ized to administer an oath in the name of his principal. That, such deputy may lawfully act in his own name as such deputy; however, in my opinion it is the better practice for the deputy to act in the name of his principal. Therefore, it is my opinion your questions No. 1 and 2 should be answered in the affirmative. As to your question No. 3, in my opinion, either method used would not be invalid.

OFFICIAL OPINION NO. 5

January 15, 1952.

Honorable Arthur G. Loftin,
Administrative Director,
Indiana Council for Mental Health,
1315 West 10th Street,
Indianapolis 7, Indiana.

Dear Mr. Loftin:

I have your request for an official opinion which reads as follows:

> "This department has had numerous requests for opinions on Section 22-1218 of the Burns' Annotated Statutes of 1933, 1950 Replacement.
>
> "This section states, 'Upon receipt of such statement certifying that such person is restored to mental health, the court shall thereupon enter an order finding such person sane.' Our questions stem from this particular certification.
>
> "First, is the certification of 'restored to mental health' greater than the certification 'sufficiently recovered to be released' in the eyes of the law?
>
> "Second, is the court's finding of mental illness or insanity a judicial finding?
>
> "Third, if the answer to question number two is in the affirmative, how then can a ministerial act such as the entrance of the certification from the superintendent on the orderbook of the court return the patient to

his normal status in life, since we understand that this is a ministerial act and a ministerial act will not invalidate or repeal a judicial act?

"Fourth, if the answer to number three holds that the ministerial act does not restore the person to his normal status in society, then is a court proceeding necessary for such restoration to sanity and capacity?

"Fifth, since it has been held that a writ of habeas corpus can be used to attack the incarceration of a person in a mental institution, therefore, was there no judicial finding and no final judgment of the court connected with the incarceration in the first place?

"I would greatly appreciate an immediate opinion if possible on this section."

In order to answer adequately your questions, it is necessary to review the authorities having to do with adjudications and determinations of insanity for various purposes. It is a basic concept of our law that a person who is insane does not have the capacity to perform the normal pecuniary functions of an adult person. In the case of Teegarden *et ux.* v. Lewis (1895), 145 Ind. 98, 102, 44 N. E. 9, it was said in this regard:

"* * * Our statute, R. S. 1894, section 2726 (R. S. 1881, section 2556), withholds from persons of unsound mind the power to make a testamentary disposition of property, while it is provided by section 2724, R. S. 1894 (section 2554, R. S. 1881), that 'Every contract, sale or conveyance, of any person while of unsound mind, shall be void.' By judicial construction, the latter section has been held to mean that such contracts shall be void, if executed by those adjudged to be of unsound mind, and voidable only, if executed by those who are unsound but not so adjudged. * * *"

Prior to our present law for the commitment of mentally ill persons, two procedures were available in regard to insane persons. First, Chapter 14 of II R. S. 1852, same being Burns' 8-201 *et seq.*, provided, as it still does, for the appointment of a guardian of both the person and/or the estate of an insane person. And another procedure was available by which a com-

mission composed of two justices of peace and a physician could determine that a person was mentally ill and in need of treatment in a state mental institution. The nature of this latter proceeding was the subject of frequent litigation.

In the case of Naanes v. State (1895), 143 Ind. 299, 304, 42 N. E. 609, the court, while dealing with the admissibility of certain records of such a proceeding, said:

> "* * * In Goodwin v. State, 96 Ind. 550, on page 564 of the opinion, this court, by Elliott, J., in referring to this kind of evidence, said: 'It is maintained with much force in Leggate v. Clark, 111 Mass. 308, that the evidence is incompetent, and we are not prepared to say this is not the correct rule. The Statute did not intend to do more than provide a method of procedure limited and restrained to a single purpose, and there is much reason for declaring that the judgment of the commission is not evidence in a civil or criminal prosecution. It is a very different thing from an inquisition of lunacy, for in such a proceeding the *status* of the party is fixed as to all the world; while the statutory inquiry by the justices is restricted to one specific purpose.'
>
> "This commission, which is the creature of the statute, and is only intended by the latter to determine whether the person alleged to be insane is a proper subject to be admitted, as a patient, for treatment, into the Hospital for the Insane. It is *extra*-judicial, and is not intended, as is the judicial proceeding *in rem* for the appointment of a guardian for the person and property of a lunatic, to fix the *status* of the person, over whom the inquisition is held. * * *"

