party, but merely stated that "it may be conceded that appellant [father] was the injured party within the meaning [of the statute]. . . ." ¹⁹¹

The unresolved conflict makes it impossible to predict the outcome of cases involving the determination of the "injured party." Undoubtedly, prosecution by a parent on behalf of his child would render the parent liable for costs on defendant's acquittal.¹⁹² It is doubtful,

186. *Id.* at 534-35. (Emphasis added.) See also *State v. Goss*, 74 Mo. 592 (1881), which applies the same rule to indictments under the predecessor to § 550.050.

187. 53 Mo. App. at 535.

188. *Ibid.*

189. 128 Mo. App. 642, 107 S.W. 431 (1908). See *State ex rel. Engle v. Smith*, 81 Mo. App. 671 (1899).

190. The father's costs liability was reversed on other grounds.

191. 128 Mo. App. at 645, 107 S.W. at 432.

192. It is not a difficult task to justify limiting *Wood* and *Hodges* to the facts presented, on the basis of one of the following reasons: existence of a parental duty on the part of the father; legal identity of father and his minor child; or disturbance of the child as an invasion of a property right of the father. Thus the father might well be considered the "injured party" within § 550.090. See also

however, whether the concept of "injured party" would be extended as far as the dicta of *Hodges* suggests, to include all complaining witnesses activated by motives other than those which are "in the sole interest of the community."

*D. Failure of Prosecution as Criterion for Determining
Costs Liability of Complaining Witness*

Under what circumstances costs of an unsuccessful criminal proceeding ought to be assessed against a private prosecutor has been often litigated in Missouri, with results which have been something less than satisfactory in view of the expressed purpose of holding prosecuting and complaining witnesses liable for costs in cases which fail.¹⁹³ Sections 550.090¹⁹⁴ and 545.280¹⁹⁵ form the bases of these decisions.

A brief discussion of a few representative cases will demonstrate the absurdities which result by applying a literal interpretation of these sections. In *Cowan v. Jones*,¹⁹⁶ defendant was convicted of criminal libel. On appeal, the conviction was reversed, but before the case could be re-tried the defendant died. Pursuant to Section 545.280, costs were originally charged to the complaining witness. Although this ruling was reversed on other grounds, the court never questioned the propriety nor doubted the validity of taxing costs against the complainant even though the prosecution failed only because of the death of the defendant. *State v. Jablousky*¹⁹⁷ indicated that reversal because of a procedural error by a prosecuting attorney who combined two offenses in one count might be a "failure of prosecution" which would subject the private prosecutor to liability for costs.

Courts have consistently held private prosecutors liable for all costs when a conviction at the trial level is reversed on appeal.¹⁹⁸ *State v.*

§ 507.180: "The guardian or next friend of any infant who commences or prosecutes a suit shall be responsible for the costs thereof. . . ."

193. See notes 149-51 and accompanying text, *supra*.

194. Relating to liability in magistrate courts, and reads, in part: "if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged."

195. Relating to liability in courts other than magistrate, and reads, in part: "and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court. . . ."

196. 79 Mo. App. 222 (1898).

197. 169 Mo. App. 238, 152 S.W. 390 (1912).

198. See, *e.g.*, *Cramer v. Smith*, 350 Mo. 736, 168 S.W.2d 1039 (1943); *State ex rel. Smith v. Hodges*, 53 Mo. App. 532 (1893); *State v. Shaw*, 45 Mo. App. 383 (1891); *State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311 (1888).

*Wood*¹⁹⁹ shows the absurdity of these rules and the damper they might place upon the initiation of well-founded prosecutions by private individuals. Although the ruling as to costs was reversed on other grounds, the court in *Wood* intimated that the prosecuting witness would have been liable for *all* costs, including costs of appeal, in a case eventually ending in acquittal. The full history of this case is as follows: defendant was convicted in a justice of the peace court and appealed to the circuit court, where on a trial *de novo* he was convicted. The verdict of the jury was subsequently set aside and a new trial granted. Defendant was again convicted in the circuit court, and appealed to the court of appeals, where the judgment was reversed and the cause remanded for a new trial. On the fourth trial the defense was successful and the defendant acquitted.

Certainly it would not be in line with the legislative intent²⁰⁰ to impose upon the private prosecutor liability for costs in a case such as *Wood*. It is submitted that liability of the prosecutor should be restricted to cases resulting in acquittal or dismissal at or before the trial level—liability should never be imposed on a complainant when the case reaches the appellate court.²⁰¹ The present language imposing

199. 128 Mo. App. 642, 107 S.W. 431 (1908).

200. See notes 149-51 and accompanying text, *supra*.

201. Section 550.050, on its face a provision of general applicability in costs assessment, is perhaps the greatest anachronism relating to criminal costs assessment on the books of Missouri today. It provides, in part:

Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same.

Since almost every prosecution involves, upon conviction, a "fine, penalty or forfeiture" of some kind, it would appear that upon failure of prosecution for any reason, the complainant would be held for costs, regardless of the crime charged. However, the history of the statute and cases construing it tell the tale of a law long deceased.

As originally enacted, the section provided:

In all prosecutions for any fine, penalty, or forfeiture, instituted otherwise than by indictment, unless the same is commenced by the attorney general, or circuit attorney, or some other officer whose duty it is to institute the same, the informer, or person commencing the prosecution, although he may not be entitled to any part of the said fine, penalty, or forfeiture, shall be adjudged to pay all costs, if the defendant is acquitted. MO. REV. STAT. ch. 35 § 4 (1845).

