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DETENTION HOSPITAL — PERSON ADMITTED BY ORDER, DEPARTMENT OF PUBLIC WELFARE — PAYMENT, EXPENSE OF CARE, PROVIDED BY PERSON LEGALLY LIABLE — SUM PAID SHOULD BE DIVIDED EQUALLY BETWEEN STATE AND COUNTY FROM WHICH PERSON COMMITTED — IF COUNTY INDEBTED TO STATE, STATE MAY RETAIN SHARE DUE COUNTY AND GIVE COUNTY PROPER CREDIT — SECTION 1890-108 G.C.

SYLLABUS:

Where a person is admitted to a detention hospital by order of the Department of Public Welfare pursuant to the provisions of Section 1890-108, General Code, and where payment on account of the expense of caring for and maintaining such person in such detention hospital, either in whole or in part, is made by some person legally liable therefor, the sum so paid should be divided equally between the state and the county from which such person was committed. If the county is indebted to the state, the state may retain the share due the county giving the county proper credit therefor.

Columbus, Ohio, March 28, 1942.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

You have requested my opinion as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

Under section 1890-109 of the new Mental Code, patients who can not be accepted by the State Institutions may be committed to county detention hospitals. While confined in such hospitals, the cost of care of each patient is paid, $1.25 by the state and $1.25 by the county, per day.

QUESTION: In the event all or any portion of such cost of $2.50 a day is paid by persons responsible for a patient, should the county of commitment receive one-half of the amount so paid; or, in case the state is withholding money belonging to the county of commitment by reason of previous indebtedness of the county to the state, should such county receive credit on its account for one-half of the money so paid?"

Sections 1890-108 and 1890-109, General Code, respectively provide:

Section 1890-108.

"The division of mental diseases, department of public welfare, may order the admission to a detention hospital of any persons who have been committed under the provisions of this chapter to a state hospital for the mentally ill but who have been denied admission to such hospital because of lack of room. A person so committed shall be detained in the detention hospital until the superintendent thereof or the person in charge of such detention hospital and the division of mental diseases determines that the person so committed shall be discharged, or may be transferred to a state hospital or other facility provided for herein."

Section 1890-109.

"In all cases all patients now confined in detention hospitals as mentally ill under adjudication and commitment to a state hospital by the probate court or who shall hereafter be so adjudicated and committed, and whose admission to the state hospital is denied by reason of lack of room, the cost of maintenance and care shall be borne jointly by the state and the county from which such mentally ill person or persons are committed under the provisions of existing laws governing the support of patients confined in state hospitals, as specified by existing sections 1815-1, 1815-3, 1815-4, 1815-5, 1815-6, 1815-7,

1815-9, 1815-10 and 1816 of the General Code, the state's financial obligation to begin as of the date the application for admission to a state hospital is refused. The rate to be paid to detention hospitals for the maintenance and care of the mentally ill shall be fixed by the state department of public welfare in an amount not to exceed two and 50/100 dollars ($2.50) per day for each person.

Payment at the full rate specified in this act shall be made in the first instance by the state from such funds as may from time to time be provided in any act appropriating state funds therefor. The county from which the mentally ill person or persons are committed shall have authority to expend funds to reimburse the state for its share of the obligation specified by this act. The treasurer of each county shall pay to the treasurer of state, upon the warrant of the county auditor, the amount charged against such county for the preceding month for the maintenance and care of all such persons so committed and confined not later than fifteen (15) days after the presentation of the monthly welfare of the state of Ohio.

The patient or the estate of the patient and those persons named in section 1815-9 of the General Code shall be liable for such support and maintenance.

Collections from responsible relatives for the support of patients confined in detention hospitals under the provisions of this section shall be the legal responsibility of the state department of public welfare.

The state shall not be held responsible for the expense of care and maintenance of any person confined in any detention hospital who does not have a legal settlement in the state of Ohio."

