# INDEX

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# New Jersey Supreme Court.

JOHN O. LINDSLEY,
*Relator,*
*vs.*
BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON,
*Respondent.*

On Petition for Writ of Mandamus.

## PETITION FOR THE WRIT

(*Filed November* 29, 1929.)

*To the Honorable Thomas W. Trenchard, Justice of the Supreme Court of the State of New Jersey:*

The petition of John O. Lindsley, now residing in the City of Trenton, in the County of Mercer, and State of New Jersey, respectfully shows:

1. That on June 26, 1917, in the Court of Oyer and Terminer of the County of Essex, he entered a plea of *nolo contendere* to an indictment charging murder, and was thereupon sentenced to life imprisonment in the State Prison at Trenton; that on July 13, 1917, he was conveyed to the State Prison, and has since been, and is now, incarcerated therein.

2. That your petitioner is advised that under the Indeterminate Sentence Act, enacted by the Legislature of the State of New Jersey, and other Acts adopted subsequently thereto, the Board of Managers of the New Jersey State Prison was vested with authority to release inmates under sentence in said State Prison upon the expiration of the minimum term of imprisonment, less

earned commutation thereof; and that in cases of life imprisonment, imposed at the time your petitioner was sentenced, the minimum term was fifteen (15) years.

3. That on July 1, 1928, your petitioner had served the said minimum term of 15 years, less earned commutation thereof, and thereby became entitled to apply to the said Board of Managers for a release from said State Prison under parole; that your petitioner thereupon presented to the said Board of Managers of the New Jersey State Prison an application for parole, and your petitioner was subsequently advised that at a meeting of said Board of Managers, held in the month of December, 1928, a motion was made and unanimously adopted resolving that in accordance with the opinion of the Attorney-General the Board refuse to consider the application of your petitioner for parole; and that the said Board of Managers has ever since refused to consider said application of your petitioner.

4. That your petitioner is advised that under the Statutes of the State of New Jersey, in such case made and provided, he is entitled of right to have the said application for parole considered and acted upon by the said Board of Managers of the New Jersey State Prison.

Your petitioner, therefore, prays that a writ of peremptory mandamus may issue, commanding and directing the said Board of Managers of the New Jersey State Prison to consider and act upon the said application for parole filed as aforesaid by your petitioner.

And your petitioner will ever pray, etc.

JOHN O. LINDSLEY
*Petitioner.*

HARRY HEHER,
*Attorney of Petitioner.*

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss:*

John O. Lindsley, being duly sworn according to law, on his oath deposes and says:

I have read the foregoing petition and know the contents thereof, and the same are in all respects true, according to my knowledge, information and belief.

On June 26, 1917, in the Court of Oyer and Terminer of the County of Essex, I entered a plea of *nolo-contendere* to an indictment charging murder, and thereupon was sentenced to life imprisonment in the State Prison at Trenton. On July 13, 1917, I was conveyed to said State Prison at Trenton, and have since been incarcerated therein.

Assuming that when I had served a minimum term of 15 years, less earned commutation thereof, I was entitled to parole, I became eligible for such parole on July 1, 1928. Thereafter I applied to the Board of Managers of the New Jersey State Prison for a parole, which application I was informed came before said Board for action at a meeting of said Board of Managers held in the month of December, 1928. I was thereafter advised that a motion was unanimously adopted by said Board resolving that in accordance with the opinion of the Attorney-General the Board refuse to consider my application, and that no action was taken thereon.

The said Board of Managers has since refused to consider and act upon the application for parole so made as aforesaid, and I am informed that it still refuses to consider and act upon the same.

JOHN O. LINDSLEY.

Sworn and subscribed to before me this twenty-sixth day of November, nineteen hundred and twenty-nine.

[L. S.] IRVIN C. BLEAM,
*Notary Public for N. J.*

(There is also attached to the petition affidavit of Anna E. Seabridge, verifying the minutes of the meeting of the Board of Managers of the New Jersey State Prison, held in the month of December, 1928, and amendment thereof adopted at meeting held on January 8, 1929, and set forth verbatim in the Stipulation of Facts filed in this cause and herein set forth.)

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10 NEW JERSEY SUPREME COURT.

JOHN O. LINDSLEY,
*Relator,*
*vs.*
BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON,
*Respondent.*
} On Petition for Writ of Mandamus.

## RULE TO SHOW CAUSE

20 (*Filed November 29, 1929.*)

Upon reading and filing the petition of the relator, John O. Lindsley, and the affidavits thereunto annexed, and sufficient cause therefor appearing:

It is, on this twenty-ninth day of November, nineteen hundred and twenty-nine, Ordered, that the Board of Managers of the New Jersey State Prison, the respondent in this cause, do show cause before the Supreme Court of the State of New Jersey, on the third Tuesday 30 of January, 1930, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the State House in the City of Trenton, why a peremptory writ of mandamus should not issue out of and under the seal of this Court, commanding and enjoining the said Board of Directors of the New Jersey State Prison to consider and act upon the application of the said relator, John O. Lindsley, for suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for his release

from said imprisonment on parole under such terms and conditions as shall be established by said Board of Managers of the New Jersey State Prison.

And it is further Ordered, that service of a copy of this rule, and of the said petition and affidavits, which copies need not be certified, be made within five days from the date hereof upon the President of the said Board of Managers of the New Jersey State Prison, the respondent herein.

And it is further Ordered, that either party have leave to take depositions upon two days' notice to the other.

Let this rule be entered on the minutes.

THOMAS W. TRENCHARD,
*Justice Supreme Court.*

On motion of
HARRY HEHER,
*Attorney of Petitioner.*

(Due service of above rule, petition and affidavits was acknowledged by E. R. Johnstone, President of the Respondent Board.)

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NEW JERSEY SUPREME COURT.

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| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## STIPULATION OF FACTS

(*Filed January* 8, 1930.)

It is hereby stipulated and agreed between the parties to this proceeding that the following facts would be established beyond dispute by competent evidence, if proofs were offered by the respective parties, and that said statement of facts shall have the same force and

effect as if established under oath by witnesses having knowledge thereof in appropriate proceedings had for said purpose:

1. That on June 26, 1917, in the Court of Oyer and Terminer of the County of Essex, in the State of New Jersey, the relator, John O. Lindsley, entered a plea of *nolo contendere* to an indictment charging murder, which shortly before said day was returned against him in said Court, and was thereupon sentenced to life imprisonment in the State Prison at Trenton.

2. That on July 13, 1917, the said relator, pursuant to the mandate of said sentence and judgment entered on said plea, was conveyed to the said State Prison at Trenton, and that ever since said day he has been, and is now, incarcerated therein in satisfaction of said sentence.

3. That on July 1, 1928, the said relator had served in said prison, by virtue of said sentence and judgment, a term of fifteen years, less earned commutation thereof.

4. That at a meeting of the Board of Managers of the New Jersey State Prison, held in the month of December, 1928, the principal keeper of said State Prison presented to said Board of Managers, for its consideration, the matter of the parole of the relator, under the act which vested in said Board the power to parole prisoners confined in said prison under the Indeterminate Sentence Act, at the expiration of the minimum term, and thereupon the said Board, unanimously resolved that, in accordance with the opinion of the Attorney-General set forth in the next succeeding paragraph, it would refuse to consider the case of the relator for parole as aforesaid, and that ever since said day the said Board has refused, and still refuses, to consider said matter.

5. That the following is a copy in full of the minutes of the aforesaid meeting of the aforesaid Board of Managers dealing with the aforesaid matter, and setting forth in full the action of said Board in said matter:

37 The following is in the opinion of the Attorney-General as of December 28, 1927:

"Your letter of the 16th instant, requesting to be advised as to whether Chapter 196, of the Laws of 1927, has a retroactive effect has been received. Our courts are loath to give to a statute any retroactive effect, and unless retrospective intention clearly appears, it will be construed to have a prospective meaning only. *Roxbury Lodge* v. *Hocking,* 60 N. J. L. 439. I apprehend, however, that your inquiry was intended to proceed further, because in the last paragraph of your communication to me you call attention to the fact that the following words, which appeared in Section 205 of Chapter 147 of the Laws of 1918, and was reenacted in Chapter 120 of the Laws of 1923, had been stricken out, to wit: 'In the case of a life sentence, the minimum term shall be taken to be fifteen years.' Section 205 reads verbatim, as it did in the original act of 1918 and in the amendment of 1923, with the exception of the words above quoted, which have been exscinded therefrom. By the exscinding of these words from the statute, the power of the Board of Managers of the State Prison to parole in the case of a prisoner sentenced to life, has been abrogated.

"Under the Indeterminate Sentence Act of 1911, and the amendments and supplements thereto, no person committed upon a sentence prescribing a definite minimum term of imprisonment could be released by the Board of Managers until the expiration of such minimum term, less any earned commutation thereof. In the case of a life sentence, of course, there was no minimum term, but the Legislature, in Chapter 147 of the Laws of 1918, and again in Chapter 120 of the Laws of 1923, provided that the minimum term of a life sentence should be taken to be fifteen years. This, as I have indicated, formed no part of the sentence of the law, and when the Legislature in 1927, in amending the law eliminated those words therefrom, there was thereafter no minimum term in the case of a life sentence.

"The foregoing necessarily, leads to the conclusion that all prisoners now undergoing life sentence must be detained for the term of their natural life, unless sooner released by the Board of Pardons, either acting as such, or in pursuance of the statute as a parole board."

38 On motion of Mr. Barkalow, seconded by Col. Sears, it was unanimously resolved that in accordance with the opinion of the Attorney-General the Board hereby refuses to consider the case of John O. Lindsley, No. 4781, for parole.

January 8th—Board of Managers Meeting.

5. On motion of Mr. Barkalow, seconded by Col. Sears, the following change in the minutes of the December meeting, to be inserted preceding paragraph 37, was approved: "Prisoner J. O. Lindsley, No. 4781, now confined in this Institution, serving a term of life prison, was brought before the Board for parole consideration in accordance with the laws of 1918, which states that in the case of a life sentence the minimum term shall be taken to be fifteen years.

6. On motion of Col. Sears, seconded by Mr. Maddock, the minutes of the December meeting, with the above change, were approved and ordered filed.

HARRY HEHER,
*Attorney of Relator.*

W. A. STEVENS,
*Attorney General, appearing for Respondent.*

NEW JERSEY SUPREME COURT.

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|---|---|
| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## REASONS

(*Filed January* 8, 1930.)

The relator assigns the following reasons for the issuance of the peremptory writ of mandamus in accordance with the prayer of the petition heretofore filed in this cause:

1. That the action of the said Board of Managers of the New Jersey State Prison, in refusing to consider and determine the right of the relator to release on parole, was arbitrary and illegal.

2. That the relator had a vested right to determination by said respondent of his right to release on parole upon the expiration of the minimum term of fifteen years, less earned commutation thereof, and to release on parole under the provisions of the statutes in such case made and provided, and the refusal of the respondent to act in the premises constituted a deprivation of relator's lawful rights in the premises.

3. That Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider and determine relator's rights in the premises, if it be construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of Article I, Section 10 of the Constitution of the United States, prohibiting the respective States from passing any *ex post facto* law.

4. That said Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider and determine relator's rights in the premises, if it be

construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the respective States from depriving any person of life, liberty or property without due process of law.

5. That said Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider and determine relator's rights in the premises, if it be construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of Paragraph 3 of Section 7, Article IV, of the Constitution of the State of New Jersey, prohibiting the Legislature from passing any *ex post facto* law.

HARRY HEHER,
*Attorney of Relator.*

Service of the within reasons is hereby acknowledged this eighth day of January, A. D. 1930.

W. A. STEVENS,
Attorney-General,
*Attorney for Respondent.*

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NEW JERSEY SUPREME COURT.

MICHAEL FERRARO,
*Relator,*
*vs.*
BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON,
*Respondent.*

On Petition for Writ of Mandamus.

## PETITION FOR THE WRIT

(*Filed January* 3, 1930)

*To the Honorable Thomas W. Trenchard, Justice of the Supreme Court of the State of New Jersey:*

The petition of Michael Ferraro, now residing in the City of Trenton, in the County of Mercer and State of New Jersey, respectfully shows:

1. That on July 20, 1918, in the Court of Oyer and Terminer of the County of Passaic, he entered a plea of *nolo contendere* to an indictment charging murder, and on the same day was sentenced to life imprisonment in the State Prison at Trenton, and was forthwith conveyed to the State Prison, and has ever since been, and is now, incarcerated therein.

2. That your petitioner is advised that under the Indeterminate Sentence Act, enacted by the Legislature of the State of New Jersey, and other acts adopted subsequently thereto, the Board of Managers of the New Jersey State Prison, was vested with authority to release inmates under sentence in said State Prison upon the expiration of the minimum term of imprisonment, less earned commutation thereof; and that in cases of life imprisonment, imposed at the time your petitioner was sentenced, the minimum term was fifteen (15) years.

3. That during the whole of the period of your petitioner's incarceration in said State Prison, pursuant to said sentence and judgment, he has at all times observed the rules of said institution, and conducted himself in an exemplary manner, and his record of conduct shows that he has throughout observed all the rules of said institution; and that on April 19, 1929, your petitioner had served the minimum term of fifteen years, less earned commutation thereof, and under the Act of the Legislature in such case made and provided, he became entitled to a release under parole from said State Prison by said Board of Managers, under such terms and conditions as the latter body might prescribe.

4. That your petitioner is prepared to give to said Board of Managers satisfactory evidence of his ability and purpose, in the event of his parole, to live at liberty without violating the law, and of his fitness to be at large; that the said Board of Managers has failed to give your petitioner a hearing or an opportunity to establish that he is fit to be at large, and has the ability and purpose to live at liberty without violating the law,

and has neglected and refused, and still neglects and refuses to release your petitioner from said State Prison under parole; that your petitioner is advised that at a meeting of the said Board of Managers, held in the month of December, 1928, it was determined that, in accordance with the opinion of the Attorney-General, the Board would refuse to release, upon the expiration of the minimum term, your petitioner and such others as were sentenced to life imprisonment, and that the ground for such refusal was the conclusion of the Attorney-General that all prisoners now undergoing life sentence must be detained for the term of their natural life, unless sooner released by the Board of Pardons, either acting as such, or in pursuance of the statute as a parole board; and that the said Board of Managers has ever since refused, and still refuses, to release your petitioner under parole.

5. That your petitioner is advised that under the Statute of the State of New Jersey, in such case made and provided, he has served the minimum term prescribed by law, less earned commutation thereof, and that having observed the rules of said institution, he is entitled to an opportunity to give to said Board of Managers evidence of his ability and purpose, in the event of his parole, to live at liberty without violating the law, and of his fitness to be at large, in which event he is entitled to immediate release on parole, under the aforesaid statute, fixing the minimum term in cases of life imprisonment at fifteen years.

6. That your petitioner has the ability and purpose in the event of his parole, to live at liberty without violating the law, and is fit to be at large, all of which he is able and willing to establish to the satisfaction of said Board of Managers, if given the opportunity.

Your petitioner therefore prays that a writ of peremptory mandamus may issue, commanding and directing the said Board of Managers of the New Jersey State Prison to consider and determine the right of your petitioner to release on parole, under the statutes in

such case made and provided, granting the right to persons sentenced to life imprisonment, under certain prescribed conditions, to release on parole when the said minimum sentence of fifteen years less earned commutation thereof has been served.

And your petitioner will ever pray, etc.

MICHAEL FERRARO,
*Petitioner.*

HARRY HEHER,
*Attorney of Petitioner.*

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } *ss:*

Michael Ferraro, being duly sworn according to law, on his oath deposes and says:

I have read the foregoing petition and know the contents thereof, and the same are in all respects true, according to my knowledge, information and belief.

On July 20, 1918, in the Court of Oyer and Terminer of the County of Passaic, I entered a plea of *nolo contendere* to an indictment charging murder, and on the said day was sentenced to life imprisonment in the State Prison at Trenton, and was immediately conveyed to said State Prison at Trenton, and have ever since been incarcerated therein.

Assuming that when I had served a minimum term of fifteen years, less earned commutation thereof, I was entitled to parole, my right thereto became fixed on April 19, 1929. I have always observed the rules promulgated for the government of the State Prison, and have had, and now have, the ability and purpose in the event of my parole, to live at liberty without violating the law. Ever since April 19, 1929, I have been able and willing, and am now able and willing, to establish to the satisfaction of the Board of Managers of said State Prison, my ability and purpose, in the event of my parole, to live at liberty without violating the law, and my fitness to be at large, but the said Board has neglected and refused, and still neglects and refuses, to release deponent from the said State Prison under parole, or to

consider and determine my right to release on parole.

