

## DISCRETIONARY RELIEF FROM CONSEQUENCES OF CRIMINAL CONVICTIONS IN MISSOURI PART TWO

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### III. FORM AND EFFECT OF RELIEF

#### *Form of Document or Order*

There is no requirement in the statutes or in the constitution fixing the form of the parole or commutation document or order. Since a pardon is in derogation of the law, in order to be valid and effective, the instrument granting it must accurately describe the offense intended to be forgiven.<sup>98</sup> Unless care is given to the language used in the pardon or parole order, it may not operate as intended. It does not matter that the paper signed by the governor is called a pardon, if it does not purport to be a pardon of the offense but only a release and discharge of the convict from the penitentiary entitling him to all the rights, privileges, and immunities which by law attach and result therefrom.<sup>99</sup> While the governor may grant a pardon on conditions, such conditions to be operative must appear on the face of the paper.<sup>100</sup>

When a parole is granted by the court, the same requirements

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98. Ex parte Higgins (1884) 14 Mo. App. 601 (Memo. opinion).

99. See State v. Kirschner (1886) 23 Mo. App. 349. The material portion of the document involved provided: "Know ye that, by virtue of the authority in me vested by law, and for good and sufficient reasons appearing, I, Silas Woodson, Governor of the State of Missouri, do hereby release, discharge and forever set free James Wilkerson, who was, at the November term, A. D. eighteen hundred and seventy-two, by a judgment of the Circuit Court of Cole County, sentenced to imprisonment in the state penitentiary for the term of two years, for the crime of grand larceny, and I do hereby entitle the said James Wilkerson, to all the rights, privileges and immunities which by law attach and result from the operation of these presents. Conditioned, that the said James Wilkerson immediately upon his release, leave the County of Cole, and never return thereto voluntarily." Also note the separate opinion in State v. Saunders (1921) 288 Mo. 640, 232 S. W. 973, that the document was neither a pardon nor a parole; and as a suspension of the judgment of the court, it could not be sustained since it would be a matter beyond the power of the executive.

100. Ex parte Reno (1877) 66 Mo. 266.

must be met in order that a parole may really be granted. In several instances, the action of the court has fallen short of a parole. Such was the case where a judgment was rendered, sentencing the defendant to pay the costs, and to imprisonment in the jail for a specified period of time, and the court granted a stay of execution on the condition that defendant would move from the place she then occupied and not return thereto nor again violate the law. This was held not to constitute the granting of a parole, since it failed to recite the essential requirements of the law regulating the granting of such relief.<sup>101</sup> A similar situation arose where the court incorporated in the usual judgment sentencing the defendant, the provision that execution was stayed until six o'clock of the afternoon, and that if he was thereafter found in the county, he was to be arrested and committed to the penitentiary in accord with the sentence theretofore passed. The defendant having violated this condition and having been committed to the penitentiary, sought a writ of habeas corpus, which was opposed by the state on the ground that the stay was in the nature of a parole and that the petitioner having violated it, was not entitled to be discharged. The court held that the modification made by the trial judge of the otherwise formal judgment of conviction, bore no resemblance to a parole and could not be sustained, although the legality of the rest of the sentence was not affected thereby.<sup>102</sup> In another case the court, after the defendant had been confined in jail for ninety days, made an order releasing him from custody and suspending further punishment pending good behavior. The supreme court stated that this order had no validity as a parole, even though it was intended by the judge as a commutation of punishment. Even if it had been a valid parole, the court said, it had been revoked by the subsequent order re-arresting and imprisoning the defendant. Further, since the parole failed to require the defendant to execute a bond and to appear in court to make proof of his good behavior, it was void. The real basis for the

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101. *Ex parte Cornwall* (1909) 223 Mo. 259, 122 S. W. 666.

102. "The recognition of the power of a court to suspend a sentence indefinitely or to stay its execution would be to allow the judicial department to usurp the power and exercise one of the functions of the executive department. This is upon the well grounded theory that a court's power in the administration of the criminal law, is limited, upon conviction of the accused, to the imposition of the sentence authorized to be imposed." *Ex parte Thornberry* (1923) 300 Mo. 661, 254 S. W. 1087.

decision, however, was that the statute nowhere granted to a judge in vacation the power to commute a punishment already assessed and entered of record by the court in term time.<sup>103</sup>

### *When Effective Acceptance*

Inasmuch as a pardon, parole, or commutation are all mere matters of grace, neither benefit nor right can be claimed under them until the act of clemency is fully performed. The simple intention of the executive to bestow a pardon confers no right, and is wholly nugatory until the intention is fully completed. This intention may be said to be fully completed when the pardon is signed by the executive, properly attested, authenticated by the seal of the state, and delivered, either to the person who is the subject of the favor, or to some one acting on his behalf. Whenever these things are done, the grantee, or donee of the favor, becomes entitled as a matter of right to all the benefits and immunities it confers, and he cannot be deprived of them by a recall.<sup>104</sup> So a delivery sufficient to make the pardon effective took place when the governor got the usual pardon form from the office of the Secretary of State, filled it in, handed the paper to one of the parties waiting in the ante-room, instructed him that it must be inscribed on the prison records and expressed the opinion that it should be done by twelve o'clock, as, after that time, his term as governor would cease. Such paper was then delivered to the warden in the morning of the day issued and entered on the prison records in the afternoon of the same day.<sup>105</sup> Said the court: "A delivery of the pardon, under the circumstances in proof, is prima facie, equivalent to delivery, or is constructive delivery to the prisoner." In this same case, the court further held that the power of the governor to grant pardons and commutations is in nowise dependent upon any entry which the law requires the Secretary of State to make, nor upon any entry required to be made by the warden, since the former requirement may be regarded as intended to preserve the evidence of the official acts of the governor, and the latter as designed to protect the warden in discharging a person who is the recipient of executive clemency.<sup>106</sup> The failure of the governor

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103. *Workmann v. Turner* (Mo. App. 1926) 283 S. W. 61.

104. *Ex parte Reno* (1877) 66 Mo. 266.

