

Restoration of Civil Rights to Rehabilitated Felons

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It has been pointed out that the provision of the current laws which specifies what shall be presumed a reasonable return draws a distinction between the owners of unencumbered property and the owners of property held subject to mortgage. Property held free and clear is limited to a yield of six percent of the fair value, including land, whereas mortgaged holdings are allowed an additional two percent "of principal for the amortization of any mortgages." It might be argued that this differentiation denies to the owner of unencumbered property the equal protection of the laws. An adequate consideration of this question goes beyond the scope of this article, but it may be said that this is a constitutional limitation which has been invoked with relatively infrequent success¹² and the classification does not appear to be so arbitrary or unreasonable as to violate the provision in Amendment XIV of the United States Constitution and in Article I, Section 11 of the constitution of the State of New York. Relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment,¹³ and the needs of holders of mortgaged real estate have already been recognized in other emergency legislation, the mortgage moratorium statutes.¹⁴ Literal and precise equality in respect of some matters is neither attainable nor required.¹⁵ Whether owners of mortgaged property and owners of property not so encumbered fall within this rule remains for the courts to say.

HARRY L. DONNELLY,
JAMES L. GUILMARTIN.

RESTORATION OF CIVIL RIGHTS TO REHABILITATED FELONS.—The amendment to Section 116 of the Executive Law¹ by the legislature at the last session is a step forward in the attempt to rehabilitate the criminal and restore him to his place in society. The amendment creates in the board of parole of the State of New York power to restore to the convicted felon those rights and privileges of citizen-

tees are subject to the inherent power of the state to control them if the public interest so requires. *Matter of Cohen*, N. Y. L. J., May 22, 1945, p. 1943, col. 1.

¹² Cf. *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923); *Miller v. Schoene*, 276 U. S. 272, 48 Sup. Ct. 246 (1928); *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77 (1876); *Nebbia v. People*, 291 U. S. 502, 54 Sup. Ct. 505 (1933); *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926).

¹³ *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578 (1937).

¹⁴ L. 1933, c. 793, as amended; C. P. A. § 1077a, 1077b, 1077c, 1077cc, 1077d, 1077e, 1077f.

¹⁵ *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 561, 562, 40 Sup. Ct. 402 (1919).

¹ N. Y. Laws 1945, c. 96. Effective March 6, 1945.

ship² which were forfeited by the conviction.³

Citizenship itself is suspended during the actual term of sentence in prison,⁴ and is revived only upon the release from prison. However, the restoration of citizenship does not revive certain civil rights⁵ which are recognized as flowing from the status of citizenship. "Release from prison does not end the punishment. The convict is forbidden to earn his livelihood in certain professions or occupations or to exercise some of the privileges of citizenship in the community to which he has returned. These penalties continue, no matter how good his subsequent behavior."⁶ It is these privileges and rights which the present amended law seeks to restore to the criminal under certain conditions.

Included in these rights which the felon forfeits by reason of his conviction is the right to register for and vote in any election. By statutory prohibition he also forfeits the right to practice medicine, dentistry or podiatry, and the right to obtain a certificate as public accountant as well as to obtain a license to conduct business as private detective or investigator, or in connection with traffic in alcoholic beverages.⁷

² Conviction of felony does not carry with it loss of citizenship but it affects the felon's civil rights. *OP. ATT'Y GEN.*, 51 St. Dep't 74 (1934).

³ N. Y. CONST. Art. II, § 3 provides: "... the legislature shall enact laws excluding from rights of suffrage all persons convicted of bribery or of any infamous crime." N. Y. PEN. LAW § 2: "A 'felony' is a crime which is or may be punishable by: (1) death; or, (2) imprisonment in a state prison."

The word "convicted" refers to a judgment of conviction, and one who has pleaded guilty, or against whom a verdict of guilty was rendered by a judge is not disqualified where no judgment is entered thereon. *People v. Fabian*, 192 N. Y. 443, 85 N. E. 672 (1908).

⁴ Citizenship itself is lost during the actual term of sentence in prison. *OP. ATT'Y GEN.* (1915) 76, construing Section 510 of the N. Y. Penal Law: "A sentence of imprisonment in a state prison for any term less than for life, forfeits all the public offices, and suspends during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced."

⁵ "Civil rights", as distinguished from rights which are naturally inherent, are those defined and given by positive law enacted for the maintenance of government." *Green v. State of New York*, 251 App. Div. 108, 110, 295 N. Y. Supp. 672, 674 (1937).

⁶ Cf. The Governor's message to the legislature (Jan. 1, 1945).

