ELEEMOSYNARY INSTITUTIONS: Superintendent cannot return ~~xpaxx~~ patients to county because of inadequacy of appropriation.

April 27, 1942

H-20

Mr. Ira A. Jones, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

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Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

> "A letter signed by Miss Margaret M. Cobb, Assistant Budget Director, calls attention to the following:
>
> "'No expenditures shall be made and no obligation incurred by any department without the certificate of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same.' * * * 'Any officer or employee of the state who shall make any expenditure or incur any obligation from the auditor shall be personally liable and liable on his bond for the amount of such expenditure or obligation.'
>
> "Miss Cobb further quotes you, as Attorney General:
>
> "'It is our further opinion that a contract for printing to be furnished the Grain Inspection and Weighing De-

partment in excess of the appropriation for that purpose, * * * would be without express authority of law, and therefore void, and the Legislature under the provisions of Section 48 of Article IV of the Constitution of Missouri, would be prohibited from paying or authorizing the payment of any such claim.'

"Due to the financial condition of the Operations account at certain hospitals, we find that a deficit will definitely occur, as a result of increased cost of food prices, if the present population of these hospitals is maintained at its present level.

"The only alternative, in view of the above facts, that we can see is to reduce the patient population at these hospitals where these conditions occur.

"We would like an answer to the following two specific questions:

"Do the superintendent and his staff have the right to discharge or parole from the hospital, due to lack of funds for proper food and drugs, any patient even though such patient may, in the opinion of the superintendent and his staff, have not recovered and may be definitely psychotic and possibly will be a menace to the community?

"If the superintendent and his staff have the right to discharge any patient under the foregoing conditions and the counties and relatives refuse to take such patient, what procedure has the superintendent to follow?"

Section 9321, R. S. Mo. 1939, provides as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."
>
> (Underlining ours.)

Section 9369, R. S. Mo. 1939, provides in part as follows:

> "* * * * * * * * * * * * Provided, that whenever any person has been received as an inmate of any such institution, and thereafter the county, municipality, guardian, trustee or person responsible for the support of such inmate shall neglect or refuse to pay, within the time and in the manner required by law or the rules and regulations of such institution, any installment required to be paid for the support of such inmate, it shall be the duty of the superintendent or the chief officer of such institution to return such inmate to the sheriff of such county or municipality, or to the guardian, trustee or person responsible for the payment of such installment, and at the expense of such county, municipality, guardian, trustee or person: * * * * *."

In Rice v. Gray, 34 S. W. (2d) 567, it is said:

> "The state is charged with the duty of caring for the insane within its borders."

However, as pointed out in Smoot's "Law of Insanity", page 115:

> "While the individual primarily has the right to restrain and care for insane members of society, yet the paramount duty to do so rests upon organized government in the proper exercise of its function of looking after the welfare of its citizens, to secure the well being of those within its protection. * * * * * * This duty rests primarily upon the state, especially if the retention is in a state institution. * * * As between the state and county or township the duty of care for its indigent insane rests upon the state in the first instance, but may look to the county or township for reimbursement. Liability in such cases, is, as a rule, fixed by local statutes."

The underlined portion in Section 9321, supra, is ambiguous in so far as it provides when a patient may be discharged or paroled by the superintendent. It is a rule of statutory construction that in order to determine the legislative intent in the case of ambiguity resort may be had to the history of the statute. State v. Forest, 162 S. W. 706, 59 C. J. 1017.

Under the territorial government and in the early days of statehood the burden of caring for the indigent insane

was placed upon the respective counties. Territorial Laws of 1817, Chapter 191, Section 1, Revised Statutes of Missouri 1825, page 434. It was not until 1855 that a state asylum for the insane was provided for by our legislature. Laws of Missouri 1854-1855, page 142. Section 11 of that act provided as follows:

> "Persons afflicted with any form of insanity may be admitted into the asylum when the superintendent deems it probable that their condition can be improved by the care and treatment of the institution and any patient may be discharged by the superintendent whenever he may believe that the condition of such patient cannot be improved by a longer stay in the asylum."

Under this original law the cost of the care and treatment of the indigent insane was paid by the state. This fact probably accounts for Section 3 of Article 2 of this Act, which section is the same as Section 9330, R. S. Mo. 1939. This law provides as follows:

> "The indigent insane of this state shall always have the preference over those who have the ability to pay for their support in a state hospital; and if there are not provisions in the state hospitals for the accommodation of all the insane persons in the state, then recent cases of insanity, by which term are meant cases of less than one year's standing, shall have preference over cases of more than one year's standing: Provided, no county shall have in the institution more than its just proportion, according to its insane population."

It will be seen, therefore, that the state asylum for the insane was inaugurated for the treatment and improvement of the condition of the insane of the state and was intended to be a hospital rather than a place of confinement. The

superintendent was to admit only those whose condition could be improved and could discharge those whose condition he believed could not be improved by a longer stay. The duty of the county to provide for the care of the indigent insane was not abrogated by this law, as a reading of what is now Section 9330 discloses that the state insane asylum was not intended to provide for all the insane persons in the state.

Later in 1855, however, the cost of the maintenance of the indigent insane in the state hospital was transferred to the respective counties (Revised Statutes of Missouri 1855, Chapter 11, Article 3), but the requirements for admission and discharge remained the same.

