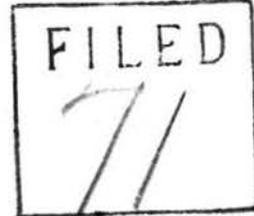


COSTS) Costs cannot be taxed against any party to
HABEAS CORPUS) a habeas corpus proceeding.

January 3, 1938

Honorable John C. Pope
Prosecuting Attorney
Webster County
Marshfield, Missouri



Dear Sir:

This is to acknowledge receipt of your request of November 30, 1937 for an opinion, reading as follows:

"A person is held in the county jail for first degree murder without bail. He applies to the Supreme Court for a writ of Habeas Corpus, and the Supreme Court admits him to bail. Who is liable for the costs of such proceedings?"

A diligent search of our statutes has failed to reveal who would be liable for the costs in a habeas corpus proceedings. This very situation arose in the case of Ex parte Nelson, 253 Mo. 627. In this case, an application for a writ of habeas corpus was granted by the Supreme Court and the costs were taxed against the petitioner. Thereafter, a motion was filed by petitioner to set aside the order taxing the costs against him, and the court, in ruling upon the motion to set aside the order taxing the costs, said:

"At the common law no costs were recoverable. (City of St. Louis v. Meintz, 107 Mo. 611.) Costs in Missouri being, therefore, purely creatures of the statute, enactments in relation thereto must be strictly construed. (State ex rel. v. Seibert, 130 Mo. l.c. 217; St. Louis & Gulf Railway Co. v. Cape Girardeau, etc. Railway Co., 126 Mo. App. 272; Lucas v. Brown, 127 Mo. App. 645.)

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"We find upon an examination of our statute in regard to habeas corpus no provision therein in regard to the taxation of costs. Reference must be had, therefore, to the general statute which provides (Sec. 2263, R. S. 1909) that 'in all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law.' In the application of this general rule to the case at bar, we are met with a condition which precludes the assessment of the costs against 'the other party' or the officer who had the petitioner in custody at the time of the issuance of the writ. The officer, who was the sheriff of Jackson county, held petitioner under a writ regular on its face which had been issued by a court having jurisdiction of the subject-matter. This was ample to protect the sheriff and there is, therefore, no authority for the taxation of the costs against him; nor is there authority for the taxation of same against the petitioner. In addition to the absence of a statute, there is a manifest injustice in burdening the successful party to a proceeding with the costs of same, especially in a habeas corpus suit where the purpose of the action is to secure the liberty of the petitioner. ***

"There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. In the absence of such power we cannot and should not concern ourselves with payment of costs heretofore made by the parties to this proceeding or recognize any agreements entered into by them in regard to same."

#3 - Honorable John C. Pope

January 3, 1938.

We do observe, however, that certain charges relative to the allowing of the writ of habeas corpus may be paid by the petitioner. This is provided for by Section 1435 of R. S. Mo. 1929, reading as follows:

"The courts and magistrates allowing a writ of habeas corpus may, in their discretion, require, as a duty to be performed in order to render the service thereof effectual, that the charges of bringing up the prisoner and conveying him back, if remanded, shall be paid by the petitioner; and in such case the court or magistrate shall, on the allowance of the writ, specify the amount, which shall not exceed ten cents per mile; and the amount so to be paid shall be stated in writing on the writ, signed by the clerk, if in term, or by the officer by whom the writ is awarded."

CONCLUSION

In view of the above, it is our opinion that since the Legislature has not enacted any statute governing costs being taxed against any party to a habeas corpus proceeding, that no costs may be taxed against any party to such proceeding.

Yours very truly,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General