PENAL INSTITUTIONS: Period provided by 3/4ths law runs only while convict in prison. Where power reserved parole may be revoked for any reason deemed sufficient by Governor. Where convict deprived of 3/4ths benefits, and paroled, his parole may be revoked, and convict required to serve full terms.

PAROLES:

June 24, 1942.

6-26

FILED
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Mr. Robert C. Edson
Director of Probation and Parole
Missouri State Penitentiary
Jefferson City, Missouri

Dear Mr. Edson:

This is in reply to your request for our opinion by your recent letter which is in the following terms:

"The above named subject was received at the Missouri State Penitentiary March 7, 1929, to serve a term of fifteen years having pled guilty to the charge of Robbery 1st in the Circuit Court of Jackson County.

"On September 21, 1935, the subject escaped from the East Church Farm. He was returned from Reding, California, October 13, 1938. Due to this escape, which is a violation of prison rules, the subject's time was flattened so that had he remained in prison his full sentence without the benefit of three-fourths law, would have expired December 27, 1946.

"On February 25, 1941, the subject was paroled by Governor Lloyd C. Stark.

"The subject violated his parole by virtue of the fact that he committed an offense in California and he is now serving from one to ten years in Folsom Prison for Grand Larceny. By reason of this new felony

> conviction the subject's parole was revoked by Governor Forrest C. Donnell on April 18, 1942.
>
> "Now the question has been raised and we would appreciate your opinion as to whether the three-fourths law became operative when the subject was granted a parole. In other words, whether the subject was restored to a status of good behavior. In view of the above facts we would appreciate further knowing whether the Board had the power or right to recommend the revocation of the subject's parole and whether the Governor had the right to revoke the subject's parole and whether we can again take the subject into custody and cause him to serve the remaining portion of his sentence as a parole violator."

In a subsequent conversation you informed us that the conviction in California for another offense there, was on February 26, 1942.

From your letter and our conversation, we understand the first question is, was the revocation of parole valid? Our ultimate answer is in the affirmative.

Rogers was sentenced to imprisonment in the penitentiary for a term of fifteen (15) years. Assuming good behavior, he could be held to serve three-fourths of that period, under Section 9086, R. S. Missouri, 1939, which in part provides:

> "Any convict who is now or may hereafter be confined in the penitentiary, and who shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any

> infraction of the rules of the prison or laws of the same recorded against such convict, shall be discharged in the same manner as if said convict had served the full time for which sentenced, and in such case no pardon from the governor shall be required; * * * * *."

Three-fourths of fifteen (15) years is eleven years and three months. After Rogers had served in the penitentiary for six years, six months and fourteen days, and on September 21, 1935, he escaped from a prison farm. At that time he still owed on three-fourths of his sentence, a balance of four years, eight months and sixteen days. Thereafter, he was recaptured and returned to the penitentiary on October 19, 1938. Thereafter, he remained in the penitentiary for two years, four months and six days, until February 25, 1941, when he was paroled. At that time he still owed on three-fourths of his sentence, a balance of two years, four months and ten days.

The three-fourths period runs only while a convict is in the penitentiary. The statute establishing the three-fourths rule, Section 9086, supra, applies only to a convict, "who shall serve three-fourths of the time for which he or she may have been sentenced * * *." This statute was construed in Ex parte Carney, 122 S. W. (2d) 888, l. c. 889, 890, 343 Mo. 558, and it was held that the benefits and burdens provided by this statute, attach only "while undergoing punishment" in the penitentiary. This State adheres to, "the majority rule that parole suspends the running of the sentence * * *." 39 American Jurisprudence, p. 578, section 94. It follows that the extent of the term of a parole is governed solely by the parole itself. As far as the time element is concerned, the revocation is valid.

