

4641.

COSTS — HABEAS CORPUS PROCEEDINGS — WHERE PATIENT OF CITY HOSPITAL RELEASED, PAID BY MUNICIPALITY—WHERE PERSON ARRESTED UNDER CITY ORDINANCE RELEASED, PAID BY STATE.

SYLLABUS:

1. *Where a person confined in a city hospital quarantine ward under a health regulation at the instance of a municipal corporation is discharged by a habeas corpus proceeding the cost of such action should be taxed against such municipal corporation.*

2. *In cases where persons are confined by arrest under city ordinance and are later released under habeas corpus proceedings, the cost of such action shall be taxed to the state and paid out of the county treasury upon the warrant of the county auditor.*

COLUMBUS, OHIO, September 22, 1932.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads:

“At the request of the City Solicitor of Cincinnati, Ohio, we are submitting the following questions for your opinion:

Question 1. In cases where persons are confined in a city hospital quarantine ward so designated by the local Commissioner of Health under regulation No. 24, Ohio Sanitary Code, (revised August 20, 1925), and are later released by the issuance of a writ of habeas corpus, is a municipal corporation liable for the payment of court costs under sections 12180 and 12189 of the General Code?

Question 2. In cases where persons are confined by arrest under city ordinances and are later released under habeas corpus proceedings, is the municipality liable for the payment of court costs?”

Section 12162, General Code, defining who may grant a writ of habeas corpus, reads as follows:

“The writ of habeas corpus may be granted by the supreme court, the court of appeals, the common pleas court, the probate court, or by a judge of either.”

It should be noted that costs were formerly unknown to common law and are entirely dependent upon statute, and so may be regulated, changed, or entirely taken away at the will of the legislature. 11 Ohio Jurisprudence 12; Opinions of the Attorney General for 1927, page 239.

Section 12180, General Code, to which you refer, reads as follows:

“If it appears that the prisoner is in custody under a warrant or commitment in pursuance of law, the return shall be prima facie evidence of

the cause of detention. If he is restrained of his liberty by alleged private authority, the return of the writ shall be considered only as a plea of the facts therein set forth, and the party claiming the custody shall be held to make proof of such facts. Upon the final disposition of a case, the court or judge shall make such order as to costs as it requires." Section 12189, General Code, to which you also refer, reads:

"The fees of officers and witnesses shall be taxed by the judge, on return of the proceedings on the writ, and collected as a part of the original costs in the case. When the prisoner is discharged, the costs shall be taxed to the state, and paid out of the county treasury, upon the warrant of the county auditor. No officer or person shall demand payment in advance of any fees which he is entitled to by virtue of the proceedings, when the writ is demanded or issued for the discharge from custody of a person confined under color of proceedings in a criminal case. When a person in custody by virtue or under color of proceedings in a civil case is discharged, costs shall be taxed against the party at whose instance he was so in custody. If he be remanded to custody, costs shall be taxed against him."

As to your first question, since the person whose release was effected by habeas corpus was not confined under color of proceedings in a criminal case, the rule as to the taxing of costs by virtue and under color of proceedings in a civil case applies, and such costs should be taxed against the party at whose instance the person confined was in custody.

It would follow therefrom that if the person in question was confined in a city hospital quarantine ward at the instance of the municipality then such municipal corporation is liable for the payment of the costs of such action.

In this respect it should be noted that a health commissioner is not a municipal officer but is an employe of the city health district. Consequently, if a person was confined at the instance of a municipal health commissioner the costs of a successful habeas corpus action should be borne by such officer or the city health district.

Coming now to your second inquiry, namely, the payment of costs incurred in a habeas corpus proceeding to release a person confined by arrest under a city ordinance, reference to the payment of such costs is contained in Section 12189, *supra*, which reads:

"When the prisoner is discharged the costs shall be taxed to the state and paid out of the county treasury upon the warrant of the county auditor."

While this sentence does not specifically refer to costs in a case of one confined under color of proceedings in a criminal case, it follows that, since the statute specifically provides for the method of payment of costs in a civil case, the sentence necessarily refers to costs incident to a discharge of a prisoner confined under color of proceedings in a criminal case.

In specific answer to your second inquiry, I am of the opinion that, in cases where persons are confined by arrest under city ordinance and are later released under habeas corpus proceedings, the costs of such action shall be taxed to the state and paid out of the county treasury upon the warrant of the county auditor.

Respectfully,

GILBERT BETTMAN,
Attorney General.