I am advised that at a meeting of the said Board of Managers held in the month of December, 1928, it was determined that, in accordance with the opinion of the Attorney-General, the Board would refuse to release, upon the expiration of the minimum term, deponent and such others as were sentenced to life imprisonment, and that the ground for such refusal was the conclusion of the Attorney-General that all prisoners now undergoing life sentence must be detained for the term of their natural life, unless sooner released by the Board of Pardons, either acting as such, or in pursuance of the statute as a parole board. This determination, I am informed, was reached in the matter of the application of John O. Lindsley, also sentenced to life imprisonment, for release on parole.

MICHAEL FERRARO.

Sworn and subscribed to before me this 2d day of January, 1930.

IRVIN C. BLEAM,

[L. S] *Notary Public for New Jersey.*

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(There is also attached to the petition affidavit of Anna E. Seabridge, verifying the minutes of the meeting of the Board of Managers of the New Jersey State Prison, held in the month of December, 1928, and amendment thereof adopted at meeting held on January 8, 1929, and set forth verbatim in the Stipulation of Facts filed in this cause and herein set forth.)

NEW JERSEY SUPREME COURT.

MICHAEL FERRARO,
*Relator,*
*vs.*
BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON,
*Respondent.*
} On Petition for Writ of Mandamus.

## RULE TO SHOW CAUSE

(*Filed January* 3, 1930.)

Upon reading and filing the petition of the relator, Michael Ferraro, and the affidavits thereunto annexed, and sufficient cause therefor appearing:

It is, on this second day of January, nineteen hundred and thirty, Ordered, that the Board of Managers of the New Jersey State Prison, the respondent in this cause, do show cause before the Supreme Court of the State of New Jersey, on the third Tuesday of January, 1930, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the State House in the City of Trenton, why a peremptory writ of mandamus should not issue out of and under the seal of this Court, commanding and enjoining the said Board of Managers of the New Jersey State Prison to consider and determine the right of the said relator, Michael Ferraro, to a suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for a release of his imprisonment on parole under such terms and conditions as shall be established by said Board of Managers of the New Jersey State Prison, under the statutes in force at the time of the imposition of said sentence of relator to life imprisonment, granting the right to persons sentenced to life imprisonment, under certain prescribed conditions, to release under parole, when the said minimum sentence of fifteen years less earned commutation thereof has been served, and to act upon the determination so made.

And it is further Ordered, that service of a copy of this rule, and of the said petition and affidavits, which copies need not be certified, be made within five days from the date hereof upon the President of the said Board of Managers of the New Jersey State Prison, the respondent herein.

And it is further Ordered, that either party have leave to take depositions upon two days' notice to the other.

Let this rule be entered on the minutes.

THOMAS W. TRENCHARD,
*Justice Supreme Court.*

On motion of
HARRY HEHER,
*Attorney of Petitioner.*

(Due service of above rule, petition and affidavits was acknowledged by the Attorney-General, as attorney for the respondent.)

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NEW JERSEY SUPREME COURT.

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| MICHEAL FERRARO, *Relator.* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## STIPULATION OF FACTS

(*Filed January 7*, 1930)

It is hereby stipulated and agreed between the parties to this proceeding that the following facts would be established beyond dispute by competent evidence, if proofs were offered by the respective parties, and that said statement of facts shall have the same force and effect as if established under oath by witnesses having knowledge thereof in appropriate proceedings had for said purpose:

1. That on July 20, 1918, in the Court of Oyer and Terminer of the County of Passaic, in the State of New Jersey, the relator, Michael Ferraro, entered a plea of *nolo contendere* to an indictment charging murder, which shortly before said day was returned against him in said court, and was thereupon sentenced to life imprisonment in the State Prison at Trenton.

2. That on the aforesaid day, July 20, 1918, the said relator, pursuant to the mandate of said sentence and judgment entered on said plea, was conveyed to the said State Prison at Trenton, and that ever since said day he has been, and is now, incarcerated therein, in satisfaction of said sentence.

3. That during the whole of the period of relator's incarceration in said State Prison, pursuant to said sentence and judgment, he has at all times observed the rules of said institution, and has conducted himself in an exemplary manner, and that his record of conduct shows that he has throughout observed all the rules of said institution.

4. That on April 19, 1929, the said relator had served in said prison, by virtue of said sentence and judgment, a term of fifteen years, less earned commutation thereof, by virtue of his observance of the rules and exemplary conduct as aforesaid.

5. That on July 1, 1928, one John O. Lindsley, likewise confined in said institution, under a sentence to life imprisonment, had served in said prison by virtue of said sentence and judgment, a term of fifteen years, less earned commutation thereof; that for the purpose of determining the applicability to the relator herein and others in the same category, of the statutes heretofore enacted, vesting in said Board of Managers the power to parole prisoners sentenced under the Indeterminate Sentence Act, at the expiration of the minimum term, and fixing the minimum term in cases of sentence to life imprisonment at fifteen years, the principal keeper of said State Prison presented to said Board of Managers, for its consideration, at a meeting

of said body held in the month of December, 1928, the matter of the right of said John O. Lindsley to parole under the aforesaid statutes, and thereupon the said Board unanimously resolved that, in accordance with the opinion of the Attorney-General set forth in the next succeeding paragraph, it would refuse to consider the case of the said John O. Lindsley for parole as aforesaid, and that ever since said day the said Board has refused, and still refuses, to consider said matter.

6. That the following is a copy in full of the minutes of the aforesaid meeting of the aforesaid Board of Managers dealing with the aforesaid matter, and setting forth in full the action of said Board in said matter:

37 The following is in the opinion of the Attorney-General as of December 28, 1927:

> "Your letter of the 16th instant, requesting to be advised as to whether Chapter 196, of the Laws of 1927, has a retroactive effect, has been received. Our Courts are loath to give to a statute any retroactive effect, and unless retrospective intention clearly appears, it will be construed to have a prospective meaning only. *Roxbury Lodge* v. *Hocking,* 60 *N. J. L.* 439. I apprehend, however, that your inquiry was intended to proceed further, because in the last paragraph of your communication to me you call attention to the fact that the following words, which appeared in Section 205 of Chapter 147 of the Laws of 1918, and was reenacted in Chapter 120 of the Laws of 1923, had been stricken out, to wit: 'In the case of life sentence, the minimum term shall be taken to be fifteen years.' Section 205 reads verbatim, as it did in the original act of 1918 and in the amendment of 1923, with the exception of the words above quoted, which have been exscinded therefrom. By the exscinding of these words from the statute, the power of the Board of Managers of the State Prison to parole in the case of a prisoner sentenced to life, has been abrogated.

"Under the Indeterminate Sentence Act of 1911, and the amendments and supplements thereto, no person committed upon a sentence prescribing a definite minimum term of imprisonment could be released by the Board of Managers until the expiration of such minimum term, less any earned commutation thereof. In the case of a life sentence, of course, there was no minimum term, but the Legislature, in Chapter 147 of the Laws of 1918, and again in Chapter 120 of the Laws of 1923, provided that the minimum term of a life sentence should be taken to be fifteen years. This, as I have indicated, formed no part of the sentence of the law, and when the Legislature in 1927, in amending the law eliminated those words therefrom, there was thereafter no minimum term in the case of a life sentence.

"The foregoing, necessarily, leads to the conclusion that all prisoners now undergoing life sentence must be detained for the term of their natural life, unless sooner released by the Board of Pardons, either acting as such, or in pursuance of the statute as a parole board."

38 On motion of Mr. Barkalow, seconded by Col. Sears, it was unanimously resolved that in accordance with the opinion of the Attorney-General the Board hereby refuses to consider the case of John O. Lindsley, No. 4781, for parole.

January 8th—Board of Managers Meeting.

5. On motion of Mr. Barkalow, seconded by Col. Sears, the following change in the minutes of the December meeting to be inserted preceding paragraph 37, was approved: "Prisoner J. O. Lindsley, No. 4781, now confined in this institution, serving a term of life prison, was brought before the Board for parole consideration, in accordance with the laws of 1918, which states that in the case of a life sentence the minimum term shall be taken to be fifteen years.

6. On motion of Col. Sears, seconded by Mr. Maddock, the minutes of the December meeting, with the above change, were approved and ordered filed.

7. That ever since April 19, 1929, the said Board of Managers of said prison has refused, and still refuses, to consider and determine the right of relator to release on parole, under the aforesaid statutes; that ever since that day the relator has been ready and willing, and is still ready and willing, to give to the said Board of Managers ~~satisfactory~~ evidence of his ability and purpose, in the event of his parole, to live at liberty without violating the law, and of his fitness to be at large; and that the failure of said Board of Managers to consider and determine relator's right to release on parole as aforesaid, was due solely to the opinion expressed by the Attorney-General, as set forth in the preceding paragraph, that, for the reasons therein stated, it lacked the power and authority to act in the premises.

HARRY HEHER,
*Attorney of Relator.*

W. A. STEVENS,
*Attorney-General, Appearing for Respondent.*

NEW JERSEY SUPREME COURT.

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|---|---|
| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## REASONS

(*Filed January 7*, 1930.)

The relator assigns the following reasons for the issuance of the peremptory writ of mandamus in accordance with the prayer of the petition heretofore filed in this cause:

1. That the action of the said Board of Managers of the New Jersey State Prison, in refusing to consider and determine the right of the relator to release on parole, was arbitrary and illegal.

2. That the relator had a vested right to determination by said respondent of his right to release on parole upon the expiration of the minimum term of fifteen years, less earned commutation thereof, and to release on parole under the provisions of the statutes in such case made and provided, and the refusal of the respondent to act in the premises constituted a deprivation of relator's rights in the premises.

3. That Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider and determine relator's rights in the premises, if it be construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of Article I, Section 10 of the Constitution of the United States, prohibiting the respective States from passing any *ex post facto* law.

4. That said Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider

and determine relator's rights in the premises, if it be construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the respective States from depriving any person of life, liberty or property without due process of law.

5. That said Chapter 196 of the Laws of 1927, upon which the said respondent relies in refusing to consider and determine relator's rights in the premises, if it be construed to apply to relator, is unconstitutional and therefore void, in that it contravenes the provisions of Paragraph 3 of Section 7, Article IV of the Constitution of the State of New Jersey, prohibiting the Legislature from passing any *ex post facto* law.

HARRY HEHER,
*Attorney of Relator.*

Service of the within reasons is hereby acknowledged this eighth day of January, A. D. 1930.

W. A. STEVENS,
Attorney-General,
*Attorney for Respondent.*

NEW JERSEY SUPREME COURT.

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| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause |

## ADDITIONAL STIPULATION OF FACT

(*Filed January* 20, 1930)

It is hereby further stipulated and agreed between the parties to this proceeding:

1-a. That the crime charged in the said indictment returned against the relator, to which he entered a plea of nolo contendere, as set forth in paragraph 1, was committed on June 9, 1917.

HARRY HEHER,
*Attorney of Relator,*
W. A. STEVENS,
*Attorney-General, appearing for Respondent.*

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NEW JERSEY SUPREME COURT.

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| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## ADDITIONAL REASONS

(*Filed January* 21, 1930)

The relator assigns the following additional reasons for the issuance of the peremptory writ of mandamus in accordance with the prayer of the petition heretofore filed in this cause:

1. That Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of relator, unconstitutional and therefore void, in that they contravene the provisions of Article I, Section 10 of the Constitution of the United States, prohibiting the respective States from passing any *ex post facto* law.

2. That said Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of the relator, unconstitutional and therefore void, in that they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the respective States from depriving any person of life, liberty or property without due process of law.

3. That said Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of relator, unconstitutional and therefore void, in that they contravene the provisions of Paragraph 3, Section 7, Article IV, of the Constitution of the State of New Jersey, prohibiting the Legislature from passing any *ex post facto* law.

HARRY HEHER,
*Attorney of Relator.*

Service of the within additional reasons is hereby acknowledged this 20th day of January, 1930.

W. A. STEVENS,
Attorney-General,
*Attorney of Respondent.*

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NEW JERSEY SUPREME COURT.
No. 234, January Term, 1930.

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| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Rule to Show Cause Why a Writ of Mandamus Should Not Issue. |

## OPINION

(*Filed August 2*, 1930)

Argued January, 1930. Decided August 2, 1930.

1. Sec. 205 of ch. 147, Pamph. L. 1918, was not *in pari materia* with sec. 2 of ch. 191, Pamph. L. 1911, as amended by ch. 214, Pamph. L. 1914, in such manner as to substitute the words of the former: "In case of a life sentence the minimum term shall be taken to be fifteen years" in the place of that portion of the latter which read: "Every prisoner who * * * if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as herein provided."

2. The repeal by ch. 196, Pamph. L. 1927, of the words "in case of a life sentence the minimum term shall be taken to be fifteen years" from sec. 205 of ch. 147, Pamph. L. 1918, is not *ex post facto* as to commutation credits not earned, at the time of the repeal, by a life term prisoner whose crime was committed and sentence was imposed before the effective date of the last mentioned enactment.

3. Application by a life term prisoner for peremptory writ of *mandamus* to compel the Board of Managers of the State Prison to consider and act upon his request for parole considered and denied.

Before Justices Trenchard, Lloyd and Case.

For relator—Harry Heher.

For respondent—William A. Stevens, Attorney-General, Theodore Backes, Second Assistant Attorney-General.

The Opinion of the court was delivered by

CASE, *J.*

The relator, John O. Lindsley, on June 26, 1917, entered a plea of *"nolo contendere"* to an indictment for a murder committed on June 9, 1917, and received a sentence of "life imprisonment in the State Prison". It is stipulated that "on July first, 1928, the said relator had served in said prison, by virtue of said sentence and judgment, a term of fifteen years less earned commutation thereof" and that at a meeting of the Board of Managers of the State Prison held in the month of December, 1928, the principal keeper of the State Prison presented to the Board of Managers for its consideration the matter of the parole of the relator under the act which vested in said Board the power to parole prisoners confined in State Prison under the Indeterminate Sentence act, and that thereupon the said Board, in accordance with an opinion of the attorney-general, refused to consider the case of the relator for parole and has ever since refused and still refuses to consider the matter. The relator, submitting that he is entitled of right to have his application considered and acted upon by the Board of Managers, caused a rule to issue directing the respondent to show cause why a peremptory writ of *mandamus* should not issue commanding and enjoining the Board to consider and act upon his application for parole. The matter is now up on the return of that rule. The only facts before us aside from those already stated are that the relator, having been conveyed to the State Prison on July 13, 1917, has since been and is now

incarcerated therein, that the relator was brought before the Board for parole consideration, in accordance with the "Laws of 1918", at the said meeting held in December, 1928, and the opinion of the attorney-general upon which the Board acted is set forth. The opinion appears to have been given in December, 1927, and was not rendered with respect to this particular case. Without passing on the legal sufficiency of that opinion, we proceed to consider whether it clearly appears that the relator, at the time of presenting his application for parole, was entitled as of right to have the same considered and acted upon.

The relator rests his case on the act entitled "A supplement to an act entitled 'An act relating to courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898)', approved June fourteenth, one thousand eight hundred and ninety-eight", being chapter 191 of the laws of 1911 and generally known as the Indeterminate Sentence act, and upon the act originally entitled "An act concerning the charitable, correctional, reformatory and penal institutions, boards and commissions, located and conducted in this state, which are supported in whole or in part from county, municipal or State funds", approved February 28, 1918, being chapter 147 of the laws of 1918 and generally known as the Institutions and Agencies act, and upon the several supplements to and amendments of those acts.

The Indeterminate Sentence act was amended by chapter 214, Pamph. L. 1914, to provide in the second paragraph that "every such sentence to confinement * * * shall set forth a maximum term * * * likewise a minimum term * * * provided further every prisoner who * * * if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as herein provided". Such part of section 2 as related to the release on parole of a person under life sentence after he had served not less than fifteen years was repealed by chapter 50, Pamph. L. 1922; and the entire statute was repealed by chapter

214 of the laws of 1926, with this proviso however: "Any person convicted of an offense which was committed prior to the day on which this act shall take effect shall be punished as if this act had not been passed and any such person shall retain and have all the rights and privileges conferred by the acts herein repealed". The relator contends that either of these repealers, if held to deprive him of his alleged rights under the statute, is, as to him, *ex post facto*. We do not, however, feel impelled to consider this contention as the relator had not, either when he applied for parole or when he made application for the writ of *mandamus,* and has not yet, served that period of time, namely, fifteen years, which would entitle him, under the statute, to be considered for parole.

