STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

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for the calendar years

1943--1944

acts. If his conduct is such as to clearly indicate that he had relinquished the office, an intention to do so may be imputed to him."

State of Maine vs. *Harmon*, 115 Maine 262 at 272.

That Judge Lessard intended such a result is refuted by the fact that it is stated that he has no intention of submitting his resignation, and further, that it is his contention that he is not vacating the office. His intention would be of no moment, if the duties that devolved upon him could not be performed by any one else and thus the public interest would be jeopardized if the court was left without a judge.

Our statutes, however, on that subject are very broad. They provide that

"During the sickness, absence from the state, or inability of any judge of probate to hold the regular terms of his court, such terms, at his request or that of the register of the county, may be held by the judge of any other county; the judges may interchange service or perform each other's duties when they find it necessary or convenient. . . . "

Chapter 75, Section 8

It would thus appear that during his absence the work of the court may be carried on, perhaps with some little inconvenience to those having business before the court, but our courts have recognized that during a war some inconvenience must be submitted to because of the draft that is made upon those holding public office.

In view of these considerations it is my opinion that the judge of this court has not abandoned his office within the meaning of the law; nor is there a vacancy in that office by reason of his joining the naval forces.

ABRAHAM BREITBARD
Deputy Attorney-General

April 3, 1944

Harrison C. Greenleaf, Commissioner of Institutional Service

P. L. 1943, c. 201, §2.

You have requested an interpretation of Section 2 of Chapter 201, P. L. 1943, which reads as follows:

"*Warden shall keep a record of each convict's conduct, and recommend a deduction of sentence.* He 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 7 days from the minimum term of said convict's sentence, except those sentenced to imprisonment for life. The provisions of this section shall apply to the sentences of all convicts now or hereafter confined within the prison. The provisions of this section shall not be construed to prevent the allowance of good time from maximum sentences or definite sentences other than life sentences."

Particularly do you want to be advised whether the credit for good behavior is to be made monthly, in which case the prisoner, for such

months as he "faithfully observed all the rules and requirements of the prison," would be entitled to a deduction of 7 days, subject only to the approval of the commissioner; and whether a deduction, once made and approved by the commissioner, would be lost if the prisoner thereafter violated any of the rules or regulations of the prison, so as not to entitle him to a deduction for that month.

I think that under this act the first determination for the warden to make is whether the prisoner observed the rules and requirements of the prison; if he finds this fact to be in the affirmative, the deduction follows as a matter of course and is then subject only to the approval of the commissioner to become effective.

I am also of the opinion that the intent of the legislature was, that the warden shall enter upon his records at the end of each month or soon thereafter what the conduct of the prisoner has been during the preceding month, and if the record shows no violation of the "rules and requirements," he should then note a deduction of 7 days for that month, and, when approved by the commissioner, such deduction would become effective and the sentence reduced by that allowance.

As to the time when the commissioner shall approve, I believe that that should be left to him as an administrative function; but in my judgment it should be done at least once every three months, although the commissioner, if he sees fit, may do it monthly, immediately after the warden records the conduct of the prisoner and his right to the deduction. Whichever the commissioner chooses, the limit of time that I have suggested will enable him to review the record at or near the point of time when the entry is made, so as better to enable him to decide whether to approve or not approve.

I am also of the opinion that a deduction for good behavior approved by the commissioner cannot be later altered so as to deprive the convict of it because of a subsequent breach of prison discipline in observing the rules and regulations. For such breach, unless, of course, the act amounted to a separate and distinct crime for which he should be indicted and punished, the prisoner would receive no credit for that particular month or months.

I believe that the conclusions here reached find support in the earlier enactments on the subject, from which the statute now under consideration stems. I shall briefly refer to them.

Prior to 1933, when Chapter 152 of the Revised Statutes of 1930 was incorporated into the Health and Welfare Laws, Section 20 of the chapter provided that the record shall be kept in the same manner as in the present section, except that it was therein stated, "The warden may recommend to the executive, a deduction of 7 days * * * " This was followed by Section 21, which was as follows:

> "The record, with the recommendation of deduction provided in the preceding section, shall be submitted by the warden to the governor and council once in three months."

