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Executive Pardons

Jacob M. Goodyear

Executive Pardons

Long before the State arose from its couch, in the morning twilight of history, while the first streaks of the light of law and justice were driving back the inky darkness of cruelty and oppression, mercy, pity and compassion became evident in the human breast and sought expression, as well in the conduct of individuals, as in that of new born nations. As kingdoms grew and developed in the blazing sunshine of a new day—a day of organized civilization—so this feeling of mercy towards those who had transgressed grew and expanded; as fundamental principles of human rights and relations were given practical expression in legal codes, so there gradually was conceived a practice that was ultra vires and was founded upon more beautiful premises than the mere letter of the law. Through all the history of the human race, like the scarlet thread that runs through all the cordage of the British Navy, runs the doctrine of mercy and forgiveness, of remission for infractions of the law. Poets have sung its praises, dramatists have woven it into their themes and religious leaders have taught its application. The Greatest of Teachers said, "The letter of the law killeth, but the Spirit giveth eternal life," and just so where the letter of the law demanded the extreme penalty, this spirit above the law has given life again. Shakespeare feels its universality and expansiveness when he makes one of his characters say

> "The quality of mercy is not strained
> It droppeth as the gentle rain upon the earth beneath."

If we read Blackstone and his contemporaries, we learn of hundreds of offenses—oftimes trivial in character—for which the penalty was death, and not only that, but in addition, the lands and property of the criminal were forfeited to the Crown. From this rigorous application of the law there was no appeal or relief—it was inflexible and inexorable. The idea of mercy and forgiveness found its expression in the act of the king in pardoning the offense and remitting or sending back the property of the offender.

Clearly, the king could give back that which by law was his; but just as clearly the king could not give back that in which any subject had an interest or right of ownership. In the development of the common law the principle became well established that a pardon could discharge the king's moiety or part, but not that in which a subject had a vested interest, while the remission of forfeiture to the king and the pardoning of offenders by the Crown came to be recognized as one of the inherent and natural rights of the sovereign.

It was only natural, therefore, that the charter to William Penn from King Charles should make some reference to the former's power as sovereign of "Penn's Woods" to exercise this right of clemency or pardon. The charter expressly provides "* * * power to him, his heirs, deputies and lieutenants to remit, release, pardon and abolish (whether before judgment or after) all crimes and offenses whatsoever committed against the laws, treason and wilful and malicious murder only excepted, and in those cases to grant reprieves until the king's pleasure might be known therein".

The Constitution of 1776 imitated this provision in the Charter, but substituted the Legislature for the King, granting power to remit fines and grant pardons in all cases whatsoever except impeachment, and in case of murder and treason to grant reprieves until the next session of the General Assembly. Under this Constitution it was lawful for the Executive Council to grant a pardon on the condition the person should, within a limited time, depart from the United States, and on departing or returning, the pardon to be void. It appears this is the first instance in this state in which pardons may be granted on condition, even though such pardon amounts to banishment or expatriation[1]. By the Constitution of 1790 all restrictions of the power to pardon were removed and it was given to the executive freely and fully, and this was not altered by the Constitution of 1836 nor that of 1873[2].

[1]Flavell's Case, 8 W. & S. 197.

[2]Constitution of 1873, sec. 89,1 Purdon's statutes 171.

No general principle of law is more firmly grounded than that which fixes common law interpretations and definitions upon words and phrases that the Acts of General Assembly, judicial opinions and common usage have not altered in meaning. By common law there are some acts of such a character that a condition subsequent cannot be attached because of repugnancy to the act done. The distinction is made by Coke, who says that an express manumission of a villein cannot be on condition, because once free, he is forever free. But that the king may make a pardon to a man of his life upon condition is a doctrine that is followed by Blackstone, Hawkins, Chitty and others and this has come to have general recognition. The conclusion follows, that a pardon at common law may be upon any condition and that, there being an absence of statutory provision to the contrary, it may have the same effect in Pennsylvania. If the Governor sees fit to annex any condition, either precedent or subsequent, to a pardon before it becomes effective, it lies on the donee to fulfill that condition. If he does not fulfill the condition precedent, then the pardon never takes effect; but if he fails to observe the condition subsequent, then the pardon becomes null and void and the original sentence remains in full force and vigor[3].