In the case of Leinss *et al.* v. Weiss (1904), 33 Ind. App. 344, 347, 71 N. E. 254, concerning the validity of a transfer which was attempted to be made by a person committed to a state institution and subsequently discharged, the court said:

> "Counsel for appellants say in their brief that the controlling question in this appeal is presented by instruction number one, given by the court to the jury, which was in the following words: 'The court instructs

you that an inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county, and their certificate that said person therein named is insane and a proper subject for treatment in the hospital for the insane, is not a judgment of a court or equivalent thereto, nor is such finding and certificate equivalent to a verdict of a jury or a finding of a court that such person is of unsound mind and incapable of managing his own estate, its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment, and will not be notice to persons who deal with such person in good faith, who have no knowledge or notice of such unsoundness of mind, where there is nothing in the manner, language, or conduct of such person to put them or any prudent man upon inquiry as to his sanity, and after he had been discharged from said hospital.

"We think this instruction undoubtedly states the law. It goes no further in fact than to say to the jury that after a person has been declared of unsound mind by the action of the two justices of the peace and sent to an insane asylum, and discharged from the asylum as cured, and there is nothing in his actions or conduct which would cause a prudent man to think he was otherwise than sane, the mere fact that by the action under the statute the person has been admitted to an insane asylum is not notice to others who might deal with him in good faith. The object of the inquest under the statute is to admit a person to the insane hospital and to establish the fact that he is a proper person to be admitted. *And his discharge as cured is as much a notice of the fact that he is sane as the inquest and admission to the asylum is notice of his insanity.* §§ 3209, 3211, 3216, 3233, 3234, Burns' 1894. To hold the law other than indicated by the court in the instruction set out, would require every one who did business of any kind with another, in order to be perfectly safe, to ascertain whether or not the person with whom he was transacting business had ever been an inmate of an insane asylum. We have not been cited to any

cases, nor do we think one could be found, which holds that a person may not deal freely with one who has been discharged from an insane asylum as cured, or who, having been adjudged insane by a court, has by a proper action had a record made of his restoration to reason." (Our emphasis)

And in the case of Treloar v. Harris (1917), 66 Ind. App. 59, 117 N. E. 975, in a suit for malicious prosecution, it was said concerning the nature of such a proceeding:

> "The case which in our judgment lends most support to appellant's contention is that of Naanes v. State, wherein the court, at page 304 of 143 Ind., page 610 of 42 N. E. speaking of the proceeding provided by section 2843 of R. S. of 1881 (being section 3692, Burns' R. S. 1914), says that:
>
> > " 'It is extrajudicial, and is not intended, as is the judicial proceeding *in rem* for the appointment of a guardian for the person and property of a lunatic, to fix the status of the person over whom the inquisition is held.'
>
> "When we look to the facts of said case in which this language was used and the question there under consideration, we do not think it of controlling influence as affecting the question here under consideration. The defendant in that action, who was being prosecuted for a crime, had interposed a plea of insanity. At the trial, the state was permitted to introduce in evidence the proceedings of an examination by a commission appointed under said section 2843, R. S. 1881, *supra,* to inquire into the sanity of the defendant, such proceeding and examination having been had a short time before such trial, and the Supreme Court, in support of its holding that the admission of such evidence constituted error, very properly we think, held that such proceedings were for the purpose of determining whether the person alleged to be insane is a proper subject to be admitted as a patient for treatment in the hospital for the insane, and hence that such proceeding was extrajudicial in so far as there might be any implied

adjudication fixing the mental status of the person alleged to be insane, for the purpose of any action other than such proceeding, or for any purpose other than the single purpose contemplated by such proceeding. We do not think, however, that the court meant that the proceedings before such examining board and the judgment therein were themselves extrajudicial, or that they were extrajudicial in the sense that they would furnish no ground for complaint or cause of action in favor of the party against whom they were instituted, when they were maliciously begun without probable cause and terminated in a finding and judgment against the prosecutor thereof."