Section 1890-109, General Code, does not provide in what proportion the state and the county from which such mentally ill person or persons are committed shall bear the expense of their maintenance in a detention hospital, but merely provides that such cost shall be borne jointly by the state and such county. In the absence of any specific provision to the contrary, it must be assumed that the General Assembly intended that this expense should be borne equally by the state and such county. The section further contemplates that in the first instance the entire cost shall be paid by the state and that the state shall be reimbursed by the county monthly within fifteen days after presentation of a monthly statement by the Department of Public Welfare.

However, it is further contemplated by the provisions of such sec-

tion that the estate of such patient or certain persons named in Section 1815-9, General Code, shall be liable for the support and maintenance of such person in a detention hospital. In other words, the intent of the General Assembly very obviously was that the county and the state should be reimbursed for any expenditures made pursuant to the provisions of this section where such amounts were subsequently collected from the patient, his guardian or one of the persons named in Section 1815-9, General Code.

In cases where the full amount expended in behalf of a patient for his care and maintenance in a detention hospital is recovered from his guardian or some other person legally responsible for such expense, it seems rather clear that the state should receive one-half of such amount and the proper county the other one-half and in cases where the county is indebted to the state, the county's one-half could be retained by the state and proper credit given to the county on account of its indebtedness.

However, your question also assumes situations where the amount paid by the guardian of such patient or some other person legally liable for his maintenance and care does not equal the amount expended by the state and county for such purpose, and the problem therefore at once arises as to whether the state may claim priority and retain the full amount paid by it on account of such patient and pay the balance, if any, remaining thereafter to the county, or should such amounts so received be divided equally between the county and the state.

In some states the rule is that the state as a sovereignty has the prerogative right to priority in payment and to preference as a creditor where the assets are not sufficient to pay all lawful claims. This is on the theory that states as sovereignties have succeeded to the prerogatives of the British Crown and one of these prerogatives was priority in payment and preference of claim. I am of the view that such rule does not now obtain in Ohio and, in fact, it may well be doubted whether this principle of the common law ever was part of the law of Ohio.

On July 14, 1795, the governor and judges of the Northwest Territory, who at that time were the legislative authority, adopted an act to become effective on October 1, 1795, which provided:

"The common law of England, all statutes or acts of the

> British parliament made in aid of the common law, prior to the fourth year of the reign of King James the first (and which are of a general nature and not local to that kingdom) and also the several laws in force in this Territory, shall be the rule of decision, and shall be considered, as of full force, until repealed by legislative authority, or disapproved of by congress."

3 Laws of the Northwest Territory, 175; 1 Chase Stat. 190. This act was repealed by the General Assembly of Ohio some years after statehood was attained, on the second day of January, 1806. See 4 O.L., 38. In passing, it may be noted that doubt has several times been expressed as to whether the act of 1795 was valid and whether the common law of England in all respects was ever enforced in the territory now within the limits of this state. See Doe ex dem. Thompson's Lessee v. Gibson, 2 Ohio, 340; and comments of Mr. Chase in his edition of Ohio Statutes at page 190 of Vol. 1.

Be that as it may, the effect of these acts has not been to reject the common law in its entirety in this state. Although it might well be argued that where the common law is adopted in a body by express legislation and thereafter such adopting act is repealed, the common law is excluded, such has not been the rule followed by the decisions of our courts. Thus, in Carroll v. Olmsted, 16 Ohio, 251, 259, it was said by Avery, J.:

