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obligation upon defendant, it is a factor in determining defendant's negligence in an alleged breach or omission of such duty.[8] Since persons at public railroad crossings are not trespassers,[9] the railroad owes more than a duty not to willfully or wantonly injure them; it must exercise due care for their safety.[10]

Assuming that in the *Stratton* case plaintiff was negligent in climbing between the cars, it seems that the doctrine of last clear chance[11] might have been applied since defendant, in view of the long standing custom, owed a duty to warn plaintiff before starting the train. In North Carolina, it is not essential that defendant have actual knowledge of the danger to plaintiff, if, by the exercise of reasonable care, the peril could have been discovered.[12]

EDWIN B. HATCH, JR.

Parole—Gain Time Credits Forfeited Upon Revocation

In a recent *habeas corpus* proceeding in Florida, the petitioner sought release from confinement on the theory that his sentence had expired. At an earlier date he had been released on parole, and upon violation of the conditions of his parole he had been returned to prison to serve the unexpired portion of his sentence. He now contended that his sentence had been served, by computing for credit, in addition to the time actually served in prison, (1) the period he was at large on parole, and (2) gain time for good conduct granted prior to date of parole. *Held,* in reversing the trial court which granted the petition, neither the time spent on parole nor the gain time for good conduct granted prior to parole serve to reduce the time imposed by the original sentence.[1]

S. E. 1066, 33 L. R. A. (N. S.) 988 (1911) (custom of sounding gong as warning to persons between gates on railroad track before lowering gates).

Cf. Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F. 2d 816 (4th Cir. 1950), where evidence of custom was held for determination of the jury only where there is other evidence from which jury could properly conclude that defendant used ordinary care.

[8] Hamilton v. Southern Ry., 200 N. C. 543, 158 S. E. 75, *cert. denied,* 284 U. S. 636 (1931); STANSBURY, NORTH CAROLINA EVIDENCE §95 (1946).

[9] "Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross. . . ." Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). Missouri *ex rel.* Bush v. Sturgis, 281 Mo. 598, 221 S. W. 91 (1920).

[10] Johnson v. Seaboard Airline Ry., 163 N. C. 431, 79 S. E. 690 (1913). "A railroad company which blocks a crossing . . . for a longer time than the law permits has been held to become itself a trespasser, and to be estopped to say that one who attempts to climb over its cars is a trespasser. . . ." 44 AM. JUR. 743-744 (1942).

[11] Bogan v. Carolina Central R. R., 129 N. C. 154, 39 S. E. 808 (1901).

[12] Mount Olive Mfg. Co. v. Atlantic Coast Line R. R., 233 N. C. 661, 65 S. E. 2d 379 (1951); Aydlett v. Keim, 232 N. C. 367, 61 S. E. 2d 109 (1950); Ingram v. Smoky Mountain Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945); West Const. Co. v. Atlantic Coast Line R. R., 185 N. C. 43, 116 S. E. 3 (1923); Ray v. Aberdeen & R. R. R., 141 N. C. 84, 53 S. E. 622 (1906).

[1] Mayo v. Lukers, 53 So. 2d 916 (Fla. 1951).

A Florida statute specifically provided that in event of revocation of parole, time spent at large on parole "would in no manner decrease or diminish the time imposed by the original sentence."[2] Hence, the ruling of the court on this point seems clearly correct. However, there was no express statutory provision dealing with the status of gain time for good conduct earned prior to parole. The court cited a statute providing for forfeiture of gain time credits in the case of certain serious misconduct of those actually *in* prison,[3] but the statute clearly was not applicable, as was apparently recognized, to misconduct of parolees. However, it was reasoned from this statute that since the gain time allowance may be forfeited by misconduct during the life of the sentence, that "the time allowance is an act of grace rather than a vested right which may be withdrawn, modified or denied. . . ."[4] Hence, the administrative agency (the Florida Paroles Commission) had the authority to disallow these previously earned credits upon revocation of parole. An earlier Florida case, not cited in the principal case, had reached the same result.[5] However, in neither of these cases did the court expressly deal with what seems to be an important question; *i.e.,* should an administrative agency have the authority in the absence of an express legislative grant to disallow gain time credits previously earned, upon revocation of parole? Although the granting of gain time credits may be labelled an "act of grace," it is nevertheless an act of *legislative* grace. It could thus be reasoned that the Florida legislature had apparently intended that a prisoner should be deprived of that "grace" only when authorized by express statutory provision. On this basis, it would seem that the decision of the Florida court upholding the "administrative forfeiture" of gain time credits is not well-founded.[6]

Parole statutes may be generally classified into three categories: First, those that expressly provide that upon revocation of parole, all gain time credits shall be forfeited.[7] Second, those that provide, in

[2] FLA. STAT. ANN. §947.21 (1940). The similar statute in North Carolina is N. C. GEN. STAT. §148-61.1 (Supp. 1951).