During the same period of time, the effect of an adjudication under the guardianship statute was determined in the case of Redden *et al.* v. Baker, Guardian (1882), 86 Ind. 191, 193, as follows:

"In our opinion these provisions must be construed to mean that the incapacity or disability once found and adjudged must continue in full force until in the manner provided in the act the restoration of mind shall have been tried and determined. Any other view than this must lead to confusion and doubt. *The language of the statute, it is true, implies that there shall have been a restoration to reason for some period of time before the fact can be tried and determined, and during such time there can have been in fact no want of mental capacity, but nevertheless it must be held that there was a legal incapacity; else it would be open to proof that there was real capacity—restoration to reason—at any time pending the guardianship, and the adjudication of insanity would at most be an incomplete protection, instead of the perfect shield which the law was designed to make it.*

"It necessarily follows that there is no place for the proposition that there must be an actual personal guardianship in order to make the disability of the ward complete under the law. It is true that upon the finding of the jury that the person is of unsound mind, it is the duty of the court to appoint a guardian, and

the fact of there being such a guardian in charge of the person and estate of the ward may, as counsel argue, be a means of notice and protection to those who might have dealings with the ward; nevertheless, we are convinced that the rule is, and that it would prove unwise and disastrous to hold the contrary, that the adjudication of insanity, or as the phrase is, 'office found,' establishes the incapacity, and keeps it in force until there has been a judicial determination to the contrary; and of such adjudication, had in the proper court, with jurisdiction properly acquired, the world must take immediate and constant notice until the restoration of reason shall in like manner have been declared.

"The fact that there may not at any time be an acting personal guardian can not be allowed to affect the rule. After the adjudication of insanity, there may often be necessary and protracted delay before a suitable person can be found to accept the trust; and so upon the resignation or death, or removal of one who has been acting. It is a mistake, however, in any such case, to say that there is no guardianship. From the time of the adjudication of insanity until the restoration to reason has been judicially determined, the person so declared to be of unsound mind is the ward of the court; and whether or not at any particular part of this time there is an appointee of the court to take personal charge, in no manner affects the legal status of the ward in respect to his incapacity to make contracts." (Our emphasis.)

And in the case of Cochran v. Amsden, Guardian (1885), 104 Ind. 282, 283, 3 N. E. 934, it was said:

"The court gave an instruction containing the following statement: 'The sole question submitted for your consideration is: Is Elizabeth Clayton now a person of sound mind and capable of managing her own estate?' We regard this as a correct statement of the question which the jury were to decide. The object of an inquiry as to the mental condition of a person alleged to be of unsound mind is to ascertain whether it is or is not proper to appoint a guardian, and, in order

to determine this question, it must be ascertained whether the insane person is capable of managing his estate. The statute does not contemplate the holding of the inquest for a mere general purpose, but intends that it shall be held for a specific purpose, and that purpose is, to ascertain whether it is or is not proper to appoint a guardian. As this is the purpose of the statute, it follows that when it is sought to set aside the guardianship, the controlling question is, whether the person previously declared insane is capable of managing his estate. If he is, the guardian should be removed; if he is not, the guardian should be continued in office. We are well satisfied that the purpose of the statute in providing for such a proceeding as the present is to enable the court to determine whether the person previously adjudged to be of unsound mind has so far regained his reason as to be capable of managing his own estate. To hold otherwise would defeat the plain intention of the legislature and make the statute of no practical benefit. The language employed by the Legislature will not warrant any other conclusion than the one we have announced. * * *"

In 1927 an act was passed replacing the old procedure of a justice of the peace lunacy commission with the court proceeding to commit. This act, as subsequently amended, appears in Burns' 22-1201 *et seq.* It provides for the filing of a statement by a reputable citizen alleging the facts constituting the supposed insanity, for examination by certain medical examiners, for a preliminary hearing, for notice as follows:

"22-1205 * * * The judge shall order and direct the sheriff of the county or some other suitable person to notify the person who is alleged to be insane of the nature of the proceeding and the time when and the place where the cause will be heard and determined. If in his discretion the same be necessary, the judge may issue subpoenas for the person making the allegation of insanity, for any or all of the medical examiners, for witnesses for the person making the allegation of insanity, for witnesses for the person alleged to be insane, and for such other persons as the judge may suppose

> to be cognizant of any facts relating to the case. Such subpoenas shall command the witnesses to appear before the judge at the place selected by such judge and named in such subpoena, at a specified time, to testify to the facts set forth in such allegations, statements and reports. Such subpoenas shall be served by the sheriff of the county."

a formal hearing and a finding and judgment.

In 1933, section 7 of the 1927 Act, as previously amended, was amended by the addition of the following sentence:

> "22-1207 * * * Whenever it appears that the person who is adjudged to be insane has an estate, the court shall thereupon appoint a guardian for such insane person, under like restrictions, in the same manner and with the same powers and duties as in the case of guardians appointed for minors."

