OPINION RELATING TO THE LIABILITY OF COUNTIES FOR THE COST OF THE CRIMINAL INSANE TRANSFERRED FROM THE PENITENTIARY TO STATE HOSPITALS FOR THE INSANE UPON THE WARRANT OF THE GOVERNOR.

8636 RS Mo 1929

October 7, 1933

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Mr. J. B. McGuffin,
Prosecuting Attorney Lawrence Co.,
Mt. Vernon, Missouri

Dear Sir:

This department acknowledges receipt of your letter under date of October 3, 1933, in which you state and inquire as follows:

> "About 1919 one Joe Schmidt, a transient or tramp, while passing through this county, was charged with some felony, arrested, convicted and sentenced to a term in the State Penitentiary. Shortly thereafter this defendant was adjudged insane and by order of the Governor was transferred to the asylum at Fulton, Missouri, and he is still there as a hopelessly insane inmate.
>
> Lawrence County has been charged by the Asylum monthly and yearly ever since his reception at said hospital, at about $18.00 or $20.00 per month, and the County Court here has been paying same.
>
> Our present County Court feels that this county is not chargeable for this prisoner, or inmate, because he is not now nor never has been a resident of this county and has no ties of any description in this county to make this county liable.
>
> I have tried to arrive at a definite opinion of the law but am not satisfied fully, and will ask for your opinion to help me in the matter."

Section 3801, R. S. 1929, reads as follows:

"If any person, after having been convicted of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the asylum shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor: Provided, if such person shall have property, the costs shall be paid out of his property, by his guardian."

Section 8636, R. S. 1929, provides that:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto."

Section 8636 specifies that the county shall pay for the support and maintenance of such insane poor persons as the court may send to a state hospital.

Under section 8636, however, even the County Court is not authorized by its arbitrary will or unlimited discretion, to send any poor person it may select to a state hospital at the expense of the county. The court must hold due proceedings upon a petition filed showing that the <u>insane poor person</u> is a <u>citizen residing in the county</u> and other essential facts as prescribed by the statute. There must be a trial of the facts and a judgment of the court thereupon.

The County Court has no authority, under this statute, to send a person to a state hospital or to maintain one there at the expense of the county if that person is not a resident thereof.

Section 8653, R. S. 1929, authorizes the County Court to certify to the Superintendent of the State Hospital that a pay patient, already in the institution, has not sufficient estate to support him there, and when that is done he becomes a patient on the county and the county is chargeable with the cost of his keep.

The sections above referred to, expressly authorizing the cost of keeping a patient in the State Hospital, contain the only provisions to be found in our statutes. In each case it requires that a person be a resident of the county and that the County Court shall take the prescribed action in the premises.

In Shields v. Johnson County, 144 Mo. 76, the court was dealing with the same statute under which the instant case has arisen. In that case the man had been convicted in Johnson County and during his imprisonment in the penitentiary had become insane and, by order of the Governor, had been taken to the asylum. The Supreme Court held that it was not essential, under those circumstances and under that section of the statute, that the County Court should first adjudge the man to be a resident of the county, but the court held that it was essential for the plaintiff to prove that fact in order to render the county liable.

In the same case, the court per Burgess, J. further said, "He was a citizen of the county at the time of his being sentenced to the pentitentiary, has since become insane, and is insolvent, are conditions precedent to the liability of the county for his board and

clothing at the asylum, may be conceded, and the burden would rest upon plaintiff of showing that Farland was a resident of Johnson County at the time of his conviction, and that he had no property."

In Thomas v. Macon County, 175 Mo. l. c. 72, the court, in part, said:

> "The plaintiff relies on that part of the clause just quoted which provides that the expense 'shall be paid as now provided by law in cases of the insane poor,' for his right to recover in this case. As we have seen, the only provision made by law for charging such expense to a county, is in case the insane person is a resident of the county. The residence of the insane person in Macon County, therefore, becomes an essential fact for the plaintiff in this case toprove before he can recover."

In Walton v. Christian County, 235 Mo. l. c. 309, the court said in part as follows:

> "The liability of the counties of the state for insane criminals living and residing in said counties who were insolvent when convicted and whose sentence has been suspended as in this case, by the warrant of the governor in order that they may be transferred to the state institution for the insane is well settled."

In view of the provisions of the law and the opinions of our Supreme Court relative to the construction of the statute in question, this department holds, that in order to make a county liable for the keep of an insane convict that by warrant of the Governor has been transferred to a state hospital for the insane, it must affirmatively appear,

First: That said person, at the time of his conviction was a resident citizen of said county.

Second: That he was insolvent when convicted.

Third: That the transfer was upon the warrant of the Governor.

We further hold that when the law requires residence of a person to be proven, proof of his actual presence at the place at one particular time does not satisfy the requirement and much less does the fact weigh when the person is there as a prisoner and against his will.

REspectfully submitted,

W. W. Barnes
Assistant Attorney General

APPROVED:

Attorney General.

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