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Study of Wage Payments to Prisoners as a Penal Method

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A STUDY OF WAGE PAYMENT TO PRISONERS AS A PENAL METHOD

(Continued)

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CHAPTER III

CONSTITUTIONALITY OF THE LAWS PROVIDING COMPENSATION FOR PENAL LABOR

The constitutionality of the laws providing that prisoners be paid for their labor has been rarely called in question as a principle. This may be due to the fact that it is generally considered as a kind of gratuity on the part of the state, and not that the state is entering into the relation of debtor and creditor with its offenders.

The only reference to the subject contained in the "American Digest of Cases" is given below. In fact, this is the only case that has been appealed to a higher court. It shows that the legislature violated a provision of the constitution. It virtually made a new law by amending a law already in existence. The opinion of the judges reversing the decision of the lower court is interesting because it is the only case of the kind on record.

(*Board of Penitentiary Commissioners* v. *Spencer et al.* Decided May 24, 1914. Appeal from Franklin Court. Opinion of the court by Judge Carroll Reversing. State of Kentucky.) "The appellee, Louis Spencer and several other convicts serving terms of imprisonment in the Kentucky State Reformatory, in behalf of themselves and other convicts, brought suit against the Board of Penitentiary Commissioners, asking a mandamus to compel the Board to set apart and place to their credit as convicts certain sums of money to which they asserted they were entitled under an act passed by the Legislature during the session of 1910. The lower court granted the relief prayed for, and the Board of Penitentiary Commissioners appeal.

"On behalf of the Board several grounds are assigned why the judgment of the lower court should be reversed, but as we have concluded that

the objections to the validity of the act under which the relief was sought and granted is well taken, it will not be necessary to do more than state the reasons that have influenced us in coming to this conclusion.

"Section 51 of the Constitution provides: No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, and no law shall be revised, amended, or the provision thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred shall be reenacted at length.

"The objection to the act of 1910 is found in the failure of the Legislature to conform the act to the mandatory requirements of this section of the Constitution. The title of the act reads: An act to amend an act entitled 'an act to create a Board of Penitentiary Commissioners and regulate the penal institutions of this commonwealth,' which became a law March 5, 1898. The act then reads: Be it enacted by the General Assembly of the Commonwealth of Kentucky; Section 1: That an act entitled 'An act to create a Board of Penitentiary Commissioners and regulate the penal institutions of the commonwealth' be amended by adding after section 1 of said act the following. Then follows a section styled section 1a, providing in substance that the Board of Penitentiary Commissioners are authorized to convert one of the two penitentiaries into a penal institution to be known as the Kentucky Penitentiary in which shall be incarcerated all convicts of a certain class. In the other penitentiary which was to be known as the Kentucky State Reformatory, there was to be incarcerated another class of convicts.

"After providing in another paragraph for the training and education of the convicts, the last paragraph, and the one involved on this appeal, authorized the Board to place to the credit of each prisoner such an amount of the average per capita earnings of the inmates as the Board might deem equitable and just, taking into consideration the character of the prisoner, the nature of the crime for which he was imprisoned and the general deportment; the granting of this authority being followed by directions relating to the manner in which the fund accruing to the credit of the prisoners shall be set apart and distributed.

"Another paragraph authorizes the Board to enter into agreements with the contractors for the prison labor for such modification of existing contracts as will enable the Board to carry out the provisions of the act. Section 2 merely repeals all acts and partial acts in conflict with the act.

"At the threshold of what we have to say it might be well to observe that this court has no disposition to give a narrow or technical construction to the section of the Constitution under consideration, or the construction that will make it difficult or impracticable for the Legislature to phrase or construct titles or acts that will not be obnoxious to this provision of the Constitution. The section should be liberally construed so as not to hinder or embarrass the Legislature in its efforts to enact laws, but at the same time a construction so loose as to virtually nullify the section, which is mandatory in its terms, should not be adopted.