The early case of *White v. Walker*, 22 Mo. 433 (1856), applied this provision in holding a truly private prosecutor liable for costs upon acquittal of defendants accused of vagrancy. In a trial before a justice of the peace, the "plaintiff appeared and conducted, by leave of the court, the same [trial] against said supposed vagrants." The penalty on conviction was, indeed,

a serious forfeiture; for it consists in depriving the vagrant of his right to manage and conduct himself as a freeman; and he is to be hired out for six months to the highest bidder, for cash in hand: he is virtually reduced to

liability—"discharged or acquitted" in Section 550.090, failure of the prosecution from any cause in Section 545.280—places an unconscionable risk on public-minded citizens who complain about offenses against their peace or person.²⁰²

CONCLUSION

It is hoped that this analysis of the provisions pertaining to the taxing of costs in Missouri will awaken state officials to the problems, inconsistencies and inequities lurking in the statutes. These inequities have been tempered, to some extent, in that many of the courts no longer follow the literal language of the statutes when assessing costs. But courts should not be shackled with pre-Civil war provisions in the first place. Nor should they be forced to violate the law in order to

servitude for that time—a forfeiture not to be weighed, in the estimation of freemen, by dollars and cents. 22 Mo. at 436.

Subsequent cases, however, have rendered this section and its successors sterile by holding it applicable "only to offenses personal and not public and in cases where the informant is the person injured." *City of Greenville v. Farmer*, 195 Mo. App. 209, 190 S.W. 406 (1916). *Accord*, *State v. Lavelle*, 78 Mo. 104 (1883) ("the statute above quoted pertains to a special class of prescribed fines, penalties and forfeitures wholly different from the ordinary offenses against public order or public peace. . ."); *State v. Flick*, 167 Mo. App. 6, 150 S.W. 1119 (1912) ("This section does not apply to a public offense such as keeping a bawdyhouse."); *State v. Huiatt*, 31 Mo. App. 302 (1888) (This section "has no application to this case," "a suit charging justices of the peace with unlawful and corrupt acts.").

It is submitted that the "fines, penalties and forfeitures" originally contemplated by this law are no longer efficacious in Missouri. And neither is the mode of prosecution anticipated by the original enactment. See also MO. REV. STAT. § 545.020 (1959); *Ex parte Alexander*, 39 Mo. App. 108 (1890). *But see* KELLEY, CRIMINAL LAW AND PRACTICE § 1231 (3d ed. 1913).

202. The right of the private prosecutor to appeal the assessment of costs against him is generally recognized. See, *e.g.*, *State v. Wood*, 128 Mo. App. 642, 646, 107 S.W. 431, 432 (1908), wherein the court, concerning the right of the prosecutor to appeal costs, said: "By indorsing his name on the information as prosecuting witness, under these statutes, appellant, as to costs, voluntarily made himself a party to the proceedings and like any other party to a lawsuit may appeal if judgement is rendered against him." See also, *State v. Lavelle*, 78 Mo. 104 (1883); *State v. Shaw*, 45 Mo. App. 383 (1891); *State ex rel. Kleinsorge v. Bante*, 34 Mo. App. 311 (1889); *State v. Huiatt*, 31 Mo. App. 302 (1888). *But see* *State v. Baldwin*, 79 Mo. 243 (1883), where the court denied to the prosecuting witness the right to appeal a finding of the jury that the prosecution was "malicious or without probable cause," within the purview of the predecessor to § 550.090. *Cf.* *State v. Powell*, 44 Mo. App. 21 (1891), where by way of dictum the court intimated that the *Baldwin* case stood for the proposition that a prosecuting witness could not appeal "to free himself from all liability," but only to question the taxation of certain items. It is submitted that such a statement is erroneous, for *Baldwin* simply denied the complainant the right to appeal a finding of fact by the jury that the prosecution was malicious. See cases cited *supra*, in which prosecutor's right to appeal the assessment generally was not questioned.

reach just results. However, as a result of Missouri's accumulation of antiquated, partially revised statutory provisions upon which piecemeal legislation has been heaped, assessments of costs in criminal cases are today almost by their very nature either inequitable or illegal.

The result is the present morass of statutory confusion and unenlightening judicial interpretation of these assessment provisions, which form an unintelligible scheme wholly lacking in organization, consistency and, most important, apparent purpose. A thorough rewriting of the provisions is in order. Nothing short of complete revision, reorganization and codification demonstrating a clear-cut purpose for assessing costs will suffice to produce a unified, coherent body of law with internal logical consistency.

Appendix

The word costs when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill.

Costs in criminal proceedings are those charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense, as compensation to the officers for their services.¹

Although an enumeration of particular costs which may be taxed in a criminal proceeding is beyond the intended scope of this note, the inserted reproduction of a "Bill of Costs" from the circuit court of St. Louis County (which is not untypical of costs bills used elsewhere in Missouri) should aid in the understanding of what costs are taxable in prosecutions.¹¹

i. *City of Carterville v. Cardwell*, 152 Mo. App. 32, 132 S.W. 745 (1910). The court also mentioned that, "As between a party to a suit and the officer or witness, the charges are usually denominated fees; but as between the parties to the suit, these charges are usually called costs."

ii. The costs bill included herein does not provide for the taxing of jury fees. However, taxing of jury fees is specifically provided for by Mo. REV. STAT. § 550.280 (1959).

