

PATTON V. STATE

1. COSTS: In criminal cases.

Ordinarily, the costs in a criminal case will abide and follow the final judgment. But if in the course of the prosecution the court has specially adjudged the cost of some particular matter against the defendant (e. g., the cost upon overruling his demurrer to the indictment), he must pay it, though he be acquitted on the trial and a general judgment of cost be rendered against the county.

2. SAME: Fee of prosecuting attorney.

The prosecuting attorney is not entitled to a fee on a judgment

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overruling the defendant's demurrer to the complaint. He is allowed no fees in criminal prosecutions except on convictions.

APPEAL from Ouachita Circuit Court.

Hon. C. E. MITCHEL, Circuit Judge.

H. G. Bunn, for Appellant.

This is not a case coming under Sec. 1, Acts 1875, p. 102. The cost except in equity follow the final judgment.—1 Ark., 345; 1 Stewart, Ala., 63. Overruling a demurrer not a final order or judgment.—27 Ark., 113. Costs at law adjudged to winner.—5 Pick., 259; 16 Am. Dec., 405.

C. B. Moore, Attorney-General, contra.

ENGLISH, C. J. Thomas J. Patton was indicted for misdemeanor in the circuit court of Ouachita county. He filed a demurrer to the indictment, which the court overruled and adjudged that he pay all costs in and about the demurrer expended.

He then pleaded not guilty, was tried, and acquitted, and the final judgment was that he "be discharged and that Ouachita county pay all costs herein expended."

In taxing up the costs in the case, the clerk taxed defendant with costs on the demurrer to the indictment, \$7.30, including a fee of \$5 to the prosecuting attorney. Defendant filed a motion to retax the costs, which was overruled by the court, and he appealed.

It is submitted for appellant—first, that he should have been taxed with no costs; and second, that if taxable with the costs of the demurrer, there is no statute allowing the prosecuting attorney a fee of \$5 on a judgment merely overruling a demurrer to an indictment.

I. Ordinarily, the costs in a criminal case will abide and follow the final judgment. But, if in the course of the

prosecution, the court has specially adjudged the cost of some some particular matter against defendant, the general judgment for costs against the county on his acquittal will not relieve him from such specially adjudged costs.

II. There is no statute allowing a prosecuting attorney a fee of \$5 on a judgment overruling a demurrer in a criminal prosecution. In criminal prosecutions he is allowed no fees except on convictions.—Fees Act, thirteenth Dec., 1875, Sec. 1.

He is allowed a fee of \$5 “for each judgment obtained on complaint, information, or otherwise in the name of the State or any county.”—Ib. But this has no application to a judgment merely overruling a demurrer to an indictment in a criminal case.

Reversed and remanded to the court below with instructions to sustain the motion to retax the costs by striking from the costs taxed against appellant the fee of \$5 to the prosecuting attorney.