"The Constitution is not a technical instrument and should not be so construed as to defeat the substantial purpose of its adoption as the organic

law of the state. It was intended to operate upon and regulate the practical matters that are continually presenting themselves in governmental affairs, and generally speaking, the language employed is simple in expression and free from ambiguity. But, of course, when any of its sections are attempted to be applied to any one of the multitude of things constantly coming up, there naturally and reasonably come into existence, in company with these attempted applications, differences of opinion as to the meaning of certain provisions, and this unavoidable difference of opinion has given rise to much litigation. But this, in more or less degree, is true of every law that has ever been enacted as well as every contract dealing with private rights that has ever been written.

"The section now under consideration, however, is so sharp and readily understood that it will be not difficult to so construe it as to render it an easy matter for the Legislature to observe its provisions. But notwithstanding this, the number of legislative acts in which its provisions have been disregarded is surprising. Time and again this court has found it necessary to declare legislative acts invalid on account of fatal defects arising under this section, and time and again it has, with painstaking care, endeavored to point out the necessity for a substantial observance of its requirements and fully explain, if needed explanation was necessary, how they might be complied with. So often has this been done that it would seem superfluous to repeat what has been said, especially in view of the fact that under all the opinions of this court this act must be adjudged insufficient.

"It might also not be out of place to observe again that it is not either the duty or the pleasure of the court to interfere with the freedom of the Legislative Department or to attempt to control or restrain its activities, unless it appears that the Legislature is forbidden by or conflicts with or violates some provision of the Constitution. We fully appreciate the fact that the Legislature is at liberty, so far as the Constitution of the state is concerned, to enact such laws under such titles as its judgment dictates, subject to the single limitation that they do not disregard in some material ways the restrictions imposed by the Constitution, the bounds of its authority as marked out by the people in the Constitution. This court, in its judicial capacity, has no authority and no disposition to interfere with the Legislature of the state or to pass judgment on the propriety or wisdom of the laws that it may enact.

"But to the judicial department of the state has been committed the authority to save the Constitution from being ignored or disregarded by individuals and collections of individuals, as well as by other departments of the government, and when it is made plain to the court, that the Constitution has been ignored or disregarded, its duty to interpose its authority is as extensive as the exigencies of the case may require.

"It is also true that this supervising power and large jurisdiction is not conferred by any express grant of the Constitution, but it has become so firmly established as a part of the jurisprudence of the state that no thoughtful person can be found to question it. It has been exercised by this court from the very beginning of the state, always, however, with reluctance and never unless imperatively demanded by a sense of duty

that could not be set aside without disregarding the obligations assumed on taking the office.

(Cases are cited in which these principles have been acted upon, but they have no bearing upon the question in hand and are for that reason omitted.)

"And it is the spirit expressed in these cases and actuated by the conception of its power and duty as therein set forth, that this court has always approached the consideration of cases, which imposed upon it a necessity of setting aside a legislative act.

"The title of this act expressly declares that it is 'An act to amend an act entitled "An act to create a Board of Penitentiary Commissioners and regulate the penal institutions of this commonwealth," which became a law March the 5th, 1898,' and then the act immediately proceeds to amend the act of March 5, 1898, by adding to it a new section styled '1a' leaving the whole of the act of 1898 in effect. The Constitution expressly declares that no law shall be amended by reference to its title only, but that so much thereof as is amended shall be re-enacted and published at length. This mere statement would seem sufficient to demonstrate that the title of this act flagrantly disregards the provisions of the Constitution referred to.

"This proposition is so plain that the only argument advanced in support of the act is that it is not in fact an amendment to the act of 1898 and creates new rights and confers new authority, no reference to which was made in the act of 1898. Therefore, it is said the sufficiency of the act is not to be measured by section 51, but that the title, as well as the act, should be treated as new legislation.

"The conclusive answer to this argument, it seems to us, is that the Legislature did not treat this act as a new act, but saw proper to style it an amendment to the act of 1898.