It is true that the Institutions and Agencies act contained in section 205, until the words were amended out by chapter 196 of the laws of 1927, the following: "In case of a life sentence the minimum term shall be taken to be fifteen years" and in section 306 certain deductions from the minimum term for good behavior and the like; but we do not read these words into the Indeterminate Sentence act; neither do we read the Indeterminate Sentence act into the above mentioned provision of the Institutions and Agencies act. We do not consider that the statutes are sufficiently *in pari materia* as to relator to justify this method of construction. They represent different schemes and different legislative conceptions. A marked distinction between them is that the former is impressed with a mandatory aspect and the latter with a discretionary aspect which, in each instance, is lacking from the other. The Indeterminate Sentence act very clearly distinguishes the life sentence from the maximum-minimum sentence.

We find nothing in the Indeterminate Sentence act to warrant the application for a peremptory writ of *mandamus*.

Looking at the Institutions and Agencies act, as comprehensive within itself, we first note that the statute

did not come into existence until after the crime had been committed and the sentence imposed, and that the only application of the statute to a person serving a life sentence is found in the words already quoted (section 205): "In case of a life sentence the minimum term shall be taken to be fifteen years", which words were stricken from the statute by chapter 196, Pamph. L. 1927. The relator contends that this repealer, also, is *ex post facto* as to him because, if given a retroactive construction, it impairs his substantial rights. We understand the relator, in thus using the word "retroactive," to signify any application of the repealer to his sentence even though this be by way of depriving him of credits not then earned but which, under the law as it had theretofore been, he might expect to earn; because, as hereinafter mentioned, there is no data in the record by which we are informed regarding the credits already earned at the passage of the repealer.

The generally accepted classification of *ex post facto* laws is as follows:

1. A law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent.

2. A law which aggravates a crime or makes it greater than when it was committed.

3. A law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed.

4. A law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender. *People* vs. *Hayes,* 140 N. Y. 484. *Calder* vs. *Bull,* 3 Dall. 386, 1 Law Ed. 648.

Other classes sometimes added to the foregoing are:

5. A law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right which, when done, was lawful.

6. A law which deprives persons accused of crime of some lawful protection to which they have become en-

titled, such as the protection of a former conviction or acquittal, or of the proclamation of amnesty. Cooley Const. L. p. 286.

Throughout the several jurisdictions variations of and extensions to the foregoing have occurred and such, "to make the classification sufficiently general to embrace all the laws which have been adjudged *ex post facto*", have been assembled by 12 C. J. p. 1101 into a further class, viz.: "Every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage".

It is not apparent that the instance at bar comes within any of these classes, unless, indeed, it be the last, and, when analyzed, we think not even there. As the issue is framed, we cannot give separate consideration to such credits as may have accrued at and prior to the passage of the repealer. The record does not disclose the allowance or accumulation of remission credits during the period between July first, 1918, the effective date of the Institutions and Agencies act, and March 28, 1927, the termination of the minimum sentence as to life terms by chapter 196 of the laws of 1927. Whether, while this legislation was in force, credits were actually recorded in such fashion as to become a vested right, and in such volume as to justify the application for parole at the time made, has not been argued; nor are the pertinent facts clearly in evidence. The point that the legislature could not, as against the relator, repeal the minimum sentence provision of the 1918 legislation was presented and argued. But the relator did not file a reason, make an argument or present the facts directed to the credits and deductions accumulated at the time of the repeal as distinguished from the later date July 1, 1928, and we, consequently, do not express an opinion with respect thereto. The naked statement in the stipulation that "on July first, 1928, the said relator had served in said prison, by virtue of said sentence and judgment, a term of fifteen years less earned commutation thereof" contains no information as to the statute

under which the allowance of commutation was made, nor when it began or ended, nor—and this particularly—whether this net result includes any commutation for the period subsequent to March 28, 1927. We feel obliged to assume that the stipulation includes an allowance of credits subsequent to March 28, 1927, and down to July first, 1928. No substantial reason is advanced why an administrative measure of prison discipline, enacted after the commission of the crime, may not at any time be altered or repealed with respect to unearned credits. The issue actually presented is whether a legislative act graciously setting up a system of remissions, to be credited at intervals, becomes so immutably a part of the organic law that a subsequent statute discontinuing the practice is, as well prospectively against unearned credits as retrospectively against those already granted, *ex post facto* so far as concerns a prisoner whose crime and conviction had occurred and whose sentence had been imposed before the passage of the substantive act, but whose term had not expired and whose availability for parole had not matured at the time of the repeal.

We find that the proposition as thus broadly stated is without support either in *Moore* vs. *State,* 43 N. J. L. 203, or in any of the other cases cited in relator's comprehensive brief, and that it does not come within any of the accepted classes of *ex post facto* laws. Moreover, we have the thought that the parole powers granted by section 201 *et seq.* of the Institutions and Agencies act carry a wide discretion. The article within which these sections are found applies to all the institutions and non-institutional agencies of the state, including, equally with the correctional institutions, such institutions as the state hospitals for the insane, the state village for epileptics, the sanatorium for tuberculous diseases, the state homes for the feebleminded, and the state homes for disabled soldiers. Of co-extensive application is section 202, still within the same article, which provides that "the State Board (viz., the State Board of Control of Institutions and Agencies, not the Board of Managers of the State

Prison) shall prescribe by rules, formally adopted, the procedure for and the granting of parole and the terms and conditions incident thereto." What these rules are, or at any time have been, and whether the presentation of relator's application for parole conformed thereto, we are not told. We are here concerned with a statute of wide application, covering a broad field of governmental activity and one that, perhaps necessarily, is general in many of its expressions. The paucity of the record, the seriousness of the offense of which the relator stands convicted and the apparent latitude granted by the statute to the state boards in matters of administration and detail present doubts which the relator has not removed. On the facts presented we are not satisfied that such a situation existed as clearly placed upon the Board of Managers of the State Prison the legal obligation to act. The rule is thoroughly settled that a *mandamus* never issues where the legal obligation to perform the act which is the subject matter of the application is not clear. *Browne* vs. *Lee*, 98 N. J. L. 1.

A peremptory writ of *mandamus* is denied. If an appeal is desired, the procedings may be moulded to that end.

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NEW JERSEY SUPREME COURT.

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|---|---|
| JOHN O. LINDSLEY, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent,* | On Petition for Peremptory Writ of Mandamus. |

## RULE DISCHARGING RULE TO SHOW CAUSE

(*Filed January* 28, 1931)

The rule granted to relator herein, directing the respondent to show cause why a peremptory writ of *mandamus* should not issue commanding and enjoining the respondent to consider and act upon the application

of relator for a suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for his release from said imprisonment on parole, under such terms and conditions as should be established by said respondent, now coming on to be heard in the presence of Harry Heher, Esquire, of counsel with the relator, and William A. Stevens, Esquire, Attorney-General, and Theodore Backes, Esquire, Second Assistant Attorney-General, of counsel with the respondent; and the court having considered relator's petition for a peremptory writ of *mandamus,* and the stipulation of facts and reasons filed herein, and having heard the arguments of counsel, and being of the opinion that the prayer of the petition should be denied.

It is hereby ordered that the said rule to show cause, directed to the respondent as aforesaid, be and the same is hereby discharged.

Let the above rule be entered on the minutes. Entered January 28, 1931. On motion of

HARRY HEHER,
*Attorney of Relator.*

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NEW JERSEY SUPREME COURT.

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|---|---|
| JOHN O. LINDSLEY, *Relator,* | On Petition for Peremptory Writ of Mandamus. |
| *vs.* | |
| BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Rule Discharging Rule to Show Cause. |

## NOTICE OF APPEAL

(*Filed January 29,* 1931)

Take notice that the relator, John O. Lindsley, appeals to the Court of Errors and Appeals of New Jersey from the order and judgment entered in this cause discharging the rule heretofore granted to the relator herein, direct-

ing that the respondent show cause why a peremptory writ of *mandamus* should not issue commanding and enjoining the respondent to consider and act upon the application of relator for a suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for his release from said imprisonment on parole, under such terms and conditions as should be established by the respondent, upon the following grounds:

1. The Supreme Court erred in discharging the rule to show cause granted as aforesaid to said relator.

2. The Supreme Court erred in denying to relator a peremptory writ of *mandamus,* commanding and enjoining the respondent to consider and act upon the aforesaid application of the relator for release from his imprisonment on parole.

HARRY HEHER,
*Attorney of Relator.*

To William A. Stevens, Esquire, Attorney-General, Theodore Backes, Esquire, Second Assistant Attorney-General, Attorneys of Respondent.

Service of the within notice is hereby acknowledged this 29th day of January, 1931.

W. A. STEVENS,
*Attorney of Respondent.*

NEW JERSEY SUPREME COURT.

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|---|---|
| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## ADDITIONAL STIPULATION OF FACT

(*Filed January* 20, 1930)

It is hereby further stipulated and agreed between the parties to this proceeding:

1-a. That the crime charged in the said indictment returned against the relator, to which he entered a plea of *nolo contendere,* as set forth in paragraph 1, was committed on May 5, 1918.

HARRY HEHER,
*Attorney of Relator.*
W. A. STEVENS,
*Attorney-General, appearing for Respondent.*

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NEW JERSEY SUPREME COURT.

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|---|---|
| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Writ of Mandamus. On Rule to Show Cause. |

## ADDITIONAL REASONS

(*Filed January* 21, 1930)

The relator assigns the following additional reasons for the issuance of the peremptory writ of *mandamus* in accordance with the prayer of the petition heretofore filed in this cause:

1. That Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of relator, unconstitutional and therefore void, in that they contravene the provisions of Article I, Section 10 of the Constitution of the United States, prohibiting the respective States from passing any *ex post facto* law.

2. That said Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of relator, unconstitutional and therefore void, in that they contravene the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the respective States from depriving any person of life, liberty or property without due process of law.

3. That said Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926 and Chapter 147 of the Laws of 1918, if they be construed to apply to relator, and any other statute passed subsequent to the commission of the offense charged in the indictment to which the relator pleaded, which, construed as aforesaid, shall operate to the disadvantage of the relator, are, in so far as they impair the substantial rights of relator, unconstitutional and therefore void, in that they contravene the provisions of Paragraph 3, Section 7, Article IV, of the Constitution of the State of New Jersey, prohibiting the Legislature from passing any *ex post facto* law.

HARRY HEHER,
*Attorney of Relator.*

Service of the within additional reasons is hereby acknowledged this 20th day of January, 1930.

W. A. STEVENS,
*Attorney-General, Attorney of Respondent.*

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NEW JERSEY SUPREME COURT.

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|---|---|
| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Peremptory Writ of Mandamus. |

## RULE DISCHARGING RULE TO SHOW CAUSE

(*Filed January* 28, 1931)

The rule granted to relator herein, directing the respondent to show cause why a peremptory writ of *mandamus* should not issue commanding and enjoining the respondent to consider and act upon the application of relator for a suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for his release from said imprisonment on parole, under such terms and conditions as should be established by said respondent, now coming on to be heard in the presence of Harry Heher, Esquire, of counsel with the relator, and William A. Stevens, Esquire, Attorney-General, and Theodore Backes, Esquire, Second Assistant Attorney-General, of counsel with the respondent; and the court having considered relator's petition for a peremptory writ of *mandamus,* and the stipulation of facts and reasons filed herein, and having heard the arguments of counsel, and being of the opinion that the prayer of the petition should be denied:

It is hereby ordered that the said rule to show cause, directed to the respondent as aforesaid, be and the same is hereby discharged.

Let the above rule be entered on the minutes.

Entered January 28, 1931. On motion of

HARRY HEHER,
*Attorney of Relator.*

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NEW JERSEY SUPREME COURT.

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|---|---|
| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Petition for Peremptory Writ of Mandamus. On Rule Discharging Rule to Show Cause. |

## NOTICE OF APPEAL

(*Filed January 29*, 1931)

Take notice that the relator, Michael Ferraro, appeals to the Court of Errors and Appeals of New Jersey from the order and judgment entered in this cause discharging the rule heretofore granted to the relator herein, directing that the respondent show cause why a peremptory writ of *mandamus* should not issue commanding and enjoining the respondent to consider and act upon the application of relator for a suspension of his confinement in the New Jersey State Prison, under a judgment entered upon a conviction of crime, and for his release from said imprisonment on parole, under such terms and conditions as should be established by the respondent, upon the following grounds:

1. The Supreme Court erred in discharging the rule to show cause granted as aforesaid to said relator.

2. The Supreme Court erred in denying to relator a peremptory writ of *mandamus,* commanding and enjoining the respondent to consider and act upon the

aforesaid application of the relator for release from his imprisonment on parole.

HARRY HEHER,
*Attorney of Relator.*

To William A. Stevens, Esquire, Attorney-General, Theodore Backes, Esquire, Second Assistant Attorney-General, Attorneys of Respondent.

Service of the within notice is hereby acknowledged this 29th day of January, 1931.

W. A. STEVENS,
*Attorney of Respondent.*

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NEW JERSEY SUPREME COURT,
No. 235, January Term, 1930.

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| MICHAEL FERRARO, *Relator,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Rule to Show Cause Why a Writ of Mandamus Should Not Issue. |

## PER CURIAM

(*Filed August 2, 1930*)

Argued January, 1930. Decided August 2, 1930.

Before Justices Trenchard, Lloyd and Case.

For relator—Harry Heher.

For respondent—William A. Stevens, Attorney-General, Theodore Backes, Second Assistant Attorney-General.

PER CURIAM:

The relator, Michael Ferraro, on July 20, 1918, entered a plea of *"nolo contendere"* to an indictment for a murder committed on May 5, 1918, and received a sentence of life imprisonment in the State Prison. The relator observed all the rules of conduct of that institu-

tion, and on April 19, 1929, had served "a term of fifteen years, less earned commutation thereof". A very brief stipulation of facts, having set forth the foregoing, alleges that one John O. Lindsley, likewise under a sentence of life imprisonment, had on July first, 1928, served a term of fifteen years less earned commutation thereof, and that "for the purpose of determining the applicability to the relator herein and others in the same category of the statutes heretofore enacted vesting in said Board of Managers the power to parole prisoners sentenced under the Indeterminate Sentence act, at the expiration of the minimum term, and fixing the minimum term in cases of sentence to life imprisonment at fifteen years, the principal keeper of said State Prison presented to said Board of Managers for its consideration, at a meeting of said body held in the month of December, 1928, the matter of the right of the said John O. Lindsley to parole under the aforesaid statutes, and thereupon the Board unanimously resolved that, in accordance with the opinion of the attorney-general set forth in the next succeeding paragraph, it would refuse to consider the case of the said John O. Lindsley for parole as aforesaid, and that ever since said day the Board has refused, and still refuses, to consider said matter"; following which is a copy of the opinion of the attorney-general and other excerpts from the minutes of the Board relating to John O. Lindsley and the further allegation that ever since April 19, 1929, the Board of Managers has refused to consider and determine the right of the relator to release on parole.

This and the case of *John O. Lindsley, relator,* vs. *Board of Managers of the New Jersey State Prison, respondent,* decided at this term of court, were argued on the same briefs. In this, as in the Lindsley case, the crime was committed prior to July first, 1918, the effective date of the Institutions and Agencies act (chapter 147, laws of 1918). The Ferraro sentence was imposed after that date.

We find no minute of any presentation of the Ferraro case to the Board for consideration or of a refusal by the Board to consider. The stipulation does recite that "the said Board of Managers of said prison has refused, and still refuses, to consider and determine the right of relator to release on parole under the aforesaid statutes"; but the stipulation gives quite in detail the corporate action of the Board in the Lindsley case, which, of course, is of only secondary interest to the relator, and we are wondering whether the omission of such record as to Ferraro signifies that there was no actual presentation or other action upon his case. Such importance as this question may have arises out of the nature of the litigation, as action of the Board, to be properly so designated, should have been corporate action and not a mere informal understanding that specific cases without record or action were to be presented for an opinion of the court. However, we reach our conclusion regardless of this observation.

Except as noted above the two cases present the same features.

Notwithstanding the differences, we think that the Ferraro case is controlled by the same rules and principles as were applied by us in the Lindsley case; and the writ of *mandamus* is denied for the same reason. If an appeal is to be taken, the pleadings may be moulded for that purpose.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

# NEW JERSEY
# Court of Errors and Appeals

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|---|---|
| JOHN O. LINDSLEY, *Relator-Appellant,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent-Appellee.* | On Petitions for Writs of Mandamus. |
| MICHAEL FERRARO, *Relator-Appellant,* *vs.* BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent-Appellee.* | |

## BRIEF FOR RESPONDENT-APPELLEE

The facts with respect to relator, John O. Lindsley, show that on June 26, 1917, he entered a plea of *nolo contendere* to an indictment for a murder committed on June 9, 1917; that he received a sentence of "life imprisonment in the State Prison"; that he was received at the State Prison on July 13, 1917, and had been continuously confined there down to the date of the application for this writ; that in December, 1928, the Principal Keeper of the State Prison presented to the Board of Managers of said prison a request of Lindsley that he be paroled, "in accordance with the laws of 1918" (State of Case, p. 8). It thus appears that at the time of said application of Lindsley for parole he

had been confined in the prison for a period of about eleven years and five months.