⁷ N. Y. EDUC. LAW § 1251; § 1311, subd. 13; § 1412, subd. 8; § 1496; N. Y. GEN. BUS. LAW § 74; N. Y. ALCO. BEV. CONT. LAW § 126, subds. 1, 4; N. Y. PEN. LAW § 510-a; N. Y. ELEC. LAW § 152.

The reinstatement of any attorney, disbarred because of a conviction of felony, was advisedly excluded from the purview of the present enactment since the right of determining the qualifications of those engaged in the legal profession is the exclusive function of the courts. *JUDIC. LAW* § 88; *In re Graduates of the Law Department of the U. of N. Y.*, 10 Abb. Pr. 348, 31 Barb. 353 (N. Y. 1860). The courts, in view of the implicit trust and integrity demanded of an attorney, have always required, as a prerequisite to reinstatement to the bar, a pardon, and in addition, a factual demonstration of innocence of the original crime. *Matter of Kaufman*, 245 N. Y. 423, 157 N. E. 730 (1927); *In re Finn*, 256 App. Div. 288, 10 N. Y. S. (2d) 29 (1939).

By amendment of those statutes⁸ which specifically created these disabilities, otherwise perpetual, the legislature has limited them to a fixed term. They are made mandatory only for a period of five consecutive years after release of the convicted felon from the sentence imposed.⁹ At the end of the period so fixed the released felon may apply to the board of parole for a removal of any or all of these statutory disabilities. Upon satisfactory proof of sufficient rehabilitation and good conduct during the period fixed, as well as any prior period, the board of parole may, by the discretionary power vested in it by the new law,¹⁰ end the disability and restore the criminal to these particular civil rights.

This newly created power which is now vested in the parole board, although not a pardon, partakes of the nature of a limited executive pardon. The governor alone has the right to pardon.¹¹ Pardon is an act of executive clemency and is a matter of grace and not of right, an act of mercy, not of justice.¹² The present legislative enactment, therefore, may be said to be a gift to the convicted felon. In so legislating, it was felt that progress could be made in rehabilitating the criminal by a liberal policy in offering to deserving persons convicted of crime an opportunity to enjoy the full rights of citizenship. While an application for pardon is still his privilege, the criminal is now given a more efficient method to replace the often, lengthy and cumbersome procedure inherent in the exercise of the power of pardon.

The board of parole is eminently equipped¹³ to deal with the

⁸ *Ibid.*

⁹ N. Y. EXEC. LAW § 116, subd. 3: "The period of five consecutive years with respect to any person shall be measured either from the date of the payment of any fine imposed upon him or the suspension of sentence, or from the date of his unrevoked release from custody by parole, commutation or termination of his sentence, provided that no such certificate shall be granted to any person while subject to parole supervision."

Art. 8 of the Correction Law, dealing with parole, provides only for the physical liberation of a prisoner so long as he complies with the conditions of his parole. It does not, unlike a commutation of sentence, result in termination of the sentence and the restoration of civil rights. *Matter of Lehrman v. State of N. Y.*, 176 Misc. 1022, 29 N. Y. S. (2d) 635 (1941).

¹⁰ N. Y. EXEC. LAW § 116.

¹¹ N. Y. CONST. Art. IV, § 4: "The governor shall have power to grant reprieves, commutations and pardons after conviction, . . . upon such conditions and with such restrictions, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons."

See N. Y. CODE OF CRIM. PROC. § 692.

¹² An executive pardon does not obliterate the judicial finding of the guilt of the offense which has been pardoned. *People ex rel. Prisament v. Brophy*, 287 N. Y. 132, 38 N. E. (2d) 468 (1941).

Roberts v. State, 160 N. Y. 217, 54 N. E. 678 (1899).

¹³ Similar procedural matters to be met with in the exercise of the new power, regarding investigation of the criminal, were in the past entrusted to the board of parole in connection with the governor's exercise of the pardon power.

situation presented by the new law. It consists of three members appointed by the governor with the consent of the senate.¹⁴ Its primary function of close supervision and control of the convict¹⁵ while on parole, renders it a suitable fiduciary to which to entrust the cautious exercise of this quasi-executive power of pardon created by the new law.

There are also safeguards inherent in the law itself. The applicant has the burden of offering satisfactory proof of conduct warranting the restoration of his civil rights. Such proof must be approved by the unanimous vote of the parole board. As evidence of its approval the board grants to the applicant a certificate attesting his good conduct during the five-year period after the legal termination of his sentence. Here also the board may exercise its discretion by limiting the certificate so as to remove only one or more, and not all of the disabilities imposed by law.¹⁶ This certificate, as evidence of good moral character, is to be granted only where such evidence is required by law, or where the law provides that it will end a disability otherwise imposed.¹⁷

The right to register for and vote at any election is restored to the convict upon the granting of the certificate of good conduct, unless the certificate expressly provides otherwise.¹⁸ However, in restoring the rights and privileges of pursuing those professions and occupations¹⁹ not specifically excluded, the certificate granted for this purpose removes the disability and no more. These rights are restored upon condition subsequent. The power of the parole board

N. Y. EXEC. LAW § 116, subd. 2: "The board of parole shall also have the powers and perform the duties, when requested by the governor, of collecting the records, making investigations and reporting to the governor, the facts, circumstances, criminal records and social, physical, mental and psychiatric conditions and histories of prisoners under consideration by the governor as to pardon or commutation of sentence . . ."