When the change was made in 1933, that part of the section where the warden was to make the recommendation to the executive was changed and instead thereof it was provided that "The warden may

make with the approval of the commissioner" a deduction of 7 days, etc. Since by that legislation in 1933 this chapter and others were all put under the administration of the Department of Health and Welfare, Section 21 requiring the record to be submitted to the governor and council once in three months was repealed. No other similar provision was made with relation to the approval of the commissioner; but I am of the opinion that none was necessary, because it was expected of the commissioner in the performance of his duties to review the record and approve it at a time seasonable to its proper consideration and when the matters pertaining to it are fresh in the minds of the persons concerned. Hence, I believe that the provisions which I have quoted and which require the warden to submit to the governor and council his recommendation once in three months is a good guide for the commissioner to follow in the performance of his duties required under this provision, unless he believes that more frequent times would better suit his administration of the act.

These provisions also tend to confirm the observations that I have made with regard to the monthly deductions and the recording thereof. It seems quite clear to me that when the warden submitted his recommendation to the governor and council, it required some action on their part, either in adopting the recommendation of the warden and allowing the deduction, or in disapproving it, so that the warden could then readily record the fact and reduce accordingly the time that the prisoner was to serve. Otherwise he would be unable to determine when the prisoner was entitled to his release; for if there was no such action by the governor and council, he could not know whether the deduction was approved and thus these provisions would be entirely frustrated and the prisoner might not receive the promised reward for good behavior. This I do not believe the legislature intended.

The Supreme Judicial Court of Massachusetts in an advisory opinion of their statute of 1857, Chapter 284, from which our first statute on the subject in 1858 was copied in the major part, said regarding the deductions there provided, ". . . They afford an assurance of the highest character that, upon condition of good behavior, the convict shall have the promised benefit of an earlier release." And in speaking of the monthly record with relation to which our statute was identical with that of Massachusetts, they said:

> "The first provision relates to the monthly record, which the warden of the state prison is required to make, of the conduct of each convict. The object is to determine whether the convict has observed all the rules and requirements of the prison, and has not been subjected to punishment. We do not suppose that these are two distinct subjects of inquiry and record—faithful observance of the rules, and exemption from punishment—but only two modes of stating the inquiry; so that, if in looking over the daily journal on which delinquencies and punishments are noted, there is no punishment against a convict during the month, the conclusion will be that he has faithfully observed the rules, so that he will be entitled

> to a favorable record. Such a record the law contemplates to be made at or soon after the end of each month."
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> 15 Gray's Reports (Mass.) 618.

As I have already indicated, our first enactment on the subject was Laws of 1858, Chapter 16. According to this act, the warden was required to keep the monthly record and make his recommendation to the executive. But instead of the 7-day per month allowance on all sentences, there was a scale of deductions monthly, depending upon the length of the sentence, and the longer the sentence, the more days per month the prisoner was allowed. This first enactment was changed from time to time, first by Chapter 235, Laws of 1864, and then by Chapter 20, Laws of 1866. In each of these the scale of deductions was changed by increasing the number of days monthly, depending on the term of the sentence. No material change was made in the Revisions of 1871 and 1883. In 1889, however, by Chapter 184 the statute was amended. This time the scale was eliminated, and a deduction of 7 days was to be made in all cases except imprisonment for life. The first sentence of this section reads substantially as it did until the change in 1933, before noted. The second sentence of this section contained this proviso,

> "Provided, however, that this act shall not be construed as lessening the deduction, to which any convict under sentence when it takes effect, would otherwise be entitled."

This referred to the scale contained in the previous enactment, wherein 8 days to 10 days per month were allowed on long-term sentences.

This would clearly tend to indicate that the legislature had in mind that the deduction was a matter of right and not one of grace, and something to which the prisoner was entitled, if he earned it by good behavior. It also had in mind, no doubt, that any law which would affect the term of those then serving by increasing the sentence (which would be the effect of it, if they reduced the number of days per month as a deduction) might contravene the Constitution and be invalidated as an *ex post facto* law.

ABRAHAM BREITBARD
Deputy Attorney-General

April 6, 1944

Mrs. Katherine T. Bennett
Norway, Maine

Dear Madam:—

I have your letter of April 5th in regard to Mr. Whitman, chairman of the school board of Norway. You say, "He has moved to California." The statute reads:

> "In case any member of the superintending school committee *shall remove from the town* or be absent for more than 90 days a vacancy shall be declared to exist and the remaining members shall within 30 days thereafter choose another member as hereinbefore provided. Whenever the remaining members fail to appoint