PROBATE COURT:
INSANE PERSONS: The probate court cannot commit a person to a state hospital for the insane for observation after a hearing upon the sanity of a person.

January 6, 1950

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Mr. Homer T. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

I.

We are in receipt of your letter of November 21, 1949, in which you request an official opinion from this office upon the following set of facts:

> "We had a hearing before the Probate Court of this county relative to the sanity of a certain person, who was present in person and by attorney.
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> "The court took the matter of her sanity under advisement, but what he would really like to do is to send her to Farmington State Hospital for observation of Dr. Hoctor, who is in charge of that hospital and who is considered an authority in this sort of case. The attorney for the defendant, however, will not consent for her to be sent there for observation.
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> "Does the court have the right to send her there for observation, before ruling on the matter, as he is in doubt as to just what he ought to do about the matter, but he would like to send her there for observation and the opinion of Dr. Hoctor."

II.

Your letter does not state whether or not the alleged insane person was charged to be a poor person or a person with property sufficient to support herself at a state hospital. Since the adoption of the Constitution of Missouri in 1945, the probate court has jurisdiction over all insanity hearings so that we will consider the statute that applies in both situations.

Mr. Homer F. Williams

Section 9328, as reenacted by the Laws of Missouri, 1945, page 905, provides, in part, as follows:

> "The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto.* * *"

Section 447, R. S. Mo. 1939, and subsequent sections in Article XVIII of Chapter 1 of the Revised Statutes of Missouri, 1939, provide the procedure for inquiring into the sanity of a person by the probate court.

A leading case in Missouri on the procedure for the probate courts to follow in all insanity cases is In Re Moynihan (also known as Higgins v. Hoctor) 62 S.W.(2d) 410, 332 Mo. 1022, 91 A.L.R. 74. In this case Mrs. Moynihan was ordered on July 17, 1931, temporarily confined at the State Hospital No. 4 at Farmington, Missouri. The order is set forth in the statement of facts in said case. On August 7, 1931, the case was called for trial and an attorney appointed to represent Mrs. Moynihan; evidence heard, and judgment rendered committing her to State Hospital No. 4 at Farmington, Missouri without Mrs. Moynihan being present at the trial. The Supreme Court thoroughly considred all phases of this insanity inquiry and the court said, l.c. 415, 417, 418 and 419:

> "An insanity hearing is not to be compared to a criminal trial. The purpose is entirely different. The person alleged to be insane is accused of no crime or wrong. He is suffering from a disease of the mind or nerves, and he, as much as any one, needs protection from its effects. It is not intended to deprive him of his property, but to afford a means of preserving it. It is not intended to deprive him of his liberty as punishment but for his own protection and the protection of others from acts which he would not knowingly commit. It is intended to preserve all of his rights of both liberty and property until he is able to exercise them. * * *"
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> "As to the right to arrest and restrain until hearing one who is so deranged as to endanger himself or others as done in this case, and as provided for by sections 498, 499, R. S. 1929

(Mo. St. Ann. Secs. 498, 499) see notes 10 A.L.R. 488, and 45 A.L.R. 1464."

* * * * *

"* * *While the statutes covering the whole subject of insanity are constitutional and amply safeguard the rights of persons whose sanity is inquired into, the probate courts should observe the spirit as well as the letter of these laws. Acting under sections 498, 499, R.S. 1929 (Mo. St. Ann. Secs. 498, 499), it was proper for the court to order the temporary restraint and confinement of Mary E. Moynihan if it had reasonable grounds to believe that she was 'so far disordered in her mind as to endanger her own person or the person or property of others.' 'As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason, it follows, * * *that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as may be necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.' Buswell on Insanity, p. 33, Sec. 23. See, also, notes, 10 A.L.R. 488, and 45 A.L.R. 1464. But, even in such circumstances, it should be remembered that the preliminary order authorized by sections 498, 499, R.S. 1929, is not a valid final adjudication of the fact of insanity. The hearing provided by section 452, R.S. 1929 (Mo. St. Ann. Sec. 452), must still be had, and the person suspected of insanity still 'is entitled to be present at said hearing and to be assisted by counsel,' as stated in the notice required by section 450, R.S. 1929 (Mo. St. Ann. Sec. 450). The practice of sending a person to an insane asylum before the hearing might result in preventing the person claimed to be insane from employing counsel or being present at the hearing. Of course, there may be circumstances when such action is advisable and where there is no other suitable place available except at great expense, but such action should be

