MISSOURI STATE SCHOOLS: Whenever an indigent inmate or patient at the Missouri State School becomes dangerously insane, the superintendent of said School may temporarily place such a patient in a state hospital for the insane. But the superintendent of said school shall immediately cause to be instituted proceedings in the probate court of the county where the school is located to have the court determine whether or not such patient is actually insane so that said patient may be detained by the state hospital for the insane until she is restored to sanity.

INSANITY HEARINGS:

February 1, 1951

2/6/51

FILED
73

Mr. B. E. Ragland
Director, Division of
Mental Diseases
State Office Building
Jefferson City, Missouri

Dear Mr. Ragland:

You have requested an official opinion from this department in regard to the following problem:

> "A Patient at the Missouri State School, Marshall, Missouri, becomes mentally deranged and beyond the control of that institution. Does the superintendent of that school have authority, by virtue of Section 9393, R.S.Mo.1939, to transfer such patient to a state mental hospital for treatment and confinement without a hearing in the probate court of the county, from which the patient came originally, to establish the insanity of such a patient? The patient is an indigent person.
>
> "It is understood that the patient has never been adjudged insane, but was received at the School at Marshall in accordance with the provisions of Section 9392 R.S. Mo. 1939. The superintendent of one of our mental hospitals questions the authority of the superintendent of the State School at Marshall to transfer such a patient to a mental hospital without a court order from a court of record."

Section 202.610, R.S. Mo. 1949, (Sec. 9392, R.S. Mo. 1939) provides the method by which patients may be admitted to the Missouri State Schools.

The Schools are maintained for feeble-minded and epileptic persons residing in the state who are unable to support themselves or be supported by their parents or guardians. The statutory method does not provide for a judicial hearing before admission

to said schools, although the state patients, either of age or over age, may be admitted upon the official application of any judge of a court of record. This section is not quoted herein because it is quite lengthy.

The Supreme Court of Minnesota in the case of In re: Masters, 216 Minn. 553, 13 N.W.2d 487, 158 A.L.R. 210, said:

> "The original proceedings in probate court resulting in a determination of feeble-mindedness were quite irregular, no formal notice having been given Mrs. Masters of the fact that her own feeble-mindedness was to be inquired into. * * *
>
> "Though Minn. St. 1941, Sec. 525.78, Mason St. 1940 Supp. Sec. 8992-183, requires only such 'notice . . . . .as the court may direct,' such notice must satisfy the constitutional requirement of 'due process of law.' This prerequisite to a valid commitment cannot be ignored either by the legislature or by a court proceeding as the legislature prescribes. * * *
>
> "Notice in commitment proceedings is not always practicable where the person sought to be committed is violently and dangerously insane. But those types of insanity or feeble-mindedness which manifest themselves in harmless symptoms lend themselves to the orderly processes of a formal hearing and adjudication; and in such cases the constitutional mandates must be strictly observed by giving the person under inquiry not only adequate notice of the fact of a hearing and the purpose thereof, but also every opportunity to be heard before the order of commitment is issued. 28 Am. Jur, Insane and Other Incompetent Persons. p. 676, Sec. 32.
>
> * * * * * *
>
> "Clearly, then, no distinction can be made as to the necessity and sufficiency of notice and opportunity to be heard as between normal and abnormal persons. The life of each is equally sacred; the liberty of each must be equally secure in order that the right to the pursuit of happiness may be equally open. See note, 43 Am. St. Rep. 531.
>
> "We do not apologize for discussing these fundamental American concepts; concepts which, in their

> enthusiasm for social welfare, our governmental agencies charged with the duty of caring for society's less fortunate members often inadvertently overlook or deliberately disregard."

You will note from this case that the Supreme Court of Minnesota held that a judicial proceeding which included notice to the feeble-minded and gave persons an opportunity to be heard at the hearing, was required in order to commit an alleged feeble-minded to the state school for feeble-minded.

This case also brings out that where the person sought to be committed is violently and dangerously insane it is not necessary to first give notice of the commitment.