105. *Ibid.*

106. "The omission of the Secretary to make an entry of the official act of the Governor, in granting a pardon, would not have the effect to make

to report the fact of a pardon, the name of the convict, etc., as required by the constitution, to the General Assembly, would not authorize the convict's re-imprisonment.<sup>107</sup> Since pardons, paroles, and commutations are purely matters of grace or favor, the intended beneficiary may either reject or accept the proffered favor when it is based upon condition. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him.<sup>108</sup> If he prefers serving the sentence originally imposed upon him to a suspension of it under the conditions attached, the prisoner has a 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 it was granted to him. Having accepted the parole, he cannot later object to the conditions imposed. Such was the court's holding where the defendant accepted a bench parole with a provision, which authorized the court to revoke it without notice to him. This decision goes so far as to hold that the defendant could not claim that the statute giving the court the right to parole was invalid as to the court's power to revoke without notice. The defendant could not apply for and accept the benefits of the statute and then insist that the same statute was invalid when the court asserted its right to revoke the parole.<sup>109</sup>

In most cases, where an appeal is taken by the defendant, and, pending the appeal, a pardon is granted to and accepted by the defendant, he thereby will waive all his rights of appeal and when the matter is brought to the attention of the appellate court,

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void the pardon, any more than an entry, made by him in his register that the governor had granted a pardon, would impart validity to it, when, in fact, no such pardon had ever been granted. Besides, the prisoner had no authority or control over the Secretary of State in regard to the performance of his duties." *Ex parte Reno* (1877) 66 Mo. 266, 272.

107. *Ex parte Reno* (1877) 66 Mo. 266.

108. *Ex parte Strauss* (Mo. 1928) 7 S. W. (2d) 1000.

109. "Defendant's reasoning is unsound. He proceeds on the theory that some natural and legal right of his is being denied him, whereas the parole for which he applied and which was granted him was purely an act of grace on the part of the state through the court. Defendant had been lawfully convicted and sentenced. He then had the option to serve his sentence or apply for a parole under the laws of this state. He knew the provision of that law and applied for and accepted his parole subject to its provisions and conditions, among which was that which authorized the court to revoke the parole without further notice to him. It was upon this condition he was paroled. If this was invalid the parole was ineffective, and the judgment was in full force. By accepting its terms he is now precluded from assailing its validity." *State v. Collins* (1910) 225 Mo. 633, 125 S. W. 465.

it will dismiss the appeal. This is so because the very essence of a pardon is forgiveness or remission of a penalty; it implies guilt and affirms the verdict. But an appeal will not be dismissed by the court where the pardon recites that it was granted upon the recommendation of the board of probation and parole and because the governor was convinced that the accused was not guilty, since the accused is entitled to remove the stigma of the conviction, especially in view of the habitual criminal statute which applies to subsequent offenders who shall have been previously discharged either upon pardon or upon compliance with the sentence.<sup>110</sup>

#### *Effect on the Sentence and Judgment*

While the cases generally are in conflict as to the effect of a pardon upon the sentence of the court,<sup>111</sup> very little litigation seems to have arisen thus far in Missouri concerning not only the effect of a pardon but also that of a parole or commutation on the sentence. It may be said, however, that a parole does not displace or abridge the sentence, but merely stops its execution either temporarily or indefinitely, as the case may prove to be. It suspends rather than destroys.<sup>112</sup> So, where the governor attached to a parole the condition that if the parolee failed to meet its conditions, "he may be arrested and returned to the penitentiary there to serve out the remainder of his sentence," the court rightfully concluded that the full unexpired sentence at the time the parole was granted continued until the end of the parole period, so that, in case of a violation, he would have to serve the full unexpired sentence measured from the effective date of the parole.<sup>113</sup> But it has been held that a pardon, which of course

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110. *State v. Jacobson* (Mo. 1941) 152 S. W. (2d) 1061.

111. Some decisions hold that the governor's pardon does not wipe out the offense, nor the fact of a prior conviction; others hold that an unconditional pardon wipes out and obliterates the offense and absolves the convict of all guilt. And note the relatively recent case that on the issue whether the acceptance of a pardon amounts to a waiver of the accused's rights on appeal, a distinction may be drawn between the ordinary pardon which implies guilt and acceptance a confession thereof, and one where it affirmatively appears to have been granted because the governor was satisfied of the innocence of the accused. *State v. Jacobson* (Mo. 1941) 152 S. W. (2d) 1061.

112. *State v. Collins* (1910) 225 Mo. 633, 125 S. W. 465.

113. *Jacobs v. Crawford* (1925) 308 Mo. 302, 272 S. W. 931. For general annotation on parole as suspending the running of sentence, see 28 A. L. R. 947. And for effect of the Missouri three-fourths law on the time to be served, see note 172, et seq., supra. That the time a person is under judicial parole shall not be counted on his sentence, in case of termination of his parole, see R. S. Mo. 1939 §4200.

is unconditional, terminates the convict's term in the prison, so that he may be a competent witness within the scope of the statute relating to the competency of witnesses in the penitentiary.<sup>114</sup>

There is also a conflict in the authorities, generally, whether a pardon will release the defendant from the payment of a fine as well as from the punishment imposed by the sentence.<sup>115</sup> The courts of Missouri do not seem to have had occasion to pass on this question. Perhaps the reason rests largely in the remedy provided by a specific statute,<sup>116</sup> which prescribes that for any fine imposed by any statute, and for any forfeiture of a recognizance, where the securities are made liable, the governor has power to grant a remittitur, when it appears to him that such fine or forfeiture does an injustice or inflicts great hardship upon the defendant or defendants.<sup>117</sup>

Another factor sometimes involved in cases of pardon is the element of court costs. For instance, in an early case, where the governor granted a pardon releasing the defendant from the payment of the fines and costs assessed in the case, except the fine assessed against him and his pro rata share of the costs, the court stated that "it is evident that, after a judgment for costs, they cannot be remitted by pardon. Costs for which judgment has been given, are not remitted by a pardon of the offense, subsequent to the judgment, because there was an interest vested in private persons."<sup>118</sup>

The effect of a commutation on the sentence of the court is obvious, since a commutation is a change of the punishment to which a person has been condemned by the court to one less severe. The following language in an apt decision is enlightening in this regard:

His (the governor's) power of commutation, however, act-

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114. *State v. Kelleher* (1909) 224 Mo. 145, 123 S. W. 551.

115. See Annotation, 74 A. L. R. 118.

116. R. S. Mo. 1939 §4189.

117. This statute, however, provides a method for obtaining the relief above set forth: "All applications for such relief shall be in writing, signed by the party or parties seeking such remitter, and accompanied by a statement of the facts of the case, signed by the judge or circuit attorney of the county in which such fine or forfeiture is entered, and a certificate of the clerk that all costs have been paid; and the governor shall indorse his decision on each case and file the same in the office of the secretary of state."

