CRIMINAL LAW: Ward under guardianship by reason of unsound mind can be prosecuted criminally.

May 28, 1942

Hon. G. Logan Marr
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Versailles, Missouri

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Dear Sir:

We are in receipt of your request for an opinion, under date of May 26, 1942, which reads as follows:

> "Lafayette Light is a resident of this county, and is a ward of the public administrator of Jackson County, Missouri. He is a veteran of World War 1, and is getting compensation from the Federal Government. He is in reality a charge and a ward of the Federal Veterans Bureau. The Veterans Administration really look after him, although his present legal representative is the public administrator of Jackson County. Any estate he has is the compensation paid him by the Federal Government. Light does own a farm on which he does live. The Federal Government from time to time has had him confined in Federal institutions.
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> "Wherever Light lives, he is a nuisance because of his dispositions and his mental derangement. Now he works in his garden with only his shoes and hat on. He kills and eats trespassing chickens of his neighbor. He tears

down a division fence that he has erected and when the neighbors cows come over, he milks the cows for his own use and then drives the cows home. He crashes through wooden gates with his truck across private passage ways leading into his farm. He threatens to close another private passage way across his land, that might be excepted out of his conveyances. At the most, he seems to be guilty of misdemeanors. He uses foul and violent language, makes threats of a blood curdling nature, and then retreats behind the fact that he is insane, and challenges the parties offended to do something about the situation. A representative from the Veterans Bureau at Excelsior Springs, Mo., has been down to investigate some of the facts and the causes for complaint.

"The neighbor offended has been trying to get some action out of my office. Right now I at a loss to know what can be done.

"Sections 4046, 4047, Mo. R. S. 1939, seems to concern a case wherein the defendant, became insane from the time the crime was committed and before the trial of the case and was insane at the time of the trial. Sections 9348-9351 incl., R. S. Mo., 1939, provide for the handling of insane parties charged with a crime. Therein, a defendant has not been adjudicated insane. In the Light case, the defendant is a person of unsound mind, and has been adjudicated and has a legal guardian. Section 9340 R. S. Mo., 1939, provides that if a person be dangerous to be at large, then an order can be obtained to have him confined.

"In case that Light should be apprehended for his misdemeanors; should he be prosecuted or should he be tried for his liberty, in the probate court on the theory that he is a dangerous person to be at large and should be confined. Should that complaint be made to the Morgan County probate court, or the Jackson county probate court?

"Is this man a pauper and would make the county liable for the costs, or with his compensation from the Federal government should he pay his own costs in a state institution?

"Is this man a legal resident of Morgan County, Mo.?

"If he is a ward of the Federal government, how can we obtain superior jurisdiction unless we just assume it? I have taken this matter up with the guardian, the public administrator of Jackson County, and he referred me to the Veterans' Administration. They seem to be very slow about any action, and they might not take any action. This man has caused endless trouble, and he has been found by the Federal government not to be crazy and violent enough all the time to be confined in some Federal institution. In the meantime the adjoining neighbor complains to me and the sheriff about the treatment, he is called upon to suffer from this man Light."

We are assuming from the facts stated in your request that the Public Administrator of Jackson County, Missouri, was appointed guardian of the ward, LaFayette Light, in accordance with Section 447, Article 18, Chapter 1, R. S. Missouri, 1939, which reads as follows:

> "If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into by a jury: Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury."

Under Article 18, R. S. Missouri, 1939, and by reason of Section 474 of said article, the probate judge may make an order of restraint for the safekeeping of the ward. Under this section it is discretionary with the probate judge to make such an order.

Also, under Section 497, of Article 18, R. S. Missouri, 1939, it is mandatory that the guardian confine the ward if he is so far disordered in his mind as to endanger his own person or the person or property of others. The fact that the ward is not now confined, is in your county, and there is no evidence that he has escaped from any confinement, shows that no order has been made as set out in Sections 474 and 497 R. S. Missouri, 1939.

The hearing as to insanity or as to the unsoundness of mind, as above described and set out in Section 447, supra, is a proceeding to protect the property of the ward and is not conclusive as to his criminal condition.

Section 9348 R. S. Missouri, 1939, reads as follows:

> "When a person, tried upon indictment for any crime or misdemeanor, shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two following sections."

It will be specifically noticed that the above section specifically states: " * * * tried upon indictment for any crime or misdemeanor, * * * ." Since Section 9348, supra, merely sets out the form of verdict of the jury in case the defense is insanity, we are suggesting that an information for misdemeanor, if filed, be filed in the circuit court, and that the defendant be given a jury trial.