Section 202.630, R.S. Mo. 1949, Subsection 2,(Sec. 9393, R.S. Mo. 1939) provides as follows:

* * * * * * * * * * *

> "2. If any patient becomes dangerously insane, and be so certified by the superintendent, he shall be transferred and placed in the state hospital located nearest to the county from which said patient was sent. The expense of transfer to said hospital to be paid for by the county from whence said patient came. (9393)"

The Supreme Court of Vermont in the case of In Re: Allen, 82 Vt. 365, 73 A. 1078, 26 L.R.A. (n.s.) page 232, says:

> "At common law an insane person may be temporarily restrained without legal process, and if need be in an asylum, if his going at large would be dangerous to himself or to others, preliminary to the institution of judicial proceedings for the determination of his mental condition, and such a restraint does not violate any constitutional provision. Colby v. Jackson, 12 N.H. 526; Keleher v. Putnam, 60 N.H. 30, 49 Am. Rep. 304; Porter v. Ritch, 70 Conn. 235, 47 L.R.A. 353, 39 Atl. 169; Look v. Deen, 108 Mass. 116, 11 Am. Rep. 323. When however, as in the case at bar, the confinement is permanent in nature, the person thus confined is deprived of his liberty which, in order to be lawful, must be in pursuance of a judgment of a court of competent jurisdiction, after such person has had sufficient notice and an adequate opportunity to defend. It is no answer to say the person is insane and consequently notice to him will be useless,

> for that is assuming as a fact the very thing in question and which is presumed to be otherwise until proved. Such notice and opportunity are required by the Constitution of this State, Art. 10, wherein it reads: 'Nor can any person be justly deprived of his liberty except by the laws of the land, or the judgment of his peers'; and by the Fourteenth Amendment to the Federal Constitution, that no state shall 'deprive any person of life, liberty or property, without due process of law.' Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 44 L. ed. 747, 20 Sup. Ct. 620; Simon v. Craft, 182 U.S. 427, 45 L. ed. 1165, 21 Sup. Ct. 836; * * *" (Underscoring ours)

The Legislature of Missouri has provided a statutory procedure to follow in cases involving the transfer of inmates from charitable institutions to a state hospital for the insane. This statute fully complies with the statutory requirement of due process. It is Section 202.340 R.S. Mo. 1949, (Sec. 9344, R.S. Mo. 1939, Laws 1945, page 905) and reads as follows:

> "202.340. Transfer of inmates of charitable institutions to state hospitals.--1. Whenever an inmate of a private or public charitable institution for the maintenance and care of indigent persons shall become insane, any citizen may file in the probate court of the county where such institution is located, a statement in writing substantially complying with the form set forth in section 202.130, and shall in addition thereto allege in said statement the county in this state of which said insane person was resident immediately prior to his admission to said charitable institution.
>
> "2. The clerk of the probate court in which such statement is filed shall proceed therewith as provided in section 202.140, and shall forward to the clerk of the county court of the county of which said insane person is alleged to have been a resident immediately prior to his admission to said charitable institution, a copy of such statement and a notice of the place and time when said statement will be presented to the court, which shall not be less than twelve days after the notice is deposited in the mail as herein provided. The copy of said statement and said notice shall be placed in a well-secured envelope, directed and addressed to the clerk of the county court of the county to whom the same is herein required to be forwarded, deposited

in the post office, postage prepaid, and registered in accordance with the postal laws of the United States of America; the return of such service shall be endorsed on a copy of the notice so sent by the clerk or his deputy and shall be conclusive evidence of the matters therein contained, and shall confer complete jurisdiction upon the court in which the statement is filed to hear and determine the same; provided, however, the alleged insane person shall be entitled to the notice provided for in Section 202.140.

"3. Said probate court shall hear said matter on the date mentioned in said notice or upon any day to which said court shall adjourn or continue the hearing thereof, in the manner now provided for resident insane persons. If the person charged shall be found by the court to be insane and indigent and to have been a resident of the county as alleged in said statement immediately prior to his admission to said charitable institution, its judgment shall entitle said person to admission to a state hospital upon the same terms as resident insane and indigent persons, and the county of which such insane and indigent and to have been a resident immediately prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by sections 202.010, 202.070, 202.100, 202.120 to 202.240, 202.270 to 202.320, 202.340, 202.350, 202.430 to 202.450, 51.160, 546.510 to 546.540, and 549.050, RSMo. 1949, the same as if said person had been sent to the state hospital as an indigent insane person by order of the court of the county of which he is found to have been a resident immediately prior to his admission to said charitable institution. (9344, A.L. 1945 p. 905)"

Therefore, in order for the former patient of the Missouri State School to be permanently detained by the state hospital for the insane, the superintendent of the Missouri State School should comply with this section in order that the probate court may determine whether or not the patient is actually insane.

