

1096.

CHILDREN—TEMPORARILY COMMITTED TO CHILDREN'S HOME—CIRCUMSTANCES UNDER WHICH VACCINATION OR SERUM INJECTION MAY BE REQUIRED.

SYLLABUS:

There is no question but that the combined power of the juvenile court and the trustees of a county children's home is sufficient to enable such officers to require the administration of such medical and surgical treatment as circumstances require for the welfare of children under the custody and control of the trustees of such home, and, when the facts justify, such authorities may require the administration of vaccine, antitoxin and serum treatments. Such officials may not take such action in this respect as would, under the existing facts, amount to an abuse of discretion.

COLUMBUS, OHIO, October 23, 1929.

HON. C. G. L. YEARICK, *Prosecuting Attorney, Newark, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

"The trustees of the Licking County Children's Home have presented to me the following question:

'Is there any authority for requiring children committed to the Children's Home for temporary care to submit to vaccination or serum injection?'

By Section 3093, General Code, children committed for temporary care, or received by arrangement with parent or guardian, shall be considered under the custody and control of the trustees only during the period of such temporary care.

Sections 1261-26 and 1261-31 provide for inspection and supervision of various public institutions by the district board of health.

I should like your opinion as to whether the trustees of the Children's Home may adopt its own rules and regulations concerning vaccination of temporary commitment, and also as to whether the county board of health may adopt rules and regulations concerning the same matter."

Without undertaking to refer to the numerous statutes relating to the powers of the boards of health to make rules and regulations to prevent the spread of contagious and infectious diseases, it may be stated that such boards do not possess the power to require compulsory vaccination or serum treatments. While there are certain sections which seem to grant powers broad enough to include such requirement, there are other sections which seem to negative such power. Section 4449 of the General Code provides:

"The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination."

From the section above quoted, it clearly appears that boards of health may undertake measures to induce persons to become vaccinated, but there seems to be no authority to make a rule requiring it. Section 7686 of the General Code more nearly approaches compulsory vaccination than any other statute and provides:

"The board of each district may make and enforce such rules and

regulations to secure the vaccination of, and to prevent the spread of small-pox among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public require. Boards of health, councils of municipal corporations and the trustees of townships, on application of the board of education of the district, at the public expense, without delay, shall provide the means of vaccination to such pupils as are not provided therewith by their parents or guardians."

In construing the above section, it has been held that while pupils may be required to be vaccinated before attending school, such vaccination cannot be compelled if the child does not attend.

In an opinion found in Opinions of the Attorney General for the year 1925, at page 173, it was held, as disclosed by the first branch of the syllabus:

"A board of education under the provisions of Section 7686, General Code, may in the exercise of a sound discretion, make and enforce rules and regulations to secure the vaccination of, and to prevent the spread of small-pox among the pupils attending or eligible to attend, the public schools, as in its opinion the safety and interest of the public require, and may enforce a rule excluding from the schools all children who have not been vaccinated; but cannot require a pupil against his will or the will of its parents to submit to actual vaccination."

From the foregoing, it will appear that the power of the board of health is restricted to the enforcement of quarantines and encouragement of voluntary vaccination as measures to prevent the spread of dangerous diseases and has broad powers to make regulations within such limitations.

It appears, therefore, that boards of health would be powerless to make rules which would require vaccination of children in the custody and control of the trustees of the children's home.

Sections 4442 and 4443 of the General Code, which relate to contagious diseases in public institutions, provide:

Section 4442. "When smallpox, cholera, yellow fever, diphtheria, scarlet fever or other dangerous, contagious or infectious diseases appear in any state, county or municipal, benevolent, correctional or penal institution, the superintendent or manager thereof shall at once isolate the person or persons so affected and enforce the provisions of this chapter for the prevention of contagious diseases, so far as they may apply, and the rules, regulations and orders of the state board of health to that effect."

Section 4443. "The trustees or manager of any such institution may erect any necessary temporary building for the reception of such affected persons or for the detention of persons exposed to such diseases and may remove such persons to and confine them in such buildings."

From the foregoing sections, it will be noted that the Legislature has provided the means of protection against contagious diseases in such institutions. While Section 4442, supra, expressly authorizes the managers of such institution to carry into effect "the rules, regulations and orders of the state board of health to that effect," this grants no power with reference to vaccination for the reason, as hereinbefore pointed out, boards of health have no such power to make such orders.

