CRIMINAL LAW:)
PROBATE COURTS)
PROHIBITION:)

Section 4191, R.S. Mo. 1939, discloses exclusive procedural steps to be taken where a defendant has been charged, tried, convicted and sentenced and his insanity is suggested. Probate court is without authority to entertain insanity hearing in such cases. Prohibition will lie to restrain the probate court from exercising such jurisdiction.

March 16, 1949

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Honorable Louis H. Schult
Judge 38th Judicial District
Caruthersville, Missouri

Dear Sir:

The department acknowledges receipt of your recent request for an opinion, which request reads as follows:

"In February of this year I tried a criminal case herein the defendant was charged with felonious assault. Defendant admitted the assault but plead permanent insanity. Defendant was found guilty and sentenced to five years in the penitentiary, thus in effect finding him sane. Defendant has appealed.

"Since then, application filed and hearing had in the Probate Court as to defendant's sanity; the Probate Judge having announced he will find defendant insane, the State, by writ of prohibition is trying to prevent the Probate Judge from passing on same.

"Defendant's counsel contends that under Section 9328 (re-enacted Laws 1945, P.1) the Probate Court has jurisdiction while the State contends that since this is a proceeding to have a party declared insane after conviction, that Section 4191 controls and it is a matter for the Governor to pass on; that the defendant should apply to the Governor for a hearing and not to the Probate Court.

"And, if the Probate Court has jurisdiction, could that court commit him to State Hospital No. 1, for the criminal insane rather than to State Hospital 4, Farmington.

> "I am wondering whether this question has ever been presented to you, and if not, will you kindly give me your opinion as to whether Section 9328 or Section 4191 controls?"

The inquiry may be disposed of by ascertaining whether or not the Probate Court, under the circumstances outlined above, has jurisdiction to entertain the insanity proceeding. If no jurisdiction exists, prohibition will necessarily lie to prevent theProbate Court from entering its decree.

Before applying Section 4191, R.S. Mo. 1939, of the Missouri criminal code, to the case at hand, reference is made to an opinion of the Supreme Court of Arkansas in the case of Ferguson v. Martineau, 171 S.W. 472, 115 Ark. 317. There the Court was called upon to determine the right of the Probate Judge of Pulaski County, Arkansas to entertain an insanity hearing on a defendant who had been convicted and sentenced to be executed for a criminal offense. The Probate Court in that instance proceeded under a statute which provides as follows:

> "If any person shall give information in writing to such court that any person in his county is an idiot, lunatic or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that there is good cause for the exercise of its jurisdiction, should cause the person so charged to be brought before such court, and inquire into the facts by a jury, if the facts be doubtful."

The Supreme Court of Arkansas ruled in the above cited case that the probate court had no power to enter upon an inquiry as to the sanity of a person held under sentence of death, nor could a court of chancery issue an injunction restraining the execution of such sentence until after the probate hearing. In discussing the purpose of the statute quoted above the Court said:

> "This section was enacted solely for the purpose of protecting the civil and property rights of insane persons, as is

> clearly shown by the section itself and the other sections of the same chapter. It has no reference whatever to determining the issue of the sanity of one who has been convicted and sentenced to be executed for a criminal offense, and who is already in custody of the law for that purpose."

Section 4191, R.S. Mo. 1939, has special application to the case at hand. This section is contained in Article 18, of Chapter 30, R.S. Mo. 1939, which article deals with "pardon, suspension of sentence, remittance of fine and parole of prisoners." Section 4191, supra, has appeared in former revisions of our statutes since Laws of 1881, with minor changes having taken place in its wording, which changes do not cause the present statute to differ from the 1889 revision which disclosed that power of inquiry, authorized therein, was vested in the Governor of the State. Section 4191, R.S. Mo. 1939, 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 hospital for the care and treatment of the insane, 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 hospital for the care and treatment of the insane shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the hospital for the care and treatment of the

> insane for his board and clothing shall be paid as now or hereafter provided by law in cases of the insane poor: Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property, by his guardian. (R.S. 1929, 3801 Amended, Laws 1939, p.352.)"

Concerning the purpose of Section 4191, R.S. Mo. 1939, supra, the Supreme Court of Missouri, in the case of Schields v. Johnson County, 47 S.W. 107, 144 Mo. 76 l.c. 80, spoke as follows:

> "By this statute express power and authority are conferred upon the Executive of the State to inquire into the facts, in such manner as he may think best, with respect to the insanity of convicts who become insane after their conviction, and before the expiration of their sentences, and by his warrant, directed to the warden of the penitentiary, to order such lunatic conveyed to the insane asylum, and there kept until restored to reason. There is no appeal from the conclusion which may be reached by the executive in such cases, and his warrant to the warden is conclusive with respect to such action. This power was conferred upon the Executive for the manifest purpose of avoiding the necessary inconvenience and expense of an attempt to remove convicts who become insane after their incarceration in the penitentiary to the county or place where convicted for the purpose of having them declared insane by a jury of the county where committed."

Assuming for the purpose of argument, that Section 4191 and Section 9328, R.S. Mo. 1939, relate to the same subject, insanity inquiries, such laws must be read together and the pro-

visions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to the other act general in its terms (Eagleton v. Murphy, 156 S.W. (2nd) 683, 348 Mo. 949).