118. *State v. McO'Blenis* (1855) 21 Mo. 272, 276. Also see *State v. Jacobson* (Mo. 1941) 152 S. W. (2d) 1061.

ing on the original sentence of the court, cuts down and modifies that sentence; and the force of that sentence, thus modified, sends the prisoner to the penitentiary. The commutation does not annul the sentence of the court, but is, *pro tanto*, an affirmation of it, with modification.<sup>119</sup>

As a result, even though a defendant is originally sentenced to death and that sentence later commuted to life imprisonment, he is confined in the penitentiary by virtue of the sentence of the court. It is the force of the sentence that places him there and not the power of the governor.

In case of a conditional commutation, the sentence of the court is lessened conditionally. If the conditions of the commutation are not met, the sentence as originally imposed must be served, and only when the conditions are fully complied with, does the commutation reduce the sentence.

#### *Effect on Other Criminal Offenses*

The pardon of one specific crime does not free the beneficiary of the governor's act of clemency from the penal consequences of all other crimes he has committed up to the date of the pardon.<sup>120</sup> Similarly, the fact that the accused has been pardoned for a prior conviction, does not exempt him from the increased punishment prescribed by the habitual criminal act,<sup>121</sup> as is clearly apparent from the language used in the Missouri act that a defendant cannot be brought within its purview unless he "shall be discharged, either upon pardon or upon compliance with the sentence."<sup>122</sup> And the word "pardon" as used in this statute includes "parole," so that the use of the latter word in an information filed against the defendant, rather than the word "pardon" did not render the information defective.<sup>123</sup>

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119. *Ex parte Collins* (1887) 94 Mo. 22, 6 S. W. 345. And from the same case note this language: "This is easily proven: A man is convicted by the verdict of a jury, or upon his own confession in open court, and his punishment assessed, either by the verdict or by the court, at ten years in the penitentiary, and he is sentenced accordingly. That sentence is thereupon commuted by the governor to the period of five years. Afterwards, a question of the competency of the convict to testify as a witness comes up. By what test would that competency be tried, but by the record of the lower court?" *Ex parte Collins* (1887) 94 Mo. 22, 6 S. W. 345, 346.

120. *State v. Creech* (1876) 1 Mo. App. 370.

121. For general treatment of this, see Annotations, 58 A. L. R. 49; 82 A. L. R. 362; 116 A. L. R. 224.

122. *State v. Austin* (1893) 113 Mo. 538, 21 S. W. 31, *State v. Christup* (1935) 337 Mo. 776, 35 S. W. (2d) 1024.

123. *State v. Asher* (Mo. 1922) 246 S. W. 911. Also see *State v. Jennings* (1919) 278 Mo. 544, 213 S. W. 421, where the defendant received a bench parole, and at the date of the present trial was at liberty under

*Restoration of Civil Rights*

Upon conviction for most offenses, the defendant by virtue of the Constitution of the state,<sup>124</sup> or because of statute,<sup>125</sup> suffers the loss of certain civil rights, such as the right to vote, to hold office, and to serve as a juror. A general statute provides that a sentence in the penitentiary for a term less than life suspends all civil rights of the person so sentenced, during the term thereof, and that after a sentence to life imprisonment, the defendant is civilly dead.<sup>126</sup> Where civil death occurs, his property can be administered upon in the probate court, and a release from prison by parole or commutation would not entitle him to contract or to own property. In fact, the parole of any convict seems hardly sufficient of itself to remove the temporary suspension of his civil rights until the full or commuted term of his sentence has expired. Where the civil right is lost because of the constitutional provision, such right surely can be restored only by the action of the governor.

There are several statutory provisions relating to the restoration of civil rights. The disabilities against voting, being a juror, or holding any office of honor, profit, or trust in this state may be removed by the governor through the exercise of the pardoning power vested in him.<sup>127</sup> Where the convict has been

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such parole, he was not in legal contemplation in custody different from that of the Circuit Court; but was by force of the parole statute in the legal custody of and under the jurisdiction of said court, and such custody was not a ground to postpone trial temporarily under the doctrine that the court is without jurisdiction to proceed with the trial of a defendant for another offense until the first judgment has been satisfied or reversed.

124. Mo. Const. 1875, Art. VII, §2. "No person . . . while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

125. R. S. Mo. 1939 §4601, (offenses relating to records, currency, instruments, and securities); R. S. Mo. 1939 §4357, (fraud by election judges and clerks); R. S. Mo. 1939 §4322, (perjury and subornation thereof); R. S. Mo. 1939 §4341, (fraud in office); R. S. Mo. 1939 §4427, (murder; manslaughter; carnal knowledge of female between 16 and 18 years; carnal knowledge of a woman above 14 years; forcing woman to marry; taking away female under 18 years; enticing female to house of ill-fame; seduction; defiling ward by guardian; mayhem; assault with intent to kill; poisoning); R. S. Mo. 1939 §4561, (arson, burglary, robbery or larceny in any degree, or if sentenced to the penitentiary 'for any other crime in this article relating to public and private property, except to persons under age of 20 years at conviction'); R. S. Mo. 1939 §4796, (miscellaneous offenses).

126. R. S. Mo. 1939 §9225.

127. R. S. Mo. 1939 §9227.

convicted of arson, burglary, robbery, or larceny, in any degree, or has been sentenced to imprisonment in the penitentiary for any other crime in the article of the statutes relating to offenses against public and private property, the disqualifications or disabilities "may be removed by the pardon of the governor any time after one year from the date of conviction."<sup>128</sup> However, such a statute cannot limit the power of the governor to restore civil rights by virtue of the pardoning power granted him by the state constitution.<sup>129</sup>

Question may be raised as to the constitutionality of the statute providing that any convict who serves three-fourths of his sentence in an orderly and peaceable manner, "shall be discharged in the same manner" as if he had served the full time for which he was sentenced, and requiring no pardon from the governor.<sup>130</sup> In all cases of first conviction of felony the civil disabilities incurred thereby cease at the end of two years from such discharge under the three-fourths rule, and such convict thereupon is restored to all the rights of citizenship.<sup>131</sup> If the loss of civil rights is a part of the sentence or judgment, as it seems to be, the statute operates as an unlawful exercise of the executive power by the legislature.<sup>132</sup> If such loss occurs by virtue of the

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128. R. S. Mo. 1939 §4561. But a conviction in another state does not disqualify. See *State v. Landrum* (1908) 127 Mo. App. 653, 106 S. W. 1111.

