INSANE PATIENTS: When law requires that patient be served by process personally, regardless of the effect upon the patient the insane asylum must permit such service.

March 18, 1939

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Honorable W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We herewith submit the following as our opinion, as requested in your letter of February 16th, concerning question set out in letter addressed to you from State Hospital No. 3, Nevada, Missouri, dated February 15th, which is as follows:

> "The question has been raised in our Institution-- Is it within our rights as Physicians, to refuse the Sheriffs and Deputy Sheriffs as Servers, to serve papers on our patients -- of divorce proceedings, law suits or estate settlements, when the effects on our patients is delerterious to the therapy under which our patients are being treated? Can we legally refuse these papers being served on our patients, or does the Law require that they be served, when we rightfully know the bad effects it will produce on our mental patients?
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> "If I am informed correctly, in private practice, papers cannot be served on patients in which the effect would be to the detriment of the patient under treatment. Insofar as we are a State Institution, do we have to allow this to be done? "

Section 488, R. S. Mo. 1929, relates to process served on an insane person after a guardian is appointed. Said section reads as follows:

> "In all actions commenced against such insane person, the process shall be served on his guardian; and, on judgment against such insane person or his guardian, as such, the execution shall be against his property only."

In the decision of Graves v. Graves, 255 Mo. 468, l. c. 481, the court sets forth the rules with reference to service on insane persons before and after a guardian is appointed. The decision, in conformity with the plain wording of the statute, holds that after a guardian is duly appointed all service should be had on the guardian. We herewith quote extensively from said decision for the reason that we believe it contains a complete answer to your question and on which we ultimately base our conclusion:

> "Under Chapter 2, article 19, which deals with 'Guardians and Curators of Insane Persons,' we find this section 514, supra, which reads:
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> "'In all actions commenced against such insane person, the process shall be served on his guardian; and, on judgment against such insane person or his guardian, as such, the execution shall be against his property only.'
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> "This section, as the context of the chapter shows, has reference to lunatics who have been adjudged insane, and had guardians appointed. It has no reference to lunatics without guardians. The general rule is, that a lunatic without a guardian, although having been adjudged insane, can be sued. Thus in 22 Cyc. 1224, it is said:

"'An insane person not under guardianship may be sued the same as a sane person. At common law the rule was the same after inquisition of lunacy and the appointment of a guardian or committee; but now if there be a committee or guardian it is generally necessary to join him as a party defendant, and in some states plaintiff is required to obtain leave of court before instituting suit against an adjudged incompetent. After restoration to sanity the former lunatic may of course be sued the same as any other person.'

"And in such case, where there is no guardian, the court can appoint a guardian ad litem to make the defense. Thus in 22 Cyc., 1231, the rule is stated:

"'But where no guardian or committee has been appointed, or if appointed refuses to qualify or has been removed, the action may be prosecuted or defended in his name, with the sanction of the court, by any competent person as the insane person's next friend, even though the lunatic has not been judicially declared insane, if it otherwise appears that he is insane. A next friend may prosecute a writ of error in his insane defendant's behalf, or may bring a suit to protect the lunatic's estate through a receivership until a guardian can be appointed; but a suit brought by a next friend is substantially that of the insane person, and he has no authority to bind the lunatic or his estate, and is subject to removal at any time by order of the court.'

"And on page 1233 it is further announced as the rule:

"'Likewise where a guardian or committee has not been appointed, or if appointed refuses to qualify or has been removed, a guardian ad litem should, upon a proper suggestion or petition, be appointed to defend in the name of the insane person, even though defendant has not been judicially declared insane, if the fact of insanity is shown by affidavit or otherwise. A guardian ad litem so appointed is under the direct control of the court, and may make any defense either by way of answer or cross bill or both that occasion may require or the court may order.'

"This court has specifically recognized the rule in the case of Bensieck v. Cook, 110 Mo. l. c. 183, whereat we said:

"'The trial court pursued the right course in appointing a guardian ad litem for defendant, Joseph Cook. (Mitchell v. Kingman, 5 Pick. 431; Buswell on Insanity, sec. 132; Sturges v. Longworth, 1 Ohio St. 544.) And the power of the court to appoint such a guardian, of necessity, concedes the power of the court, upon the proper basis of facts being presented, to render a judgment as binding on the lunatic and his property interests, as a similar judgment would be upon a sane person.'

"In that case, like this, Cook was in confinement for insanity when service of summons was had. In Cyc.

under the paragraph quoted will be found a collection of the cases supporting the rule. It is safe to say that an adjudged lunatic without a guardian, may be sued, by having personal service of summons upon him, but upon suggestions of insanity, a guardian ad litem should be appointed, to conduct his case under the supervision of the court. When such is done, then the judgment binds the lunatic. But the trouble with the case at bar is that this petition seems to aver that this judgment in the original case was rendered without such steps. If so it states a good cause of action. If no guardian ad litem was appointed, then the lunatic never had his day in court in the full sense of the term, and a judgment rendered against him after a suggestion of lunacy as here, would smack of legal if not actual fraud. It may be that this petition has been artistically drawn for the purpose of withholding the fact of a guardian ad litem, but if so the defendant should have cast her anchor windward, and not contented herself with a demurrer. As it stands, we think this petition stated a cause of action, and the trial court erred in sustaining the demurrer."

Conclusion.

We are of the opinion that you cannot legally refuse to permit officers to serve process on any patient in an insane asylum, even though it has a disturbing effect on the patient. This conclusion applies mainly to patients who have been committed to the institutions without guardians. The decision and the statute, quoted supra, explain fully

this exception. In matters relating to divorce petitions the service must be had on the patient personally. In ordinary lawsuits or estate settlements, mentioned in your letter, the facts in each individual case will have to govern. In other words, when the law requires that the patient be served personally in any matter, regardless of the condition of the patient, sheriffs, constables and process servers are within their rights when they serve any process on said patients if the process is legal on its face.

Respectfully submitted,

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APPROVED:

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