If the probate court finds that the patient is not insane then it must be transferred back to the Missouri State School. If the probate court finds at the hearing provided for in this section that the patient is insane, then the patient shall become the patient of the state hospital and be held there until

restored to sanity. The Supreme Court of Missouri in the case of In re: Moynihan, 62 S.W. 2d, 410, recognized the right to arrest and restrain until hearing one who is so deranged as to endanger himself or others as was done in this case and cited the notes in 10 A.L.R., 488 and 45 A.L.R. 1464. The notes in 10 A.L.R. include a citation to the Allen case, cited above, and also the following notes on page 489:

> "But insanity which does not render one dangerous to himself or others will not justify his arrest and detention without judicial proceedings. MAXWELL v. MAXWELL (reported herewith) ante, 482; Witte v. Haben (1915) 131 Minn. 71, L.R.A. 1916C, 228, 154 N.W. 662, Ann. Cas. 1917D, 534 (reasonable suspicion of insanity which is not dangerous is not a defense); Look v. Dean (1871) 108 Mass. 116, 11 Am. Rep. 323; Keleher v. Putnam (1880) 60 N.H. 30, 49 Am. Rep. 304; Emmerich v. Thorley (1898) 35 App. Div. 452, 54 N.Y. Supp. 791.
>
> "Although recognizing the rule that a dangerous maniac may be temporarily restrained until he can be arrested on legal process, the court in Keleher v. Putnam (1880 60 N.H. 30, 49 Am. Rep. 304, supra, said: 'But not every insane person is dangerous. Nothing can be more harmless that some of the milder forms of insanity. Nor is it any justification that the defendants were actuated by a desire to promote the plaintiff's welfare. The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives these unfortunate persons the safeguards of legal proceedings and the care of responsible guardians.'
>
> "So it will be observed that, in the reported case (MAXWELL v. MAXWELL, ante, 482), the right to restrain an insane person of his liberty is limited to cases of actual insanity and immediate danger to the person in question or to the public."

The Supreme Court of Missouri in said Moynihan case also said:

> "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 S. Ct. 836, 840, 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 S. Ct. 136, 61 L. Ed. 427; White v. White, 108 Tex. 570, 196 S.W. 508, L.R.A. 1918A, 339."

* * * * * * *

"However, even though an insanity proceeding is primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom to do as he sees fit with his property and putting him under the stigma of irrationalism is such a serious matter that there should be, for the person whose sanity is inquired into, every proper safeguard. As this court said in the Searcy and Shanklin Cases, declaring unconstitutional the statute authorizing such hearings without notice: 'If he be a raving maniac, he can appear by attorney or through his friends, and see that a proper person is appointed guardian, or that a proper care is given to his property and to his person. In addition what if the person was not really insane at all, and without notice was adjudged insane and confined in an asylum, and the management of his property given to another? In such contingency the propriety of notice would be manifest, and, if given, would defeat the recovery of a judgment. It will not do to say that, in the 57 years that these provisions not requiring notice have been on the statute books, no instance is recorded of any sane person being so adjudged and deprived of his liberty or property, and that instances of such outrages are found only in highly colored and improbable stories in works of fiction. For the Marquis case (85 Mo. 615) is an instance in our own reports where a citizen was so adjudged insane without notice, and at the very next term of court appeared and proved that he was not, and never was, insane. But however the past experience may have been, the fact remains that the possibility of such an outrage being perpetrated is afforded by the statutory provisions referred to; and it is the duty of the

courts, whenever the question arises, to prevent the happening of such a wrong, by declaring those provisions to be unconstitutional.'"

* * * * * * * * *

"* * *At that time, however, the provision for bringing the person informed against as insane before the court was repealed, and the provision, declared unconstitutional in the Searcy and Shanklin Cases, for proceeding without either requiring him to be present or to have notice, was adopted. This defect was remedied in 1917, after the latter decision by requiring service of reasonable notice on the alleged insane person. Laws of 1917, p. 102, now section 450, R.S. 1929 (Mo. St. Ann. Sec. 450). This court has recently held that this requirement of reasonable notice cannot be waived by the party alleged to be incompetent or his attorney. State ex rel. Terry v. Holtkamp (Mo. Sup.) 51 S.W.(2d) 13; State ex rel. Townsend v. Mueller (Mo. Sup.) 51 S.W.(2d) 8. * * *"