129. Mo. Const. 1875, Art. V, §8.

130. See *State v. Austin* (1893) 113 Mo. 538, 21 S. W. 31, and *State v. Stanton* (Mo. 1934) 68 S. W. (2d) 811, for apparent approval of the provision.

131. R. S. 1939 §9086. And note *Ex parte Schatz* (1925) 307 Mo. 67, 269 S. W. 383, that where a statute places no restrictions on the word 'discharged' it has the meaning of being restored to freedom. It may not mean that the convict has been given the right of suffrage, or the right to hold office, but it does mean that in all other respects he is a citizen. And 'discharge' is not the same as 'he has complied with said sentence', in an indictment under the habitual criminal act. *State v. Austin* (1893) 113 Mo. 538, 21 S. W. 31.

132. *State v. Grant* (1883) 79 Mo. 113; "If the conclusion be the correct one that the disabilities annexed to a conviction of the crime of petit larceny form a part of the punishment, and of consequence part of the judgment, then it would seem to follow as an obvious and necessary sequence that any act of the legislature professedly remitting a portion of the judgment, professedly relieving the convict of one of the disabilities incurred, cannot prevail, if the constitution, which forbids one department of the government from the exercise of any power properly belonging to either of the other, is to be obeyed . . . the pardoning power is vested by our constitution alone in the governor; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities . . . is by a full pardon of the offense, and that, while the crime itself remains unpardoned, the disabilities annexed thereto will remain unaltered and unaffected by any legislative act."

constitution, such rights would be beyond the power of the legislature to restore by legislative enactment, unless perhaps the three-fourths law can, also, be regarded as a part of the judgment of conviction.

It is provided that any person discharged under the provisions of those sections relating to judicial paroles, is to be restored to all the rights and privileges of citizenship but whether the restoration is automatic does not clearly appear, and if not, by what authority, is not apparent.<sup>133</sup> As a matter of legal principle, the restoration would probably have to be by the governor.

The loss of civil rights is commonly referred to as the loss of citizenship. A person, however, does not lose all civil rights upon conviction for a crime. He may lose the right to vote, to hold office, to be a juror, to own or to sell property, but some rights are unaffected. For instance, if the convict commits a new crime, he is entitled to a jury trial and all the rights connected therewith. After a final discharge from the penitentiary, he can live wherever he pleases and go wherever he may desire to live.<sup>134</sup> Some civil rights are, therefore, obviously of such a nature that they are not suspended by a criminal conviction.

A convict cannot execute a valid mortgage,<sup>135</sup> nor can a valid decree be obtained, in a divorce action by a wife against him while in prison, investing her with the title to his real estate, unless he is represented in court by a trustee,<sup>136</sup> appointed in accord with the statute relating to the property of inmates of the penitentiary.<sup>137</sup> These same questions of legality arise in event the convict is on parole. In this connection, however, where a defendant was never taken into custody nor confined a day in the penitentiary but was permitted to remain at large at all times under a parole until he was finally discharged and pardoned, a tax suit against him while he was under no actual restraint as to his liberty and had full opportunity to appear in court and defend, could legally terminate in a valid judgment, without the appointment of a trustee. This result was reached because the statute provides that a trustee may be appointed only "upon producing a copy of the sentence, duly certified, and satis-

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133. R. S. Mo. 1939 §4210.

134. *Ex parte Schatz* (1925) 307 Mo. 67, 269 S. W. 333.

135. *Williams v. Shackelford* (1888) 97 Mo. 322, 11 S. W. 222.

136. *McLaughlin v. McLaughlin* (1910) 228 Mo. 635, 129 S. W. 21.

137. R. S. Mo. 1939 §9230.

factory evidence that such convict is actually imprisoned under such sentence."<sup>138</sup> Nor was the appointment of a trustee necessary where the plaintiff was sentenced to imprisonment in the penitentiary for less than life, but was on parole at the time of trial, even though the suit was brought in his own name while in prison.<sup>139</sup> Also, a deed to real estate executed by a person convicted of a felony while he is on parole, is valid.<sup>140</sup>

### *The Power to Revoke*

The actual power of revocation rests in the governor,<sup>141</sup> or other granting authority, as the case may be.<sup>142</sup> In the absence of any constitutional or statutory provision and in the absence from the pardon, parole, or commutation of express stipulations authorizing the governor to inquire into and pass upon the question of a violation of the terms of the extended executive clemency, or to order the re-arrest of the convict, and subject him to the execution of the original sentence imposed, the governor cannot legally revoke the pardon, parole, or commutation.<sup>143</sup> Where the conditional pardon or commutation expressly provides that upon a violation of its conditions, the offender shall be liable to summary arrest and recommitment for the unexpired portion of his original term, such provision is binding and authorizes the convict's re-arrest and recommitment upon non-performance of the conditions in the manner and by or through the official authority therein provided.<sup>144</sup>

On the other hand, when a conditional pardon or a parole is issued which does not provide how it shall be determined whether the prisoner has violated the conditions imposed, then the convict is entitled to a hearing before some competent judicial tribunal before he can be remanded to serve the remainder of his

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138. "Even though it be argued that Section 2291 suspended all civil rights of plaintiff, and that therefore, while under sentence, he could not execute a valid conveyance, and judgment could not be rendered against him, nevertheless, we maintain the view that the parole operated to hold in abeyance the legal consequences contemplated by said section, at least in so far as the validity of transactions affecting plaintiff's property is concerned." *Ward v. Morton* (1922) 294 Mo. 409, 418, 242 S. W. 966.

139. *Cole v. American Ry. Express Co.* (1934) 228 Mo. App. 78, 68 S. W. (2d) 736.

140. *Ward v. Morton* (1922) 294 Mo. 409, 242 S. W. 966.

141. *Ex parte Strauss* (Mo. 1928) 7 S. W. (2d) 1000.

142. See R. S. Mo. 1929 §§4200, 4202, as to judicial paroles; also note *Kella v. Bradley* (1935) 229 Mo. App. 821, 84 S. W. (2d) 653.

143. *Ex parte Strauss* (Mo. 1928) 7 S. W. (2d) 1000.

