

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1943--1944

February 29, 1944

Harrison C. Greenleaf, Commissioner of Institutional Service

In answer to your memorandum of January 21, 1944, asking for an opinion of this department relative to Chapter 201, P. L. 1943, entitled "An Act to Clarify the Laws Relating to Paroles and Good Time Allowance to Convicts in State Prison." The question propounded is:

"The Parole Board would like the opinion of the Attorney-General's Department as to whether this law should be considered to affect inmates of the State Prison who were paroled prior to July 9, 1943, the effective date of the law, or only those prisoners who were paroled after that date."

This Act by Section 1 thereof changed the method of computing the "unexpired portion of the (his) maximum sentence" which a prisoner was required to serve who had been returned to prison because of the violation of his parole. It provides that in computing the time,

"Such prisoner shall forfeit any deduction made from his sentence by reason of faithful observance of the rules and requirements of the prison prior to parole or while on parole."

Whether this amendment to the then existing Act would be applicable to prisoners paroled prior to July 9, 1943, when the Act took effect, would depend on whether the amendment increased the term of punishment of the prisoner, for, if it did, it would be as to him an *ex post facto* law and violative of Section 11 of Article I of the Constitution of the State.

"As the term *ex post facto* has been construed, it applies only to penal or criminal matters. The objection to *ex post facto* legislation consist in the uncertainty which would be introduced thereby into legislation of a penal or criminal character, and the injustice of punishing an act which was not punishable when done, or of punishing it in a different manner from that in which it was punishable when done. But not all retrospective legislation is unconstitutional as being *ex post facto*. The question in each case is whether it will increase the penalty or operate to deprive a party of substantial rights or privileges to which he was entitled as the law stood when the offence was committed, or 'in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.'"

Murphy v. Commonwealth, 172 Mass., at 268.

See also Cooley's *Constitutional Limitations*, Eighth Edition, Vol. I, page 542.

An examination of the statutes, at the time this Act took effect, in my judgment shows that this amendment would increase the punishment by adding to the term of imprisonment the violator was to serve, deductions which accrued to him both prior and subsequent to his parole and which this amendment declares that he forfeits. In that respect it differs from the statutes in effect at the time the amendment became law, by increasing the punishment.

Chapter 182, P. L. 1933, amending R. S. Chapter 152, Section 20 (also Section 329 of Chapter 1, P. L. 1933) provides, so far as here pertinent, that the warden

"shall keep a record of the conduct of each convict, and for every month, during which it thereby appears that such convict has faithfully observed all the rules and requirements of the prison, the warden may make, with the approval of the commissioner, a deduction of seven days from the maximum term of said convict's sentence."

Chapter 153, Section 3, P. L. 1933, amending Section 30 of Chapter 147, R. S., with relation to paroled prisoners, provides, so far as here pertinent,

"The prisoner so paroled, while at large by virtue of such parole, shall be deemed to be still serving the sentence imposed upon him, and shall be entitled to good time the same as if confined in prison."

Section 34 of Chapter 147, R. S., prior to the amendment in 1943, read as follows:

"A prisoner violating the provisions of his parole and for whose return a warrant has been issued by the warden or superintendent, shall, after the issuance of such warrant, be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired portion of his maximum imprisonment, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of the time to be served." (Emphasis mine.)

Under this provision it seems clear to me that in computing the unexpired portion of the maximum imprisonment, the only time that was to be omitted or not "counted" was the time from the date of the declared delinquency to the date of his arrest. This, then, would omit the time from the date of the violation of the parole, which would be the date of the "declared delinquency," to the date of his arrest and return to prison. All other time is to be counted. This would include the credit for deductions during the time that he was actually confined and the credit while he was on parole.

It is quite plain from these observations that the forfeiture of the good time earned and credited prior to parole and the good time allowed while on parole would increase the "unexpired portion" of the maximum imprisonment.

In speaking of the right to credits, it is said in 41 Am. Jur. at page 916, Sec. 44:

"The tendency of the courts seems to be, if possible, to construe such statutes as entitling the prisoner to the benefits of the statute as a matter of right and not as a favor."

See also annotation in 127 A. L. R. 1200. Then again it is there stated,

"Other courts hold that while good conduct statutes do not confer any legal right on the prisoner, they confer on him a privilege of which he may avail himself, and of which he cannot be deprived except as provided by the statute."

See also *State ex rel. Davis v. Hunter*, 124 Iowa, 569. In the same volume of *American Jurisprudence*, at page 919, Sec. 45, it is said,

"Where the right to, or privilege of obtaining, good conduct allowances has fully accrued, it is not subject to withdrawal, modification or denial except as clearly authorized by statute."

It therefore appears from the statutes in existence at the time, that they did not authorize the forfeiture of good conduct allowances that had fully accrued to the prisoner. Consequently, any law which would retrospectively withdraw, modify or deny credits already accrued for good conduct would be violative of the constitutional provision prohibiting *ex post facto* legislation. *Murphy v. Commonwealth*, *supra*. See also *Re McKenna*, 79 Vt. 34.

After due consideration of the problem here involved, I advise you:—1. That as to prisoners paroled prior to July 9, 1943, Chapter 201, P. L. 1943, is inapplicable and that they do not forfeit the credit allowed for good behavior during the period prior to the parole and while on parole.

2. That as to prisoners paroled after July 9, 1943, such time as accrued and was credited up to that date would not be subject to forfeiture.

ABRAHAM BREITBARD

Deputy Attorney-General

March 1, 1944

Philip D. Stubbs, Esq., Commissioner, Inheritance Tax Division

Re: Government Bonds payable to two or more beneficiaries

P. L., Maine, 1933, Chapter 148, Section 2, as amended, reads as follows:

"The following property shall be subject to an inheritance tax for the use of the state: (a) All property within the jurisdiction of this state and interest therein belonging to inhabitants of this state . . . which shall pass . . . 3. By survivorship in any form of joint ownership including joint bank deposits in which the decedent joint owner contributed during his lifetime any part of the property held in such joint ownership or of the purchase price thereof."

Government bonds payable to two or more persons constitute a joint ownership and the amount which a decedent has contributed in the purchase of said bonds is a part of his estate and is subject to the State Inheritance and Estate Laws.

FRANK I. COWAN

Attorney-General

March 2, 1944

J. Elliott Hale, Acting Director, Division of Sanitary Engineering

I have your memo of March 1st asking whether hot-water storage tanks come within the definition of fixtures which appears in Section 175 of Chapter 1, Laws of 1933, so that a city or town can require inspection and the issuing of a permit before such a tank can be installed. The purpose is to prevent the installation of tanks not equipped with the proper safety valves.