Throughout the 1927 Act, as amended at various times, the terminology is that the court shall determine the sanity or insanity of the person involved. The nature of the proceedings pursuant to the 1927 Act is discussed in the case of *In re* Mast (1939), 217 Ind. 28, 31, 25 N. E. (2d) 1003. In that case it was said:

> "As noted above the statute provides a full, complete, and comprehensive procedure for the examination and commitment of persons to the state hospital for the insane. The statute provides a summary proceeding to determine the necessity of admitting the person to a hospital for treatment. *The determination is not a conclusive judgment since it is subject to collateral attack by habeas corpus.* The fact that the statute directed that the hearing shall be had in chambers, either in term or in vacation, and that if the judge is disqualified to act he may appoint a judge *pro tempore* to conduct a hearing, *discloses that this proceeding is not a trial or hearing in court.* It is quite evident that the statute was enacted for the purpose of obviating certain abuses of a preceding statute, which directed the inquest to be held by two justices of the peace and a

physician. Clearly the act provides a special procedure for the determination of the necessity of admitting the person to the hospital for treatment, separate and apart from the regular and usual procedure in court where the code authorizes a change of venue, special judge, continuance, and other like procedure. The responsibility of determining whether a person is in need of such treatment and is a proper person to be admitted to the hospital for the treatment of the insane is placed upon the judge. The necessary steps are prescribed and do not depend in any sense upon the civil code of practice.

"Section 23 of the Act, § 22-1223, Burns' 1933, § 4315, Baldwin's 1934, provides that any person committed to any hospital for the insane may apply to the proper court for a writ of habeas corpus and the question of the person's insanity be decided at the hearing. This section affords the patient a day in court and protects her constitutional rights.

"The statute does not require the presence of the person charged to be in need of medical treatment. There may be many instances when the patient is not able personally to be present because of his mental or physical infirmity, although the statute provides that: 'Notice of such pending proceedings shall be furnished to the person to be committed, and his right to appear and defend shall not be denied.' This provision follows a section of the statute with reference to a proceeding to have United States war veterans adjudged insane and committed to federal hospitals and doubtless refers to that section. Be that as it may, the right to appear and defend is a right to be present in person or by attorney, or both. The appellant was present by counsel. The physicians filed a full statement of her history and condition and recommended that she be committed for treatment. It appears that her rights were protected and the proceeding was for her good and benefit. Her condition, according to these statements, was such that she was not a fit person to appear before the judge.

"It frequently occurs in proceedings of this nature that time is an important element in committing the

> *afflicted person to an institution for treatment. The Legislature created this special proceeding for the determination of that matter and carefully avoided the submission of the matter to the court.* Change of venue, continuance, motion for a new trial, and appeal in many cases would cause delay detrimental to the health of the patient. *It is the opinion of this court that it was not the purpose and intention of the Legislature to create a court procedure in such matters, but to create a special hearing to determine the necessity of admission of the patient to the hospital for treatment; that neither a continuance, change of judge, nor an appeal is contemplated."* (Our emphasis.)

The most recent case in this regard is the case of State *ex rel.* Codding v. Eby, Judge (1945), 223 Ind. 302, 306, 16 N. E. (2d) 1003. In this case a woman discharged from a state insane hospital as "sufficiently recovered to be released" sought to mandate the committing judge to issue an order finding her sane, pursuant to section 18 of the 1927 act, as subsequently amended, same being Burns' 22-1218, which reads as follows:

> "Any patient may be discharged from any hospital for insane, by the superintendent thereof, when sufficiently recovered or upon restoration to mental health. Incurable and harmless patients shall be discharged whenever it is necessary to make room for recent cases. All dangerous patients shall be retained in the hospital. Whenever any patient is discharged by the superintendent of any hospital for insane for the reason that such patient is sufficiently recovered to be released or has been restored to mental health, it shall be the duty of the superintendent of such hospital to send a verified certificate to the court by which such patient was committed, stating the name of the patient, the date on which such patient was committed to such hospital, his address at the time of commitment, the date of the discharge of such patient, the person to whom discharged, if any, and the fact that, in the opinion of the superintendent, such patient is sufficiently recovered to be released, or has been restored to mental health.

