UNITED STATES *ex rel.* PHILLIPS *v.* GAINES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 109. October Term, 1879. — Decided March 15, 1880.

A court has no power to award costs in criminal proceedings unless some statute has conferred it.

In Tennessee the costs of a criminal prosecution are made by statute a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer when the proper foundation has been laid for such an order by the court; but in this case the steps required by law to be taken in order to charge such costs upon the State as a debt had not been taken.

THE case is stated in the opinion.

MR. JUSTICE STRONG delivered the opinion of the court.

This case comes before us by writ of error, in a case where there was a certificate of division between the judges of the Circuit Court for the Middle District of Tennessee.

It is a petition for a *mandamus* to the comptroller of the State, commanding him to issue his warrant to the state treasurer for the payment of a bill of costs of an indictment against Phillips, one of the relators, and others not named.

The petition represents that on the 10th of October, 1870, the petitioner Phillips and others were indicted in the county of Putnam for the murder of one Stephen Ford; that after his arrest, the said Phillips presented his petition to the state court, praying for a removal of the indictment into the Circuit Court of the United States, under and by virtue of the acts of Congress of March 3, 1863, May 11, 1866, and February 5, 1867; that the state court ordered and adjudged that the cause should be thus transferred and that copies of the record and all proceedings in that court were made out and duly filed in the said United States Circuit Court. The petition further represents that the Circuit Court took cognizance of the case until 1874, when the State of Tennessee, by her attorney, appeared and dismissed the case, agreeing that the costs should be adjudged against the State; that the court accordingly rendered such a judgment, and that a warrant for the payment of the costs had been demanded from the comptroller and refused.

A portion of the record of the indictment and of the proceedings

thereon including what purports to be a bill of costs and the judgment of the court certified by the clerk and made an exhibit is appended to the petition. It is evidently incomplete. It does not contain the petition filed in the state court for the removal of the cause. The brief of the plaintiff in error, however, states that the killing, for which Phillips was indicted, was an act of war and in battle; that the petitioner adhered to the cause of the government, and that Ford, the person killed, was a belligerent and soldier of the army of the rebellion. These averments are not denied, and if they were made in the petition it may be assumed that the indictment was removable and properly removed under the act of Congress, and that the Circuit Court obtained jurisdiction of it.

The record made, as we have stated, an exhibit of the petition for a *mandamus*, shows that in the Circuit Court the State of Tennessee entered a *nolle prosequi* to the indictment; and that thereupon the court considered that the defendant, Phillips, be dismissed and go without day; that the State pay the costs of prosecution; and that the same be certified to the comptroller for payment. It also shows that a bill of costs including not merely the costs of prosecution but the defendant's costs was presented to the comptroller, and that a warrant upon the treasurer therefor was demanded, but was refused.

To this petition for a *mandamus*, the defence set up by the comptroller was twofold; first, that the Circuit Court of the United States had no power to render the judgment for costs against the State of Tennessee; second, that the court had no power to enforce the collection of the judgment for costs by *mandamus* by reason of the facts averred in the petition, the defendant being an officer of the State and the court having no power to control his action. For these reasons the court refused to grant the writ, and that refusal is now assigned for error. We are not, however, called upon to consider them, in view of the facts of the case as they are made to appear.

Costs in criminal proceedings are a creature of statute, and a court has no power to award them unless some statute has conferred it. By the common law, the public pays no costs. In England, the king does not, and the State stands in place of the king. This is the rule in the State of Tennessee. *Mooneys* v. *State*, 2 Yerger, 578. But in that State, statutes have changed the rule. The act of 1827, c. 36, Hay and Cobb, 54, enacted as follows:

"In all criminal cases, above the grade of petit larceny, originating in the Circuit Courts, where the defendant may be acquitted, and in all cases where the defendant may be convicted and shall prove insolvent and unable to pay the costs, the same shall be paid out of the treasury of the State." Before that act, in cases of acquittal by the verdict of a jury, costs were to be adjudged against the county. Act 1813, c. 136, § 3.

The act of 1827 had no application to costs in cases ended by a *nolle prosequi*. But an act passed in 1832, c. 8, § 2, enacted that in all prosecutions for offences subjecting the offender to confinement in the jail and penitentiary house of the State in which a *nolle prosequi* shall be entered, or the defendant or defendants in such prosecution shall be otherwise discharged, the costs of such prosecution shall be paid by the State in the same manner and under the same provisions as in cases where the defendant or defendants may be acquitted by the verdict of a jury. The indictment against Phillips was such a case. Conceding, then, that the costs of the prosecution in that case were chargeable to the State, was the comptroller bound to issue his warrant for the bill presented to him? It is made his duty by the law of the State, to examine and adjust all accounts and claims against the State, which are by law to be paid out of the treasury, and to draw warrants upon the treasury for the sums which upon such examination and adjustment, may be found due from the State. Civil Code, § 207. But the statutes of the State make some special provisions respecting costs. Before the comptroller can issue a warrant for their payment, a bill of fees and costs must be presented to him in legal form, and it must be shown that all the preliminary requisites of the law have been complied with. *State* v. *Delap*, Peck, 91. An examination of the state statutes will reveal what these preliminary requisites are. Section 5569, (Thompson and Steger's Compilation,) declares that the costs chargeable upon the State or county in criminal cases shall be made out so as to show the specific items, and be examined and entered of record and certified to be correct, by the court or judge before whom the cause was tried or disposed of, and also by the district attorney. Section 5579 directs that a copy of the judgment and bill of costs, certified by the clerk of the court and by the Attorney-General and judge shall be presented to the comptroller, etc., . . . by the clerk or some person authorized by him, in writing, to receive

the same, whereupon a warrant shall issue for the amount. Provisions somewhat similar are found in §§ 5571 and 5572.

In the present case it does not appear that these prerequisites to a comptroller's warrant had been complied with. The bill of costs had not been taxed, nor had it been examined and certified by the Circuit Court, nor by the Attorney General or district attorney, and it contained the costs of the defendant, for which the State is not liable.

Though, therefore, the costs of the prosecution are undoubtedly a debt of the State, for which the comptroller may be compelled to draw a warrant upon the state treasurer, the demand made upon him by the relators was unauthorized by law; and, consequently the *mandamus* was properly refused.

The judgment of the Circuit Court is *Affirmed.*

Mr. John P. Murray and *Mr. Benton McMillan* for plaintiffs in error. No appearance for defendant in error.

KNICKERBOCKER LIFE INSURANCE COMPANY *v.* SCHNEIDER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

No. 163. October Term, 1879. — Decided March 2, 1880.

When the plaintiff in an action at law on a life insurance policy against the insurer avers in his declaration that the company had been notified of the death of the person whose life was insured in the policy, and that the necessary preliminary proofs required by it had been made, and the answer is a general denial of all and singular the allegations of the petition so far as the same may have a tendency to give to said plaintiffs any right or cause of action against the respondent, and, not specially traversing the allegations as to notice and proof, sets up specific defences, on which alone the defendant relies, it is not necessary to prove the notification, nor that the necessary preliminary proofs were made.

The case is stated in the opinion.

Mr. Chief Justice Waite delivered the opinion of the court.

This was a suit on a policy of insurance for $20,000 issued by the plaintiff in error on the life of Gustav Osterman in favor of Schneider & Zuberbier, his creditors. The policy provided for payment within three months after due and satisfactory proof of the