From the foregoing, it will be seen that if there is power in the board of

trustees having control of a children's home to require vaccination, such power must arise by reason of the implied custodial powers conferred upon such trustees by reason of the statutes. Section 3093 of the General Code provides:

"All wards of a county or district children's home, or any other accredited institution or agency caring for dependent children who by reason of abandonment, neglect or dependence have been committed by the juvenile court to the permanent care of such home, or who have been by the parent or guardian voluntarily surrendered to such an institution or agency, shall be under the sole and exclusive guardianship and control of the trustees until they become of lawful age. The board of trustees may by contract or otherwise provide suitable accommodations outside of the home and may provide for the care of any child under its control by payment of a suitable amount for board, to a competent person, whenever the interests of such child require such an arrangement. Children committed for temporary care or received by arrangement with parent or guardian shall be considered under the custody and control of the trustees only during the period of such temporary care, except as hereinafter provided. Whenever a child has been received upon agreement of parent to pay a stipulated sum for his support and such parent is in arrears for a period of six months or more, the trustees may institute proceedings in the juvenile court to ascertain whether such child has been abandoned. The judge of the juvenile court shall after hearing the case make such order for the future care of the child as in his judgment is just and proper for the best interest of the child."

In analyzing the provisions of the section last quoted, it would appear that during the period of temporary commitment such children are under the guardianship of the institution to which they are committed during such period of commitment because they are in its "custody and control."

The language relative to the custody and control during the period of temporary commitment is not so emphatic as that used in connection with a permanent commitment. In connection with the latter the statute prescribes that the institution shall "become vested with the sole and exclusive guardianship and control," while, of course, as to temporary commitment, as above mentioned, the language relates to the "custody and control." In this connection Section 1643 of the General Code should be noted, which provides in part:

"When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age. Provided, in case such child is committed to the permanent care and guardianship of the Ohio Board of Administration, or the Board of State Charities, or of an institution or association, certified by the Board of State Charities, with permission and power to place such child in a foster home, with the probability of adoption, such jurisdiction shall cease at the time of commitment."

I am of the opinion that notwithstanding the provisions of Section 1643, *supra*, a child, while temporarily committed to an institution, is under the guardianship of the institution while so committed. In any event, it must be conceded that the guardianship in the case of a temporary commitment is either in the juvenile court

or the trustees of the institution, or both. It has come to my attention that it is a common practice in many counties, in the event a child who is an inmate of a children's home needs unusual medical or surgical attention, such as a major operation or administration of antitoxin or vaccine, for the trustees to secure an order from the court authorizing such treatments. It is believed that this practice is commendable in those cases where this method may be conveniently followed, for the reason that, in the event it should be held that the court still retains such guardianship of the child, while it is temporarily committed, the court's consent to such treatment which is administered under the direction of the board of trustees would remove any possible question that might arise as to the division of the guardianship authority. In other words, if the sole guardianship is not in the hands of the trustees, then it must be in the court, or in both the court and the trustees, as hereinbefore stated. There must be some guardianship powers authorized to be exercised by the trustees for the reason they have the custody and control of the child. Therefore, as hereinbefore stated, if the court and the trustees concur in the administration of a given treatment, which said treatment is necessary for the welfare of the child, in view of all the facts, it is believed that no question can be raised as to their authority. It is certain that during the time of such temporary commitment the parents or other persons have no authority over such child.

In view of the foregoing, it would appear that when the consent of the court has been given, such steps may be taken relative to the administration of medical attention to such a child as might be taken by the parents of such a child if it were in their custody and control. In case of serious epidemics, when entire families have been exposed, a situation could well be imagined whereby it would be near to criminal negligence for parents to refuse the administration of vaccine or antitoxin to protect their children. Circumstances may arise when similar duties may be required by officers managing an institution or having the custody and control of children who are inmates thereof. Under Section 7686 of the General Code, hereinbefore mentioned, a child may be barred from the public schools if it has not been properly vaccinated. In the event that a child, such as you mention, would be required to attend the public schools where such a rule was in force in order to acquire an education, circumstances might arise where vaccination would be justified in order that the child might complete its education.

Without undertaking to indicate what facts should exist in order to justify the requirement of vaccination or the administration of antitoxin in case of temporary commitments, it may be stated that it is my opinion that the combined power of the juvenile court and the trustees of a county children's home will enable them to require such medical treatment under circumstances wherein it will be for the welfare of the children under their custody and control. It follows, of course, that such officials may not take such action in this respect as would, under the existing facts, amount to an abuse of discretion.

Respectfully,
EDWARD C. TURNER,
Attorney General.