The facts with respect to relator, Michael Ferraro, show that on July 20, 1918, he entered a plea of *nolo contendere* to an indictment charging murder committed on May 5, 1918; that he received a sentence of "life imprisonment in the State Prison"; that he was received at said prison on July 20, 1918, and had been continuously confined therein down to the date of the application for this writ. There is nothing to show that formal application for the parole of Ferraro has ever been made by him, or on his behalf, to the Board of Managers of the prison. From the above it appears that at the time the application of the relator, Lindsley, was presented to the Board of Managers for parole, the relator, Ferraro, had actually been confined in the prison for a period of about ten years and five months.

As we understand the position of these two relators, it is their ultimate claim that they are now entitled as of right to be paroled from the State Prison.

Further, we understand that such claims are founded on the provisions of Chapter 191 of the Laws of 1911, as amended by Chapter 214 of the Laws of 1914 (1 *Cum. Sup.* to C. S. of N. J. 1924, p. 906), and the provisions of Chapter 147 of the Laws of 1918 (1 *Cum. Sup.* to C. S. of N. J. 1924, p. 283, &c.). The first two acts above cited are commonly referred to as Indeterminate Sentence Acts, and the act last above referred to is commonly known as the Institutions and Agencies Act.

**Relators have no right to relief under the Indeterminate Sentence Act, its supplements and amendments.**

In 1911, by Chapter 191 of that year, the Legislature enacted what is known as the Indeterminate Sentence Act. This was done by way of a supplement to the Criminal Procedure Act of 1898. Section 1 of this act provided that every sentence to confinement in the State Prison should specify the exact nature of the crime.

Section 2 provided that every such sentence should set forth a maximum and a minimum term of imprisonment. Section 6 provides that the Board of Inspectors of the prison should have power to establish, with the consent of the Governor, needful rules for the purpose of determining the fitness of prisoners to be at large on parole. Furthermore, the duty is placed upon the Principal Keeper of the prison to obtain and record information concerning the past life of a prisoner and the nature and gravity of the crime for which he is confined, and to lay such information before the Board for consideration by that body when determining the fitness of a prisoner to be at large. By section 5 of the act it is provided that a person sentenced to prison, pursuant to its provisions, shall not be entitled to the benefits of the system established by the act entitled "An act for the government and regulation of the State Prison", Rev., 1877, p. 1119, 4 C. S. of N. J. 1910, p. 4916, its supplements and amendments, whereby prisoners were given remissions in the terms of their sentences for good conduct.

By Chapter 214 of the Laws of 1914, Section 2 of said Chapter 191 of 1911 was amended so as to provide, in part, that every prisoner who has been or may hereafter be convicted of any offense against the State of New Jersey, and who is confined in execution of the judgment of such conviction in the New Jersey State Prison * * * for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution and who, * * * if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole *as in said act provided.* (Italics ours.)

Section 8 of this amendment of 1914 reads, in part, as follows:

> "Upon the expiration of the minimum terms of such prisoners as have been thus deemed fit to be at large, their confinement in prison shall be suspended and they shall be set at large on parole upon

such terms and conditions as shall be established by the Board of Inspectors; * * *"

As one all-sufficient answer to relators' claim to release on parole, under the provisions of the Indeterminate Sentence Acts, we wish to point out that the relators have not been confined in the State Prison for periods of fifteen years, and that, under the provisions of these statutes, confinement for at least that period of time is a condition precedent to the right to be considered for release on parole. It will be recalled in this connection that it is expressly provided, with respect to these acts, that a prisoner is not entitled to any remission in his sentence for good behavior while in confinement. Such is the determination of the court below with respect to relators' claims under these acts.

In addition to this defense to relators' claim for relief here, it is submitted that there is no language in these acts which, either directly or by inference, command the Board to parole prisoners upon the happening of certain events. The provisions of Section 6 of the 1911 act seem to indicate that a wide discretion is vested in the Board, with respect to parole. We submit that the most that can be claimed for these Indeterminate Sentence Acts is that, under certain circumstances, lying within the sound discretion of the Board, a person sentenced to imprisonment for life, after fifteen years of confinement in the prison, may become eligible for consideration for parole. An examination of Section 2 of said Chapter 214 of the Laws of 1914 will show that the section does not, in words, prescribe a minimum term of imprisonment for persons sentenced to the State Prison for life, nor does the language there used indicate an intent to prescribe a commutation of a life sentence to a sentence for fifteen years. A commutation is a substitute for the original sentence, so that the legal status of a prisoner after his sentence has been commuted is the same as it would have been if the sentence had originally been the same as the substituted one.

After commutation, a commuted sentence is the only one in existence. The fact that, in this instance, there is no commutation of the sentence is one of the things that distinguishes the cases at bar from the case relied on so strongly by our adversary in *State* vs. *Board of Parole,* 155 Louisiana 698.

By Chapter 50 of the Laws of 1922, said Chapter 191 of 1911, as amended by Chapter 214 of 1914, was amended by striking out the provision empowering the Board to release on parole, after an imprisonment of not less than fifteen years, prisoners sentenced to imprisonment for life. By Chapter 214 of the Laws of 1926, said Chapter 214 of the Laws of 1914 was repealed.

**Relators have no right to relief, under said Institutions and Agencies Act (Chapter 147 of the Laws of 1918,) its amendments and supplements.**

This statute became effective on July 1, 1918, a date subsequent to the imprisonment of the relators. Unlike Chapter 191 of 1911 and Chapter 214 of 1914, referred to heretofore, which acts deal primarily with criminal procedure, Chapter 147 of the Laws of 1918 (Institutions and Agencies Act), in so far as it deals with persons sentenced to imprisonment for criminal offenses, has for its object the control of prisoners after they have been sentenced to the correctional institutions of the State. The title of this act reads:

> "An act concerning the charitable, hospital, relief, training, correctional, reformatory and penal institutions, boards and commissions located and conducted in this State, which are supported in whole or in part from county, municipal or State funds."

An examination of this statute will show that it is one of wide application, governing a broad field of governmental activity. Pursuant to law, the department is under the control of an agency known as the State Board of Control of Institutions and Agencies. This

board appoints an administrative official known as the Commissioner of Institutions and Agencies, and also a Board of Managers for each of the various State institutions. By Section 116 of the act, "supreme and final authority * * *" is granted to the said State Board of Control.

Sections 114 and 115 of Article 1 of this Act define the powers and duties of Boards of Managers appointed pursuant to the act.

Section 201 of Article II grants power to the several Boards of Managers of the correctional institutions (of which the State Prison at Trenton is one) to release upon parole such inmates of their respective institutions as they may determine to be eligible therefor, except a person sentenced to death.

Section 202 of the act reads as follows:

> "The State Board shall prescribe by rules formally adopted the procedure for and the granting of parole and the terms and conditions incident thereto."

Section 205 of the act, in substance, provided, *as originally enacted in 1918,* that no person committed upon a sentence prescribing a definite minimum term of imprisonment shall be released upon parole by the Board of Managers until the expiration of such minimum term, less any earned commutation thereof. Further, that "in case of a life sentence, the minimum term shall be taken to be fifteen years". By Chapter 196 of the Laws of 1927, the above-quoted clause, with respect to a life sentence, was exscinded from the act.

Assuming said Chapter 196 of the Laws of 1927 to be a legal enactment (although our adversary asserts that same is unconstitutional as to relators), and that relators are asserting a present right to parole, under the provisions of Section 201 of Article II of Chapter 147 of the Laws of 1918, we say that the writs here sought should not be allowed, for the reason that this record does not show that the relators are eligible for parole at this time.

The position of relators, with respect to the nature and character of the power to parole vested by this act in the agencies of the State, is set forth at the bottom of page 26 of our adversary's brief, as follows:

> "The function of the respondent board in the instant cases was not judicial but merely administrative. It was not vested with any discretion. It was directed to ascertain the existence of the prerequisites to the right of parole vested in the prisoners who had complied with the statute, and upon an affirmative finding, the right of the prisoners to release became an absolute one."

We say that the above is not a correct statement of the legal power of the several State agencies involved, with respect to the parole of persons confined in the correctional institutions of the State. There is no provision of said Institutions and Agencies Act expressly declaring that, in the event a convict maintains good conduct while in prison, and submits to the Board of Managers evidence of his ability and purpose, in the event of his parole, to live at liberty without violating the law, the Board of Managers shall release him upon parole. In substance, the provisions of Section 201 of Chapter 147 of the Laws of 1918 provides that the Board of Managers (subject to terms and conditions prescribed by the State Board) "shall have power to release upon parole such inmates of their respective institutions *as they may determine to be eligible* * * *".

As evidence of the fact that the maintenance of good conduct by the prisoner during his confinement, and his submission to the Board of evidence of his intention to live at liberty without violating the law, are not intended by the Legislature to indicate the sole requisites to entitle one to parole, we desire to call attention to the provisions of Section 307 of this Institutions and Agencies Act. It will be observed that, in part, this section provides that it shall be the duty of the Principal Keeper to obtain and record information concerning the past life of the

convict and the nature and gravity of the crime for which he was sentenced, as well as his conduct while in prison, and to present such information and data to the Board of Managers to be considered by that body in its determination of the advisability of paroling the convict.

Furthermore, if the intent of this scheme of prison administration is such that a prisoner is to be entitled, as of right, to parole upon the happening of certain contingencies, it is a reasonable assumption that such contingencies would be expressly named in the statute itself. In this instance the Legislature has not prescribed regulations pursuant to which a prisoner may ascertain just what he must do and how he must act in order to gain a parole. On the contrary, Section 103 of said Chapter 147 of the Laws of 1918 provides that the State Board shall prescribe (evidently, from time to time, as circumstances may dictate), rules and procedures for the granting of parole, and the terms and conditions incident thereto. Referring to this requirement, the opinion of the court below notes that the record is silent as to what such rules are at present, or have been at any time, or whether the relators' applications conform thereto.

The fundamental wrong in relators' construction of this parole act is that the same is to be applied as if it were enacted solely in the nature of rights and rewards to the convict, in consideration of good behavior on his part while in confinement, whereas, the thing which is of paramount importance in the administration of this or any other parole scheme is to provide for its administration in such a way as to insure the safety of the public from crimes committed by prisoners while they are at liberty on parole. Such an administration of the act necessarily implies that broad discretionary powers be vested in the agencies to whom the power to parole is given. In view of the state of the record in this case, it is submitted that the relator, Lindsley, would be but little helped even if jurisdiction to hear his application be assumed.

Assuming that Chapter 196 of the Laws of 1927 (the amendment by which the clause reading "in case of a life sentence, the minimum term shall be taken to be fifteen years" was exscinded from Section 205 of the Institutions Act), is *not* a legal enactment as against the relators, then we contend that relators are not presently entitled to parole, due to the fact that they have not been confined in the State Prison for fifteen years. Assuming this state of the law, the relators' claim of present eligibility for parole is premised upon an assertion on their part that their actual periods of confinement in the prison, plus the credit of time allowed to them for good behavior, equal fifteen years. It is the relators' claim that remissions of time for good behavior inure to them under the provisions of Section 306 of Chapter 147 of the Laws of 1918. As to this, we contend (a) that relators, having been sentenced to imprisonment for life, are not entitled to the benefits of Section 306, and (b) that if they are entitled to remissions, under said Section 306, they were not entitled to earn any such credits after the date of the enactment of Chapter 196 of the Laws of 1927, namely, March 28, 1927.

Viewing Chapter 147 of the Laws of 1918, as the same was originally enacted, we note that the only reference to persons sentenced to imprisonment for life is the reference incorporated in Section 205 of the statute. It will be noted that this Section 205 forms part of a subdivision of the statute, which deals solely and exclusively with the subject of parole. By Section 201 it is provided that, except in the case of a person sentenced to death, the governing board of an institution shall have power to release on parole the inmates of their institution. To limit this broad grant of power, and apparently for no other purpose, the Legislature, by Section 205, in effect, provided that where a person is committed on a sentence prescribing a definite minimum term of imprisonment, such a person may not be released on parole until he has served his minimum term, *less earned commutation thereof*. Following this, Section

205 contains a statement reading: "in case of a life sentence, the minimum term shall be taken to be fifteen years". It is submitted that, considering the location of this quoted section in this statute, it is obvious that its sole purpose is to deal with the matter of the parole of persons sentenced to life imprisonment, and to indicate that, in the exercise of the grant of power under Section 201, the Board may not parole a person sentenced for life until he has been confined in the prison for at least fifteen years.

It will be noted that, unlike that part of Section 205 dealing with persons committed under a sentence prescribing a definite minimum term of imprisonment, there is no reference in the above-quoted language, dealing with persons sentenced to imprisonment for life, to remissions for good behavior. Section 306 of this statute (which section is not included in the subdivision of the act dealing with parole), specifically provides for a remission of time to a prisoner who has been *sentenced* for a maximum and minimum term. There is no similar provision in Section 306, or elsewhere in this statute, with respect to persons sentenced to imprisonment for life. The history of this remission of time legislation shows that it never applied to persons sentenced to imprisonment for life. In the act entitled "An act for the government and regulation of the State Prison" (Rev., 1877, p 1119; 4 C. S. of N. J. 1910, p. 4916), of which the statute here in question, Chapter 147 of the Laws of 1918, is a revision, the right to remission for good conduct, etc., was limited to such persons as were sentenced for periods of months or years.

If it be determined that, by its reference to persons sentenced for life in Section 205 of Chapter 147 of the Laws of 1918, the Legislature intended that persons so sentenced for life should have the benefits of remissions of time granted by Section 306 of said act, then we contend that relators were not entitled to earn any remission credits *after* March 28, 1927, the date on which the Legislature, by Chapter 196 of 1927, exscinded the

reference to persons sentenced for life from said Section 205. We predicate this contention upon the ground that such rights to remission in time of service for good behavior, etc., dealt with in said Section 306 of this act, are nothing more than statutory privileges, which rest upon reasons of public policy and concerning which changes may be made as circumstances seem to require. The relators' contention that the enactment of Chapter 196 of the Laws of 1927 deprived them of vested rights to continue to earn remissions from their sentences *after* the date of said enactment is without merit. A right cannot be considered vested unless it is something more than such a mere expectancy as may be based upon the anticipated continuance of general laws. Undoubtedly, the Legislature has the right to repeal all legislative acts which are not in the nature of contracts or private grants. Our adversary's brief p. 4 shows that the relator, Lindsley's minimum term of fifteen years, less earned remission thereof, was served on July 1, 1928 (more than a year after the passage of Chapter 196 of the Laws of 1927), and that relator, Ferraro's minimum term of fifteen years, less earned remission, was served on April 19, 1929 (more than two years after the passage of said Chapter 196 of the Laws of 1927).

**Changes made by the Legislature in Chapter 191 of 1911, as amended by Chapter 214 of 1914, and in Chapter 147 of 1918.**

By Chapter 50 of the Laws of 1922, Section 2 of the Indeterminate Sentence Act (Chapter 191 of the Laws of 1911, as amended by Chapter 214 of the Laws of 1914), was amended by striking out the following:

> "provided, that a commutation from sentence of death to imprisonment for life is hereby construed to have a minimum term of fifteen years; provided, further, that every prisoner who has been, or may hereafter be, convicted of any offense against the State of New Jersey, and is confined in execution of the judgment of such conviction in

> the New Jersey State Prison, for a definite term or terms of over one year, or *for the term of his natural life,* whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, *if sentenced for the term of his natural life, has served not less than fifteen years,* may be released on parole as herein provided." (Italics ours.)

The legality of this repealer as against the relators is not now pertinent, inasmuch as it appears that the relators have not been confined in the State Prison for periods of fifteen years, and hence have no present right to be considered for release on parole, under the Indeterminate Sentence Acts.

By Chapter 214 of 1926, the following statutes were repealed:

> Chapter 191 of the Laws of 1911,
> Chapter 384 of the Laws of 1912,
> Chapter 214 of the Laws of 1914,
> Chapter 50 of the Laws of 1922, and
> Chapter 155 of the Laws of 1924.