> Upon receipt of such statement, certifying that such person is restored to mental health, the court shall thereupon enter an order finding such person sane. * * *"

The court first held that a certification that a patient was "sufficiently recovered to be released" was not equivalent but less than a certification that the patient "has been restored to mental health." The court, in refusing to allow the mandate, said:

> "* * * It will not be affected by the order. Nor will the order restore the 'right to manage her own property.' It has long been held in Indiana, so far as we know without dissent, that a guardian may not be appointed for an insane person without a prior adjudication of unsoundness of mind. Coon v. Cook (1855), 6 Ind. 268, 272. See Robeson v. Martin (1884), 93 Ind. 420. This is the rule in most of the states, 32 C. J. *Insane Persons,* § 249, p. 653, n. 53, though there is a division of authority upon the subject. 25 Am. Jur. *Guardian and Ward,* § 22. Likewise it has been held that a guardianship may not be terminated, except by death, until there has been a judicial inquiry as to the ward's capacity to manage his own estate. Soules v. Robinson (1902), 158 Ind. 97, 100, 62 N. E. 999, 1000.
>
> "Respondent has pointed to the statute, § 8-215, Burns' 1933, under which there may be an adjudication of restoration to sanity. Relatrix says that it is not applicable. If the guardianship was created pursuant to the statute of which this section is a part it is her only remedy. *If the only adjudication of insanity was under § 22-1207, we see no reason why the same remedy is not available.* It may not be exclusive. If she does not choose to make use of it, nevertheless, prerequisite to termination of the trust is an adjudication in some judicial proceeding that she has regained her sanity. A court having jurisdiction to adjudicate the necessity for the guardianship and to make the appointment certainly has power to adjudge that the necessity no longer exists. If by petition therein raising the issue,

> under the safeguards of due process, the court after hearing evidence should find her sane and proceed to terminate the guardianship, we would not be inclined to hold insufficient the judgment entered therein, but an order entered pursuant to § 22-1218 is no such judgment. Since entry of the order will accomplish nothing of substantial benefit to relatrix we shall not compel respondent to perform 'an idle act.'"

Your first question was: "First, is the certification of 'restored to mental health' greater than the certification 'sufficiently recovered to be released' in the eyes of the law?" As pointed out in the Codding case, *supra,* neither certification is equivalent to a restoration of capacity. However, that case states that a certification of "sufficiently recovered to be released" infers that the person involved is not "restored to mental health." Thus, the two certifications are not legal equivalents.

Your second question reads as follows: "Second, is the court's finding of mental illness or insanity a judicial finding?" As is apparent from the authorities heretofore examined, this question has not been directly adjudicated in Indiana. However, a judicial determination of mental incapacity is a necessary prerequisite to the appointment of a guardian and, as previously pointed out, Burns' 22-1207 authorizes the appointment of a guardian on the basis of the determination of insanity pursuant to the 1927 act. In view of the case of *In re* Mast, *supra,* it is my conclusion that such proceedings are special statutory proceedings of a formal nature conducted by *nisi prius* courts, but not subject to the usual civil procedures.

Your third question reads as follows: "Third, if the answer to question number two is in the affirmative, how then can a ministerial act such as the entrance of the certification from the superintendent on the orderbook of the court return the patient to his normal status in life, since we understand that this is a ministerial act and a ministerial act will not invalidate or repeal a judicial act?" As stated in the Codding case, *supra,* p. 306:

> "* * * Her liberty was at the disposal of the superintendent who gave it to her before he issued the cer-

> tificate. It will not be affected by the order. Nor will the order restore the 'right to manage her own property.' * * *"

Thus, if the capacity of a person to manage his affairs is removed by a determination of insanity under the 1927 act, *supra,* the ministerial act of entering the superintendent's certificate will not restore that capacity.

Your fourth question reads as follows: "Fourth, if the answer to number three holds that the ministerial act does not restore the person to his normal status in society, then is a court proceeding necessary for such restoration to sanity and capacity?" On the basis of the reasoning and authorities cited in answer to your second question, it is my belief that the capacity of a person committed to a state mental institution is lost. As pointed out in my answer to your third question, the certification by the superintendent is not sufficient to restore capacity.

Therefore, I believe any person wishing to be assured that he has capacity, after having been discharged from a state mental institution, should institute court proceedings to have restoration to sanity and capacity judicially determined.

Your fifth question reads as follows: "Fifth, since it has been held that a writ of habeas corpus can be used to attack the incarceration of a person in a mental institution, therefore, was there no judicial finding and no final judgment of the court connected with the incarceration in the first place?" As pointed out in the case *In re* Mast, *supra,* the availability of habeas corpus protects the individual's constitutional rights and allows the unique procedure provided in the 1927 act. There is no indication that that provision, as such, has any effect in determining whether or not there was a judicial finding or judgment in that proceeding.