144. *Ex parte Webbe* (Mo. 1929) 30 S. W. (2d) 612.

sentence.<sup>145</sup> Accordingly, when the governor had commuted a ten year sentence to a term in the Missouri Reformatory, conditioned that the prisoner comply with all the rules and regulations of said reformatory, or be returned by the superintendent thereof to the penitentiary to serve the rest of the sentence, it was held that whenever the prisoner failed to comply with all the rules and regulations of the reformatory, it was the express duty of the superintendent to return him to the penitentiary. If the superintendent failed to do so, it was held to be a part of the executive function of the governor to sustain and make effective the terms of his order of commutation.<sup>146</sup> It would therefore appear that the power of revocation may be delegated by the governor by the terms of the conditional commutation, although this case left no room for the governor's delegate to exercise any discretion whether or not it was proper to make the revocation, if he found the conditions broken. So it appears that the governor is not confined to the statutory ground or manner of revocation, in view of the constitutional provision, which indicates that he has such power independently of statute,<sup>147</sup> and he may, as a result, fix his own manner and method of revocation.<sup>148</sup>

The court or the judge in vacation is given the discretionary power by statute to terminate paroles which the court or judge may have granted.<sup>149</sup>

#### *Notice and Hearing*

Where the parole or conditional pardon or commutation reserves in the governor the right to summarily determine if the conditions have been broken by the beneficiary, the proceedings of revocation are purely informal.<sup>150</sup> Where, however, the parole, pardon, or commutation makes no provision for revocation and none exists by virtue of the constitution or statute, the rule of the common law seems to be applicable. Under the common law, the established practice is for some court of general criminal jurisdiction, upon having its attention called by affidavit or otherwise, to the fact that a pardoned convict has violated or failed to

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145. *Ibid.*

146. *Ibid.*

147. *Ibid.*; *Lime v. Blagg* (1939) 345 Mo. 1, 131 S. W. (2d) 583.

148. *Lime v. Blagg* (1939) 345 Mo. 1, 131 S. W. (2d) 583.

149. See R. S. Mo. 1939 §§4201, 4202. After one revocation, the Court may grant a second parole. R. S. Mo. 1939 §4200.

150. *Ex parte Strauss* (Mo. 1928) 7 S. W. (2d) 1000.

comply with, the condition or conditions of his pardon, to issue a rule reciting the original judgment of conviction and sentence, the pardon and its conditions, and the alleged violation of, or non-compliance with, the condition or conditions thereof, and requiring the sheriff to arrest the convict and bring him before the court to show cause why the original sentence imposed upon him should not be executed. A copy of such rule should be served upon the convict at the time of his arrest, and when brought before the court, if the prisoner denies that he is the same person who was convicted, sentenced and pardoned, he has an absolute right to a trial by jury. Otherwise a person might be remanded to suffer punishment who has never had a jury trial. If his identity is not denied, all the other facts and issues can be heard and tried by the judge alone.<sup>151</sup>

The right of the parolee to a hearing before revocation also applies where the parole is granted by the court. In one interesting case,<sup>152</sup> the defendant was paroled and a short time afterwards was arrested without warrant or other process and incarcerated in jail without a hearing. He sought his freedom by making application for a writ of habeas corpus, alleging that Section 2181, Revised Statutes 1899,<sup>153</sup> which authorized the court or judge in vacation to terminate said parole at any time, without notice to such a person by merely directing the clerk of the court to make out and deliver to the sheriff or other proper person a certified copy of the sentence, with a certificate that such person has been paroled and his parole terminated, was unconstitutional. He further alleged that the parole statute was wise and salutary in so far as it granted him immunity for his offense, but he insisted that the same statute was invalid when the court asserted the right to revoke without giving him a trial as to its right and power so to do. The court rejected his contention on the ground that he had accepted the parole, which he had applied for voluntarily, and which was issued under and subject to the provisions of the contested statute, and thereby upheld the constitutionality of such statute. The court also dis-

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151. *Ex parte Strauss* (Mo. 1928) 7 S. W. (2d) 1000, 1001. See *State v. Collins* (1910) 225 Mo. 633, 125 S. W. 465, for suggestion that where a question of personal identity arises after revocation of a bench parole, the remedy can be by habeas corpus.

152. *State v. Collins* (1910) 225 Mo. 633, 125 S. W. 465.

153. Now R. S. Mo. 1939 §4202.

posed of the further argument of the defendant that the officer under this statute might arrest the wrong man and thus deprive an innocent citizen of the right to show that he was not the person described in the warrant. The court indicated that the innocent party, in such a case, could invoke the writ of habeas corpus, but that here the petition established the identity of the prisoner, and consequently no issue of identity could be injected into the case.

Where a convict is on parole and is convicted of a new offense, the new conviction and sentence constitute a judicial determination of a violation of one of the conditions of his parole.<sup>154</sup> Since the power to parole is vested alone in the trial court, the action of the court or judge thereof in terminating, as well as in granting the parole, is not subject to review by an appellate court.<sup>155</sup> However, a motion by the prosecuting attorney to revoke a parole on the ground that the judgment granting it was procured by fraud practiced upon the court, is an independent action in equity, to which the parole statutes are not applicable.<sup>156</sup> Hence, the prisoner could disqualify a regular judge from hearing the motion, although the case expressly holds that this ruling does not interfere with the statutory jurisdiction of the circuit judge to grant and to revoke paroles under the statute.

The Missouri statutes set forth the manner in which judicial paroles may be terminated. For instance, where the parole has been awarded to a defendant upon whom a jail sentence has been imposed by the court or who is actually confined in jail under a judgment of a justice of the peace, or who is sentenced to one of the juvenile reformatories, the court, or judge may at any time, without notice to the defendant, terminate his parole by simply directing execution to issue on the judgment, or, in case the person shall have been actually confined in jail, the parole may be terminated by directing the sheriff or jailer to retake such person under the commitment already in his hands.<sup>157</sup> In

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154. *Ex parte Green* (1929) 322 Mo. 857, 17 S. W. (2d) 939, citing *Ex parte Strauss* (Mo. 1928) 17 S. W. (2d) 1000.

155. *State ex rel. Gentry v. Montgomery* (1927) 317 Mo. 811, 297 S. W. 80.

156. *State ex rel. Wilkerson v. Kelly* (1940) 346 Mo. 416, 142 S. W. (2d) 27, over-ruling *Ex parte Smith* (1938) 232 Mo. App. 521, 119 S. W. (2d) 65.