Section 6 of said Chapter 214 of 1926 reads as follows:

> "This act shall take effect on the first day of July, one thousand nine hundred and twenty-six; provided, however, that any person convicted of an offense which was committed prior to the day on which this act shall take effect, shall be punished as if this act had not been passed, and any such person shall retain and have all the rights and benefits conferred by the acts herein repealed."

In considering the effect of this saving clause in this 1926 statute, with respect to the status of the relators, we desire to point out:

(a) That on July 1, 1926, there was no provision in any of the acts repealed by Chapter 214 of the Laws of 1926, whereby a person who was sentenced to the State Prison for the term of his life could be paroled. It will be recalled that the provisions incorporated in Chapter 214 of the Laws of 1914, with respect to the parole of persons sentenced to imprisonment for life, were expressly exscinded from said Laws of 1914 by Chapter 50 of the Laws of 1922.

(b) That on July 1, 1926, the relators had not been confined in the State Prison for a period of fifteen years, and there is no evidence that on said date they were, in other respects, eligible for parole. Further, that at the date of the application for the writs here sought the petitioners had not been confined in the State Prison for a period of fifteen years.

With respect to the relators' allegations that these amendatory acts are *ex post facto,* we submit that the cases construing the constitutional provisions dealing with *ex post facto* laws do not support this claim. As pointed out in the opinion of the court below, these cases do not come within any of the classes of *ex post facto* laws described in the leading case of *Calder* vs. *Bull,* 3 Dall. 386, and in our leading case of *Moore* vs. *State,* 43 N. J. L. 203. The effect of these various repealers was not to add any new punishment to that prescribed at the time the offenses here in question were committed. They do not change the legal effect of the judgments which were imposed upon these relators at the time they were sentenced to the State Prison.

As stated heretofore, a parole is a mere matter of grace and a statute authorizing the granting of paroles may be amended or repealed, at any time, without violating the constitutional rights of prisoners.

*Neal* vs. *Hines et al.*, 203 S. W. 518.
*People ex rel. Cecere* vs. *Jennings, Warden,* 165 N. E. 277.

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,
THEODORE BACKES,
*Second Assistant Attorney-General,*

WILLIAM A. STEVENS,
*Attorney-General.*

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# NEW JERSEY
# Court of Errors and Appeals

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| JOHN O. LINDSLEY, *Relator-Appellant,* vs. BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | On Appeal. Petitions for Writs of Mandamus |
| MICHAEL FERRARO, *Relator-Appellant,* vs. BOARD OF MANAGERS OF THE NEW JERSEY STATE PRISON, *Respondent.* | |

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## BRIEF FOR RELATORS-APPELLANTS.

In each of the above causes a rule was entered in the Supreme Court, on the application of the relator-appellant, directing the respondent to show cause why a peremptory writ of mandamus should not issue command-

ing and enjoining the respondent to consider and act upon the application of the relator-appellant for a suspension of his confinement in the State Prison, under a judgment entered upon a conviction of crime, and for his release from said imprisonment on parole under such terms and conditions as should be established by the respondent (Case 4, 15). The Supreme Court, in an opinion by Mr. Justice Case (Case 25), denied the applications, and thereupon a rule discharging the rule to show cause was entered in each cause (Case 32, 37). Each of the relators-appellants served notice of appeal from the order and judgment discharging the rule to show cause (Case 33, 38).

The propriety of taking an appeal from the rule discharging the rule to show cause will be discussed herein under Point V.

These relators-appellants are confined to the State Prison under sentence to life imprisonment imposed in each instance on a plea of *nolo contendere* to an indictment charging murder. They seek release from their imprisonment under the Indeterminate Sentence Act and other statutes hereinafter referred to, granting the right to prisoners to whom the terms thereof apply, under certain prescribed conditions, to release on parole when the minimum term of the sentence, less earned commutation thereof, has been served, and fixing fifteen years as the minimum term in case of life imprisonment. The power to determine the existence of the prerequisites to the right of parole was vested in the Board of Managers, but in the instant cases the Board refused to take action, following the opinion of the Attorney-General, that the repeal of the provision fixing fifteen years as the mini-

mum term in cases of life imprisonment, accomplished by an amendment striking out the clause fixing the minimum term as fifteen years in such cases, had deprived the Board of its jurisdiction, and that the prisoners undergoing life sentence "must be detained for the term of their natural life, unless sooner released by the Board of Pardons, either acting as such, or in pursuance of the statute as a parole board" (Case 7-8).

The cases of the relators-appellants typify in their essential aspects those of a fairly numerous group, and it is the desire of the respondent and prison authorities that all questions raised as to the power of the Board of Managers, and the rights of the prisoners confined under sentence to life imprisonment, be fully determined, to the end that such prisoners be speedily accorded every right granted to them by law. For this purpose the case of John O. Lindsley was selected by the principal keeper for presentation to the Board of Managers, and following the refusal of the Board to act, in accordance with the opinion of the Attorney-General (Case 6), the rule was granted by Mr. Justice Trenchard directing the Board to show cause why a peremptory writ of mandamus should not issue commanding the Board to consider and act upon his application for release from his imprisonment on parole. Subsequently, and in order to bring every possible question before the court, the relator-appellant, Michael Ferraro, presented a similar application, and Justice Trenchard allowed the rule directing the said Board to show cause why a like peremptory writ of mandamus should not issue commanding it to consider and determine this relator-appellant's right to release on parole, under the statutes in force at the

time of the imposition of his sentence, granting the right to persons sentenced to life imprisonment, under certain prescribed conditions, to release on parole, when the minimum term of fifteen years, less earned commutation thereof, has been served, and to act upon the determination so made.

The facts have been stipulated in each case (Case 5, 16, 23, 35). Lindsley was sentenced on June 26, 1917, in the Court of Oyer and Terminer of the County of Essex. He entered the prison on July 13, 1917, and on July 1, 1928, had served the minimum term of fifteen years, less earned commutation thereof. In accordance with the mandate of the Indeterminate Sentence Act, the principal keeper presented his case to the Board of Managers at a meeting held in the month of December, 1928, and it was then that the Board refused to consider and determine the matter. The stipulation contains a transcript of the minutes of that meeting of the Board, dealing with this matter (Case 6-8).

Ferraro was sentenced on July 20, 1918, in the Court of Oyer and Terminer of the County of Passaic. He entered the prison on that day, and on April 19, 1929, had served the minimum term of fifteen years, less earned commutation thereof. It is stipulated, among other things (Case 20), that his record of conduct shows that he has throughout observed all the rules of the institution, and that since the expiration of the minimum term he has been ready and willing to give to the Board evidence of his ability and purpose, in the event of his parole, to live at liberty without violating the law, and of his fitness to be at large; and that the failure of the Board to consider and determine his right to release on

parole was due solely to the opinion of the Attorney-General that it lacked the power to act in the premises.

The relators-appellants contend that upon establishing to the satisfaction of the Board of Managers their ability and purpose, in the event of parole, to live at liberty without violating the law, and their fitness to be at large, they have an absolute right to release on parole under the provisions of the Indeterminate Sentence Act, and that the power of the Board is not discretionary in any sense. This is the express direction of the act.

> 1 Supp. Comp. Stat., 907, Sections 53-179g and 53-179h.

These relators-appellants have filed reasons in support of their respective petitions for writs of mandamus (Case 9, 21), setting forth that the action of the respondent, in refusing to consider and determine the right of relators-appellants to release on parole, was arbitrary and illegal, and that if Chapter 196 of the Laws of 1927 be applied to them, it is unconstitutional and therefore void, in that it contravenes the provisions of Article I, Section 10, of the Constitution of the United States, prohibiting the States from passing any *ex post facto* law, and the provisions of the Fourteenth Amendment to the Constitution of the United States, prohibiting the States from depriving any person of life, liberty or property without due process of law, and likewise the provisions of Paragraph 3, Section 7, Article IV, of the Constitution of the State of New Jersey, prohibiting the Legislature from passing any *ex post facto* law.

By additional reasons filed by the relators-appellants (Case 23, 35), this contention is also made as to Chapter 147 of the Laws of 1918, Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926, in so far as they operate to the disadvantage of the relators-appellants and impair their substantial rights.

A synopsis of the applicable statutes will be followed by a presentation of the pertinent questions of law. The conclusions of Mr. Justice Case will be discussed under Point IV.

**Synopsis of the Applicable Statutory Enactments**

In 1911, by a supplement to the act entitled "An act relating to courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898)," approved June 14, 1898, the Legislature adopted the Indeterminate Sentence plan for the punishment of crimes. This was a departure from a long established policy, and was the modern concept of the most effective way to promote the reformation of the unfortunates constituting our prison population. It provided that the sentence should fix a maximum term equal to the limit of imprisonment as provided in "An act for the punishment of crimes (Revision of 1898)," approved June 14, 1898, for the crime for which the prisoner was sentenced, and a minimum term of not less than one year and not more than one-half of the maximum term. The minimum term in cases of the commutation of the death sentence to life imprisonment was fixed at twenty-five years.

Section 6 vested in the Board of Inspectors the power to establish needful rules for determining the fitness of prisoners to be at large, and the principal keeper was therein directed to keep a record of the conduct of each prisoner, and record other information which might aid the Board of Inspectors in determining the fitness of the prisoners to be at large.

Section 7 directed the principal keeper to present to the board of inspectors a list of all prisoners whose minimum terms were about to expire, and the board was directed to determine the fitness of such prisoners to be at large.

Section 8 provided that,—"upon the expiration of the minimum terms of such prisoners as have been thus deemed fit to be at large, the Governor or person administering the government approving, and not otherwise, their confinement in prison *shall be suspended and they shall be set at large on parole under such terms and conditions as shall be established by the Governor, or person administering the government.*"

Section 15 provided that nothing contained in the act should be construed to repeal any existing statutes relative to the parole of prisoners by the Court of Pardons.

This act was approved on April 21, 1911, and became effective six months thereafter.

P. L. 1911, Ch. 191, p. 356; 1 Sup. Comp. Stat. 906, Sections 53-179a, et seq.

At the time of the adoption of this act a sentence, in terms, to life imprisonment was not permissible under any statute. The act permitting the jury to make a binding recommendation of life imprisonment was adopted in 1916.

P. L. 1916, Ch. 270, p. 576; 1 Sup. Comp. Stat. 857, Section 52-108.

The act permitting the acceptance of a plea of *nolo contendere,* in which event the sentence shall be either life imprisonment or that imposed upon a conviction of murder in the second degree, was approved in 1917.

P. L. 1917, Ch. 238, p. 801; 1 Sup. Comp. Stat. 857, Section 52-107.

In 1912, a further supplement to the criminal procedure act was adopted. It applied to prisoners confined in the prison at the time of the adoption of the Indeterminate Sentence Law, and permitted application for parole when two-thirds of the sentence, less earned commutation thereof, had been served. It provided that "one-half a life sentence of any such prisoner, coming within the terms of this provision, shall be construed as amounting to twenty-five years."

P. L. 1912, Ch. 384, p. 769.

In 1914, various sections of Chapter 191 of the Laws of 1911 (Indeterminate Sentence Act) were amended. Section 2 was amended to provide that the minimum term should not be less than one year and not more than two-thirds of the maximum term. The minimum term in cases of the commutation of the death sentence to life imprisonment was fixed at fifteen years. It provided further that,—"every prisoner who has been, or may hereafter be, convicted of any offense * * *, and is confined * * * in the New Jersey State Prison, for a definite term or terms of over one year, *or for the term of his natural life,* * * * and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, *if sentenced for the term of his natural life, has served not less than fifteen years,* may be released on parole as herein provided."

Section 7 of the original act was amended to provide that the prisoners whose minimum terms were about to expire "*shall* be allowed to *appear in person before said board or a committee thereof,* and the board or committee *shall diligently seek to determine the fitness of such prisoners to be at large,*" and that "no prisoner shall be paroled by said board who shall not have given satisfactory evidence of his ability and purpose to live at liberty without violating the law."

Section 8 of the act was amended by striking out the clause requiring the approval of the Governor to the parole of such prisoners who shall have been deemed by

the board to be fit to be at large, and provided that such prisoners shall be released on parole under such terms and conditions as shall be established by the Board of Inspectors, instead of the Governor, as provided by the original act. The provisions of this section making mandatory the release of prisoners who shall have satisfied the board of their fitness to be at large, were reenacted without change.

This act took effect on April 15, 1914.

P. L. 1914, Ch. 214, p. 429.

In 1918, the Department of Charities and Corrections was reorganized (Chapter 147 of the Laws of 1918).

1 Sup. Comp. Stat. 283, Sec. 34-42 et seq.

By amendment subsequently adopted, it became the "Department of Institutions and Agencies."

Section 112, of Article I, provides that the State Board shall appoint for each of the institutions or non-institutional agencies included in the provisions of sections 117 and 118 (Section 118 sets forth the correctional institutions, including the State Prison), a board of managers, and sections 114 and 116 define the powers and duties of such boards of managers.

Article II deals with the parole power vested in such boards. Section 201 provides that the managerial boards of the correctional institutions,—"shall have power to release upon parole, such inmates of their respective institutions as they may determine to be eligible therefor, except a person sentenced to death."

Section 205 provides that,—"no person committed upon a sentence prescribing a definite minimum term of imprisonment shall be released upon parole by the board of managers until the expiration of such minimum term less any earned commutation thereof. *In case of a life sentence, the minimum term shall be taken to be fifteen years.*"

Section 206 provides that the provisions of the act shall apply to all persons *"heretofore or hereafter* committed to any correctional institution as classified in this act."

Section 208 vests in the managerial board power to issue a final discharge from custody to any person committed to the institution and released on parole, who has by his conduct given evidence that he is to be deemed reliable and trustworthy and will remain at liberty without violating the law.

Section 306 provides the basis for the remission of sentence for faithful performance of assigned labor, orderly deportment and good conduct. It is under this section that the earned commutation of the sentence imposed in each of the instant cases was determined.

This act was approved on February 28, 1918.

P. L. 1918, Ch. 147, p. 343.

In 1922, Chapter 191 of the Laws of 1911 (Indeterminate Sentence Act), as amended by Chapter 214 of the Laws of 1914, was further amended by striking out the provision that the minimum term in cases of the commutation of the death sentence shall be fifteen years, and the further provision that any prisoner who was confined for a definite term or terms of over one year, or for the term of his natural life, and who has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, fifteen years, became eligible for parole. This act took effect on March 7, 1922.

P. L. 1922, Ch. 50, p. 96.

In 1923, various sections of Article II of Chapter 147 of the Laws of 1918, creating what is presently known as the Department of Institutions and Agencies, were amended. Section 205, fixing fifteen years as the minimum term in cases of sentence to life imprisonment, was re-enacted without change; likewise Section 206, making the provisions of the act applicable to all persons "heretofore or hereafter committed to any correctional institution as classified in this act."

P. L. 1923, Ch. 120, p. 256.

In 1924, Section 2 of Chapter 191 of the Laws of 1911, as finally amended by Chapter 50 of the Laws of 1922, was again amended by re-enacting this section as

amended by Chapter 50 of the Laws of 1922, and the addition of a clause that has no pertinency to this inquiry, unless it be that the policy declared in the act of 1911, and the amendments and supplements thereto, was here reiterated as the established policy of the State.

P. L. 1924, Ch. 155, p. 354.

By Chapter 214 of the Laws of 1926, the following acts were repealed:

Chapter 191 of the Laws of 1911 (Indeterminate Sentence Act;

Chapter 384 of the Laws of 1912;

Chapter 214 of the Laws of 1914;

Chapter 50 of the Laws of 1922;

Chapter 155 of the Laws of 1924.

This repealer, however, contains a saving clause providing,—"that any person convicted of an offense which was committed prior to the day on which this act shall take effect, shall be punished as if this act had not been passed, and any such person shall retain and have all the rights and benefits conferred by the acts herein repealed."

By its express terms, this repealer took effect on July 1, 1926.

P. L. 1926, Ch. 214, p. 357.

In 1927, Section 205 of Chapter 147 of the Laws of 1918, as amended by Chapter 120 of the Laws of 1923, was further amended by the exscinding of the clause—"in case of a life sentence, the minimum term shall be taken to be fifteen years." Otherwise, this section remains unchanged. The amending act contained no other provision, except that it should take effect immediately.

P. L. 1927, Ch. 196, p. 381.

Chapter 147 of the Laws of 1918 continued and extended the authority of the managerial board. Further, it vested the power of appointment in the Department of Institutions and Agencies, and effected a change of official title. Thereafter the managing body was to be known as a "Board of Managers." It is vested with the general supervisory power of the old Board of Inspectors.

The Legislature cannot be assumed to have intended an absurdity or absurd consequences from its enactment.