The parole provided that its term should extend "up to August 23, 1945." That is a proper condition, under Article V, Section 8 of the Constitution of Missouri, which authorizes the Governor to act in this connection, and in part provides that, "The Governor shall have power to grant . . . commutations and pardons, after conviction . . . upon such condition

and with such restrictions and limitations as he may think proper * * *."

That power to pardon includes the power to issue a conditional pardon (46 C. J., page 1182, Section 3), or a parole which is the same thing. It was so ruled in State v. Asher, (Mo. Sup.) 246 S. W. 911, l. c. 913, and the following definition of a parole was quoted with approval:

> "'A form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on the violation of the condition of the parole.'" See 46 C. J., page 1183, 1184, Section 6.

Also, for the purposes of this case, conditional pardons and paroles are the same as documents sometimes called conditional commutations. A commutation of sentence is "the substitution of a less for a greater punishment by authority of law." (Lime v. Blagg, (Mo. Sup.) 131 S. W. (2d) 583; 46 C. J., page 1182, Section 4). That commutations may be conditional under said Article V, Section 8, of the Constitution of Missouri was pointed out in Ex parte Strauss, (Mo. Sup.) 7 S. W. 2d 1000 (1-4), 320 Mo. 349; 46 C. J., page 1199, 1200, Section 54.

When Rogers left the penitentiary under the parole, he accepted and was bound by its terms. It was so ruled in Ex Parte Strauss, 7 S. W. (2d) 1000, 1001, 320 Mo. 349, and the court said:

> "The Governor may therefore attach to a commutation granted by him any condition he chooses, provided it is not illegal, immoral, or impossible of fulfill-

> ment. Ex parte Mounce, 307 Mo. 40, 269 S. W. 385. * * * * * * * * * * A commutation of sentence is a matter of grace or favor. It is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out the sentence originally imposed upon him to a suspension of it under the conditions imposed, he has the clear right to do so; but, if he elects to accept the commutation and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. Ex parte Alvarez, 50 Fla. 24, 39 So. 481, 111 Am. St. Rep. 102 7 Ann. Cas. 88."

Respecting the method of establishing the conditions of a parole (or conditional pardon), the Court, in Ex Parte Reno, 66 Mo. 266, l. c. 273, 27 Am. Rep. 337, ruled:

> "* * * While the Governor may grant a pardon on conditions, such conditions to be operative should appear on the face of the paper. * * * * *."

To the same effect are numerous decisions from other states, collected in an annotation at 60 A. L. R. 1423.

Copies of the Rogers parole and revocation were attached to your letter dated June 22, 1942. Pertinent provisions of the parole are:

> "Now, therefore, I, Lloyd C. Stark, Governor of the State of Missouri, by Virtue of Authority in me vested and

for good and sufficient reasons appearing do, for the purpose of the parole, hereby commute the sentence of the said Norman L. Rogers, to a term ending the 23rd day of August, 1945, without benefit of the three-fourths law, * * * * * * * * * * * * * * * * * upon the express conditions, however, that the said Norman L. Rogers, shall faithfully demean himself as a citizen of the State of Missouri and abide by the laws thereof,* * * * * * * * * * * * * *. This parole is issued upon the express understanding and condition that Charles C. Coxe, Parole Officer of the State of California, holds himself personally responsible to the Governor for Norman L. Rogers, proper employment, good behavior, and compliance with the conditions of this parole up to August 23, 1945,* * * * * * * * * * * * * * * *.

"Failing in any of which, or upon the order of the Governor at any time he may be arrested and returned to the penitentiary and without a hearing there to serve out the remainder of his sentence."

The revocation thereof in part states:

"REVOCATION OF CONDITIONAL PAROLE"

"* * * * * * * * * * * * * * * * * * * *

"And, whereas, it has been made to appear to the undersigned, Governor of the State of Missouri, that the said Norman Rogers has violated the terms and conditions of said Conditional Commutation Parole in this, to-wit: An FBI bulletin reports that subject is now serving from 1 to 10 years in Folsom Prison in California for Grand Larceny.

