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Parole Revocation--Right to Hearing

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1950 amendment seems to taboo vertical integration in support of the instant case.[21]

The holding, however, that the action may accrue at *anytime* after the acquisition is not so easily reconciled. Although laches will not apply against the government,[22] equity courts should be reluctant to frame a decree against one whose only offense was innocently making an extraordinarily good investment forty years ago. In view of the multitude of other similarly innocent acquisitions since 1914, great force is lent to that argument.

That it was unforeseeable, however, that the DuPont-GM marriage of 1917-19 would be annulled in 1957 is no longer of practical concern. What counsel is to advise his clients as to future stock acquisitions and mergers is far more important — yet it remains a matter for clairvoyance. No *certain* test for determining the validity of stock acquisitions is provided by the court. The court implies that the measure of substantial restraint should be a *quantitative* one, yet it leaves to speculation the method of determining *what quantity* is substantial. Thus ambiguity remains the rule and the resulting confusion falls prey to Justice Jackson's comment that "if there is one thing that the people are entitled to expect from their law makers, it is rules of law that will enable individuals to tell whether they are married and if so to whom."[23]

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PAROLE REVOCATION — RIGHT TO HEARING

Petitioner had been paroled while serving a one to fifteen year sentence for attempted burglary. Prior to the expiration of his maximum term and before final release, his parole was revoked, and he was taken into custody. The petitioner instituted habeas corpus proceedings in an Ohio court of appeals stating that he had not been given any notice or knowledge of any alleged violation of the conditions of his parole, and further, that any finding that there had been such violation would be arbitrary and an abuse of discretion. The court of appeals dismissed the petition and ordered that petitioner be remanded to the custody of the sheriff. The Supreme Court of Ohio affirmed this decision.[1]

The Ohio courts were faced with the question of whether a convicted person, who is legally outside the prison walls by virtue of a parole, is

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[21] See note 7 *supra.*

[22] In United States v. Pullman Co., 50 F. Supp. 123, (E.D. Penn. 1943) the action was heard forty-three years after the acquisitions.

[23] Estin v. Estin, 334 U.S. 541, 553 (1947).

entitled, by the laws of Ohio and the Federal Constitutitution, to notice and hearing before revocation of such parole.

There are two questions to be answered in determining if notice and hearing are requisites for a valid parole revocation. First, is such procedure embraced within state or federal constitutional guarantees of due process? Secondly, if the answer to the first question is in the negative, is such procedure required by the pertinent statutory provisions?

The Ohio Supreme Court approached the constitutional question by analogizing the position of the parolee to that of the probationer.[2] He is merely a felon at large by the sovereign grace. During the process by which he had been relieved of his freedom the constitutional safeguards which form the protective bulwark around the individual citizen's liberties had been followed,[3] and are not again available to him because he is still a "convict" and has not yet been re-endowed with that status classified as "citizen." This reasoning is supported by the definitions of parole[4] and convict[5] as set forth in the Ohio Revised Code.

Not all jurisdictions arrive at the same decision the Ohio court did on this constitutional question.[6] Many of the courts which arrive at the

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[1] *In re* Varner, 166 Ohio St. 340, 142 N.E.2d 846 (1957).

[2] *Id.* at 343, 142 N.E.2d at 849. The Ohio Supreme Court quoted Mr. Justice Cardozo's statement in the opinion of the United States Supreme Court in Escoe v. Zerbst, 295 U.S. 490, 492 (1934): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

[3] Fuller v. State, 122 Ala. 32, 26 So. 146 (1899); *Ex parte* Levi, 39 Cal.2d 41, 244 P.2d 403 (1952); *In re* Patterson, 94 Kan. 439, 146 Pac. 1009 (1915); Guy v. Utecht, 216 Minn. 255, 12 N.W.2d 753 (1943).