*Walker* v. *Freeholders of Essex,* 82 N. J. L. 348, 82 Atl. 422.

The legislative purpose being clearly indicated by the saving clause annexed to the repealer, the inquiry remains,—Did it indicate a contrary intent by the enactment of Chapter 196 of the Laws of 1927? The purpose of this statute was solely to eliminate the clause of Section 205 of Chapter 147 of the Laws of 1918, as amended, fixing the minimum term in cases of sentence to life imprisonment at fifteen years. There is nothing in this enactment to indicate a legislative intention to make it retroactive so as to disturb the rights of relators and others who were guaranteed the benefits of the Indeterminate Sentence law by the saving clause of the repealer passed in the prior year. Its purpose was obviously to eliminate a provision that had no place in our statutory law in view of the repeal of the Indeterminate Sentence Acts. It was in harmony with the legislative purpose declared by the repealer of 1926, and not inconsistent therewith.

The clause in a statute purporting to repeal other statutes is subject to the same rules and interpretation as other enactments, and the intent must prevail over literal interpretation.

*State ex. inf. Barrett* v. *Joyce,* 307 Mo. 49, 269 S. W. 623.

## B

## Chapter 196 of the Laws of 1927 Should Not Be Given A Retroactive Construction

A statute will not be construed as retroactive unless its language precludes any other reasonable interpretation.

In *Citizens' Gas Light Company* v. *Alden,* 44 N. J. L. 648, 653, Mr. Justice Knapp, speaking for the Court of Errors and Appeals, said:

"But it is not enough that words used in an act "may be given a retrospect, without doing violence "to their meaning, or that such a course may "coincide with their common understanding.

"Laws, generally, are enacted for the regulation "of future affairs and conduct, and to establish "the basis on which rights may thereafter under "them be rested, and are not usually designed to "alter or affect the quality or legal relations of past "acts and concluded transactions, much less to "disturb rights which have arisen under laws "running concurrently with their birth. Hence we "do not look for or expect in any enactment that it "shall be operative as of time prior to its own "existence; and before we are permitted to ascribe "to it such purpose, there must be found in the law "such clear and indubitable expression of the legis- "lative design as precludes any other reasonable "interpretation of the words used. The rule in the "courts is, that retroactive effect will not be given "to a statute when the words in it can be construed "as designed to make it prospective only. * * *. All "legislation is framed, or presumed to be, in view "of this conspicuous canon of construction govern- "ing in courts where the duty of interpretation is "reposed. And when the legislature intend to give "to law of their enactment operation upon the past, "they will and must do it with such choice of words "as places it beyond the realm of doubt."

See also, *Frelinghuysen* v. *Town of Morristown*, 77 N. J. L. 493, 72 Atl. 2.

Where the statute is susceptible of being construed either retroactively or prospectively, without doing violence to the language used, it will not be given a retroactive construction.

*Spencer* v. *Middlesex County Board of Taxation*, 95 N. J. L. 5, 111 Atl. 640.

*Cox* v. *Hart*, 260 U. S. 427, 43 S. Ct. 154, 67 L. Ed. 332.

*Public Service Electric Co.* v. *Board of Public Utility Commissioners,* 88 N. J. L. 603, 96 Atl. 1013.

*Monahan* v. *Matthews,* 91 N. J. L. 123, 103 Atl. 40.

*Crucible Steel Co.* v. *Polack Tyre & Rubber Co.,* 92 N. J. L. 231, 103 Atl. 224.

In *Shwab* v. *Doyle,* 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454, Mr. Justice McKenna, speaking for the Federal Supreme Court, said:

> "The initial admonition is that laws are not to "be considered as applying to cases which arose "before their passage unless that intention be "clearly declared. 1 Kent, Com. 455; *Eidman* v. "*Martinez,* 184 U. S. 578, 22 S. Ct. 515, 46 L. Ed. "697; *White* v. *U. S.* 191, U. S. 545, 24 S. Ct. "171, 48 L. Ed. 295; *Gould* v. *Gould,* 245 U. S. "151, 38 S. Ct. 53, 62 L. Ed. 211; Story, Const. "Sec. 1398. The comment of Story is: 'Retro-" 'spective laws are, indeed, generally unjust; and, " 'as has been forcibly said, neither accord with " 'sound legislation nor with the fundamental " 'principles of the social compact.'
>
> "There is absolute prohibition against them "when their purpose is punitive; they then being "denominated *ex post facto* laws. It is the sense "of the situation that that which impels prohibition "in such case exacts clearness of declaration when "burdens are imposed upon completed and remote "transactions, or consequences given to them of "which there could have been no foresight or con-"templation when they were designed and con-"summated."

To justify a retroactive construction, Justice McKenna held that the statute must contain a "declaration of retroactivity, clear, strong, and imperative," and that,—"If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

See, also, as to the rule of statutory construction to make statutes operate prospectively, unless their terms indicate retroactivity,—*Erie County* v. *Lowenthal,* 195 N. Y. S. 177; In Re Frost's Estate, 182 N. Y. S. 559, aff. 230 N. Y. 580.

Chancellor Walker has laid down the applicable rule as follows:

> "An amendatory act, like other legislative enact-
> "ments, takes effect only from the time of its pas-
> "sage and has no application to prior transaction
> "unless an intent to the contrary is expressed in
> "the act or clearly implied from its provisions.
> "* * * In line with this case is that of Mc-
> "Laughlin v. Newark, 57 N. J. L. 298, in which
> "the supreme court held that an amendment to an
> "existing statute, which, under our constitution,
> "recites the amended section at length in the amend-
> "ing act, does not express an intention then to
> "enact the whole section as amended, but only an
> "intention then to enact the change which is indi-
> "cated. That, of course, means that the original
> "act stands from the time of its passage to the
> "time of the amendment, after which time it still
> "stands so far as not amended, and is changed
> "from that time forth so far only as amended.
> "The rule has been stated as follows:
>
> " 'The portions of the amended sections which
> " 'are merely copied without change are not to be
> " 'considered as repealed and again reenacted, but to
> " 'have been the law all along; and the new parts
> " 'or the changed portions are not to be taken to
> " 'have been the law at any time prior to the pas-
> " 'sage of the amended act. The change takes
> " 'effect prospectively according to the general
> " 'rule.' 1 Lewis' Suth. Stat. Con. (2d ed.), 443
> "Sec. 237."
>
> *In re. St. Michael's Church,* 76 N. J. E. 524, at 532.

It cannot here be said, as in *Spencer* v. *Middlesex County Board of Taxation, supra,* that the act is susceptible of being construed either way without doing violence to the language used. Even then this unquestioned rule of construction would prevent a retroactive operation. But in the case *sub judice* to construe the act of 1927 retroactively is to nullify the saving clause annexed to the repealer of the Indeterminate Sentence Law, and to do violence to the plainly evinced legislative intent.

It is a fundamental rule of construction that penal statutes must be strictly construed.

Statutes prescribing punishment are strictly construed, and must be construed together. They never are construed against an accused or a convicted person beyond their literal and obvious meaning. If a statute creating or increasing a penalty is capable of two constructions, it should be construed so as to operate in favor of life and liberty.

16 C. J. 1360.

The proposition that penal statutes are to be strictly construed is to be applied not to the merely remedial, but only to the restrictive and punitive clauses in penal statutes. A statute operates to *enlarge* or to *restrain* liberty; when the former, it is to be *largely* construed; when the latter, *cautiously and strictly.* This is a maxim of the Roman law, which, though foreign to the notion of the old English common law, that crime is to be avenged in kind and in full measure, was at an early period adopted by English jurists. In construing such statutes, however, we are to look for their reasonable sense, and if this is clearly ascertained it must be applied, though a narrower sense is possible. The courts are, on the one hand, to refuse to "extend the punishment to cases which are not clearly embraced" in the statutes; on the other hand, to refuse, "by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope." At the

same time, *in matters of reasonable doubt,* this doubt is to tell in *favor of liberty and life.*

1 Wharton's Criminal Law (11th Ed.), 52 Sec. 40.

## POINT II

**A Retroactive Construction of the Act of 1927, or of the Repealer of the Indeterminate Sentence Law, Would Render Them Ex Post Facto Laws, and Therefore Unconstitutional and Void.**

A law is *ex post facto,* and therefore void, which shall, in its operation, make that criminal which was not so at the time the action was performed; or which shall increase the punishment, or, in short, which, in relation to the offense or its consequences, *alters the situation of a party to his disadvantage.*

*Moore* v. *State,* 43 N. J. L. 203.

*Thompson* v. *Utah,* 170 U. S. 343, 18 S. Ct. 620, 42 L. Ed. 1061.

*In re Medley,* 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835.

*Fletcher* v. *Peck,* 6 Cra. (U. S.) 87, 3 L. Ed. 162.

*In re Wright,* 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748.

*Burgess* v. *Salmon,* 97 U. S. 381, 384, 24 L. Ed. 1104.

*Calder* v. *Bull,* 3 Dall. 386, 1 L. Ed. 648.

Laws dealing with remedies and procedure are within the prohibition of the Constitution, if they operate to the *disadvantage of the accused in a substantial manner.*

*Beazell* v. *Ohio,* 269 U. S. 167, 46 S. Ct. 68, 70 L. Ed. 216.

In the case last above cited, Mr. Justice Stone said:

"It is settled by decisions of this court, so well "known that their citation may be dispensed with, "that any statute which punishes as a crime an act

"previously committed, which was innocent when "done, or which makes more burdensome the "punishment for a crime after its commission, or "which deprives one charged with crime of any "defense available according to law at the time "when the act was committed, is prohibited as an "ex post facto. The constitutional prohibition of "the judicial interpretation of it rests upon the "notion that laws, whatever their form, which pur- "port to make innocent acts criminal after the "event, or to aggravate an offense, are harsh and "oppressive, and that the criminal quality attribut- "able to an act, either by the legal definition of the "offense or by the nature or act of the punishment "imposed for its commission, should not be altered "by legislative enactment, if the effect, is to *the "disadvantage of the accused.*"

In *Kring* v. *Missouri,* 107 U. S. 221, 2 S. Ct. 443, 27 L. Ed. 506, the history of the *ex post facto* clause of the Constitution is reviewed by Mr. Justice Miller. He quotes an English author as follows:

"Ex post facto is a term used in the law, signifying "something done after or arising from or to affect "another thing that was committed before. An ex "post facto law is one which operates upon a sub- "ject not liable to it at the time the law was made."

Justice Miller then states the applicable rule, which has ever since been consistently followed in the adjudicated cases:

"We are of opinion that any law passed after the "commission of an offense, which, in the language "of Washington, in U. S. v. Hall, 'In relation to "'that offense, or its consequences, *alters the "'situation of a party to his disadvantage,'* is an "ex post facto law, and in the language of Denio, "in Hartung v. People (22 N. Y. 95), 'no one can "'be criminally punished in this court except ac- "'cording to a law prescribing for his government "'by the sovereign authority before the imputed

"'offense was committed, and which existed as a "'law at the time'."

Even in England, where there are no restrictions on the power of Parliament to make or repeal laws, *ex post facto* laws have long been regarded as unreasonable.

1 Blackstone Com. 160.

And it has been said that they are there now looked on as barbarous.

*Phillips* v. *Ayre,* L. R. 6. Q. B. 1.

In *Moore* v. *State,* 43 N. J. L. 203, at 214, Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said that: *"Ex post facto* laws are, in a general sense, enactments after the facts to which they relate," and that (p. 215), "a law increasing the punishment of former crimes is as clearly *ex post facto* as one inflicting punishment for a previous innocent act."

He said further of these laws (p. 221), "—It is by their effect upon the *status* of individuals that they are to be so characterized."

A much quoted case in support of this principal is *Hartung* v. *People,* 22 N. Y. 95, where the statute provided for a year's imprisonment before the execution of a death sentence, whereas the former law provided a period of not less than four weeks nor more than eight weeks between the sentence and its execution. Judge Denio said of this:

> "It is enough to bring the law within the con-"demnation of the Constitution, that it changes the "punishment, after the commission of the offense "by *substituting for the prescribed penalty a dif-"ferent one.* We have no means of saying whether "one or the other would be the most severe in a "given case. That would depend upon the dispo-"sition and temperament of the convict. The legis-"lature cannot thus experiment upon the criminal "law."

The prisoner having subsequently, upon a retrial, pleaded the former conviction as a bar, the court in *Hartung* v. *People,* 26 N. Y. 167 (also reported in 28

N. Y. 400), sustaining such plea, explained that its former decision considered the repealing act to be *ex post facto* "because it attempted to change the punishment which the law had attached to the offense of the prisoner when it was committed, not by remitting some divisible portion of it, but by altering its kind and character."

Mr. Wharton, in his treatise on criminal law, 1 Wharton's Criminal Law (11th ed.), 53 Sec. 41, said:

> "So far as concerns statutes, the rule is rigor-
> "ously applied, and is fortified by the constitutional
> "provision, that no statute shall have any ex post
> "facto operation. And this clause has been inter-
> "preted as meaning that no person is to be sub-
> "jected by statute either to a penalty for an act
> "which at the time of its commission, was not the
> "object of prosecution, or to a penalty higher than
> "was attached to such act at the time of its com-
> "mission."

He cites cases in his notes supporting the proposition that a law which, "—in any way alters the position of the defendant to his disadvantage," cannot be given a retroactive operation.

Mr. Wharton says further (1 Wharton's Criminal Law, p. 54, Sec 42):

> "While acts imposing severe penalties cannot be
> "applied retrospectively, *doubtful questions as to*
> "*what is a severe penalty are to be determined in*
> "*favor of the accused,* but, as a general rule,
> "changes in a punishment subsequent to the com-
> "mission of an offense not consisting in a lessen-
> "ing of the prior penalty or some severable portion
> "thereof have no application to such offense.
> "* * *.
>
> "A statute, however, subsequent to an offense,
> "may change the mode by which it is to be prose-
> "cuted, provided the punishment attached to the
> "offense is not thereby increased, or the defendant's
> "rights *materially impaired.*"

To the same effect, see 12 C. J. 1097-8, 1100-01.

In order to render legislation unconstitutional as *ex post facto,* it need not be detrimental to all persons charged with offenses; it is sufficient that it materially alters their condition in a manner which may be detrimental to some.

*In re Murphy,* 87 Fed. 549.

A statute which increases the minimum penalty for an offense previously committed is *ex post facto,* even though it mitigates the punishment in other respects.

*Com.* v. *McDonough,* 13 Allen (Mass.) 581.

*Flaherty* v. *Thomas,* 12 Allen (Mass.) 428.

Solitary confinement, keeping the prisoner ignorant of the time of his execution, or any other change calculated to add terror to the death penalty, makes the law *ex post facto* as to past offenses.

*In re Savage,* 134 U. S. 176, 10 S. Ct. 389, 33 L. Ed. 842.

*In re Medley,* 134 U. S. 160, 10 S. Ct. 384, 33 L. Ed. 835.

An act which adds a fine to the punishment by imprisonment imposed by the law in force when the offense was committed is *ex post facto.*

*State* v. *McDonald,* 20 Minn. 136.

A law shortening the time between sentence and execution of a prisoner condemned to death is void as to previous offenses as an *ex post facto* law.

*In re Tyson,* 13 Colo. 482, 22 Pac. 810, 6 L. R. A. 472.

In *Murphy* v. *Com.,* 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, the court applied the principle here contended for in the following language:

> "But the legislature under the guise of laws re-
> "lating to procedure or prison discipline or penal
> "administration cannot take away or interfere with
> "*any substantial right or privilege which was se-*
> "*cured to a party by the law as it was when the*
> "*offense was committed.* *Kring* v. *Missouri,* 107
> "U. S. 232, 27 L. Ed. 510; *Thompson* v. *Utah,* 170

"U. S. 343, 42 L. Ed. 106; *Medley, Petitioner,* "134 U. S. 160, 33 L. Ed. 835. *To deprive him* "*in any manner of such right or privilege would be* "*to increase the penalty.* In determining in any "case whether this is or is not the effect of a "statute, it is to be borne in mind that the constitu- "tional provision was intended as a security to life "and liberty, and as a safeguard against the in- "fliction of any punishment except such as was duly "authorized by law, and it is to be construed so as "to promote these ends. As the law formerly stood "in this State, the effect of *good conduct* on the "part of the prisoner was to shorten his term of im- "prisonment, and to give him a *right to his dis-* "*charge at the expiration of the shortened term.* "* * *

"It would seem plain, therefore, that a subse- "quent statute, which interfered to his *disadvantage* "*with the right of deduction for good behavior to* "*which a convict was entitled, at the time of the* "*commission of the offense,* would have been un- "constitutional and void, notwithstanding the fact "that those acts related, according to their titles, to "the discipline of the State Prison and to that of "jails and houses of correction, and therefore ap- "peared to pertain to prison regulation. To have "taken away the right of deduction for good be- "havior or to have interfered with it to the disad- "vantage of the convict, would have been, in effect, "to lengthen the sentence at the time when it was "committed, and a statute which did that clearly "would have been ex post facto. See Opinion of "Justices, 13 Gray 618; *Kring* v. *Missouri,* 107 U. "S. 232, 27 L. Ed. 510; *Medley, Petitioner,* 134 "U. S. 160, 33 L. Ed. 835; *Thompson* v. *Utah,* "170 U. S. 343, 42 L. Ed. 1061; *Com.* v. *Mc-* "*Donough,* 13 Allen 581; In re *Canfield,* 98 Mich. "644."