> Due to the above conviction, revocation of subject's parole is desired. and has not obeyed the laws of the State of Missouri or conducted himself in all respects as a law-abiding citizen since the date of his parole.
>
> "NOW, THEREFORE, in consideration of the premises and by virtue of authority in me vested, I, FORREST C. DONNELL, Governor of the State of Missouri, do hereby annul, cancel and revoke the conditional commutation granted the said Norman Rogers upon the said 25th day of February, 1941, and hereby order and direct that the Warden or Deputy Warden of the State Penitentiary arrest and obtain the said Norman Rogers and return him to the State Penitentiary at Jefferson City, Mo., where the Warden shall confine him until he shall have served the remainder of said 15 years' sentence which has not been served in accordance with the terms of the criminal judgment upon the date of his release from said Penitentiary on said Conditional Commutation Parole issued upon said February 25, 1941, aforesaid."

One of the conditions of the parole was that Rogers, "shall faithfully demean himself as a citizen of the State of Missouri and abide by the laws thereof * * *." That specific condition did not require Rogers to obey the laws of California. Therefore, his violation of the laws of the State of California does not constitute a violation of the aforesaid specific condition. If the revocation of parole were based solely upon violation of said specific condition, the revocation would be void.

Moreover, under the terms of his particular parole, the Governor had no right to make a determination whether Rogers had violated a specific condition, because no such right was reserved in the parole. In Ex Parte Strauss, supra, the court further said, at l. c. 1001 of 7 S. W. (2d):

> "* * * A terse yet comprehensive statement of it appears in Ruling Case Law as follows:
>
> "' * * * * *, and in the absence from the pardon itself of express stipulations so authorizing the Governor, he has no authority to inquire into or pass upon the question of a violation of the condition or conditions of such pardon, or to order the rearrest of the convict, or to subject him to the execution of the original sentence imposed, and any order of the Governor undertaking to adjudge a violation of the conditions of his pardon by the grantee and revoking such pardon, and ordering his recommitment in execution of his original sentence is a nullity. * * * A condition in a pardon that the Governor may summarily determine whether the conditions have been complied with, and if he finds that they have not may revoke the pardon and order the reconfinement of the offender, is binding upon the convict, and authorizes his rearrest and commitment upon the terms and in the manner imposed. * * * * * * * * * * *.'"

Within the above quoted principles, while the reservation of a specific condition was imperfectly done, the Governor did reserve to himself a broad general condition and authority, which makes this revocation valid. In the last quoted paragraph of the parole, the words, "Failing in any of which," refer to the specific conditions. Immediately following is the reservation of the broad general power:

> "* * * or upon the order of the Governor at any time he may be arrested and returned to the penitentiary and without

> a hearing there to serve out the remainder of his sentence."

That portion of the parole made no specific restriction as to the reason for which the Governor could order the return of Rogers. Therefore, it means that the Governor may revoke it for any reason satisfactory to him. There is nothing which would require even that he state a reason. Ex parte Strauss, supra, and other Missouri cases there cited, ruled that the convict is bound by the conditions of the parole. The validity of this particular broad condition has not been adjudicated in Missouri, but is recognized as valid in other jurisdictions without exception, as shown by numerous decisions collected in 54 A. L. R. 1473, 1483, 1484.

In State ex rel. Davis v. Hunter, 100 N. W. 510, l. c. 512, 124 Ia. 569, 104 Am. St. Rep. 361, the court said:

> "But the order of suspension in the case before us contained the express condition that it might be revoked at the discretion of the executive, and should remain in force only during his pleasure; and it is plain, therefore, from its very terms, that no determination of any fact was essential to the authority of the Governor to terminate the suspension and cause the prisoner to be returned to the penitentiary. It cannot be contended therefore, that any judicial proceeding was necessary." (Italics ours.) That "suspension" was the equivalent of a parole under the Iowa statute. The revocation was not quoted but the court said that it specified that it revoked the parole "for good and sufficient reasons appearing to him (the Governor)."

