

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

**This document is from the files of the Office of  
the Maine Attorney General as transferred to  
the Maine State Law and Legislative Reference  
Library on January 19, 2022**

April 9, 1962

Ferry B. Hayden, Superintendent

Mental Health and Corrections

Courtland D. Perry, Asst. Attorney General

Mental Health and Corrections

Persons Who May be Transferred as Incurrigibles from the Reformatory for Men to the State Prison.

QUESTION PRESENTED: Under Section 75, Chapter 27, Revised Statutes of Maine, 1954, must the course of conduct on which a determination of incurrigibility is based be manifested solely within the Reformatory for Men?

Section 75 of Chapter 27 of the Revised Statutes of Maine, 1954:

"Any person committed to the reformatory for men whose presence therein may be seriously detrimental to the well-being of the institution or who willfully and persistently refuses to obey the rules and regulations of said institution, may be deemed and declared incurrigible by the superintendent of said reformatory who may certify that fact upon the original mittimus with recommendation that said person be transferred to the state prison and present said recommendation to a board of transfer set up within the department of mental health and corrections. This board shall consist of the commissioner, the warden of the state prison and the superintendent of the Augusta state hospital. Such recommendation to become effective must have the unanimous approval of the board to transfer and in such event shall take place forthwith. Any person so transferred shall serve the remainder of the term he might otherwise have been held at the reformatory or upon complaint being made to any judge of any municipal court in the county, he may, upon hearing, bind over any person so accused to the term of the superior court next to be holden within such county, and if indictment is returned therefor, then upon conviction said incurrigible may be sentenced to the state prison for not less than 1 year nor more than 5 years. Upon conviction of such person committed to the reformatory for men as such incurrigible and sentence as above provided, said person shall be discharged from said reformatory for men and be relieved from serving the balance of his sentence in said reformatory. The provisions of this section, as they relate to the board of transfer and its powers, shall apply only to those persons committed to the reformatory for men for a felony."

In the yet unreported Maine case of Green v. Robbins, the court discussed obiter dicta the language and import of Section 75, and although such opinions of the court are not part of the holding in the case, they may be considered persuasive as an indication of the thinking of the judiciary on the subject. The court referring to Section 75, stated that the legislature had created through such section, the punishable crime of incurrigibility and in discussing incurrigibility as defined by the Statute, the court went on to say, "in such a case, we are dealing with a course of conduct which may not involve any single instance or commission of a separate punishable crime. It is the total affect of such conduct which must be assessed by the board of transfer ... ."

The court states that it is the "course of conduct" which is considered by the board, which includes the implication consideration of the state of mind of an inmate. The course of conduct by the language of this section may be considered by the board of transfer or by a Superior Court after complaint to a Municipal Court. It is clear from this that conduct before original commitment may not be considered as the basis for a transfer since such conduct is an element taken into consideration by the original sentencing court. Neither the board of transfer nor a court with the same jurisdiction can supplant its judgment for that of the sentencing court.

It is less clear that conduct while on parole would not be properly the basis for a transfer. An illustration aids in clarifying this point. A homosexual in the community may verbally proposition other males without the element of simple assault. This is not a crime in the community, and the mere words, although uttered repeatedly to numbers of persons, do not constitute a criminal offense. Such activity in the community is in no way seriously detrimental to the well-being of the Reformatory for Men. If, however, the same course of conduct were followed in the institution, it could be seriously detrimental to the well-being of the institution.

The court, in Green v. Robbins, used the term "course of conduct" with reference to the phrase "whose presence therein" which, in effect, amounts to saying "whose course of conduct therein" may be seriously detrimental. It is, therefore, the opinion of this office that the course of conduct and the confinement in the Reformatory for Men must be consistent in order to be considered the basis for a determination of incorrigibility either by the board of transfer or by a Superior Court.

---

Courtland D. Perry  
Assistant Attorney General

CEP/alw  
CC: Attorney General's Dept.