[3] FLA. STAT. ANN. §954.04 (1940). This statute provides that all commutations which shall have accrued in favor of the prisoner shall be forfeited for each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct.

[4] Mayo v. Lukers, 53 So. 2d 916,917 (Fla. 1951).

[5] Dear v. Mayo, 153 Fla. 164, 14 So. 2d 267 (1943).

[6] Apparently the court is of the opinion that a result is automatically derived by placing a label on the gain time credits. Whether gain time credits are, or are not, "vested rights," is irrelevant. If the test of "vested" is "the certainty of the future right of enjoyment," clearly they are not "vested rights" for a statute specifically provides for forfeiture under certain circumstances. Even if they could be labelled vested rights," they may be divested by legislative authority, as indicated by statutes, note 7 *infra.* Therefore, the Florida court would not seem to be justified in concluding that the gain time credits may be disallowed simply because they are not "vested rights," but instead are "acts of grace."

[7] COLO. STAT. ANN. c. 48 §§549, 557 (1935); DEL. REV. CODE c. 101, 4155 §38 (1935); LA. REV. STAT. §15:574.9 (West 1950); ME. REV. STAT. c. 136 §22 (1944); OKLA. STAT. ANN. tit. 57 §332.14 (1949); WIS. STAT. §57.11 (3) (1947).

effect, that forfeiture of gain time credits shall lie in the discretion of the administrative agency responsible for parole matters.[8] Third, those statutes which do not expressly deal with the status of gain time credits upon revocation of parole.[9]

Jurisdictions in the third category are split as to the status of gain time credits on revocation of parole. Where one statute provided that upon revocation of parole the prisoner may be required to "serve in prison the whole or any part of the maximum period for which at the time of his release, he was subject to imprisonment under his sentence . . . ,"[10] it was held that emphasis was to be placed on the words, "at the time of his release"[11] on parole; *i.e.*, that the exact status of his

[8] CAL. GEN. STAT. c. 429 §883 (1949); N. Y. CORRECTION LAW §218; UTAH CODE ANN. §85-9-78 (1943); 18 U. S. C. §4165 (1948). Courts would not review the action of the particular agency unless it clearly appears that it has exceeded its powers or that substantial injustice has been done. See People *ex rel.* Threadcraft v. Brophy, 7 N. Y. S. 2d 75, 255 App. Div. 823 (1938); *Ex Parte* Taylor, 216 Cal. 274, 13 P. 2d 906 (1932). *But cf.* People *ex rel.* Fershing v. Wilson, 20 N. Y. S. 2d 895, 174 Misc. 191 (Sup. Ct. 1939), *reversed*, 20 N. Y. S. 2d 897, 259 App. Div. 957 (3d Dep't 1939). Federal courts construe 18 U. S. C. §4165, which provides for discretionary forfeiture of gain time for good conduct for violation of the rules of the institution, as being applicable to forfeiture upon revocation of parole. Such construction rests on the theory that while on parole a parolee is "still in contemplation of law a prisoner, his parole privilege being merely an extension of the prison walls. Jarman v. U. S., 92 F. 2d 309, 310 (4th Cir. 1937). Federal cases seem to indicate that forfeiture is an almost automatic procedure upon revocation of parole. See Hedrick v. Steele, 187 F. 2d 261 (8th Cir. 1951); Taylor v. Squier, 142 F. 2d 737 (9th Cir. 1944); Sanford v. Runyon, 136 F. 2d 54 (5th Cir. 1943); Christianson v. Zerbst, 89 F. 2d 40 (10th Cir. 1937); Phipps v. Pescor, 68 F. Supp. 242 (W. D. Mo. 1946). WASH. REV. STAT. ANN. §10249-4 (Supp. 1940) allows the discretionary imposition, as a condition of parole, that credits shall be forfeited upon violation of parole.