And, in Ex Parte Butler, (1928) 269 Pac. 786, 787, 40 Okl. Cr. 434, the Criminal Court of Appeals of Oklahoma said:

> "The parole granted petitioner was an act of grace or favor upon the part of the state by its chief executive. Petitioner was free to accept the parole with its conditions, or reject it and serve his sentence. He chose the former, and stipulated that, for a violation of the conditions, or for any other reason deemed sufficient, the parole might be summarily revoked by the Governor, and petitioner should be remanded to the penitentiary to serve out the sentence. Upon its revocation, the legal status of the petitioner should be regarded the same as it was before the parole was granted and accepted." (Italics ours). This is in accord with earlier Oklahoma cases which forcibly state the rule, 54 A. L. R., supra.

In Exparte Frazier, (1922), 239 S. W. 972, 91 Tex. Crim. Rep. 475, the conditional pardon stated in part that ". . . if the said A. L. Frazier is guilty of any misconduct or violation of the laws of this state, or there arises any other good and sufficient reason in the opinion of the Governor, justifying him in doing so, this pardon is subject to be revoked at the Governor's discretion, * * *." The Governor's revocation stated it had been made known to the Governor that Frazier had "been guilty of conduct unbecoming a good citizen, * * *." The court said at l. c. 973 of 239 S. W.:

> "Of what use or avail would a court hearing or judgment be, when it is agreed upon and written into the document as decisive that whatever in the Governor's opinion justifies him shall be ground for revocation. * * * * * In our opinion the

> conditions imposed by the pardon granted appellant were neither illegal nor immoral, and by acceptance of same he bound himself to submit to a revocation when made by the Governor for any causes which, in the opinion of the latter, justified such action. Such revocation could not and did not deny to appellant his right to a writ of habeas corpus, but when brought before the courts in obedience thereto he has no right -- and we no power -- to go beyond the terms agreed upon by him in his acceptance, and by the Governor in his grant, of such pardon."

In our opinion, the fact that Rogers was convicted of a felony in another state is adequate ground (though no ground need be stated) for the revocation under the reservation by the Governor of the power to revoke, "upon the order of the Governor at any time . . . without a hearing."

Inasmuch as the revocation could lawfully be made, the Board of Probation and Parole could lawfully recommend such action. Section 9160, R. S. Missouri, 1939, in part, provides:

> "The Board of Probation and Parole shall have authority and it shall be its duty to * * * * * * * * * * * * * * * * to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; * * * * * * *."

The next question is, May Rogers be held to serve the full period of his fifteen-year sentence?

The above mentioned three-fourths rule of Section 9086, applies to any convict who:

> "* * * shall serve three-fourths of the time for which he or she may have been sentenced, in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict, * * *."

Your letter states that Rogers escaped from a prison farm, on September 21, 1935. The record clerk of the penitentiary has informed us that this fact was recorded at the time in a ledger called the "Escape Book." Your letter further states that the time of Rogers "was flattened," meaning that the records were made to show he was being held to serve the full period of his sentence, without benefit of the three-fourths law. The decision to hold a convict for the full period of his sentence is properly made in practice by the Warden, with the approval of the Commission of the Department of Penal Institutions, who are authorized by statute to administer the affairs of the penitentiary. In Ex parte Rody, 152 S. W. (2d) 657, l. c. 660, it was held:

> "* * * * * As stated in the Garney Case, the conditions of the three-fourths rule enacted by Sec. 9086, supra, must be read into every judgment of conviction. They offer a reward in the form of diminished incarceration to every convict for obedience to the rules of the prison and laws of the same.
>
> "But the enforcement of these rules and laws, so far as they affect the reward, is administrative, not judicial. Sec. 9086, itself, requires breaches thereof to be recorded on the prison records. Sec. 8985, supra, requires the Commission of the Department of Penal Institutions to make and enforce such by-laws rules and regulations as they deem necessary. And Sec. 9041, supra, requires the Warden of the Penitentiary to see

> that they are enforced. It is, of course, the duty of these officers to see that the statute laws governing the same subject matter -- the highest form of regulation except the Constitution -- are enforced. And it makes no difference that a breach of the law or regulation may also constitute a felony or misdemeanor, separately punishable as such."

