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Writ of *habeas corpus* Where Person Is Confined in Asylum Without Verdict by a Jury

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Kentucky Court of Appeals

NOTES

WRIT OF HABEAS CORPUS WHERE PERSON IS CONFINED IN ASYLUM WITHOUT VERDICT BY A JURY.*

JAMES E. FERGUSON, ... *Plaintiff.*

VS.—OPINION

DR. F. G. LARUE, ... *Defendant.*

LUNACY—A person confined in the Asylum without the verdict of a jury may be released on a writ of Habeus Corpus.

James E. Furguson has filed with the Judge of this Court a petition for a writ of Habeas Corpus in order to obtain his release from the Eastern State Hospital. Ferguson was sent to the hospital by an order of the Lawrence Circuit Court as an insane person, and he complains that he is confined to the hospital without due process of law for the reason that he had no notice of the lunacy inquest and that he was not tried and adjudged insane by a jury.

If the petitioner is correct in his contentions, or any of them, he is confined without due process of law. At the outset it should be borne in mind that the question of the sanity or insanity of the petitioner is not involved in this proceeding, and so far as this proceeding is concerned this Court cannot, and does not consider whether the petitioner is sane or insane, but the only question here considered is whether he is confined to the asylum without due process of law.

There are certain fundamental rights guaranteed to every citizen of this State and of the United States by the Constitution of the United States, and by the Constitution of Kentucky these rights are declared to be inherent in a free people and they cannot be taken away.

*An opinion by Judge R. C. Stoll, formerly Judge Fayette Circuit Court. This is the fourth in a series of opinions by Judge Stoll. In many instances they discuss the constitutionality of statutes and questions of law not as yet passed upon by the Court of Appeals of Kentucky.

The Bill of Rights of the Constitution of Kentucky provides that "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic" and "all men have certain inherent and inalienable rights among which may be reckoned the right of enjoying and defending their lives and liberties and the right of acquiring and protecting property." The Bill of Rights also provides that "the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

The Constitution of the United States provides that no person shall be deprived of life, liberty, or property without due process of law.

In considering the questions involved in this proceeding the above principles of our organic law and should always be remembered, because upon them rests the very foundation of our liberty, the preservation of which should be the firm resolve of every person who loves his home and his country.

In the proceedings which resulted in the confinement of Ferguson in the asylum, R. L. Vinson filed a written statement that Ferguson was a person of unsound mind. Two reputable physicians were appointed by the Lawrence Circuit Court and they reported that in their opinion Ferguson was insane, and two physicians filed an affidavit with the Court stating that it would be unsafe to bring Ferguson into court to attend an inquest to be held upon him for insanity. No notice was ever issued to or served upon Ferguson, but a notice was issued commanding the Sheriff to summon R. L. Vinson, who is the same person who filed the information which started the inquest, to appear in the Lawrence Circuit Court before County Judge Fyffe and that he should bring with him James E. Ferguson. This notice was served upon Vinson. An attorney of the Lawrence County Bar was appointed to represent Ferguson. The record shows that a jury trial was waived and the Court ordered Ferguson to be confined in the asylum. No notice of any kind was served upon Ferguson that an inquest was to be held touching his sanity and it did not appear that the attorney appointed to represent him ever consulted with him and he was not in court at all during the proceedings. This, in short, was all that was done except that he was committed to the asylum.

We have then this condition existing. Ferguson was ordered confined to the asylum and thereby deprived of his liberty, without notice to him that an inquest was to be held. He had no opportunity to defend himself in court; he knew nothing of it; he was confronted by no witnesses; no witness was cross-examined by him or in his presence or by a lawyer of his choosing; no jury heard or tried his case and the testimony shows that the first notice he had was by the officer who took him to the asylum.

Under the law a person is presumed to be sane until he is proven insane, and while this presumption exists he should be notified that he is to be tried for insanity. This proceeding was brought under the Act of 1918 as amended, and under this act the defendant has a right to demand a trial by jury, or the court on its own motion may call a jury to try such a case and it may be contended that this meets with the requirement of our Bill of Rights and of the Constitution of the United States.

If the trial of a person for lunacy comes within the scope and meaning of Section 7 of the Bill of Rights, it is quite certain that the plaintiff's sanity was not determined by the ancient mode of trial by jury. The Courts have upon several occasions considered just what questions were entitled to be tried by jury.

In the case of *Carson* v. *Commonwealth*, 1 A. K. Marshall, 290, in considering this question the Court asid,

> "And in making this inquiry, it is material, barely to look into the laws regulating the trial of such cases at the time and previous to the adoption of the constitution. For if before and at the time those who should be accused of like offenses were, by the existing laws, allowed to have a decision of their case by a jury, any change in the law by which they may be deprived of that privilege, must as it is an innovation upon the ancient right, be considered as an infraction of the clear and obvious meaning of the constitution."