The case of State v. Brockington, 162 S. W. (2nd) 860, 349, Mo 662, discloses the attitude of the Supreme Court relative to the special application to be made of Sections 4190-4195, R.S. Mo. 1939, which statutes disclose a mode of procedure to be followed in the class of cases with which we are dealing. In the Brockington case a judgment of the trial court imposed the death sentence on defendant. Pending the defendant's appeal the Governor advised the Sheriff of Jackson County of the receipt of information casting doubt on the then sanity of defendant. The sheriff then instituted proceedings to inquire into defendant's sanity under the provisions of Section 4192 R.S. Mo. 1939, which proceedings resulted in finding the defendant insane. Acting upon said finding, the Governor of Missouri, suspended the execution of the death sentence against defendant for the reason that he had been declared insane and committed him to the State Hospital for the Insane, No. 2, at St. Joseph, Missouri. Later the State Hospital released defendant without giving due notice to the Governor. The Court held that defendant had never been discharged from the State Hospital No. 2, within the meaning of our statutory provisions relating to confinement and treatment of convicts becoming insane pending the execution of a judgment assessing their punishment. The Court further declared:

> "*** It would do violence to the spirit and letter of said statutory provisions (Sec. 4190-4195) to hold that the officers of such institutions, vested with authority to discharge persons committed thereto because of insanity, may blandly discharge therefrom convicts whose sentences, stand unexecuted by reason of their insanity without affording due opportunity to other law enforcement officers of the State to carry into execution the judgments of our courts having criminal jurisdiction, thus tending to hinder the administration of the criminal laws in such instances. The statutes contemplate as did the warrant of the Governor

> committing Brockington to State Hospital No. 2; that those responsible for the receipt and restraint of Brockington at said Institution would give due notice of his restoration to reason to the Governor and otherwise comply with the laws and orders of the duly constituted State officials and tribunals to the end that the judgment and sentence of the court, temporarily suspended during Brockington's insanity, he carried into execution in accord with due process of law."

The Brockington case differs from the instant case in that in the former a death sentence was adjudged, whereas in our case a five years sentence was adjudged. In the Brockington case the sheriff instituted the proceedings under authority expressly given in Sections 4192-4194, inclusive, R.S. Mo. 1939. The result of that inquiry was then used as the basis for the Governor's action under Section 4191, R.S. Mo. 1939. This last mentioned section directs that the Governor "inquire into the facts" but does not direct that an insanity proceeding be instituted as in cases where the death sentence has been imposed.

At 14 American Jurisprudence, l.c. 804, the following is found relative to the effect of insanity after conviction:

> "A person who was sane at the time he committed an offense and at the time of trial and sentence, but claims to have become insane during his confinement awaiting execution of his sentence, does not have an absolute right to a trial to determine his present mental condition unless it is expressly conferred by statute. An inquisition upon the defendant's present condition rests in the sound discretion of the court. It is generally recognized that to permit convicted persons to arrest the execution of the sentence imposed upon them by demanding as a legal right an inquisition into their mental

> condition would be tantamount to granting them the privilege of thwarting the administration of criminal justice for an indefinite term. Hence, persons in confinement awaiting the execution of the death penalty have no legal right, except where such right is conferred by statute, to have an inquisition into their mental condition. The initiating of such a proceeding is within the discretion of the court or the executive having jurisdiction in such matters." (Underscoring ours).

Discussions and citations made herein, supra, clearly indicate that the only recourse defendant has at this time is to follow the procedure disclosed in Section 4191, R.S. Mo. 1939, if he feels that his present condition makes him a fit subject for confinement in an institution for the insane. The circuit court on its own motion, if it so desires, has adequate authority to conduct its own inquisition in this matter, and by so doing, have facts available to present to the Governor for his action under Section 4191, R.S. Mo. 1939. The exercise of such jurisdiction by the Circuit court would merely be in aid of its general jurisdiction over this criminal case at a time when the defendant is still in the custody of the court.

Prohibition is a proper remedy for the State to invoke in this instance against the unwarranted usurpation and exercise of jurisdiction by the probate court. The probate court does not have legal custody of the defendant and it is difficult to see where it can accomplish its declared purpose in this instance. We have been unable to discover where the State has ever before sought to prohibit this untimely exercise of jurisdiction by a probate court. However, it must be conceded that prohibition may be invoked to restrain the enforcement of orders beyond or in excess of the legitimate authority of the judge though the court over which he presides has general jurisdiction of the class of cases to which the one in question belongs-- cases involving insanity inquiries. (State ex rel. Schoenfelder v. Owen, 152 S.W. (2nd) 60,347 Mo. 1131).

From what has been said regarding the lack of jurisdiction of the Probate Court to enter a judgment in the insanity inquiry

which has been instituted in such court, it is useless to discuss the question of where the probate court would commit the subject.

CONCLUSION

Where a defendant has been charged, tried, convicted and sentenced to a term in the penitentiary and the execution of such sentence is stayed pending appeal, the probate court is without jurisdiction to entertain an insanity inquiry and adjudge such defendant an insane poor person and order his committment to a State hospital. Procedural steps outlined in Section 4191, R.S. Mo. 1939, are controlling in such case, and prohibition is a proper remedy to be invoked by the State to restrain the Probate Court from exercising such jurisdiction.

Respectfully submitted,

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APPROVED:

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