157. R. S. Mo. 1939 §4200. The Circuit Court of the county where defendant was convicted, sentenced and paroled, clearly has jurisdiction to revoke defendant's parole and order the sheriff to take him into custody. *Kella v. Bradley* (1935) 229 Mo. App. 821, 84 S. W. (2d) 653.

other cases, the court or judge granting the parole, may terminate it at any time without notice by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated. It is then the duty of such officer as soon as he receives such copy of the sentence, to arrest the defendant and deliver him to the warden of the penitentiary as if no parole had been granted.<sup>158</sup>

### *Time for Revocation*

The purpose of the judicial parole is said to be the reformation of men and women of previous good character, who have been convicted of a crime for the first time and whose prospective punishment is imprisonment in the penitentiary.<sup>159</sup> If reformation can be accomplished without placing upon the defendant the stigma of having been a convict, society is fully protected and its best interest actually served. But such reformation, if it can be accomplished at all, will take longer in some cases than in others. Partly perhaps in recognition of this fact, the legislature by statutory enactment has placed a minimum and a maximum limit upon the period of the judicial parole.<sup>160</sup> The statute has been construed to mean that, if a ten year period has elapsed and the parole has not been terminated nor the parolee discharged from his sentence, the court must either grant him an absolute discharge or terminate his parole at the first term of court thereafter, or the law will conclusively presume thereafter that such person has been discharged. In other words, this law is, in effect, a statute of limitations upon the parole period and vests in the parolee the right to have his parole terminated after the lapse of a reasonable time.<sup>161</sup>

A closely related problem arises where the court orders an indefinite suspension of sentence. Such a problem arose where the court ordered the defendant released from jail and granted him a suspension of punishment that he might seek a change in climate, and the defendant, later when an effort was made to impose the suspended punishment, contended that the court had

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158. R. S. Mo. 1939 §4202.

159. State ex rel., Howell County v. West Plains Tel. Co. (1911) 232 Mo. 579, 135 S. W. 20.

160. R. S. Mo. 1939 §4207.

161. Ex parte Mounce (1925) 307 Mo. 40, 269 S. W. 385.

no power to order a suspension in the first place and that the lapse of time entitled him to a release. The court recognized the fact that, in the absence of some statutory provision, the judgment of a court imposing a jail sentence can only be satisfied by a compliance with its terms; that the unauthorized release did not in any way operate to the prisoner's advantage or disadvantage at the time; that the defendant was not technically in jail while he was, in fact, at liberty; and that the lapse of the time, after the sentence for which he was adjudged to be confined in jail, did not automatically release him from liability to be retaken and required to serve the remainder of his term.<sup>162</sup> However, the court went on to say that although a mere delay in the infliction of punishment is not a sufficient reason for relieving a defendant from the consequences of the judgment against him, if the delay has been so great that society could derive no good from its enforcement, there would seem to be no good reason why its execution should be insisted upon.<sup>163</sup>

This same reasoning might be applied to the failure of the revoking authority to terminate a parole for a violation of its conditions by the beneficiary, until a long period of time has elapsed, or to an escaped convict, who, after his escape, has lived years as a law abiding person, no efforts having been made to return him to prison until years later.

#### *Effect of New Sentence—Concurrent or Consecutive Execution*

By virtue of statute, a convict, whose parole has been revoked for a new conviction while on parole, must first complete his former sentence and after its completion serve the latter.<sup>165</sup> The warden has no authority in the matter, and he and the other officials cannot determine legally the order in which the sentences should be served.<sup>166</sup> As a result, where the prison board caused its records to show that the prisoner was serving the new sen-

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162. *Ex parte Bugg* (1912) 163 Mo. App. 44, 145 S. W. 831.

163. *Ibid.* (Here three years had elapsed on a six months jail sentence. The court held, however, that the fine assessed could be collected, since collection had not yet been barred by the statute of limitations.) Also, see *State v. Snyder* (1889) 98 Mo. 555, 12 S. W. 369.

164. R. S. Mo. 1939 §9226.

165. *Ex parte Allen* (1906) 196 Mo. 226, 95 S. W. 415; *Lee v. Gilvan* (1921) 287 Mo. 231, 229 S. W. 1045; *Ex parte Green* (1929) 322 Mo. 857, 17 S. W. (2d) 939; *Ex parte England* (Mo. 1938) 122 S. W. (2d) 890; *Herring v. Scott* (Mo. 1940) 142 S. W. (2d) 670.

166. *Ex parte Green* (1929) 322 Mo. 857, 17 S. W. (2d) 939; *Herring v. Scott* (Mo. 1940) 142 S. W. (2d) 670.

tence first, and, after the time when he was entitled to his discharge from this sentence had expired, retained him to serve out the rest of his first term, dating from his parole therefrom, the court held that the convict had not been prejudiced by the wrong views of the board of prison control and could take no advantage of its erroneous system of bookkeeping.<sup>167</sup>

Yet there do seem to be some situations where the convict can benefit by the error of the prison authorities in this respect. For instance, in one case the convict received a fifteen year sentence in 1925 and was paroled in 1930. While on parole he was again convicted and sentenced to a term of ten years from 1933, but his parole was not revoked until 1934. He served the second sentence until he was paroled from it in 1939. The court held that he was, with his time properly credited, entitled to his discharge subject to the terms of his second parole.<sup>168</sup> But the court stated, in this connection, that if the second parole should be legally revoked, he would not be entitled to the time which he had had credited mistakenly on his second sentence and which was by this proceeding transferred to his first sentence in satisfaction thereof. In other words, the court did not rule that such time could be counted on both sentences.

The words in the statute governing the sequence of sentences that the new sentence "shall not commence to run until the expiration of the sentence under which he may be held" has been construed to mean that the two sentences should be cumulative and not concurrent.<sup>169</sup> However, a later interpretation indicates that if it means that the order in which the sentences are served is immaterial, such a construction ignores the plain words of the statute.<sup>170</sup> While one motive of the legislators in passing the statute may have been to prevent such sentences from running concurrently, they must have meant more than that. They were not dealing with offenses having some relation to each other, such as those of a kindred nature or committed or tried about the same time, where the idea of concurrent execution would more naturally occur, but, on the contrary, they were contemplating a situation where a convict under sentence for one felony

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167. *Lee v. Gilvan* (1921) 287 Mo. 231, 229 S. W. 1045; *Ex parte Green* (1929) 322 Mo. 857, 17 S. W. (2d) 839.

168. *Herring v. Scott* (Mo. 1940) 142 S. W. (2d) 670.

169. *Lee v. Gilvan* (1921) 287 Mo. 231, 229 S. W. 1045.

