INSANE PERSONS: Notice and summons required of insane person before judgment of insanity in County Court. Temporary incarceration of officer in insane asylum without notice or summons for hearing in County Court does not create vacancy in office of Sheriff.

December 12, 1936.

12-21

FILED
57

Hon. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This department is in receipt or your letter of December 8, 1936, wherein you present the following facts and questions to us for an official opinion. Your letter is as follows:

> "We had an unpleasant task this morning in the County Court. Dave Ball, son of our present sheriff Austin S. Ball, filed a petition for his father to be adjudged of unsound mind. Sheriff Ball has been drinking to excess since he has been sheriff, but has not been dangerous. As you know he shot his son accidentally; and since the 15th day of November, 1936, he has been a menace to his family, himself and the community. Finally his son took the action just named.
>
> "The son, with the friends of Ball, and the physicians put on the evidence before the court that Ball was mentally deranged when he was full of liquor and wanted to kill his best friends. The Court was of the opinion that Sheriff must be confined for treatment because of his insanity from drink, and that he must be confined and he was ordered sent to Fulton. The State Highway Patrol Troopers took him over.
>
> "It was raised before the County Court as to whether the person informed against had to be present; as to whether he should

have counsel, as to whether he should have notice, and whether the person examined should have a jury? The procedure was had under sections 8643-8651 incl. of the 1929 statutes. It was opinion to the court that the Court has jurisdiction because was poor, and unable to pay his keep, was a pauper within the meaning of the law; and these sections applied; and none of the usual requirements as set out above was necessary in order to make the committment final. The procedure in the probate court does provide for the above requirements by statute in order to constitute due process. Under these sections stated, was I right in my opinion?

"Because of the order of the court under sections 8643-8651-1929, is there a vacancy in the office of the sheriff? If there is should the coroner of the county act or should the County Court declare a vacancy and appoint the sheriff-elect? That of course being their choice. The coroner does not want to act; as he is a physician with a large practice."

I.

The first question presented in your letter, in substance, is whether it is essential for the person informed against to be present, should he have counsel, should he have notice, and should he be tried before a jury?

Your letter states that you proceeded with the hearing as to the sanity of the sheriff under Sections 8643 to 8651, R. S. Mo. 1929, inclusive.

Section 8643 contains the procedure to be followed in instituting the proceeding, it being necessary for some citizen to file with the clerk of the county court a statement, in writing, to the effect that the person is insane, and that he has not sufficient estate to support him in a state hospital, and that the facts can be proven by two persons, one of whom is a reputable physician.

Section 8644 provides for the subpoenaing of witnesses, the last sentence of which is:

> "Subpoenas may also be issued for witnesses in behalf of the person alleged to be insane."

Section 8646 is as follows:

> "At the time appointed, unless the investigation shall be adjourned over to some other time, the said court shall cause the witnesses in attendance to be examined before themselves, or a jury, if one be ordered for the purpose, duly chosen and impaneled, according to the practice of the court. At least one of the witnesses examined shall be a reputable physician."

In the decision of Ex Parte Higgins v. Hoctor, 332 Mo. l. c. 1028, the Supreme Co rt in discussing the question of whether a person's rights are violated under the Fifth and Fourteenth Amendments to the Constitution of the United States, states:

> "Petitioner says these sections violate the Fifth and Fourteenth Amendments to the Constitution of the United States, contending that authorizing the probate court to find a person insane and to appoint a guardian of his person and property, without having him present and without the verdict of a jury, deprives him of his liberty and property without due process of law. Petitioner also contends they violate, for the same reason, Section 30 of Article II of the Missouri Constitution. Notice is essential to due process of law. (Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; Shanklin v. Boyce, 275 Mo. 5, 204 S.W. 187; State ex rel. Terry v. Holtcamp, 330 Mo. 608, 51 S.W. (2d) 13.) However, 'where due notice and an opportunity for a hearing have been given, the presence of the alleged insane person at the hearing is not essential to due process.' (12 C.J. 1211, sec. 987.) Nor does due process of law require a trial by jury, even in all criminal

