

CONFEDERATE HOME:

In the event of failure of Legislature to comply with terms of deed and statute in maintaining Home and its inmates, State's title cannot be divested without consent of Legislature.

September 20, 1944

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Dr. Charlton F. Chute  
Director of Research  
Legislative Research Committee  
Jefferson City, Missouri

Dear Sir:

Recently you submitted the following request for the opinion of this department:

"Is the State of Missouri legally obligated to maintain the Confederate Home at Higginsville until the last of the inmates dies or could the present inmates (ten in number) be transferred and supported in some other state or private institution or home?"

"Statutes covering this question are found in the Revised Statutes of Missouri, 1939, Chapter 124, Article I, and the session laws of 1943, page 953. We are also enclosing a copy of the deed conveying the Confederate Home from the Executive Committee to the State of Missouri."

The transfer of the Confederate Home and its lands to the State of Missouri was effected by a deed dated March 16, 1897, by the governing body of the Confederate Home of Missouri, a corporation:

" \* \* \* in consideration of the assumption of The State of Missouri of the Maintenance and support of said Confederate Home for the term of twenty years or so long as it shall be needed for the main-

tainance and care of infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans, all as contemplated and provided in the aforesaid act of the Legislature of Missouri, approved March first 1897, convey, grant, bargain and sell, in fee simple forever unto the said State of Missouri, the following described tracts or parcels of land situate in Lafayette County, State of Missouri, near the town of Higginsville, Missouri, known as the Confederate Home of Missouri, \* \* \*."

The authority for this transfer is found in the Act of March 1, 1897 (Laws of 1897, page 26). The pertinent portions of the Act are:

"Section 1. That the institution known as the confederate home, which is situated near Higginsville, in the county of Lafayette, in the state of Missouri, is hereby declared to be an eleemosynary institution of the state of Missouri, in which infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans may be maintained and cared for.

"Sec. 2. That the purpose of this act is that the state shall assume, and does hereby assume, the maintenance and support of said confederate home for the term of twenty years, or so long as shall be needed for the purpose of section 1. In consideration of this action upon the part of the state, the present executive committee of said confederate home shall convey to the state of Missouri all the property of said confederate home now owned and held by it under its corporate franchise procured from the state under article X, chapter 42, Revised Statutes of Missouri, 1889, consisting of three hundred and sixty two and

86.100 acres of land, more or less, near Higginsville, Lafayette county, Missouri, except two and eighty-six one hundredths (2 86/100) acres for cemetery lot, together with all improvements thereon, and all personal property now at said home, and the deed therefor, after being duly recorded, shall be deposited with the secretary of state."

In 1943 the Board of Trustees of the Confederate Home was abolished and the custody of the Home's property, its affairs and management was vested in the Board of Managers of the State Eleemosynary Institutions (Laws of 1943, pages 953-955, inclusive). The State's undertaking to maintain the Confederate Home and its inmates was again affirmed, as attested by the following language:

" \* \* \* The said Board of Managers of the State Eleemosynary Institutions shall continue to maintain the Confederate Home and Memorial Park at Higginsville for the purpose for which it was established so long as it shall be needed for the maintenance and care of infirm and dependent ex-confederate soldiers and sailors, their wives, widows and orphans." (Section 15129, Laws of 1943, page 954.)

The request, then, may be stated in the following vein: In the event the obligation or undertaking to maintain the Home and its inmates might be disregarded by the Legislature, either by transferring the inmates to some other institution and the Home's use changed by appropriate statutes, or by a failure or refusal to appropriate sufficient funds, would the Home and its property be lost to the State of Missouri?

The obligation to maintain the Home still exists (Section 15129, Laws of 1943, page 954). In this connection, however, it is noted that the Board of Managers of the Eleemosynary Institutions does not have title to the property, but only custody; title and ownership being in the State of Missouri; and that the undertaking to main-

tain the Home exists by legislative enactment and not by virtue of any contract or agreement of the Board of Managers of the State Eleemosynary Institutions. This difference is emphasized by the rules of law to the effect that while the Eleemosynary Board may be sued upon its contracts (Jones v. White, 77 S. W. (2d) 603, l. c. 608), the State may not be sued without its consent (Nacy v. LePage, 341 Mo. 1039, 111 S. W. (2d) 25; Zoll v. St. Louis County, 345 Mo. 1031, 124 S. W. (2d) 1188). The State of Missouri has never consented that it be sued.

The answer to the question, we believe, does not pivot upon whether a conveyance may be forfeited when the deed does not contain a provision for such forfeiture (Choteau v. City of St. Louis, 331 Mo. 781, 55 S. W. (2d) 299), or whether the transfer of land may be set aside for partial failure of consideration (Lewis v. Brubaker, 14 S. W. (2d) 982, l. c. 988). As the State has for some years maintained the Home and its inmates, the solution, we believe, turns upon the power to divest the State of title without legislative sanction. The divestment could come about solely by judicial procedure absent legislative consent.

It is a truism that under our separation of powers doctrine the three branches of government are separate and independent, and that the judiciary may not control the actions of the other divisions. (State ex rel. Major v. Shields, 272 Mo. 342; 16 C. J. S., Secs. 104, 106; In the matter of State of New York, 65 L. Ed. 1057; Cunningham v. Railroad Co., 27 L. Ed. 992.)

In the last cited case the Supreme Court of the United States used the following language, l. c. 996:

"No foreclosure suit can be sustained without the State, because she has the legal title to the property, and a purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest, adverse to plaintiff, in this suit, is the interest of the State of Georgia in the property, of which she

has both the title and possession.

"On the hypothesis that the foreclosure by the Governor was valid, the trust asserted by plaintiff is vested in the State as trustee, and not in any of the officers sued.

"No money decree can be rendered against the State, nor against its officers, nor any decree against the Treasurer, as settled in Louisiana v. Jumel.

"If any branch of the State Government has power to give plaintiff relief it is the legislative. Why is it not sued as a body, or its members by mandamus to compel them to provide means to pay the State's indorsement?

"The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process."

This department should not be understood as in any manner sanctioning, directly or indirectly, the noncompliance with an undertaking. Neither does it desire to offer gratuitous suggestions to the General Assembly upon questions of public policy. The department concerns itself solely with the legal question presented by the request.

#### CONCLUSION

It is the opinion of this department that in the event the State of Missouri, through its General Assembly, did not satisfy the undertaking or obligation to maintain the Confederate Home at Higginville and its inmates according to the terms provided by the conveyance of the Home

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and the applicable statutes, title to the property could not be divested from the State of Missouri without legislative sanction.

Respectfully submitted

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APPROVED:

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COVELL R. HEWITT  
Acting Attorney General

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