From the historical aspects of a pardon it is apparent that the Governor stands practically in the same position as the king in an earlier day and that except where statutes have specifically altered his power, the chief executive can do no more than the king could do under the common law. While some would try to read into the grant of power to the Executive to issue pardons an unlimited authority to commute terms of imprisonment and remit fines and penalties, yet this is not the correct conception of the law as enunciated by the Courts.

One of the earliest cases involving the legal effect of a pardon was that brought by Matthew Duncan, of Franklin County, who was convicted of adultery and bastardy. He pleaded the pardon, and this was allowed, but judgment

[3]Flavell's Case, 8 W. & S. 197.

nevertheless was entered against him for the costs and an order was entered providing for payments for the support of the children who were the product of his crime. The contention was that the pardon being full and complete for the crime of adultery, no judgment could be entered against him. The Court, however, raised the distinction that in cases in which the crime may be divided into distinct parts there may be a pardon for the one without there being any effect upon the other. There is a wide difference between punishment for adultery and maintenance of the child born as the result of that crime; the one is punitive, the other to enforce a moral duty and save public expense. There may be propriety in remitting the punishment and at the same time enforcing the order for maintenance[4].

This case, however, lays down a broad and plain pronouncement concerning the costs involved. The Commonwealth contended that the costs were vested in certain officers to whom they were due and that not even the power of the Governor could interfere with the payment of these. The distinction was made that had the pardon been pleaded before judgment, then the costs would have been remitted. The time that the right to the costs vests in the officers of the law is the time of imposition of sentence; the pleading of a pardon after that time can have no effect on the costs. Justice Tilghman, speaking for the Court, says, "Costs for which judgment has been given are not remitted by a pardon of the offense subsequent to the judgment, because there was a vested interest in private persons." It is clear that this interpretation finds its roots back in the principles of the common law which permitted the king to remit his moiety or part, but not the part of his subjects. If the Governor is considered to be in the same position as the king respecting pardons, the conclusion of the court is logical and natural in its ruling respecting costs. Again, the Supreme Court lays down the general rule that the costs in a criminal proceeding are the property of the several officers to whom payable and cannot be remitted by

[4]Duncan v. Commonwealth, 4 S. &. R. 449.

the Governor, who can only absolve from imprisonment for the offense[5].

A distinction seems to be drawn, however, between the granting of a pardon after judgment has been entered and the pleading of a pardon before judgment. In the former instance the right to the costs has vested and cannot be disturbed by the pardon. In a Fayette County case the defendant was found guilty of assault and battery and a month before imposition of sentence was pardoned by the Governor. The pardon was duly filed in Court, but sentence was nevertheless entered against the defendant for the costs. This case seems to go a step farther than that of *Duncan v. Commonwealth* in that it holds the right of the officers to the costs vests after the verdict and before judgment is entered and sentence passed[6].

In the case of *Commonwealth v. Dunniston*[7] the defendant entered into a recognizance in the sum of $2000 conditioned for the appearance of a person charged with larceny. The recognizance was forfeited and after suit was brought judgment was entered. The Governor promptly remitted the forfeiture and a case stated was brought to determine the right of the Executive to remit such forfeiture. As in the matter of costs the sole question is whether the right to the money secured by the recognizance is a vested one and this the Court answers by holding that the county has no more vested right than the state would have and as the state occupying the position of sovereign could remit fines and forfeitures, so the Governor could remit the forfeited recognizance. By the provisions of the Constitution the Governor has the right to remit fines and forfeitures, grant reprieves and pardons, except in cases of impeachment, and that power even the Legislature cannot abridge or destroy. Fines are payable to the Commissioners of the respective counties and it is the duty of the latter to collect them and apply them to general county purposes. But until the money is actually collected and in the treasury the Gover-

[5]Ex parte McDonald, 2 Wharton, 440.