[9] Some provide that the prisoner shall be remanded and confined for the unexpired term of his sentence, which is calculated from the date of delinquency: ALA. CODE ANN. tit. 42 §12 (1940); ILL. ANN. STAT. c. 38 §808 (1949); IND. STAT. ANN. §13-249, *et seq.* (Burns 1933); MASS. ANN. LAWS c. 127 §149 (1949); MICH. STAT. ANN. §28.1316 (1938); N. M. STAT. ANN. §42-1709 (1941); OHIO GEN. CODE ANN. §2209-20 (Supp. 1950) (however, parolee may be re-paroled on different conditions, or sent to another institution); TENN. CODE ANN. §11843.12 (Supp. 1951). Others provide that the prisoner shall be remanded and confined for the unexpired term of his sentence, which is calculated from the date of release on parole: ARIZ. CODE ANN. §47-116 (1939); FLA. STAT. ANN. §947.21 (1940); GA. CODE ANN. §77-505 (1937) (discretionary whether time on parole shall be included as part of the original sentence); MD. ANN. CODE GEN. LAWS art. 41, §84 (1939) (discretionary whether time on parole shall be included as part of the original sentence); MO. REV. STAT. §§4202, 9160 (1939); N. C. GEN. STAT. §148.61.1 (Supp. 1951); N. H. REV. LAWS c. 429, §36 (1942); N. J. STAT. ANN. §2:198-4 (1939); ORE. COMP. LAWS ANN. §26-2308 (1940); R. I. GEN. LAWS c. 38, §5 (1938); VT. STAT. REV. §8045 (1947); W. VA. CODE ANN. §6291 (26) (1949). Some, however, remain silent as to the date from which calculated, or as to the status of his sentence upon revocation of parole: ARK. STAT. ANN. §§43-2803-2808 (1947); KY. REV. STAT. §439.190 (1948); MINN. STAT. ANN. §637.06; MISS. CODE ANN. §2543 (1942); MONT. REV. CODES ANN. 94-9819 (1947); NEB. REV. STAT. §29-2628 (1943); NEV. COMP. LAWS ANN. 11579 (Supp. 1949); N. D. REV. CODE §12-5525 (1943); PA. STAT. ANN. tit. 61 §298 (1930); S. C. CODE ANN. §1038-11 (Supp. 1948); S. D. CODE §13.5307 (1939); TEX. CODE CRIM. PROC. ANN. art. 781b §19 (1950); WYO. COMP. STAT. ANN. §11-406 (1945).

[10] W. VA. CODE ANN. §6291 (26) (1949).

[11] Watts v. Skeen, 54 S. E. 2d 563, 566 (W. Va. 1949).

sentence was to be determined as of the time of his release on parole. "In the absence of statutory authorization," the court continued, "the revocation of a parole does not operate as a forfeiture of any 'good time' earned prior to the granting of the parole. . . ."[12] Others, in refusing to forfeit the gain time, hold that statutes or rules providing for gain time are to be read into the judgment and form a part thereof;[13] that the "diminution of imprisonment provided for by statute is a privilege of which the prisoner can be deprived only in accordance with the provisions of the statute,"[14] and if no provision is made for forfeiture upon violation of parole, then the prisoner stands entitled to the time.[15] On the other hand, courts have casually disallowed the gain time for good conduct upon revocation of parole,[16] or have held that the statutory provisions allowing gain time for good conduct "cannot enter into the sentence or form a part of it, for the reward must first be earned before the prisoner is entitled to it."[17] The theory is that continued good conduct is a condition precedent to the prisoner's rights to any credits, and that the condition is not satisfied by misconduct on parole.

The relative dearth of decisions on this point in jurisdictions in the third category would seem to be indicative at least of a policy to allow a parolee to retain his gain time credits upon revocation of parole. An overwhelming majority of the states do not have statutes expressly dealing with the problem, and a majority of these states that have ruled on the point have held that the prisoner stands entitled to the time upon revocation of parole. Therefore, it would seem in line with the weight of authority that in the absence of express statutory authorization there should be no forfeiture of the credits upon revocation of parole.

In North Carolina the question has never been before the court.[18]

[12] *Ibid.*

[13] Woodward v. Murdock, 124 Ind. 439, 24 N. E. 1047 (1890). Indiana adopted its present statute in 1897, hence subsequent to the above decision. See note 9 *supra.* Apparently, however, a parolee is still allowed to retain his gain time upon revocation of parole. See Boyd v. Howard 224 Ind. 439, 68 N. E. 2d 652 (1946).