[4] OHIO REV. CODE § 2965.01 (E). "Parole means the release from confinement in any state penal or reformatory institution, by the pardon and parole commission upon such terms as the commission prescribes. A prisoner on parole is in the legal custody of the department of mental hygiene and correction, and under the control of the commission."

[5] OHIO REV. CODE § 2965.01 (G). "Convict means a person who has been convicted of a felony under the laws of this state, whether or not actually confined in a state penal or reformatory institution, unless he has been pardoned or has served his sentence."

[6] Brill v. State, 159 Fla. 682, 32 S.2d 607 (1947) Dictum to the effect that not to allow habeas corpus would be a violation of due process; People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909) The appropriate statute allowed a hearing and as such the statute did not deprive the party of his liberty without due process as it would have done had he not been entitled to a hearing; State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d (1950). The decision was based on the fact that the Common Law required a hearing; *Ex parte* Lucero, 23 N.M. 433, 168 Pac. 713 (1917). A suspended sentence gives the right to liberty, which is one of the highest rights of citizenship. This right can not be taken from a person without notice and an opportunity to be heard without invading his constitutional rights. State v. Renew, 136 S.C. 302, 132 S.E. 613 (1928) quoted the *Lucero* case; State v. O'Neal, 147 Wash, 169, 265 Pac. 175 (1928) quoted the *Lucero* case.

opposite result base their conclusion on the fact that the conditionally freed individual is entitled to his freedom, and, as such, is possessed of a *right* which can only be forfeited by breaching the condition of its grant. Forfeiture without the opportunity for a hearing is then deemed to be in violation of constitutionally guaranteed due process.[7]

After the Ohio court decided it was within the power of the legislature to dispense with notice and hearing to accomplish such revocation, the court had to determine whether the applicable statutes nevertheless required notice and hearing. The applicable sections of the Ohio Revised Code[8] contain no express provision as to notice and hearing. Statutes not expressly requiring or dispensing with notice and hearing have been interpreted in accord with the particular jurisdiction's determination of the applicability of the due process requirement.[9] The Ohio court held that the pertinent statutory provisions clearly indicated a legislative intent not to burden the parole process with such hearings. This seems evident by the court's comparison of the parolee to a "trusty" who is granted the privilege of leaving the confines of the penal institution, but is still, while enjoying that privilege, within the legal custody and under the control of the head of the institution.

The view adopted by the Ohio court is supported by several practical considerations. Because of the widespread fear of testifying publicly against a paroled convict, parole authorities are greatly dependent upon secret investigations, the benefit of which would be lost in the type of

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[7] Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941) (conditional pardon). It is interesting to note that the U.S. Circuit Court based its decision on Escoe v. Zerbst, 295 U.S. 490, apparently construing Mr. Justice Cardozo's opinion in this U.S. Supreme Court case as referring to the constitutional issue rather than the interpretation to be placed upon the construction of the federal statute. This, in spite of Justice Cardozo's declaration at page 492: ". . . we do no accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute." At least one jurisdiction does not extend the constitutional guarantee to all forms of conditional freedom. *Compare* Lester v. Foster, 207 Ga. 596, 63 S.E.2d 402 (1951) (Notice and hearing required to revoke suspended sentence); Gross v. Huff, 208 Ga. 392, 67 S.E.2d 124 (1951) (Notice and hearing required to revoke probation sentence); *with* Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937) (Notice and hearing not required to revoke parole).

[8] OHIO REV. CODE §§ 2965.09, 2965.17, 2965.18, 2965.20, 2965.21, 2965.23.

[9] People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909) A hearing required before the board of pardons on the question of whether the parole had been violated on the grounds that the constitutional guarantee of due process of law entitled him to a hearing. Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937) A hearing was not required because that statute by its express terms states that a parolee remains within the legal custody and control of the prison commission. A plain and clear abuse, if decision arrived at fraudulently, corruptly, or by mere personal caprice, was here, however, said to be subject to habeas corpus that such action might be reviewed.