[6]Playford v. Commonwealth, 4 Pa. 144.

[7]Commonwealth v. Dunniston, 9 Wharton, 142.

nor has power to pardon the offender and remit the fine and forfeiture. The right to remit cannot be affected because judgment was taken on the recognizance, as it would indeed be a false distinction to give the Governor the right to pardon for the prison term and deny him the right to remit the fines and forfeitures. While it is true that in the case of costs the right of private persons is at stake, this is not true as regards fines and forfeitures. These are purely matters of public policy under the exclusive control of the Governor and the Legislature cannot interfere with these constitutional rights.[8]

There must be special words of restitution used in the pardon in order to divest the county of its right to the fine and to remit this to the defendant[9]. It has been held under the common law that a vested interest in the king was not divested and remitted by a general act of pardon unless there were used clearly words of restitution. There is a vested right arising out of the commission of an offense and sentence therefor and this cannot be affected by a pardon from the Governor any more than a pardon by the king. From the moment of sentence the right to the fine was vested in the county and while the Governor might have remitted it by express words, yet it is not affected by a general act of pardon. In respect to the fine, the county stands in the place of the Commonwealth and the Governor may remit just as fully as if it were to be paid to the state treasury. While it is not at all easy to reconcile all the decisions regarding pardons, yet the discharge of a prisoner who has received a general pardon without a specific remission of the fine and without payment thereof will make the sheriff liable to the county in an action on his bond[10].

It is admitted that the execution of a deed of conveyance for real estate without delivery thereof to the grantee passes no title. Just so the delivery of the pardon to the donee is essential to give him any right to release. The

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[8]Commonwealth v. Dunniston, 9 Wharton, 142.
[9]Cope v. Commonwealth, 28 Pa. 297.
[10]Cope v. Commonwealth, 28 Pa. 297.

mere intention to grant a pardon can have no legal force until the completed act, which is when the pardon is finally delivered[11]. This is the only step that gives title to a pardon and the subsequent release of the offender. By loose practice a pardon has come to be considerd a mere voucher issued to the warden or sheriff for the delivery of a prisoner, but viewed in its proper light it is the prisoner's title to his freedom. While it is true that delivery to the warden of the penitentiary is prima facie evidence of delivery to the prisoner, yet it is only constructive delivery and may be rebutted. For example, a pardon issued by the Governor on the request of the War Department that the prisoner was needed for special military service, when it was found that the letters from the War Department were forgeries, was voided and the prisoner required to serve his term. Despite the fact that he had been actually taken from the custody of the warden yet he was ordered returned and his pardon voided because of the fraud practiced in securing the pardon.

A pardon is an act of grace on the part of the Chief Executive standing in the place of the sovereign or king and is not a matter of merit. If forgery and fraud in securing a pardon will act to void it and cause the recommitment of the prisoner[12], counsel for any petitioner for a pardon must be cautious not to make extravagant statements and false averments in presenting and pressing such application. The highest good faith required by law must characterize certain relations and surely in representing a client before the Pardon Board nothing less than the highest good faith should be used. While it is almost asking too much to require the pardoning authorities to check and investigate every averment of counsel for the petitioner, yet this should not be necessary if the Bar is alert to its obligations. It ought not to be the aim to secure the release of any prisoner on any representations whatever, but rather should it be to present meritorious cases for consideration. If the authorities in this state are strictly observed any misrepre-

[11]Commonwealth ex rel. v. Halloway, 44 Pa. 210.
[12]Commonwealth ex rel. v. Halloway, 44 Pa. 210.

sentation or fraud practiced to secure the pardon of a prisoner would void that pardon per se.

The question has been raised in cases in which one-half the fine imposed is payable to the county and one-half is payable to the informer, whether the fine may be remitted by the Governor[13]. The latter has the power under the Constitution to remit "fines and forfeitures" and if such a fine comes within the meaning of the Constitution, then it may be remitted. Applying the analogy that the Governor is in the same position as the king was formerly, we must draw the conclusion that only those fines which were originally payable to the state may be remitted. Though subsequent legislation may give a portion of such fine to the informer, the Governor's power under the Constitution to remit is unimpaired. All the old authorities confirm the rule that the king could remit only his moiety of the fine and, applying this rule, the Court reaches the conclusion that the informer has a vested interest in one-half the fine and that this cannot be remitted by a general pardon.