170. *Herring v. Scott* (Mo. 1940) 142 S. W. (2d) 670.

commits another perhaps of a different kind and at a remotely later time, which consideration apparently justified the imposition of the requirement that in event of a conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the state for the first conviction. In this connection, the fact that the convict was out on parole when the second offense was committed did not make him any less "under sentence" for the first offense and subject to the statutory order of execution.<sup>171</sup>

*Subsequent Conviction and the Three-fourths Law*

One reason that the sequence of serving sentences in cases of the kind above discussed is important is the statute commonly referred to as the three-fourths law,<sup>172</sup> by virtue of which a prisoner, if his conduct is proper, after serving three-fourths of his sentence, must be discharged from the penitentiary. This law and the statute fixing the proper sequence have required the release of the prisoner in several cases where, after the revocation of a parole or commutation, the second sentence has been served first, with no violation of the prison rules being recorded.<sup>173</sup> So, where the prisoner, while under a conditional release, was sentenced to and served sixty days in jail on a new charge, and, was returned to the prison by virtue of a revocation of his conditional commutation, and served three-fourths of his original sentence, with no violation of the rules of the prison charged against him, he was entitled to his release.<sup>174</sup> The same result occurred where the defendant, on October 12, 1931, entered a plea of guilty to stealing chickens and was sentenced to the penitentiary for six years. On October 22, 1934, after serving over three years, he was granted a conditional commutation, and on June 18, 1935, while the period of probation prescribed by the commutation was still operative, he pleaded guilty to a charge of grand larceny and received a two year sentence. For some reason, contrary to statute, he served his second sentence first and was then held to serve the remainder of his first sentence,

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171. *Herring v. Scott* (Mo. 1940) 142 S. W. (2d) 670.

172. R. S. Mo. 1939 §9086. For discussion of the seven-twelfths rule, see note 24, *supra*.

173. *Ex parte Carney* (1938) 343 Mo. 556, 122 S. W. (2d) 888; *Ex parte England* (Mo. 1938) 122 S. W. (2d) 890. Also note *Ex parte Rody* (Mo. 1941) 152 S. W. (2d) 657.

174. *Ex parte England* (Mo. 1938) 122 S. W. (2d) 890.

which had been conditionally commuted, so that when his petition for the writ of habeas corpus was filed he had actually served three-fourths of the first sentence in prison.<sup>175</sup>

But the three-fourths statute has no application whatsoever to a convict on parole in the sense, that if his conduct is good, he cannot be held under parole for a period, counting the time that he was incarcerated, together with the time served on parole, in excess of the three-fourths of his sentence. This is so because the three-fourths statute is construed as purely a prison rule and consequently applicable only to a convict while confined in the penitentiary.<sup>176</sup> But what is the effect of the three-fourths law

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175. ". . . we think it consonant with the legislative intent to say that the statute is not susceptible to the construction that a parolee, because of his subsequent conviction while at large under parole is to be denied the benefits of the three-fourths rule, and required to serve the full term for which he was sentenced. The evident purpose of enacting the statute was to stimulate and encourage a willingness on the part of convicts to voluntarily comply with the rules of the institution while undergoing punishment. Their own conduct, as reflected by the official records of the prison, is the measure by which there is either bestowed or withheld a fixed and predetermined reward for cooperation in promoting the orderly administration of prison discipline. Infractions of law while on parole carry their own punishment, as witness the second conviction of petitioner, and the resultant revocation of his parole. The provisions of the statute under scrutiny and the conditions of the parole under which petitioner was at large when convicted (second time) are in no sense related or interdependent." *Ex parte Carney* (1938) 343 Mo. 556, 122 S. W. (2d) 888.

176. "Granting the Carney case was well ruled on the facts, there are vital differences between it and the instant case. There the convict was out on parole when he committed the second offense. His parole was a conditional pardon and he was not 'confined in the penitentiary', as was the prisoner here. Further, the second crime there was merely grand larceny in a remote county, whereas here the petitioner escaped from prison while constructively confined therein but actually outside the walls under guard. Crimes committed by a paroled convict may be said to have no relation to the administration of the penitentiary, as the Carney case rules, except that incidently they may bring the culprit back for expiration thereof, and also that they exhibit a criminal tendency. But where a statute is enacted for the regulation of the penitentiary and the enforcement of discipline therein, as was Section 4307, supra, we are unable to see why it should not be as binding on the convict as if the same requirement had been made by a regulation of less dignity, namely a mere rule of the institution. Undoubtedly, Section 4307, is a law governing the inmates of the penitentiary, within the meaning of Section 9086." *Ex parte Rody* (Mo. 1941) 152 S. W. (2d) 657, 659. Also, see *Ex parte Carney* (1938) 343 Mo. 556, 122 S. W. (2d) 888. This case also holds that the guilt of a convict for violation of a prison law, so as to bar his discharge after serving three-fourths of his sentence, is for the prison authorities and not the courts to decide, and a convict is constructively "confined in the penitentiary" whether he be going to the penitentiary or outside under guard. The escape of a trusty from the place of his employment, however, outside the walls is not an escape from the penitentiary, within the scope of the statute making it a felony for any person confined in the penitentiary

upon a convict serving a life sentence? The answer seems to be none whatever.<sup>177</sup>

It may be, however, that even in the face of the statute fixing the sequence of sentences for a conviction after a broken parole, the court can by its own judgment decree whether the new sentence shall run concurrently or consecutively with the old.<sup>178</sup> Perhaps, in this respect the statute might be regarded as a legislative attempt to interfere with the constitutional power of the court.

### *Extradition of Parole Violators*

By permitting the parolee to go into another state, the paroling state may lose jurisdiction over the convict's person, but it does not lose jurisdiction over the parole, and is not estopped to extradite the parolee in the event of a revocation.<sup>179</sup> Similarly, if a person convicted of a crime is paroled and violates the terms of his parole by escaping into another state, he may be extra-

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for a term less than life to escape therefrom, since another statute expressly covers the escape here involved. *State v. Betterton* (1927) 317 Mo. 307, 295 S. W. 545.

177. "It may be conceded that he became entitled to whatever benefit an observance of those conditions gave him, but what benefit was that? Simply this: that he became entitled to be recommended to the governor as a fit subject for pardon. This benefit he has received. His right to a pardon does not lie in the terms of the statute. . . . The expiration of such a period cannot be affirmed of one sentenced for life. Equitably, the prisoner is perhaps entitled to his discharge, but that is a subject which lies entirely in the discretion of the executive." *Ex parte Collins* (1887) 94 Mo. 22, 6 S. W. 345.

178. See *Ex parte Simpson* (Mo. 1927) 300 S. W. 491, where the prisoner was convicted of grand larceny, sentenced to two years, and while on bail pending appeal, which terminated in a reversal, was convicted and sentenced to two years for burglary, said new sentence to commence on expiration of the term of imprisonment for the grand larceny offense, and the prisoner was in the penitentiary when the mandate of the supreme court reached the warden, the imprisonment became referable to the judgment in the grand larceny case as of the date the mandate was handed down. His three-fourths time having consequently expired, any further detention was unlawful.