> taken with caution not to impair the rights of the alleged insane person. The probate court has statutory authority to call a special term (section 449, R.S. 1929, Mo. St. Ann. Sec. 449) when speedy action is necessary, and five days, under section 760, R.S. 1929(Mo. St. Ann. Sec. 760), is ordinarily sufficient notice. See State ex rel. Terry v. Holtkamp (Mo. Sup.) 51 S.W.(2d) 13, loc. cit. 19.
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> "(11-15) However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a state hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled and set at liberty by the superintendent of his own motion at any time. Section 8629, R.S. 1929(Mo. St. Ann. Sec. 8629). The hospital is a state institution. Chapter 46, articles 1 and 2, R. S. Mo. 1929 (section 8560 et seq. (Mo. St. Ann. Sec. 8560 et seq.)). The superintendent is one skilled in the treatment of mental diseases. Section 8578, R.S. 1929 (Mo. St. Ann. Sec. 8578). He is better qualified to determine a person's mental condition and the necessity for his confinement than the probate judge. He is a public officer, and improper action on his part will not be presumed. If the person confined desires counsel or to attend the hearing of which he has notice he has that constitutional right, and it would be the duty of the superintendent to allow it, even with the precaution of an attendant, if he thought that necessary. * * *"

This case has been followed by the Supreme Court of Missouri in several subsequent cases and was cited in 98 Fed.(2d) 222 by the United States Court of Appeals. This latter court stated in the case of Barry v. Hall, 98 Fed(2d) l.c. 230 as follows:

> "It is settled that the detention for a brief period of one who is as a matter of fact insane while proper proceedings are being instituted to determine his insanity as a matter of law is not unlawful."

Mr. Homer F. Williams

On April 27, 1949, this office rendered an opinion to Judge Franklin W. Long of the probate court of Bates county in which we held that the state hospitals are not available as places of confinement of dangerous insane persons before they have been adjudicated insane by the court. This opinion was based on the fact that sections 9323, 9324, 9325 and 9328, R. S. Mo. 1939, reenacted Laws of Missouri, 1945, p. 905, do not provide authority for the superintendent of a state hospital to receive patients, pending a sanity hearing, from the sheriff who has been ordered to apprehend and confine an alleged dangerous insane person in some suitable place.

Section 9336, as reenacted Laws of Missouri, 1945, page 905, provides that if the alleged insane person is charged to be so deranged as to endanger himself and others or would be dangerous to the safety of the community by being at large and is not being confined or restrained that the judge or clerk of the probate court may issue a warrant authorizing the sheriff to apprehend such alleged insane person and confine him or her in some suitable place for such time as may be necessary to carry to a determination the proceedings to inquire into the condition of the said alleged insane person.

Sections 497 and 498, R. S. Mo. 1939, and formerly Sections 498 and 499, R. S. 1929, provide that if a person be so far disordered in his mind as to endanger his own person or the person or property of others any judge of a court of record may cause such insane person to be apprehended and employ any person to confine him or her in some suitable place until the probate court shall make further orders therein.

But, after the hearing has been held on the question of whether or not the person is insane the person cannot be temporarily confined in a state hospital for observation in order to have the physicians of the state hospital to determine the sanity or insanity of the person and then testify at a subsequent hearing. The Supreme Court pointed out in the Moynihan case that the rights of a person charged with insanity shall be carefully preserved. We do not believe that it would be fair to the alleged insane person to continue the trial after hearing most of the evidence to allow the informants to obtain more evidence of the mental condition of the alleged insane person. It is true that the prime purpose of an insanity proceeding is to provide for the welfare of the person alleged to be insane and to preserve his property and the safety of the public (Boatmen's National Bank of St. Louis v. Wurdeman, 127 S.W.(2d) 438, 344 Mo. 573.

But the probate court should find the person sane or insane at the time of the hearing according to the evidence that has been introduced on the day set for trial. If the person is found to be insane by the probate court and is committed to the state hospital then, if the superintendent of said hospital finds the

person to be sane, such superintendent has the power, under Section 9321, as reenacted Laws 1945, page 905, to discharge or parole such person, or a proceedings may be held in the probate court as provided in Section 492, R. S. Mo. 1939, in which the probate court may find that the person committed has been restored to his right mind and order his discharge. This relief can be requested by the person committed at any time.

III.

CONCLUSION

It is, therefore, the opinion of this office that the probate court cannot commit a person to a state hospital for the insane for observation after a hearing upon the sanity of a person.

Respectfully submitted,

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STEPHEN J. MILLETT
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APPROVED:

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