This opinion following the opinions in previous cases, to-wit: *Stidger* v. *Rogers*, 2 Ky. 52; and *Gullian* v. *Bowlware*, 2 Ky. 76, lays down the principle that in every case wherein prior to the adoption of the Constitution a jury was allowed, the ancient mode of trial by jury shall be preserved. From the earliest times it would appear that our Kentucky lunacy inquests were tried by jury. Our present Constitution was adopted September 28, 1891, yet as early as 1831, in Morehead and Brown's Digest of the Statute Laws of Kentucky, Vol. 2, pages

800-1, we find the following provisions relating to the trial of persons alleged to be of unsound mind:

"No inquest of idiocy or lunacy shall be tried, unless the person asserted to be an idiot or lunatic shall be in Court, or shall have ten days' notice; and it shall be the duty of the Court to appoint some fit person to attend the inquisition on behalf of the defendant, whose duty it shall be to see that the defendant is not improperly condemned. . . . Whenever application is hereafter made to any circuit court, for an inquiry to be made as to the sanity or insanity of mind of any person, it shall be the duty of the court to award a writ, by which the sheriff of the county shall be commanded to summon twelve housekeepers of the county to inquire whether the person be or be not of unsound mind; and he be of unsound mind whether he was so at the time of his birth, or became so afterwards, provided, that the court may in its discretion direct the inquest to be held in open court."

It will be seen therefore, that at the time of the adoption of our present Constitution, and for many years prior thereto, the law of Kentucky expressly required notice to be given to the person to be tried, required his presence in Court, and made it the duty of the Court to have summoned a jury of twelve men to determine the sanity of the person on trial. In the present Act there is no provision requiring notice to be personally given to the person to be tried, nor is it necessary that a jury be impaneled in the case. It is true that a jury may be impaneled on motion of the Court, but this does not preserve to the defendant the rights which were guaranteed to him under the law above quoted, and does not by any means take the place of notice to the defendant himself that his sanity at a certain time is to be determined.

The question as to legality of the commitment of lunatics tried with reference to the giving of notice, and the right of trial by jury, has upon several occasions been decided in various jurisdictions.

In the case of In Re Lambert, 86 Am. St. Rpts. 296, in passing upon the constitutionality of an act quite similar to the one in question, the court said:

"The act in question, was evidently suggested by the insanity law of New York, passed in 1896 (1 N. Y. Laws 1896, c. 545,) and the pro-

visions of that act have been closely copied. The New York Statute, however, contains many provisions and safeguards for the individual which are not contained in the law of this state. Section 62 of the New York Statute, which corresponds to section 3, article 3 of the California statute, provides that 'notice of such application (for the order of commitment) shall be served personally, at least one day before making such application, upon the person alleged to be insane,' a provision which is wholly omitted in the statute of this state. The section also provides that the judge may dispense with personal service, or may direct substituted service to be made upon some person to be designated by him, but that in such case he shall state, in a certificate to be attached to the petition for the commitment, his reasons for dispensing with personal service of such notice, and if substituted service is directed, the name of the person to be served therewith. In *People* v. *Wendel*, 33 Misc. Rep. 496, 68 N. Y. Supp. 948, the relator had been committed to an insane asylum under the provisions of this section, but had had no notice of the application, either personally or by substituted service on any one in her behalf, and there was no hearing at which she was either personally present or represented by any person. The court held that, to the extent that the insanity authorized such proceeding, it was in violation of the constitution, in that it deprived her of her liberty without due process of law, and ordered her release.

"An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this state a guardian of the person or the estate of an insane person cannot be appointed without giving him notice of the application therefor (Code Civ. Proc. sec. 1763) nor can a judgment for so small a sum as five dollars be rendered against him unless he has been served with a summons in the action; Code Civ. Proc. sec. 411. Much more is there reason for giving him notice of an application to deprive him of his personal liberty. The provision in the statute for a notice to a relative or friend of the alleged insane person cannot be made the equivalent of a notice to the person himself. Neither can the provision that upon the application for commitment a hearing may be had upon the demand of any relative or near friend in behalf of the alleged insane person, or upon the motion of the judge himself, be considered as due process of law. What constitutes due process of law may not be readily formulated in a definition of universal application, but it includes, in all cases the right of the person to such notice of the claims as is appropriate to the proceedings and adapted to the nature of the case, and the right to be heard before any order of judgment in the proceeding can be made by which he will be deprived of his life, liberty, or property. The constitutional guaranty that he shall not be deprived of his liberty without due process of law is violated whenever such judgment is had without giving him an opportunity to be heard in defense of the charge and upon such hearing to offer evidence in support of his defense. If his right to a hearing depends upon the will or caprice of others, or upon the discretion or will of the judge who is to make a decision upon the issue, he is not protected in his constitutional rights: *Underwood* v. *People*, 32 Mich. 1, 20 Am. Rep. 633. To say that if he is in fact insane, therefore any notice to him would be vain, is to beg the question whose determination underlies the right of the state to deprive him of his liberty. The fact of his insanity is to be determined before his right to his liberty

can be violated. If that question is determined against him, without any notice or opportunity to be heard, and he is confined in the hospital, his constitutional guaranty is violated."