An affirmance of the doctrine that the defendant is absolved from the costs only if the pardon issues before sentence is imposed and judgment entered is found in *Commonwealth v. Hitchman et al*[14].

When a pardon is issued after sentence has been passed and the defendant thereby is absolved from all punishment but costs, the prisoner may be held until discharged by the County Commissioners under the provisions of the insolvent laws[15]. In a Schuylkill County case, which was an amicable action to determine the liability of the sheriff for costs when he discharged such a prisoner without the consent of the Commissioners, it was decided that there is no power whatever in wardens or sheriffs to discharge without the payment of costs—unless ordered to do so by the Commissioners. Deibert was sentenced to a fine, the costs and a term of six years in jail. He was discharged by the warden without paying the costs and without the consent

[13]Shoop v. Commonwealth, 3 Pa. 126.

[14]Commonwealth v. Hitchman, 46 Pa. 357.

[15]County of Schuylkill v. Reifsnyder, 46 Pa. 446.

of the County Commissioners. The warden justified his action by the fact that a pardon had been issued to the prisoner. The Court held that the fine, which was formerly payable to the State and now was payable to the county as a substitute, could be remitted by the Governor; that the term of imprisonment could be nullified by the pardon; but that the costs were vested in the officers to whom they were payable and that the warden erred in discharging the prisoner.

Originally the investigation of applications for pardons rested entirely with the Executive, but all too soon with increasing population this became a real burden to a busy Governor charged with the business of a great Commonwealth. An Act of General Assembly created the Pardon Board and vested it with certain powers to investigate applications, hear arguments and make recommendations to the Governor. While the pardon power remains vested absolutely in the Executive, yet its practical application rests on the recommendations of this Board, which is composed of the Lieutenant Governor, the Secretary of the Commonwealth, the Attorney General and the Secretary for Internal Affairs[16].

That these recommendations of the Pardon Board are in no way obligatory on the Governor is a finding of the Supreme Court brought out in *Commonwealth ex rel v. McKenty*[17]. This case questioned the constitutionality of the Act of Assembly of May 10, 1909, P.L. 459, commonly known as the Ludlow Act providing for indeterminate prison terms and release after the minimum term had been served.

The question was raised that under this Act no legal sentence could be passed as it vested judicial powers, namely, those of parole, in a non-judicial board by giving it the right to determine the length of sentence. This objection was held not valid, the Court stating that the Legislature may define a crime and fix the punishment therefor, while the Executive is invested with certain powers of grace

[16]Act of June 19, 1911, P. L 1055, sec. 15.

[17]Commonwealth v. McKenty, 52 Pa. Super. Ct. 332.

and pardon. This power of pardon is, as before stated, inherent in the Commonwealth, but by law is vested in and delegated to the Governor. He may exercise the power of grace and pardon in isolated cases, but the Legislature quite properly may pass general acts of mercy, which in effect alter and change the whole scheme of punishment for crime. The power of mercy and pardon is not inherent in the courts, and when the Legislature provided for indeterminate sentences, it fixed the specific maximum for each crime, leaving the courts free, however, to exercise merciful principles in determining how brief a term of imprisonment was deemed proper.

The manner of bringing an application for a pardon to the attention of the Governor is not a devious one. Printed forms and instructions are provided any attorney by the Pardon Board and in addition a printed schedule of cases for argument is issued. The arguments themselves are rather informal and may or may not be contested or opposed. After argument all the papers in the case, including a certified copy of the exact sentence imposed, proof of newspaper advertisement and any other pertinent documents are considered by the Board in executive session. Recommendations for pardon or clemency are made to the Governor, notice of all such being given to counsel concerned, and the actual pardons are then issued from the Governor's Office to the respective wardens or sheriffs concerned.

Carlisle, Pa. JACOB M. GOODYEAR.