179. "On petitioners release from the California penitentiary, his sentence to said penitentiary was suspended during the time he was under parole. Even so, he was not at liberty, for he was under the restraint of the conditions of the parole. This is true, even though California lost jurisdiction of his person. On revoking said parole, California did not undertake to exercise jurisdiction over the person of the petitioner. On the contrary, it sought jurisdiction of his person by requisition on the governor of Missouri. Petitioner escaped the restraint of the parole by violating a condition of the same. In doing so, he thereby acquired the status of an escaped convict. As such he is subject to extradition under the federal constitution and law." *Ex parte Kabrich* (1938) 343 Mo. 196, 120 S. W. (2d) 42.

dited,<sup>180</sup> for a person may be considered a fugitive from justice whenever he departs leaving the demands of the state from which he fled, unsatisfied. Under the federal constitution and statutes, it is the governor's duty to surrender a fugitive upon the proper demand of the governor of another state. However, the fugitive may be required to complete a sentence in the asylum state before he is turned over to the state from which he fled, although the governor may waive the right to require the fugitive to serve such sentence before releasing him to the demanding state.<sup>181</sup> Such a waiver may be in the form of a pardon. If so, it becomes absolute upon the surrender of the fugitive to the authorities of the other state.<sup>182</sup>

The courts of the asylum state are without jurisdiction, upon an application for a writ of habeas corpus, to determine whether the parolee, whose extradition is being sought, has actually violated his parole. At least, this was the conclusion of the court in a case where an inmate of the Illinois penitentiary was given permission to reside temporarily and conditionally in Missouri. Upon information that the inmate was under arrest for a violation of a law of Missouri, the warden ordered him retaken and returned to the penitentiary pending a determination by the Illinois authorities whether he had violated his parole. The governor of Illinois immediately made a requisition for the inmate's return to that state, which request was promptly honored by the governor of Missouri. The inmate was successful in the circuit court of St. Louis in his efforts to obtain his release, but the supreme court rejected his contention that the question of his innocence

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180. *Ex parte Weinhouse* (1919) 202 Mo. App. 245, 216 S. W. 548; *Mattes v. Taylor* (Mo. 1941) 153 S. W. (2d) 833.

181. "We hold that when a convict is granted a parole by the governor, he may honor the requisition to deliver the paroled convict to the authorities of the demanding state. The State has the right to waive punishment of a convict. It is not a matter for the convict to decide which state shall punish him when he has violated the criminal law of two states. In such circumstances, it is the right of the asylum state to decide whether it will punish the prisoner or waive the punishment by turning him over to the demanding state; the prisoner has no voice and will not be heard." *Mattes v. Taylor* (Mo. 1941) 153 S. W. (2d) 833, 834.

182. *State v. Saunders* (1921) 288 Mo. 640, 232 S. W. 973. In this case, however, note the separate opinion that the document executed by the governor of Iowa did not waive that state's right, as it was neither a pardon nor a parole; that it was called a suspension of the judgment of the court was of no consequence, for as such it involved a matter not within the scope of executive power.

or guilt as a parole violator could be determined in a proceeding for extradition.<sup>183</sup>

#### IV. SOME PROSPECTIVE PROBLEMS

There are several natural inquiries which will arise and which have not been answered directly in the foregoing discussion of Missouri law, should Missouri eventually follow the present-day trend and vest the power of parole in the parole board. For instance, by what process should the power be vested in such a board? Does the pardoning power so rest in the governor by virtue of the constitution that the power to parole cannot be vested by the legislature in any other agency? Is the power to parole an exclusive executive function? If the power is granted to a board by legislative enactment, is the grant unconstitutional? Would such a statute vest judicial power in the parole board? Would an act of this type, if it contained the customary provision that the board shall establish rules and regulations regarding the granting of paroles, constitute an unlawful delegation of legislative power?

Of course, none of these inquiries has been answered by the courts of this state due to the fact that the Missouri board is merely an advisory board. Any answer must be secured by recourse to the constitution, to the language of existing decisions by our courts on related subjects, and to the decisions of the courts of other states.

Since the courts of Missouri hold that the power of parole can be exercised only by the governor on the ground that a parole is simply a conditional pardon,<sup>184</sup> the conclusion would seem to follow logically that the power could not be vested by statute in a parole board. It might, however, be suggested that the courts of Missouri have been mistaken in the real nature of a parole. It has been held elsewhere that a parole is not a pardon nor a commutation.<sup>185</sup> If it is neither of these, then, one might well conclude that the power of parole is not an exclusive function of the governor, especially in view of the fact that the power of parole is not vested by the constitution in the executive by the use of the word "parole."

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183. *State ex rel. Cooney v. Hoffmeister* (1935) 336 Mo. 682, 80 S. W. (2d) 195.

184. See note 20, *supra*.

185. See *State v. Peters* (1885) 43 Ohio 629, 4 N. E. 81.

It is well settled generally that the statutes vesting the power of parole in a board do not infringe upon the judicial power of the courts.<sup>186</sup> While the exercise of this power requires the use of judgment and discretion, the power is not basically judicial but administrative.<sup>187</sup> On the other hand, whether the authorization of the board to adopt rules and regulations, relative to the eligibility of prisoners for parole, constitutes an unlawful delegation of legislative power, is a question not settled by the cases so far decided. In order to determine whether the delegation is unlawful, it is, of course, necessary to examine the language of the statute and apply the principles of law applicable to the delegation of authority to other administrative boards.

Should any effort be made in Missouri to vest the power of parole in the parole board, the only safe procedure is by the amendment of the state constitution. This would eliminate the constitutional objections.

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186. *People v. Dennis* (1910) 246 Ill. 559; 92 N. E. 964; *State v. Stephenson* (1904) 69 Kan. 405; 76 Pac. 905; *Wilson v. Common* (1910) 141 Ky. 341; 132 S. W. 557.

187. *Woods v. Tennessee* (1914) 130 Tenn. 100; 169 S. W. 558.

# WASHINGTON UNIVERSITY LAW QUARTERLY

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Edited by the Undergraduates of Washington University School of Law,  
St. Louis. Published in December, February, April, and June at  
Washington University, St. Louis, Mo.

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Subscription Price \$2.50 per Annum. Single copies, 75 cents.  
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