In the case of *Re Allen*, 26 L. R. A., page 237, the Court said,

"The statute is silent regarding notice to the alleged incompetent than whom, from a legal point of view, no one can have a greater interest in the matters and things there to be heard and determined. Thus, securing his confinement in the hospital for the insane, as an insane state pauper, may be at the request of loving friends and relatives, prompted by honest intentions and by considerations looking to the most humane and beneficial treatment that can be given to an unfortunate of that class; or it may be part of a scheme by those seeking to get rid of him personally, or to deprive him of his just property rights, or as relatives avoid the statutory liability for support, concerning the facts of which his knowledge would to them be most damaging, and perhaps sufficient to thwart their sinister intent and purpose altogether, if he be given sufficient notice and an adequate opportunity to defend. 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; *Kelcher* v. *Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Porter* v. *Ritch*, 70 Conn. 235, 39 L. R. A. 353, 39 Atl. 169; *Look* v. *Dean*, 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."

In the case of *In Re Wellman*, 45 Pac. 726, the court said,

"Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere *ex parte* proceeding can affect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object of which was to affect the person or property of a citizen, without notice or opportunity to be heard, such legislation would be rejected and repudiated in advance, as an intolerable outrage upon the rights of the citizen. It would not only be a serious infringement of natural rights, but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law. Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice, which cannot be ignored. Without them, no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane, and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry;

the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law, until it is established by evidence in a proper proceeding. A trial without notice—a mere *ex parte* proceeding—has no proper place in a court of justice. It is a nullity and void, as affecting those not parties to it."

And in the case of *Evans* v. *Johnson,* 45 Am. St. Repts. 912, the Court, in an exhaustive opinion in which is aptly stated the fundamental principles upon which is based the right to be notified and to appear and defend said,

"It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property and even his freedom of person and commits his property, his person, his liberty, to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good? The reply is, that his insanity is the very question to be tried, and he is the only party interested in the issue. In many cases, if notice be given him, he will be prompt to attend and, in person, be the unanswerable witness of his sanity. In some cases, if notice be not given him, those interested in using the property or robbing him of it will effectuate a corrupt plan. Almost as well might a man be convicted of crime without notice. There is abundant authority for this position.* * * * If it was unreasonable in the opinion of a Roman Governor to send up a prisoner and not signify withal the crimes alleged against him, the law judges it to be equally so to pass upon the dearest civil rights of the citizen without first giving him notice of his adversary's complaint. The truth is that at the door of every temple of the law in this broad land stands justice with her preliminary requirement upon all administrations; you shall condemn no man unheard. The requirement is as old, at least, as Magna Charta."

From an examination of these opinions rendered in widely separated jurisdictions, one cannot escape the conclusion that throughout the United States a commitment to an insane asylum without notice to the person to be tried and without a trial by jury has been held by the courts to be unconstitutional, and contrary to that liberty and justice which the Fathers stated to be the very foundations of our government, and, for the preservation of which, patriots through the years since then have shed their blood. It has been said that sometimes the easiest way is the best, but not so when a person's liberty is involved. Speedy trials and everything which dispenses with tedious, archaic, or unnecessary technicalities are to be commended, when it can be done without surrendering the safeguards which the Constitution has thrown around the humblest citizen. In providing that

a person may be tried for lunacy without being given personal notice and that a trial by jury might be waived, the Legislature no doubt attempted to establish paths and orderly processes of the administration of the law which are too oftentimes like "royal roads to learning;" they are snares and delusions, are dangerous in principle and accomplish nothing. Such a summary method of commiting persons to insane asylums doubtless is the easiest way of disposing of cases of this kind, but it is not the legal way and the legal way is the only way in which it can be done.

A person against whom an information of lunacy has been filed, is entitled to notice, and he is entitled to be tried by a jury of his peers. If he is confined to the asylum his liberty is taken away from him. If he has property a committee is appointed who takes away from him the right to manage his property, and he is therefore deprived of his property and the use of it. Under our constitution such a procedure cannot be had.

The petition for an inquest, however, was properly filed in the Lawrence Circuit Court. The affidavits made by the physicians that he is of unsound mind, must and could not be brought into court, are regular upon their face, and so the Lawrence Circuit Court had jurisdiction to determine the sanity of Ferguson, but in order to do so it acted beyond its jurisdiction when it undertook to try him without notice to him personally and without giving him the right of trial by jury.

I am therefore of the opinion that notice of an inquest must be actually served upon a person charged to be a lunatic; that no person for the alleged lunatic has a right to waive a trial by jury; that the alleged lunatic is entitled to a trial by jury. Whether or not he can waive it himself I do not decide or determine, and Ferguson not having been served with notice and not having been tried by a jury, I am of the opinion that he is confined in the asylum without due process of law. But inasmuch as the proceedings in the Lawrence Circuit Court were properly begun, the Lawrence Circiut Court has the right to hold the inquest upon notice to Ferguson and must give him a trial by jury.

It is therefore ordered that Ferguson be taken from the asylum at Lexington and turned over to the proper officers of

the Lawrence Circuit Court so that this court may proceed with and continue the inquest of lunacy which has been properly begun in that Court.

RICHARD C. STOLL, *Judge.*