> "We have had some legislation in this state, by which, in terms, the English common law, and statutes made in aid of the common law, were introduced into this state. The last act upon the subject repealed the law which had expressly adopted the common law, and certain statutes made in aid thereof, which were not mentioned by name. The repealing act was passed in January, 1806. What was the effect of this legislation, first adopting the common law in a body, and then repealing the law which had so adopted it? It has not been to exclude the common law. That has always been in force, and it could not have been excluded without producing effects marked in character like those which follow in the train of a revolution. If that could have been actually excluded, we must, from necessity, have been driven to adopt at once the civil law, or some other code, to furnish a system of rules needed to act upon the countless and complicated interests of such a community as ours. No one can suppose, however, that there was ever a time when the common law of England was not in force here. It was indispensable to the action of our courts at all times. But with us, as in the other states of this Union, parts of the common law, not applicable to our circumstances, or not suited to the genius of our institutions, were not introduced, and formed

> no part of our law. To our courts the power seemed, in many cases, necessary — and then they always exercised it — of deciding what portions of that law were *not* applicable."

It therefore becomes necessary to determine whether the common law prerogative granting to the sovereignty priority of claims exists in Ohio today. In The Fidelity and Casualty Company v. The Union Savings Bank, 119 O.S., 124, 126, 127, it was said in the opinion of the court by Marshall, C.J.:

> "It becomes important, therefore, to inquire at the outset as to the meaning and characteristics of sovereignty. In its largest sense, and when applied to an absolute monarchy, it means supreme, absolute, uncontrolled, power to govern. Under any government of limited powers, sovereignty is the supreme power which governs the body politic. The quality and characteristics of sovereignty naturally depend upon the source of the power. Under monarchical government in remote periods the monarch claimed infallibility and divine rights. Such notions are so remote from the notions of sovereignty entertained under our own republican form of government that it would be idle to discuss or even refer to the sovereign powers of monarchical governments."

However, at page 129 of the opinion, it was further stated that the court found it unnecessary to declare whether the rights of sovereignty can exist in the state of Ohio without being conferred by constitutional provision or legislative enactment, and the conclusion was reached in the particular case then before the court that no prerogative of sovereignty existed which gave to the state a preferred claim. The decision, however, was to some extent based on the policy of the law as declared by the legislature in Section 321, et seq., General Code, as they then existed.

In George D. Harter Bank v. McKinley Lumber Company, 136 O.S., 465, it was said by Zimmerman, J., at 467:

> "By the English common law, debts owing the Crown of Great Britain were given priority of payment over those owing private persons, and the courts of many of the states of this country in which, by Constitution or statute, the common law is made 'the law of the land' or 'the rule of decision' except as changed by statute, have held that this royal prerogative is vested in the states as sovereignties. Therefore, when the state and private persons bear the relationship of general creditors to a debtor, or have claims of equal standing against him, the state is accorded priority in payment."

It will be noted that Judge Zimmerman states that this royal prerogative exists where "by Constitution or statute, the common law is made 'the law of the land' or 'the rule of decision' except as changed by statute." There is no provision in the Ohio Constitution or statutes adopting the common law as "the law of the land" or "the rule of decision," and Judge Zimmerman's remark carries the inference at least that in the absence of such statutory or constitutional provision this prerogative does not exist in the state.

In any event, I have been unable to find any decision where the prerogative has been held to exist in the state as against one of the counties thereof, even in states having constitutional or statutory provisions of the type mentioned by Judge Zimmerman. Since the very existence of this prerogative in Ohio is so doubtful and because it apparently has never been asserted as against a county, I believe that it can not be asserted by the state of Ohio under the circumstances set forth in your question. In other words, where partial payment is made by some person responsible for a patient, the amount so paid should be divided equally between the state and the proper county, and if the state is withholding money belonging to such county by reason of indebtedness of the county to the state, the county should receive credit on such indebtedness for its share of the money so paid.

For these reasons, I am of the opinion that where a person is admitted to a detention hospital by order of the Department of Public Welfare pursuant to the provisions of Section 1890-108, General Code, and payment on account of the expense of caring for and maintaining such person in such detention hospital either in whole or in part is made by some person legally liable therefore, the sum so paid should be divided equally between the state and the county from which such person was committed.

Respectfully,

THOMAS J. HERBERT
Attorney General.