It has been repeatedly held that the issue of insanity is tested on the question of whether or not the defendant knew he was doing wrong at the time of the commission of the act, and if at that time he knew the difference between right and wrong. It was so held in the case of State v. Miller, 225 S. W. 913, l. c., 915, where the court said:

> "The question of the sanity or insanity of a defendant who has committed a crime is limited to the time of its commission. 8 R. C. L. p. 64, par. 14; 16 C. J. p. 100, par. 75; State v. Miller, 111 Mo.

loc. cit. 551, 20 S. W. 243; State v. Wright, 134 Mo. 404, 35 S. W. 1145; State v. Palmer, 161 Mo. 152, 61 S. W. 651; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; State v. Riddle, 245 Mo. loc. cit. 458, 150 S. W. 1044, 43 L. R. A. (N. S.) 150, Ann. Cas. 1914A, 884; State v. Rose, 271 Mo. loc. cit. 18, 195 S. W. 1013."

Also, in the case of Eisenhardt et al v. Siegel et al, 119 S. W. (2d) 810, l. c. 812, where the court said:

"Plaintiffs had no case, except on the issue of murder, and there was no murder if John was insane, even though it be assumed that John killed Herman under such circumstances as would constitute murder by a sane man. It would be more than an anomaly to say that plaintiffs could proceed on the theory of murder, but that defendants could not interpose the defense of insanity, which is one of the generally recognized defenses of one charged with the commission of crime. Citation of authority is not necessary, but see Wharton on Homicide (3d Ed.) Sec. 536; 1 Wharton & Stille's Med. Jur. (5th Ed.) Sec. 162; State v. Rose, 271 Mo. 17, loc. cit. 27, 195 S. W. 1013. And the test in determining the issue of sanity is: Did the accused at the time of the commission of the alleged crime 'know that he was doing wrong?' State v. Rose, supra.

> "We shall rule the present case on the theory that the trial court found that John shot and killed Herman, and under such circumstances as to constitute murder, if John were sane, but also found that at the time of the killing, John was not criminally responsible because of his insanity."

And, in the case of State v. Jackson, 142 S. W. (2d) 45, l. c. 49, where the court said:

> "* * * 'This testimony is given for the purpose of showing that the defendant, Chester Jackson, is not a normally minded person; that he is mentally deficient, and that he has the mind of a child, and that he does not have the willpower to overcome his passions, or his desires.' Still later counsel further stated that the pain and fever from appellant's illness seventeen years before so scarred and injured him that the growth of his mind was arrested and he never became a normal child. Continuing, he said the doctor would testify that appellant's mind had not grown since his illness and is still undeveloped; that he is a degenerate, and does not have the mind of more than a ten year old boy. Following that, the statement was repeated that appellant's will power was so weak that he was unable to control his desires, impulses and instincts when aroused.
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> "None of that proves insanity in the sense required by our law. As already stated, the defense of irresistible impulse is not recognized in Missouri. And in practically all jurisdictions mere retarded mental development or subnormality is not a defense. The prevailing rule on this question is thus

> set out in 14 Am. Jur., supra, sec. 32, p. 788: 'Criminal responsibility does not depend on the mental age of the accused or upon the question whether his mind is above or below that of the ideal, average or normal. Mere weakness of mind, ignorance, or deficiency in any mental function is not in law equivalent to a want of capacity and will not excuse the perpetration of a criminal act, unless the mentality of such a person is of such subnormal character as to render him incapable of distinguishing between right and wrong, in which case it is undoubtedly a defense. The law does not require, as the condition on which criminal responsibility shall follow the commission of crime, the possession of one's faculties in full vigor or a mind unimpaired by disease or infirmity.' See, also, 10 L. R. A., N. S., 999, note; 44 A. L. R. 584, annotation."

If the defendant is acquitted by reason of insanity at the time of the commission of the act, and the jury returns a verdict that he is still insane, then the court, if the prisoner is not a poor person, and the court believes from the nature of the offense that it would be unsafe to permit the prisoner to go at large, shall make an order that he be sent to a state hospital, designating it, and further order that the costs of the confinement be paid out of the estate of such person.

If the defendant is a poor person the proper county is liable for the costs of his detention and the payment shall be made in accordance with Section 9350 R. S. Missouri, 1939. Under this section the expenses are paid by the proper county.

It is a question of fact, in each individual case, as to the residence of the defendant, and as to which

county should pay the costs of the defendant's restraint in case he is a poor person.