It was held in this case that statutes in existence when the offenses were committed secured to prisons convicted of such offenses, "deductions for good conduct and permits to be at liberty as something to which they were entitled *as of right* rather than by favor, for faithful observance of the rules and for not having been subject to punishment, and constituted rights which cannot be taken away or interfered with to their disadvantage by subsequent legislation."

To the same effect see

*State* v. *Tyree,* 70 Kan. 203, 78 p. 525, 3 Ann. Cas. 1020.

In re *Canfield,* 98 Mich. 644, 57 N. W. 807.

In the California Supreme Court, a provision in an Indeterminate Sentence law, vesting in the prison authorities power to determine after the expiration of the minimum term what length of time the prisoner should be confined, was held to be *ex post facto* as to a prisoner convicted prior to its enactment, since it *substituted the discretion* of the board of prison directors for the *statutory right* formerly existing to credits for good behavior during imprisonment.

*Ex parte Lee,* 177 Cal. 690, 171 Pac. 958.

Where a conviction under Volstead Act was obtained before enactment of a State statute, considering such conviction in increasing defendant's punishment for subsequent violations, as provided for in the State act, was held to have imparted to the State act *ex post facto* operation in violation of the Federal and State Constitution.

*People* v. *Pagni,* 230 Pac. 1001, 69 Cal. App. 94.

A case directly in point is that of *State ex rel. Woodward* v. *Board of Parole,* 155 La. 699, 99 So. 534.

There it was held that the right of one sentenced to the penitentiary for life in 1914, when statute permitting parole of life termers was in force, to have his application for a parole under that law considered, is not affected by statute of 1916, excluding a life termer from

the benefits of parole, since to give such laws a retrospective effect would constitute a violation of the constitutional inhibition against *ex post facto* laws, though parole under the act of 1914 was discretionary.

In this case, as in the one *sub judice,* the parole board refused to consider the prisoner's application for parole, because subsequent to the imposition of sentence the act was passed excluding life termers from the benefits of a parole. There, as here, a writ of mandamus was sought, to be directed to the parole board. The relator contended that at the time of the passage of the act excluding life termers from the benefit of parole, he had a vested right to parole eligibility, and that to apply the act to him would render it *ex post facto.* The Attorney-General contended that since the granting of a parole was never a matter of right, but rested in the discretion of the board, depending upon the conduct of the prisoner, relator had been deprived of no substantial vested right.

The Louisiana Supreme Court, following the rule uniformly recognized in the Federal and various State jurisdictions to which reference has been made, held:

> "There can be no doubt but that the right to be "considered for a parole, after the expiration of "one-third of the actual time required to be served, "with the benefit of commutation under other laws "(in his case something in excess of three years), "was a substantial one; for otherwise he would be "compelled to continue at hard labor under the rules "of the penitentiary just three times as long as "would have been the case had the board seen fit, "after the expiration of the limit fixed by the Act "of 1914, to grant him a parole. There can be no "comparison between such a condition, and the "right to be at liberty and pursue a livelihood under "the restrictions of a parole. Of course, the right "was not absolutely vested, in the sense that he was "bound to be paroled; but the privilege of having "his case submitted to the discretion of the board

"at the proper time did exist; whereas, now, it is "entirely taken away, and the board cannot even "consider it under the present law.

"It would seem clear, therefore, that to give the "laws of 1916 a retrospective effect would operate "seriously to his disadvantage, in violation of the "inhibition of the Constitution against ex post facto "laws."

In that case the board of control of the penitentiary in existence when the act of 1914 was passed had been abolished, but its functions with regard to parole were vested in the board of parole created by the Act of 1916, which, as was pointed out, had been divested of jurisdiction in the cases of sentence to life imprisonment. The court held that the existing board of parole should consider and determine the application.

By the overwhelming weight of authority, therefore, the act in question, if given a retroactive effect, would increase the punishment to be suffered by the relators, and would consequently operate to their disadvantage in a substantial manner. At the expiration of the minimum term, less earned commutation thereof, they had an absolute right to release on parole, if the statutory prerequisites as to deportment, fitness to be at large and ability and purpose to live at liberty without violating the law, were established. In that situation the commuted sentence was the only one in existence, and at its expiration the right to release on parole became absolute in the prisoners, and was not dependent upon the exercise of discretion by the parole board.

In State ex rel Murphy v. Wolfer, 127 Minn. 102, 148 N. W. 896, L. R. A. 1915B, 95, this doctrine finds support. There the court said:

"It is well settled that a commutation of a sent- "ence is a substitution of a less for a greater pun- "ishment. After commutation, the commuted sent- "ence is the only one to be considered. After "commutation, the sentence has the same legal "effect, and the status of the prisoner is the same,

"as though the sentence had originally been for the "commuted term. Johnson v. State, 63 So. 163; "Re Hall, 34 Neb. 206, 209, 51 N. W. 750; Re "See-see-sah-ma, 5 Ops. Atty. Gen. 370; Lee v. "Murphy, 22 Gratt. 789, 799, 12 Am. Rep. 563; "ex parte Victor, 31 Ohio St. 206, 208. It should "logically follow that when a prisoner's sentence is "reduced from a life sentence to 'a definite term "other than life,' he is brought within the language "of the statute allowing a diminution of such a "definite term for good time. This view is sus- "tained by decision in Re Hall, 34 Neb. 206, 51 "N. W. 750, and it seems to us correct in principle."

In the note appended to the report of the above case by the editor of L. R. A., we find the following:

"The definition of a 'commutation of a sentence,' "given by the court in State ex rel Murphy v. "Wolfer, is the one that is generally accepted. "Thus, in Bouvier's Law Dictionary the term is "defined as 'the change of a punishment to which "'a person has been condemned into a less severe "'one. This can be granted only by the authority "'in which the pardoning power resides.' This "definition is quoted in American and English "Encyclopedia of Law, and has been stated in vary- "ing forms by the courts in many cases. (See "cases cited in 29 Cyc. 1561, footnote 7.) But "it is also said that *'commutation of imprisonment "'allows a prisoner to acquire, by good behavior, "'a right to take a shorter term of imprisonment "'than that imposed by his original sentence.'* 3 "Am. and Eng. Enc. Law, 365, footnote 7, citing "Abbott's Law Dict."

The function of the respondent board in the instant cases was not judicial, but merely administrative. It was not vested with any discretion. It was directed to ascertain the existence of the prerequisites to the right of parole vested in the prisoners who had complied with the statute, and upon an affirmative finding, the right of the prisoner to release became an absolute one.

In Woods v. State, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915F 531, 538, we find the following:

"The powers conferred on the board of prison "commissioners are not judicial in their nature, but "only administrative. They require the exercise "of judgment and discretion, it is true; but it is "essential that such powers be vested in administra- "tive officers, to a limited extent, at least, otherwise "they cannot discharge any of their duties. Each "time such an officer acts, he must determine whe- "ther the special thing to be done falls within the "line of the powers conferred upon him by law. "This involves a comparison of the terms of the "statute, and the nature of the matter offered as a "duty, and a judgment or decision whether the lat- "ter falls within the former. The clerk of a court "is required to issue an attachment on the filing of "an affidavit, or of a bill properly verified, and the "execution of such a bond as the law demands. Of "the sufficiency of the affidavit and bond he must "judge before he acts. (The opinion gives numer- "ous other similar illustrations.) * * * In all of "these instances—and many more might be given "—the exercise of judgment is required, and in "the last three mentioned a wide discretion. Yet "it cannot be asserted that such acts or decisions "are judicial in their nature.

"As to the extent of the discretion conferred, "the act imposes upon the exercise of the power "of the board of prison commissioners to grant a "parole the condition that such power shall not be "exercised until the prisoner has served the mini- "mum of punishment fixed by law for the crime "committed. When this has been accomplished, the "discretion to grant the parole arises. On first "blush, the discretion seems then unlimited; but "it was without doubt in the mind of the Legisla- "ture that the same principles should control which "were laid down in section 4 as conditions for final

"discharge. That is to say, the board must believe, "from the history of the prisoner and his conduct "during the service of the minimum term, that "during his qualified liberty under the parole he "will probably not violate the law, and, generally, "that his release on parole will not be incompatible "with the interest of society."

In the above case it was also held that:

"The act does not attempt to confer on the board "the power to fix the punishment that any given "crime shall bear. The act itself, in effect, *becomes "a part of every judgment, and the board only one "of a series of agencies for the execution of the "judgment.*"

See, also, State v. Zolantakis, 259 Pac. 1044 (Utah), 54 A. L. R. 1463.

Likewise, the act specifically defining the credits for good behavior, in existence at the date of the judgment against the prisoner, becomes a part of the sentence and inheres in the punishment assessed.

Crooks v. Sanders, 115 S. E. (S. C.) 760, 28 A. L. R. 940.

Under the circumstances here existing, therefore the act in question was clearly an *ex post facto* law.

## POINT III

**A retroactive construction would void the statutes in question as impairing vested rights, and bring them within the prohibition of the Fourteenth Amendment to the Constitution of the United States.**

Section 306 of Chapter 147 of the Laws of 1918 makes mandatory a remission for good behavior from the maximum and minimum terms on the basis therein provided. As we have pointed out, when the minimum term, less earned commutation, has been served, the respondent was required to conduct a hearing to determine the fitness of the prisoner to be at large. Although the act as originally adopted permitted the appearance

of the prisoner before the board, if that body was so minded, a subsequent amendment made the appearance of such prisoner a matter of right. In denying to the relators the hearing and determination which the statute directed, the board deprived them of their liberty without due process of law.

Furthermore, the right to release on parole was an absolute one, if the statutory requirements were met. This is a vested right which subsequent legislation could not lawfully destroy.

"Due process of law," means such acts of government as settled maxims of law and custom sanction and permit; Ex parte Ah Fook, 49 Cal. 402; in the regular course of administration according to the prescribed forms; *Rowan* v. *State,* 30 Wis. 129, 11 Am. Rep. 559; according to the law of the land; *Walker* v. *Sauvinet,* 92 U. S. 93, 23 L. Ed. 678; *Kennard* v. *Louisiana,* 92 U. S. 480, 23 L. Ed. 478.

"Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

*Cooley Const. Lim.* 441.

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."

*Westervelt* v. *Gregg,* 12 N. Y. 209.

This does not necessarily mean judicial proceedings; it may include summary proceedings, if not arbitrary or unequal, as for collection of taxes.

*McMillen* v. *Anderson,* 95 U. S. 37, 24 L. Ed. 335.

It means any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in fur-

therance of the general public good, which regards and preserves these principles of liberty and justice.

*Hurtado* v. *California,* 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232.

In England the requirement of due process of law, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.

*Missouri Pac. R. Co.* v. *Humes* (Mo. 1885), 115 U. S. 519, 6 S. Ct. 110, 29 L. Ed. 463.

See, also, *Anderson* v. *State* (1912), 8 Okl. Cr. 90, 126 P. 840, Ann. Cas. 1914C, 314; *State* v. *Davis* (1916), 39 R. I. 276, 97 A. 818; *Smith* v. *State* (1925), 21 Ala. App. 70, 105 So. 397; *Walrod* v. *Nelson* (1926), 54 N. D. 753, 210 N. W. 525.

"Due process of law" and "law of the land" mean one and the same thing, and mean that one shall hold his life, liberty, and property under the protection of the general rules which govern society.

*Cleveland, etc., R. C.* v. *Backus,* 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

The "due process of law," by which Congress is limited in the Fifth Amendment, and the states by the Fourteenth Amendment, is equivalent to the "law of the land," and is intended to protect the citizen against arbitrary action, and secure to all persons equal and impartial justice under the law.

*U. S.* v. *Yount, 267* Fed. 861.

By "due process of the law" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued

in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

*Hagar* v. *Reclamation Dist. No.* 108, 111 U. S. 708, 4 S. Ct. 663, 28 L. Ed. 569.

Due process is not necessarily judicial process. There is no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question.

*Reetz* v. *Michigan,* 133 U. S. 668, 23 S. Ct. 390, 47 L. Ed. 563.

*Moore* v. *State, supra,* decided by our Court of Errors and Appeals, is a leading case in which the principles here contended for by the relators were applied, and is dispositive of the cases, *sub judice.*

There the court had before it a statute which purported to authorize prosecution and punishment for an offense previously committed, and as to which prosecution and punishment had already been barred by the pre-existing statute of limitations. It was held that the statute was void for two reasons, *viz.*: (1) it sought to divest a vested right; and (2) it violated the constitutional mandate against *ex post facto* laws.

Mr. Justice Dixon, in learned and exhaustive opinion, stated as a general principle, that it is not "within the appropriate sphere of legislative action to pass laws taking away vested rights," and that such were "forbidden by fundamental principle." He quoted Chief Justice Kent's statement that this doctrine was established by a "train of authority, declaratory of the common sense and reason of the most civilized states, ancient and modern."

Justice Dixon then finds this inhibition implied in the declaration of the bill of rights,—"that all men have a natural and inalienable right of enjoying and defending life and property, and of acquiring possession and defending property," and cites the Fourteenth Amendment as an injunction on the states against the wielding of such authority.

Calling attention to the natural and absolute right of the citizen to life and liberty, he declared (p. 210), that,—"life and liberty were entitled to a shield as impenetrable as that of property." He continued:

"But let us see whether the bases upon which the inviolability of property is said to rest, underlie also life and liberty. It is asserted that it is not within the appropriate sphere of legislation to take away vested rights of property without the fault or neglect of their owner; that government exists to guard such rights, not to destroy them. So far as this is true, it is axiomatic; no advocate of free institutions will deny it; none can prove it. I avow the same principle as to life and liberty. * * * The duties are equally obligatory; and we are brought back to the assertion that the rights are alike protected by fundamental principle, an assertion to be either accepted as an axiom or rejected."

Justice Dixon then called attention to the express restraints upon the Legislature, and to the various safeguards enumerated in the Constitution to protect the life and liberty of our citizens. He continued (212):

"Certainly, no such guards are thrown by the organic law around the rights of property, as these with which it protects life and liberty, against the state; and if it can be gathered from that instrument that the Legislature cannot take away from the citizen a title or a defense for property which he has acquired under the law, a fortiori must it be thence deduced that such a power may not be wielded against life or liberty."

He rejected the view of the Supreme Court,—"that it seems to run into the absurd for a criminal to assert an indefeasible right as against the Legislature, not to

be tried or punished for his offense after a specified time."

Rights are vested when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.

*Cooley Const. Lim.* 351.

*Jersey City Presb.* v. *Weehawken First Presb. Church,* 80 N. J. L. 572, 577, 78 Atl. 207.

*Pearsall* v. *Great Northern R. Co.,* 161 U. S. 646, 673; 16 S. Ct. 705, 40 L. Ed. 838.

A right is vested when there is an immediate fixed right of present or future enjoyment.

*Fearne Contingent Rens.,* p. 1 (citing *Pearsall* v. *Great Northern R. Co., supra*; *Marshall* v. *King,* 24 Miss. 85, 90; *Clarke* v. *McCreary,* 20 Miss. 347, 353).

*Stemfeld* v. *Nielson,* 15 Ariz. 424, 139 Pac. 879.

A right is vested when there is "an immediate right of present enjoyment, or a present fixed right of future enjoyment."

4 Kent. Com. 202.

Again, such rights are defined to be,—"rights to which a party may adhere, and upon which he may insist without violating any principle of sound morality."

*Grinder* v. *Nelson,* 9 Gill (Md) 299, 309.

Also as, "the power to do certain actions, or to possess certain things, according to the law of the land."

*Calder* v. *Bull,* 3 Dall. (U. S.) 386, 394, 1 L. Ed. 648.

*Gladney* v. *Lydun,* 172 Mo. 318, 326, 72 S. W. 554, 60 L. R. A. 880.