¹⁴ The board of parole, as presently constituted, was created in 1930. N. Y. EXEC. LAW § 115. However, parole was first instituted in New York in 1889. The establishment of the N. Y. State Reformatory at Elmira in 1876 presented the first opportunity for development of a parole system in the United States. Cf. BATES, PRISONS AND BEYOND (1936) 246; PROCEEDINGS OF THE GOVERNOR'S CONFERENCE ON CRIME, THE CRIMINAL AND SOCIETY, Albany, N Y, 1935..

¹⁵ N. Y. CORREC. LAW Art. 8.

¹⁶ N. Y. EXEC. LAW § 116, subd. 3.

¹⁷ *Ibid.*

¹⁸ N. Y. PEN. LAW § 510-a: "No person who has been convicted of a felony shall have the right to register for or vote at any election, except as provided in section one hundred fifty-two of the election law . . . nor shall prohibition to vote in any election extend to any person who shall have received a certificate of good conduct granted by the board of parole . . ."

N. Y. ELEC. LAW § 152: ". . . No person who has been convicted of a felony shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or received a certificate of good conduct granted by the board of parole pursuant to the provisions of the executive law to remove the disability under this section because of such conviction . . ."

¹⁹ See note 7 *supra*.

to restore these rights is conditioned by the exercise of another established power. The new law places no restraint upon the lawful discretion and power to be exercised by the licensing authority, which may grant or refuse the license or certificate necessary to legally pursue such profession or occupation.²⁰ The ultimate authority in such cases is therefore the licensing authority. In this way abuses are prevented, and the high ethical standards which the legislature has set for the medical and dental professions and the safeguards provided by statute to protect the public are preserved.²¹

It is submitted that the present law will serve to further the progressive attitude which the State of New York has always taken in attempting to solve the two-fold problem of crime prevention and punishment. The punishment attached to a crime serves to punish the criminal, to act as a deterrent to others, and to protect society. Rehabilitation of the criminal should begin where punishment ends, and it is the duty of society to give him an opportunity to prove his ability to become once again a law-abiding, self-supporting member of the community. The present emergency created by the war has afforded him this opportunity²² as never before, and he has, for the most part, earned the trust placed in him to do so. The inference of this new law is that the criminal, if proven fit, should be admitted to the full rights and privileges of citizenship.

JOHN E. PERRY.

UNEMPLOYMENT INSURANCE—NEW YORK "MERIT RATING" LAW.—In March, 1945 the New York State Legislature, by amending the Unemployment Insurance Law, passed what is popularly

²⁰ N. Y. EXEC. LAW § 116, subd. 3: ". . . Nothing in this section shall be construed to prevent or limit any licensing board, body or authority from exercising its lawful discretion or power in either granting or refusing a license to a person to whom such certificate shall have been granted."

In construing § 126 of the Alcoholic Beverage Control Law, the Attorney General held that the state liquor authority is not prohibited from granting a license to an applicant previously convicted of a felony, but subsequently pardoned. The fact that the applicant had been once convicted may, however, be taken into consideration, in determining whether or not a license should be issued. *OP. ATT'Y GEN.* (1934) 116.

It has been held that a pardon, issued under constitutional power, to a doctor convicted of manslaughter, whose license to practice medicine was thereby revoked, does not restore the right to practice, though the pardon purports to restore all the rights and privileges forfeited by the conviction. *State v. Hazard*, 139 Wash. 487, 247 Pac. 957 (1926).

²¹ In considering the purpose of Section 74 of the N. Y. General Business Law, which deals with the issuance of licenses to private detectives and investigators, the courts declared its purpose to be "the protection of the public at large and to prevent from engaging in that business disreputable, incompetent persons who would prey on the public." *Shorten v. Millbank*, 170 Misc. 905, 11 N. Y. (2d) 387 (1939).

²² Cf. Article, "Men with Criminal Records Make Good in the Army," Col. E. S. Shattuck, Gen'l Counsel, Sel. Serv.; *99th Annual Report of Prison Association of New York*, LEGIS. DOC. NO. 27 (1944).