* * * * * * * * * * *

"* * *We therefore hold that a person alleged to be insane has the right under section 448, R. S. 1929 (Mo. St. Ann. Sec. 448), to a trial by jury in the probate court, if a trial by jury is demanded either by such person or by counsel acting in his behalf; * * *"

The Supreme Court of Missouri recently in the case of State v. Green, 232 S.W. 2d 897, said:

"Due process of law implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding upon notice. It is founded upon the basic principle that every man shall have his day in court, and the benefit of the general law which proceeds only upon notice and which hears and considers before judgment is rendered and which renders judgment only after trial. This provision of our organic

> law guarantees that every one shall have his life, liberty, property and immunities protected by the general rules characteristic of, basic to and existing in our society under our system of jurisprudence. It contemplates an orderly proceeding adapted to the nature of the case and as to which any person to be affected shall have notice, an opportunity to be heard, and a chance to protect and enforce his rights before a tribunal with power to hear and rule his cause. * * *"

The Supreme Court of California in the case of In re: Lambert, 134 Cal. 626, 55 L.R.A. 856, 66 P. 851, held that a statute which permitted commitment to and retention in a hospital for the insane, upon an application for a relative or a friend of the alleged insane person, or by anyone of certain officials, accompanied by the certificate of two physicians, without any provision for notice to the alleged insane person, was unconstitutional as depriving him of liberty without due process of law. The California statute authorized the judge of the superior court of the county to issue the commitment forthwith upon presentation of the application and certificate of the two medical examiners. The court in this case said:

> "The case before us does not involve the right of the state to provide for the summary arrest of a person against whom a charge of insanity is made, and his temporary detention until the truth of the charge can be investigated. Such arrest would itself be a notice to him of the charge, under which he would be afforded an opportunity for a hearing thereon. Nor is there involved the right of the state to permanently restrain an insane person of his liberty, whether such person be harmless or dangerous, but the question is whether he is entitled to a judicial investigation of the charge that he is insane, and the right to be heard thereon before its determination. The question to be determined is not whether the action of the judge in investigating the insanity of the petitioner was conducted under the forms of law, and with proper regard for his rights, but whether the judge had the right to enter upon the investigation, or take any action whatever in reference to his insanity. In the absence from the statute of any requirement of notice to the person, any notice that might be given him would be without legal

force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. 'It is not enough that he may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require notice to him, and give him the right to a hearing, and opportunity to be heard. The Constitutional validity of a law is to be tested not by what has been done under it, but by what may by its authority be done.' Stuart v. Palmer, 74 N.Y. 188, 30 Am. Rep. 291. 'It is not what has been done, or ordinarily would be done under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement.' Bennett v. Davis, 90 Me. 105, 37 Atl. 865.

"The following authorities may be referred to in support of the foregoing views: Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633; In re Doyle, 16 R.I. 537, 18 Atl. 159, 5 L.R.A. 359, 27 Am. St. Rep. 759; State v. Billings, 55 Minn. 467, 57 N.W. 206, 794, 43 Am. St. Rep. 525; City of Portland v. City of Bangor, 65 Me. 120; 20 Am. Rep. 681; Bennett v. Davis, 90 Me. 102; 37 Atl. 864; People v. St. Saviour's Sanitarium, 34 App. Div. 363, 56 N.Y. Supp. 431. In the case last cited the question was quite fully considered by the general term of the supreme court of New York. The relator had been committed to an asylum for inebriates for the term of one year under a provision of a statute of that state authorizing such commitment to be made by any judge of a court of record upon a certificate in writing, signed by two physicians, containing statements bringing the person within the description named in the statute. It was held that as the order had been made without any notice to the relator, and without her presence, she was deprived of her liberty without due process of law, and that the commitment was void; the court very tersely and aptly phrasing the principle underlying its decision as follows: 'No matter what may be the ostensible or real purpose in restraining a person of his

> liberty,--whether it is to punish for an offense against the law, or to protect a person from himself, or the community from apprehended acts,--such restraint cannot be made permanent or of long continuance unless by due process of law.'
>
> "Under the foregoing considerations, it must be held that the insanity law of 1897, to the extent that it authorizes the confinement of a person in an insane asylum without giving him notice and an opportunity to be heard upon the charge against him is unconsitutional, and that the proceedings by virtue of which the petitioner is held by the respondent, are invalid.