*Crump* v. *Sayer* (Okl.), 157 Pac. 321.

*Eakin* v. *Raub,* 12 Serg. & R. (Pa.) 330, 360.

Again, as—"The right the person has, in whom it vests, to do certain acts, or to possess, occupy, own, or enjoy, certain things, or to ask, demand, record and receive certain things, according to the law of the land at the time."

*Martindale* v. *Moore,* 3 Blackf. (Ind.) 275, 282.

The state has no power to divest or to impair vested rights, whether such an attempt to do so be made by legislative enactment, by municipal ordinance, or by a change in the constitution of the state. This result follows from prohibition contained in the constitution of practically all the states. Before the adoption of the Fourteenth Amendment there was no prohibition in the Constitution of the United States which would prevent the states from passing laws divesting vested rights, unless these laws also impaired the obligation of contracts, or were *ex post facto* laws; but vested property rights are now protected against state action by the provision of the Fourteenth Amendment that no state "shall deprive any person of life, liberty or property without due process of law."

12 C. J. 957.

In *Board of Commissioners* v. *Forbes Pioneer Boat Line,* 80 Fla. 252, 86 So. 199, we find the following:

> "The difficulty often comes, however, in de-
> "termining what is a vested right in the sense
> "secured by the constitutional guarantee. No use-
> "ful purpose will be accomplished by attempting a
> "general definition or by quoting general definitions
> "given by the authorities. For a lengthy and en-
> "lightening discussion, see Cooley's Const. Lim. (7
> "Ed.) 508, et seq. From this author we quote
> "briefly as follows:
>
> " 'The chief restriction upon this class of legisla-
> " 'tion is that vested rights must not be disturbed,
> " 'but in its application as a shield or protection, the
> " 'term "vested rights" is not used in any narrow
> " 'or technical sense, importing a power of legal
> " 'control merely, but rather as implying a vested
> " 'interest which it is right and equitable that the
> " 'government should recognize and protect, and
> " 'of which the individual could not be deprived
> " 'arbitrarily without injustice.'

"For other definitions see 12 C. J., p. 955, Sec-
"tion 485; 6 R. C. L., p. 308, Section 294.

"In all the definitions in text books, as well as
"the adjudicated cases, the moral aspect of the
"right claimed is given consideration in determin-
"ing whether the right is protected or not, and the
"rule generally announced is that if the claim is not
"morally right, it may be taken away by legislation
"retrospective in its nature. For instance, defects
"in deeds or in acknowledgment of deeds, which
"it would be unjust for one to take advantage of,
"may be cured. Downs v. Blount, 170 Fed. 15,
"31 L. R. A. (N. S.) 1076, and cases cited in
"notes."

As to the moral aspect of the right asserted by the relators, we quote from the opinion of *State* v. *Zolantakis, supra,* where it was held that when a sentence is suspended during good behavior, without reservations, the person affected has a vested right to rely thereon so long as such condition is complied with. In the opinion, the Utah Supreme Court said:

"The purpose of the law permitting the suspen-
"sion of sentence is clearly reformatory. If those
"who are to be reformed cannot implicitly rely
"upon promises or orders contained in the suspen-
"sion of sentence, then we may well expect the law
"to fail in its purpose. Reformation can certainly
"best be accomplished by fair, consistent, and
"straightforward treatment of the person sought
"to be reformed. It would therefore seem, both
"upon authority and principle, that when a sentence
"is suspended during good behavior, without reser-
"vations, the person whose sentence is thus sus-
"pended has a vested right to rely thereon so long
"as such condition is complied with. The right
"to personal liberty is one of the most sacred and
"valuable rights of a citizen, and should not be
"regarded lightly. The right to personal liberty
"may be as valuable to one convicted of crime as

"to one not so convicted, and so long as one com-
"plies with the conditions upon which such right is
"assured by judicial declaration, he may not be
"deprived of the same. Such right may not be
"alternatively granted and denied without just
"cause."

The repeal of a law cannot impair vested rights which have been acquired under it, and the passage of a new law cannot by its retrospective action impair such vested rights.

*Smolen* v. *Industrial Com.,* 324 Ill. 32, 154 N. E. 441.

A "vested right" may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in the Constitution which apply to such rights.

*Crump* v. *Gayer,* 157 Pac. 321 (Okl.), 2 A. L. R. 331.

The crime for which Lindsley was sentenced was committed on June 9, 1917, and the crime to which Ferraro pleaded was committed on May 5, 1918. The Indeterminate Sentence Act was in force when these crimes were committed, and at the time of the imposition of sentence in each case. It was not repealed until 1926. The Act of 1914, fixing the minimum term in cases of the life imprisonment at fifteen years, was likewise in force. This act was amended in 1922 by striking out the provision fixing the minimum term in such cases at fifteen years, and it was repealed in 1926. Chapter 147 of the Laws of 1918, creating the Department of Institutions and Agencies, likewise fixed the minimum term in cases of life imprisonment at fifteen years, and thereafter, and until 1922, there were therefore two statutes containing that provision. So that the right of the relators to parole became vested under the Indeterminate Sentence Act and Chapter 147 of the Laws of 1918.

We repeat that under the statutes the relators had an absolute right to parole upon establishing the statutory requirements, but even though discretion was vested in the parole board, it could not be exercised arbitrarily.

"An appeal to a judge's discretion is an appeal to his judicial conscience. This discretion must be exercised, not in opposition to, but in accordance with established rules of law. It is not an *arbitrary power,* but one which must be exercised wisely and impartially. * * * The term 'discretion' has been defined to be "an impartial discretion, *guided and controlled in its exercise by fixed legal principles;* a legal discretion to be exercised in conformity with the *spirit of the law,* and in a manner to subserve and not to defeat the ends of substantial justice." See 3 Words and Phases, 2098.

'Men's rights, both of person and of property, are regulated by fixed, legal principles. In passing upon them, whether at law or in equity, the court must regard these principles. It has neither discretion nor power to do otherwise."

*Griffin* vs. *State,* 12 Ga. A., 615, 77 S. E. 1080.

## POINT IV.

**The Supreme Court erred in its conclusion that relators-appellants were not entitled to the writs sought.**

The Supreme Court, in its opinion in the Lindsley case (Case 25; 151 Atl. 294), held that inasmuch as the relator-appellant had not, either when he applied for parole, or when he made application for the writ of mandamus, served the full minimum term of fifteen years, he was not, under the Indeterminate Sentence Act, entitled to be considered for parole, and it therefore refused to consider said relator-appellant's contention that Chapter 50 of the Laws of 1922 and Chapter 214 of the Laws of 1926, if held to apply to said relator-appellant, were *ex post facto,* and therefore unconstitutional and void.

To so hold it was necessary to conclude that the Indeterminate Sentence Act and the pertinent provisions of the Institutions and Agencies Act were not in *pari materia,* and this the court did in the following language:

> "We do not consider that the statutes are sufficiently in *pari materia* as to relator to justify this method of construction. They represent different schemes and different legislative conceptions. A marked distinction between them is that the former is impressed with a mandatory aspect and the latter with a discretionary aspect which, in each instance, is lacking from the other. The Indeterminate Sentence Act very clearly distinguishes the life sentence from the maximum-minimum sentence."

In this conclusion, we respectfully submit, there was error. When divers laws are made relating to one subject matter, the whole must be considered as constituting one system, and mutually connected one with another.

> *West Shore R. Co.* vs. *State Board of Taxes and Assessment,* 92 N. J. L. 332, 104 Atl. 335, Aff. 92 N. J. L. 648, 106 Atl. 893.

Where there are different statutes in *pari materia,* though enacted at different times, and not referring to each other, they are to be taken and construed together as one system, and as explanatory of each other.

> In re Brook's Will, 90 N. J. Eq. 549, 107 Atl. 435.

It is a familiar rule that statutes in *pari materia* should be construed together.

> *Kemp Lumber Co.* vs. *Howard,* 237 Fed. 574.

No part of the previously existing law on the same subject is rendered inoperative by a later law, unless no other construction of the later law is reasonable.

> *Commissioner of Immigration of Port of New York* vs. *Gottlieb,* 265 U. S. 310, 44 S. Ct. 528, 68 L. Ed. 1031 (reversing 285 Fed. 295, but sustaining lower court on this point).

We respectfully deny the premise that the pertinent provisions of the Institutions and Agencies Act are impressed with a "discretionary aspect", which the Indeterminate Sentence Act does not possess. As heretofore contended, the function of the respondent Board was not judicial, but merely administrative. It was not vested with any discretion. The statute prescribed the conditions which would entitle the applicant to parole, and the function of the respondent was to ascertain the existence of the statutory prerequisites to the right of parole vested in the prisoners who had complied with the statute. There being an affirmative finding, the right of the prisoner to release became an absolute one.

> *Woods* vs. *State, supra* (the applicable part of which is quoted on page 27 of this brief).

> *Griffin* vs. *State, supra.*

There is no distinction in the Indeterminate Sentence Act between the life sentence and the maximum-minimum sentence with respect to the right of prisoners to parole on the expiration of the minimum term, if they meet the other requirements of the act.

But assuming that the Institutions and Agencies Act is comprehensive within itself, as held by Justice Case, the court, we respectfully submit, fell into error in denying relief to the relators-appellants.

In answer to the contention of relators-appellants that, if applied to them, Chapter 196 of the Laws of 1927, which repeals the provision of Section 205 of the Institutions and Agencies Act, fixing the minimum term in the case of a life sentence, is an *ex post facto* enactment, Justice Case made a distinction between credits for good conduct earned *before* and *after* March 28, 1927, when Chapter 196 of the Laws of 1927 became effective. He points out (referring to the Lindsley case), that the stipulation of facts does not show whether the earned commutation includes any credits allowed for the period subsequent to March 28, 1927, and he states that the court feels "obliged to assume that the stipulation includes an allowance of credits subsequent to March 28, 1927, and down to July 1, 1928."

The court did not express the opinion as to whether the prisoner has a vested right to the allowance of credits earned before the repealer took effect, but as to those accruing subsequent to the enactment of the repealer, it held that:

> "No substantial reason is advanced why an administrative measure of prison discipline, enacted after the commission of the crime, may not at any time be altered or repealed with respect to unearned credits. The issue actually presented is whether a legislative act graciously setting up a system of remissions, to be credited at intervals, becomes so immutably a part of the organic law that a subsequent statute discontinuing the practice is, as well prospectively against unearned credits as retrospectively against those already granted, *ex post facto* so far as concerns a prisoner whose crime and conviction had occurred and whose sentence had been imposed before the passage of the substantive act but whose term had not expired and whose availability for parole had not matured at the time of the repeal."

Our answer to this proposition is twofold; first, that it is based either upon the false premise that Section 306, providing for allowances of time for faithful performance of assigned labor, orderly deportment and good conduct, under which the relators-appellants earned commutation of their respective sentences, was in terms repealed by Chapter 196 of the Laws of 1927, in which event the repealer would, we insist, unconstitutionally deprive them of a vested right to a commutation of their respective sentences for good behavior under this section; or that, secondly, Chapter 196 of the Laws of 1927 applies to relators-appellants, and thus they are deprived of substantial rights guaranteed by the constitutional provisions hereinbefore referred to.

Section 306 of the Institutions and Agencies Act is still a part of our statute law, and there is no enactment indicating a legislative purpose to deprive the relators-appellants of such commutation of their respective sentences as they have earned under the section allowing credits for good behavior. So therefore, the conclusion of the lower court is necessarily rested upon the proposition that Chapter 196 of the Laws of 1927, repealing the minimum term provision, applies to relators-appellants, for manifestly if it did not they would be entitled to deductions of time from the minimum term for good behavior under section 306.

Section 306 of the Institutions and Agencies Act was a re-enactment of the existing statute dealing with this subject, except that it increased the time allowed for good conduct.

4 Comp. Stat. 4916, Sections 10-11.

The conclusion of the Supreme Court, therefore, is, in effect, that the repealer of the provision fixing a minimum term in the case of a life sentence (Chapter 196 of the Laws of 1927), applies to the relators-appellants, and is a constitutional enactment. Obviously, the section allowing credits for good behavior could not apply to a prisoner serving a life sentence unless the provision

fixing the minimum term at fifteen years also applies to him. For the reasons heretofore stated, we insist that this conclusion of the Supreme Court is erroneous in law, and that the relators-appellants are entitled to the relief sought.

That the relators-appellants have, respectively, served the minimum term, less earned commutation thereof, is conceded by the Attorney-General. The facts are not in dispute. Section 306 of the Institutions and Agencies Act provides that for good behavior and right conduct, as therein set forth, there shall be a remission to the prisoner of the time therein specified from the maximum and minimum term of his sentence. The act in force before the adoption of this statute, as we have pointed out, granted a remission of time from the sentence for like good conduct by the prisoner. The stipulation of facts in each case establishes the right of each prisoner to release if the acts fixing the minimum term at fifteen years in the case of a life sentence still apply to them.

Justice Case observes that Chapter 147 of the Laws of 1918 (the Institutions and Agencies Act) "did not come into existence until after the crime had been committed and the sentence imposed", and in the court below the Attorney-General contended that this act can have no application to relators-appellants because each was sentenced for a crime committed before the enactment of this statute.

Section 206 of the act of 1918 provides that the act shall apply to all persons "*heretofore or hereafter committed* to any correctional institution as classified in this act."

The power of the Legislature to enact legislation reducing the punishment for crimes theretofore committed, or altering to his advantage the situation of a prisoner or a person charged with a crime previously committed, has never been questioned. Such legislation is not *ex post facto* within the meaning of the constitutional prohibition.

*People* vs. *Hayes,* 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830.
*Dolan* vs. *Thomas,* 12 Allen (Mass.) 421.
*McInturf* vs. *State,* 20 Tex. App. 335.
*State* vs. *Kent,* 65 N. C. 311.

## POINT V.

**As to relators-appellants' right to appeal from orders discharging rules to show cause.**

The relators-appellants have appealed from the orders discharging the rules to show cause in accordance with the provision of Section 6 of the Mandamus Act, which permits the removal of such proceeding into this court if the rule to show cause is discharged as the legal consequence necessarily resulting from a determination by the court of the question of the constitutionality of any statute, such question being the main issue brought before the court and the principal ground of the litigation.

3 Comp. Stat. 3216.

The relators-appellants squarely presented to the court below the constitutionality of the statutes in question. That was the sole issue. There was no disputed question of fact. It was conceded that if the repealers of the minimum term provision did not affect the relators-appellants, they had, respectively, served the minimum sentence, and were entitled to invoke the provisions of the repealed statutes.

We reiterate, as contended under Point IV, that the conclusion of the Supreme Court was in effect that Chapter 196 of the Laws of 1927 applied to the relators-appellants, and was a constitutional enactment. The court refused to express any opinion on the constitutionality of the repealers of a similar provision in the Indeterminate Sentence Act, and that question still remains undetermined.

In the syllabus Justice Case stated his ruling to be that Chapter 196 of the Laws of 1927 was not *ex post facto* as to commutation credits not earned, at the time of its passage, by a life term prisoner whose crime was committed and sentence was imposed before the effective date of Chapter 147 of the Laws of 1918.

It is conceded that each of the relators-appellants has served the minimum term, less earned commutation thereof, and standing in the way of their release on parole are the repealers which we insist deprive them of their constitutional rights.

It is therefore obvious that the relators-appellants, in taking their appeals, have followed the course laid down in the statute.

## Conclusion

In conclusion, we respectfully urge again the wisdom and necessity, for the guidance and enlightenment alike of the respondent Board and the prisoners whose rights are now clouded in doubt, and the promotion of the due administration of justice, of a judicial determination of the full extent and scope of the powers and duties of the Board, and the rights of all such prisoners sentenced for offenses committed before the repealer of 1926 was enacted. Everyone having a duty or right in the premises is anxiously awaiting, and entitled to, a judgment that will finally dispose of all the matters in controversy. A judicial declaration that the respondent must consider and determine the right of these prisoners to parole, without more, would not entirely clarify the situation. The position of the Attorney-General seems to be that if the respondent has the power of parole in these cases, it is vested with a broad discretion, uncontrolled in its exercise by legal principles, and that the prisoner, notwithstanding a showing of the statutory prerequisites, has no absolute right to parole. The relators-appellants insist that if the Board is vested with discretion, it is not an arbitrary power, but one which must be exercised in

accordance with the letter and spirit of the law, and in a manner to subserve and not defeat the ends of substantial justice. This situation calls for a judicial definition of the power of the respondent Board, to the end that none of these prisoners shall be arbitrarily deprived of a substantial right.

HARRY HEHER,
*Attorney and of Counsel with*
*Relators-Appellants.*