cases. (2) Therefore, 'in the absence of any provision to the contrary in the State Constitutions, the several State Legislatures may provide for the trial of accused persons without a jury, or before a jury of less than twelve; and may provide that failure to demand a jury in certain cases shall be a waiver of the right to a jury trial otherwise existing.' (12 C.J. 1207, sec. 981, see, also, p. 1190, sec. 956; 6 R.C.L. 458, sec. 453, see, also, pp. 433-436, secs. 430-433.) Courts of equity have always determined issues of fact and constitutional provisions relating to jury trial do not apply to equitable actions. (35 C.J. 159-162, secs. 30, 31, 16 R.C.L. 209, sec. 27.) Offenses against municipal ordinances were triable, at common law and before the adoption of our present Constitution, without a jury and are not required to be tried before a jury now. (Delaney v. Police Court of Kansas City, 167 Mo. 667, 67 S.W. 589; City of St. Louis v. Von Hoffmann, 312 Mo. 600, 280 S.W. 421; as to due process of law see, also, City of St. Louis v. Schefe, 167 Mo. 666, 67 S.W. 1100, affirmed Schefe v. City of St. Louis, 194 U.S. 373, 24 Sup. Ct. 676, 88 L. Ed. 1024; City of St. Louis v. Fischer, 167 Mo. 654, 67 S.W. 872, 64 L.R.A. 679, 99 Am. St. Rep. 614, affirmed Fischer v. City of St. Louis, 194 U.S. 361, 24 Sup. Ct. 673, 40 L. Ed. 1018.) This court said in the Delaney case: '"Due process of law" does not necessarily mean a trial by jury. It simply means a day in court, according to the practice provided for such cases, involving, of course, notice and an opportunity to be heard before judgment is pronounced.'

"Concerning due process of law in insanity hearings, the Supreme Court of the United States said in Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165:

"'The due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course

> of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it.' (See, also, Chaloner v. Sherman, 242 U.S. 455, 37 Sup. Ct. 136, 61 L. Ed. 427; White v. White (Tex.), 196 S.W. 508, L.R.A. 1918A, 339.)
>
> "It seems to be rather generally held that at least to fulfill the requirement of due process of law 'there is no right to a jury trial in proceedings to determine the question of a person's insanity, except where, as in some jurisdictions, the right is conferred by statute.' (35 C.J. 182, sec. 71, and cases cited; 16 R.C.L. 205, sec. 23; see, also, 14 R.C.L. 560, sec. 11, 564, sec. 16.) Since an insanity hearing is a civil case, State ex rel. Peper v. Holtcamp, 235 Mo. 232, 138 S.W. 521, it would seem at least that due process of law does not require that there be a jury trial, whether demanded or not, and we so hold."

The above decision was rendered in reference to a hearing in the Probate Court, and while we are mindful of the fact that the question which you present relates to a sanity hearing in the County Court, yet we think that the principles of law stated in the above decision are applicable to the question which you present. We are, therefore, of the following opinion:

That in view of the provisions of Section 8644 that subpoenas may be issued for witnesses in behalf of the alleged insane person, and the fact that there is a trial necessary to determine the issues, would necessarily make notice to the alleged insane person essential to the validity of the hearing. The decision quoted, supra, does not make it mandatory for the alleged insane person to be present at the hearing. He could be represented by counsel, but in either event notice should be served upon him. The above decision and the authorities cited therein do not make it mandatory that the alleged insane person have a right of trial by a jury. Section 8647 states that "if, after such examination, the court or the jury, if one shall have been employed", would naturally make the matter discretionary.

II.

You do not state in your letter as to whether or not the evidence or the finding of the court in the hearing was to the effect that the alleged insane person was temporarily deranged or insane, or whether his insanity was of such a nature as to make him permanently incurable. Such a condition would affect the question of whether or not a vacancy exists in the office of sheriff of your county.

Section 11523, R. S. Mo. 1929, provides in part as follows:

> "Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court."

Section 11525, R. S. Mo. 1929, places the duties of the sheriff on the coroner when the office of sheriff shall be vacant by death or otherwise.

We assume that your county elected a sheriff at the last November election, who will assume his duties on January 1, 1937. Therefore, the vacancy, if any, is of short duration.

In discussing the question of whether there is a vacancy, it would appear from the facts that the present sheriff is unfortunate in that he has become incapacitated and demented from excessive use of intoxicating liquors and has been sent to a state hospital. This, in our opinion, would not constitute a vacancy for the reason that his mental incapacity may be of short duration. As an example, many county officers become ill during their tenure of office. They may be sent to hospitals out of the state, to remain away from their office for months, yet this would not constitute a vacancy within the meaning of the law, unless such officers resigned or declared an intention to abandon the office, or were removed.

There are no decisions directly bearing on the question in this state, but it was held in the case of State v. Pidgeon, 8 Ind. 132, as follows:

> "The insanity of an officer not shown to be incurable will not create a vacancy authorizing permanent appointment of another person in his place."

We are, therefore, of the opinion that no vacancy exists in the office of sheriff, and the statutes do not give the County Court any power to declare a vacancy. The office of sheriff will continue to function during the absence of the present sheriff by deputy sheriffs.

Respectfully submitted,

OLLIVER W. NOLEN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

OWN:HR