In the case of Thomas v. Macon County, 175 Mo. 68, l. c. 73, the court, in construing what is now Section 9348, supra, stated:

> "Then sections 4885 and 4887 make provision for another case, that is, when a person is tried for a criminal offense and acquitted on the ground that he was insane and he remains in that condition, the court is to order him to be kept in custody 'at the expense of the proper county, until the county court shall cause him to be removed to the asylum, as in cases of insane poor persons.' The statute then directs that the county court shall proceed in the matter as directed in sections 4874 and following, except that it is not to enter on the inquiry as to insanity, that fact having already been adjudged by the circuit court.
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> "The sections above referred to contain the only provisions to be found in our statutes expressly authorizing the cost of keeping a patient in the asylum to be charged to a county and in each of those cases it requires that the person be a resident of the county and that the county court should take the prescribed action in the premises."

Also, in the case of The State ex rel Yarnell v. The Cole County Court, 80 Mo. 80, the court, in passing upon a question of fact as to the residence of an insane person, at page 84, said:

> "* * * It seems to have been the purpose of the legislature to provide that before the support of an insane poor person of one county can be shifted to or cast upon another county, such insane person must have ceased to reside in the former county for the period of one year. The same policy has been indicated in the law regulating the support of the poor, (2 R. S., p. 1289, secs. 6579, 6581,) where it is provided that poor persons shall be received, maintained and supported by the county of which they are inhabitants; and that no person shall be deemed an inhabitant, within the meaning of the chapter, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

In view of the facts set out in your request, the question as to which county should pay the costs of the defendant's restraint in case a jury, by its verdict on an information filed, found that the defendant was still insane, is not involved in your request. We say that for the reason that the public administrator is not appointed for poor persons without some estate, and for that reason the costs of the defendant's detention would be at the cost of the defendant's estate.

We have no statute in this state which prohibits the filing of a charge, or a trial, under the criminal law where the defendant has been adjudicated insane in a

civil proceeding. This general rule of law has been followed in many states and by the Federal Court. In the case of Whitney v. Zerbst, 62 F. 2d 970, the Circuit Court of Appeals, Tenth District, stated the rule as follows:

> "We cannot subscribe to the doctrine that a person committed for insanity who escapes and commits a criminal act is, because of such commitment, immune from prosecution therefor.
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> "Where, after an adjudication of insanity and commitment to an asylum in a civil proceeding, a person so adjudged and confined commits a criminal act, a court having jurisdiction over the offense may take him into custody and try him for such offense in the absence of statutory provision to the contrary. Myers v. Halligan (C. C. A. 9) 244 F. 420; In re McWilliams, 254 Mo. 512, 164 S. W. 221.
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> "While insanity, in the sense that term is used in the criminal law, at the time the criminal act was done may be asserted as a defense to the criminal charge and present insanity may be asserted as a bar to trial on such charge, the issues with respect to such a defense or bar are for the determination of the court having jurisdiction of the criminal offense. In re McWilliams, 254 Mo. 512, 164 S. W. 221. The court may submit the issue of present insanity as a bar to trial to a jury impanelled for that purpose, or may determine the issue itself. Insanity at the time of the commission of the offense is a defense and presents an issue un-

> der the plea of not guilty for the determination of the jury at the trial for the offense. Ex parte Charlton (C. C. N. J.) 185 F. 880; Charlton v. Kelly, 229 U. S. 447, 462, 33 S. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397; Youtsey v. United States (C. C. A. 6) 97 F. 937.
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> "While an adjudication of insanity is admissible in evidence upon the trial of an issue of insanity at a time subsequent to such adjudication (State v. McMurry, 61 Kan. 87, 58 P. 961; Wheeler v. State, 34 Ohio St. 394, 32 Am. Rep. 372; Hempton v. State, 111 Wis. 127, 86 N. W. 596), it is not conclusive and may be rebutted by other evidence. Hale v. Harris, 169 Mich. 172, 134 N. W. 1111; Eagle v. Peterson, 136 Ark. 72, 206 S. W. 55, 57, 7 A. L. R. 553."

In the above quotation the court has cited In re McWilliams, 254 Mo. 512, 164 S. W. 221, which also follows this rule.

CONCLUSION

In view of the above authorities, it is our opinion that a ward of a public administrator of Jackson County, Missouri, who commits a misdemeanor in Morgan County can be prosecuted for his criminal acts, even though a guardian has been appointed for him.

It is further the opinion of this department that the ward can set up insanity as a defense, but it is a question of fact for the jury to pass upon. The question involved is whether or not, at the time of the com-

mission of the act, the ward knew the difference between right and wrong.

It is further the opinion of this department that if the jury should return a verdict to the effect that the defendant was insane at the time of the commission of the act, and has not permanently recovered from such insanity, the judge of the circuit court may order his confinement through the proper institution at the cost of the ward's estate.

Respectfully submitted

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APPROVED:

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