In 1895 the General Assembly amended the law relating to admission and discharge of patients (Laws of Missouri 1895, page 42), and provided as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospital for the care and treatment of the insane, and any patient may be discharged by the superintendent whenever, in his opinion, the reason of such person is fully restored: Provided, that nothing herein shall be so construed to prevent any superintendent from paroling any patient whenever he deems it best for such person confined in the hospital; and provided further, that county courts are hereby prohibited from removing from the hospital any indigent insane persons, except as herein provided."

This statute remained the law until 1937 when it was again amended (Laws of Missouri 1937, page 513), to read as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment

> of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

In 1909 what is now Section 9369, R. S. Mo. 1939, which provides that patients may be returned to the county on the failure of the county to pay for their maintenance, was passed (Laws of Missouri 1909, page 572).

It will be seen, therefore, that since the establishment of the first state insane asylum or hospital that the word "discharge" in Section 9321, supra, was used in the sense of releasing a patient because his mental condition was such that he should be discharged.

From 1855 to 1895 a patient could be discharged only when no further improvement in his mental condition could be brought about. From 1895 to 1937 the patient could only be discharged when his reason had been restored. We believe that the 1937 General Assembly, in providing that a patient could be discharged "whenever in the judgment of the superintendent and his staff such persons should be discharged", intended not to give carte blanche power to the superintendent to release the patient for any reason or no reason, but intended to continue the procedure that had been in effect the previous eighty-five years, that is, of discharging the patient when his mental condition was such that it was beneficial to such patient that he should be released. The 1937 General Assembly, realizing that in certain cases while a patient might not be fully restored to reason, still if he was cured to such an extent that he could be discharged, gave to the superintendent wide discretion in determining this fact. That the word "discharge" should be given this interpretation we believe is borne out by the fact that in providing for the release of patients for other than psychotic reasons the Legislature has specifically provided by statute

that in case the county or person liable for the cost of the maintenance of the patient in the asylum did not make such payments the patient could be returned to the county or person.

The duty imposed upon the superintendent of state hospitals, as stated in Section 9321, supra, is that he "shall" admit to the hospital persons who are insane "for the care and treatment of the same." The question arises whether a superintendent of a state hospital can refuse to do his duty of caring for and treating the insane because his appropriation is not sufficient to enable him to continue throughout to the end of the biennium. In State ex inf. McKittrick v. Williams, 144 S. W. (2d) 98, our Supreme Court said:

> "A public official holds his office cum onere with all responsibilities attached."

In that case the sheriff of Jackson County attempted to excuse his failure to suppress gambling and vice because he had not sufficient staff for proper enforcement. Our Supreme Court held that this did not excuse his failure to perform such duties. The case of Commonwealth ex rel. School District v. Tice, 282 Pa. 595, 128 Atl. 506, is cited in the Williams case, supra, and in that case it is said:

> "The office being held cum onere the only course open to the official is performance or resignation."

In the recent case of Crane v. Frohmiller, 45 Pac. (2d) 955, the Supreme Court of Arizona had before it the question of whether an officer could refuse to perform his duty because of the insufficiency of his appropriation. The court, through Judge Lockwood, said:

> "If it be necessary, * * * * * * * to exhaust the appropriation for that purpose, so that other matters arising at a later date cannot properly be taken care of, he should perform the instant

> duty with the utmost economy consistent with efficient service, and leave to the proper authorities of the state, to wit, the Governor and the Legislature, to determine whether it is necessary at a later time to provide him with additional funds.
> * * * * * * * * * * * * * * * * * * *"
> (Underlining ours.)

In Wiggins v. Kerby, 38 Pac. (2d) 315, an earlier decision by the same court, it is said:

> "* * * * * * * * * * * * * * * * * * *
> When there are charges fixed by general law against an appropriation of this kind, such, for instance, as the salary of the head of an office or department, they should be deducted from the total and the balance used to pay the legal and necessary obligations of the office as they arise until the appropriation is exhausted. In planning how the appropriation should be spent he should, of course, use his best efforts to reduce the expenses of administering his office to such a point that the appropriation will cover the cost of all the necessary duties thereof, but in any event the obligations so incurred must be paid from the appropriation in the order in which they arise, no matter what effect such action may have in exhausting the appropriation.'"

The ruling in the above cases is that a public official cannot refuse to perform his duty because his appropriation would be depleted to such extent that he would not be able to function for the entire period covered by the appropriation, and this rule, we believe, applies in the instant case.

We are aware that in the case of State ex rel. Breen v. Vanjord, 92 Pac. (2d) 273, 108 Mont. 447, the Supreme Court of Montana held that the State Board of Public Welfare could reduce the payments to old age pensioners below the sum fixed by the statute because of the inadequacy of the appropriation to cover payments for the whole biennium. A reading of that opinion discloses that the three judges who concurred in the majority opinion did so because the payments from the Federal government were to be made quarterly and, therefore, since the State aid was to conform with the Federal requirements that it was intended that a payment should be made every quarter of the year. It will be noted that a strong dissent was filed by two judges in this case. It therefore appears to us that since the duty imposed upon the superintendent of the state hospital is to provide for the care and treatment of insane patients and since he can discharge said patients only for a reason connected with their mental condition, that the fact that there is not sufficient appropriation to feed and maintain said patients for the entire biennium is no reason to discharge any of said patients, but that he must provide for their maintenance as long as the appropriation lasts.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

AO'K:CP APPROVED:

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Attorney-General