The Supreme Court of Vermont in the Allen case cited above, said:

> "For the purpose of making such a certificate any two legally qualified physicians, residents of the State, may be selected by those interested in having the person confined in an asylum, as insane, regardless of their actuating motives. The physicians are required to make their examination of the person within five days before making the certificate, and to make oath to their certificate, but they are neither designated, nor appointed, nor commissioned, by any court or public authority to act in that capacity. The examination may be made by them anywhere and under any circumstances permitting it, without notice to, or knowledge by, the supposed insane person, and solely upon such examination their certificate may be based. They are not obliged to hear other evidence, even though offered by the person examined or in his behalf to show his sanity, and if they do hear evidence so offered, it is as a mere matter of favor on their part. Such a proceeding is entirely devoid of the essential elements of due process of law. Moreover, if a person's right of hearing depends upon the grace, favor, or discretion of the persons, board, or tribunal whose duty it is to decide the question at issue, he is not protected in his constitutional right. The law must require notice to him, give him a right to a hearing, and an opportunity to be heard."

28 Am. Jur., page 664, Sec. 14, states the general rule in regard to notice to be given:

> "Contrary to earlier English practice, the general rule in the United States is that whatever the purpose of a proceeding to determine the sanity of a person may be, notice thereof must be given him if he is to be bound by an adjudication of incompetency made therein, unless notice is dispensed with by the court for a valid reason. This rule is applicable notwithstanding the statute makes no special provision as to notice. Moreover, notice to a person of proceedings to have him declared insane is generally regarded as essential to due process of law, especially if the proceeding may result in the commitment of the alleged incompetent to an institution for the insane. * * *"

44 C.J.S., page 166, sec. 67(f) states:

> "In the absence of statute, the manner of determining the issue of fact as to the incompetency of the person whose liberty is sought to be restrained is within the sound discretion of the court, as long as the method adopted is fair and orderly. Ordinarily he is entitled to a public hearing or inquest, an opportunity to be present and defend the taking of proofs, a full investigation of the facts, and a judicial finding of the facts requisite for the order of commitment. His presence however, may be dispensed with, as where it appears that his presence would be injurious to him, or attend with no advantage, and statutes so providing have been held constitutional where they provide for an appeal at which the person could have a hearing and be present. Under a statute giving the person alleged to be insane the right to appear and defend, the right is a right to be present in person or by attorney or both, and one who is not a fit person to appear in the proceeding but who is represented by counsel is not denied the right to appear and defend."

Smoot's Law of Insanity, at page 118 to 121, Sec. 159, gives the three proceedings that must be followed for a commitment of an alleged insane person: (1) there should be some form of application for commitment, (2) there must be some form of notice

sufficient to apprise the alleged non compos person of the contemplated commitment and of the time and place of any hearing preliminary thereto, (3) there must be some form of judicial procedure in the course of which the alleged non compos has the opportunity to appear, either personally or through representatives, and be heard. He states that it has been repeatedly held that statutes prescribing the form of such hearings, which ignore or reasonably restrict this right, (notice and hearing) are unconstitutional and void, as tending to deprive an individual of his liberty without due process of law.

Smoot's Laws of Insanity at page 86, also states: "It has been held that states attempting to delegate this power (to hold hearings) to agencies not charged with the exercise of judicial powers will be void. For example the statute may not delegate such powers to a clerk of the court or to a committee of physicians, etc."

We believe that said section 202.340, R.S. Mo. 1949, fully complies with the requirements of due process in requiring notice to the patient of a charitable institution and a hearing on the question of the alleged insanity before the probate court. This section should therefore be followed because the superintendent of the Missouri State School does not have the power to determine the question of insanity of any of the patients in said school.

CONCLUSION

It is the conclusion of this department that whenever an indigent inmate or patient at a Missouri School becomes dangerously insane, and it is so certified by the Superintendent, that the Superintendent of said School may transfer said patient to the state hospital, located nearest to the county from which said patient was sent, to be detained therein temporarily until such patient has been adjudged insane. But the Superintendent of said School does not have authority to permanently commit any patient of said school to a state mental hospital for permanent treatment and confinement as an insane person. The superintendentt of said School should comply with the provisions of Section 202.340 R.S. Mo. 1949, immediately after the alleged dangerously insane patient has been transferred to the state hospital.

Respectfully submitted,

APPROVED:

STEPHEN J. MILLETT
Assistant Attorney General

J. E. TAYLOR
Attorney General

SJM:mw