[14] State *ex rel.* Davis v. Hunter, 124 Iowa 569, 571, 100 N. W. 510, 512 (1904). Iowa's present statute, IOWA CODE ANN. §247.28 (1950), is unusual in that it provides that one violating a condition of parole shall be deemed guilty of a felony, and shall be imprisoned to serve five years, upon the completion of the previous sentence.

[15] *Ibid.* See also *Ex Parte* McKenna, 79 Vt. 34, 64 Atl. 77 (1906).

[16] *Ex Parte* Holton, 304 Mich. 534, 8 N. W. 2d 628 (1943).

[17] Stephens v. Conley, 48 Mont. 352, 355, 138 Pac. 189, 192 (1914).

[18] State v. Yates, 183 N. C. 753, 11 S. E. 337 (1927). The facts in this case indicate that the order of revocation from the governor stated that "no time [shall be] allowed for previous good behavior, if any such time was entered to his credit." The point was not raised, the issue being the authority to revoke a parole after the time fixed in the original sentence had expired. It is doubtful that any gain time had been granted; he had been paroled after serving only 42 days. However, it has been held in other jurisdictions that a provision in an order of revocation for forfeiture of gain time for good conduct is illegal and outside the authority of the governor. See State *ex rel.* Davis v. Hunter, 124 Iowa 569, 100 N. W. 510 (1904). See also, *Ex parte* Ridley, 3 Okl. Cr. 350, 106 Pac. 549 (1910). Since the *Ridley* case Oklahoma has amended its statute to provide for automatic cancellation of gain time credits upon revocation of parole.

While a prisoner in North Carolina may earn gain time credits for good conduct,[19] there is no express provision for forfeiture of this time except by escape or attempted escape,[20] or participation in mutiny, riot, insurrection, destruction of state property, or attack upon any officer or inmate.[21] North Carolina, being in the third category, is therefore similar to most jurisdictions in that the statute remains silent as to the status of gain time credits upon revocation of parole.

It has been the administrative policy in North Carolina to allow an ex-parolee to retain his acquired gain time credits, and this policy is founded on the belief that the administrative agency is without authority, under the present statutes, to deprive him of that time.[22] In the light of what has been said before, this view seems entirely proper from both a legal and a policy standpoint.

ROGER B. HENDRIX.

Sales—Implied Warranty of Wholesomeness—Requirement of Privity

A wrongful death action was brought in North Carolina against a retail druggist for breach of an implied warranty of wholesomeness of a salt substitute, sold in its original package to plaintiff's intestate. The defendant retailer joined his wholesaler as third-party defendant, on the allegation that the wholesaler was primarily liable on the same implied warranty. The wholesaler demurred for failure to state a cause of action and for misjoinder of parties and causes of action. The overruling of the demurrer was affirmed and the joinder held proper because the retailer, if held liable, would be able to recover the loss from the wholesaler.[1]

Most jurisdictions recognize the implied warranty of fitness for human consumption in the sale of food.[2] A majority of jurisdictions,

[19] *Rules and Regulations Governing the Management of Prisoners under the Control of the State Highway and Public Works Commission.* §2 (1949), as authorized by N. C. GEN. STAT. §148-12, 13 (1943). Time earned is dependent on the grade of the prisoner. Additional time may be earned if the prisoner is of a certain grade and on continuous good behavior for twelve months; credit may also be earned for Sunday, holiday or emergency work.

[20] N. C. GEN. STAT. §148-41 (1943).

[21] *Rules, op. cit. supra* note 19, §6(o).

[22] Informal opinion, State Highway and Public Works Commission. But see note 18 *supra.*

[1] Davis v. Radford, 233 N. C. 283, 63 S. E. 2d 822 (1951).

[2] Under the common law: Stanfield v. F. W. Woolworth Co., 143 Kan. 117, 53 P. 2d 878 (1936); Degouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W. 2d 336 (1936); Walker v. Packing Co., 220 N.C. 158, 16 S. E. 2d 668 (1941); Williams v. Elson, 218 N. C. 157, 10 S. E. 2d 668 (1940); Rabb v. Covington, 215 N. C. 572, 2 S. E. 2d 705 (1939); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. 2d 828 (1942); Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S. E. 94 (1936); Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S. E. 2d 785 (1939); 1 WILLISTON, SALES §242 (Rev. ed. 1948). The Uniform Sales Act has been adopted in 34 states. See 1 UNIFORM LAWS ANNOTATED, SALES, p. xv, (1950), Table III, for a list of the states which have adopted it, the dates of adoption, and the respective state statutes. The implied warranty of fitness under the Uniform