When Rogers escaped, his conduct was certainly not "orderly and peaceable." Therefore, his right to the benefit of the three-fourths rule was forfeited.

Moreover, the escape was an "infraction of . . . the laws of," the prison, and, therefore, the three-fourths rule is not applicable. It was so ruled by the Supreme Court, in the recent case of Ex parte Rody, 152 S. W. (2d) 657, l. c. 658 -- 661:

> "The petitioner is confined in the state penitentiary and contends that under Sec. 9086, R. S. 1939, sec. 8442, Mo. Stat. Ann. p. 6214, enacting the so-called 'three-fourths rule', he is entitled to discharge. * * * * * * * * * * * * * *
>
> "In his brief the Warden of the penitentiary, represented by the learned assistant Attorney General, concedes arguendo that petitioner's escape from the sawmill camp violated no rule of the institution, but contends that it did violate a law of the same, within the meaning of those words in the statute, the law being Sec. 4307, R. S. 1939, sec. 3913, Mo. Stat. Ann. p. 2751, which provides that 'if any person confined in the penitentiary for any term less than life shall escape from such prison, or, being

> out under guard, shall escape from the custody of the officers, he shall be liable to the punishment imposed for breaking prison.' * * * * * * * * * * State v. Betterton, 317 Mo. 307, 292 S. W. 545, and Ex parte Carney, 343 Mo. 556, 122 S. W. 2d 888.* * * * * * * *
>
> "We are unable to agree that State v. Betterton, supra, and Ex parte Carney, supra, support petitioner's first contention. On the contrary, the Betterton decision is against him. The concluding lines of the opinion held Sec. 4307 (then Sec. 3161, R. S. 1919) did apply to a prisoner escaping from a prison farm, and there is no difference in principle between escaping from a prison farm and a prison sawmill. * * * * * * * * *."
>
> "* * * * * our writ of habeas corpus is quashed and the petitioner remanded to the custody of the Warden and the Commission of the Department of Penal Institutions."

When Rogers received a parole from the Governor, he was paroled from the service of a full fifteen-year sentence. The parole states the condition that it is, "without the benefit of the three-fourths law." That is one of the conditions which have been accepted by Rogers, and by which he is bound. However, the result would be the same, even if the parole had not contained that provision. None of the principles governing paroles, heretofore stated, include any rule by which a parole would relieve a convict from disciplinary action previously taken by penal authorities. In our opinion Rogers may be held to serve the full period of his fifteen-year sentence. Whether that will be done rests in the discretion of the Board of Probation and Parole, and the Governor, under Article V, Section 8 of the Constitution of Missouri, and Section 9160, supra.

The conviction of another offense while on parole is no lawful ground for depriving a convict of the benefit of the three-fourths law, under the rule of Ex parte Carney, supra.

CONCLUSION

Under the above authorities, it is our opinion that the period of time contemplated by the three-fourths rule established by Section 9086, R. S. Missouri, 1939, runs only while the convict is in the penitentiary, and the extent of the term of a parole is governed solely by the terms of the parole. The Governor may lawfully reserve and exercise the power to revoke a parole, for any reason deemed sufficient by him, without a hearing.

Where a convict has been lawfully deprived of the benefit of said three-fourths law, and thereafter is paroled, the parole may be revoked, and the convict may be required to serve the full period of his sentence, without benefit of the three-fourths law.

Respectfully submitted,

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EH/rv