"If the Legislature had, in a separate act, with an appropriate title, invested the Board of Commissioners with the authority conferred by this act, then the arguments of the consel would be well sustained. But in determining what the Legislature intended to and did do, and for the purpose of ascertaining whether it intended to amend the old law or enact a new one we must of necessity look to the title and the body of the act, and when we do this there is no difficulty in determining what the Legislature intended and did do. It is said in so many words that it intended to and did by this act amend the act of 1898, and to further make plain this intention, it did amend the act of 1898 by a mere reference to the title of that act, without setting forth, as required by section 51, the act that was to be amended, or so much as a single word of it, although all of it was left in force.

"In view of the situation the question is directly presented whether the Legislature can, in the broadest possible way, ignore section 51 of the Constitution and treat its requirements as of no moment. We must either uphold the act and say the Constitution does not mean what it plainly says, or else declare the act invalid. These are the only alternatives presented. If this act should be sustained, it is plain that the Legislature will not only be authorized but invited to amend by its title any act that it thought proper to so amend, and presently we will have the same situation that influenced

that body to incorporate into the present Constitution so much of section 51 as we are now considering.

"To say that this act does not boldly violate section 51 would be to say that the words of the section have no meaning or effect and that a section of the Constitution that in a number of cases has been declared mandatory, has no more force than a Legislative act that each succeeding Legislature may amend or repeal at pleasure. A decision like this will virtually destroy the influence of the Constitution as a controlling guide and place a restraint upon the conduct of the people and their political agents and leave them free from the limitations that it imposes. This is putting the matter in a strong light and yet it is only stating that which a comparison of the act with the section of the Constitution shows to be true. This part of the section has, of course, no application to acts that do not purport to revise, amend, or extend another act or law. When the Legislature comes to enact new law under appropriate titles, its power is not in any manner limited by this provision, and it may act entirely independent of and without reference to it. Of course, many laws that are enacted by the Legislature touch in some way existing laws either by amending, extending, or repealing them, but notwithstanding this, the Legislature, by a new act that does not purport in its title or body to amend, revise or extend an existing law may in fact revise, amend, or extend, free from the control of section 51, and this has often been done.

(Instances cited of amendments which do not violate section 51.)

"With these expressions of views, it follows that the judgment of the lower court must be reversed, with directions to dismiss the petition, and it is so ordered. The whole court sitting."[99]

The opinion of the Attorney-General of the State of Texas as to the unconstitutionality of the Legislative Act providing for the payment of prisoners in that state is summarized below:

The attorney held that the bill violates the provisions of section 3, article 1; section 51, article 3, and section 6 of article 16, of the constitution of Texas, in that it seeks to give convicts a special interest in public property, and in that the same constitutes the making of a grant or appropriation of public money or property to individuals or a class of individuals for private purposes.

The principal part of his opinion is as follows:

"The people of Texas have invested millions of dollars of their joint funds in the acquisition and maintenance of a vast property for the use of their prison system. Every citizen of the state has an equal interest in this property.

"The act of the Legislature under consideration not only gives one citizen or class of citizens excessive rights in this property and so reduces the rights of the remaining citizens therein; it even says that a class of

[99]Reports of civil and criminal cases decided by the Court of Appeals of Kentucky, Vol. 159, Ky. Repts. containing cases decided from 14, 1914 to October 1, 1914, pages 255-270.

men who have become so dangerous to society as to require segregation, and who through their voluntary conduct have forfeited to society the dearest rights of citizenship, and citizenship itself, shall, by virtue of the self-same conduct and the procedure affecting its discovery, be vested with special and exclusive interests in the public property much higher than, and derogatory of, the rights of the citizens themselves therein. The state holds the title to this property for the citizenry; and to the empty right of ownership by citizenship is added the obligation to maintain the property by taxation when necessary; but the usufruct of the property is given to the men who by reason of their war upon society have lost their status and station as citizens.

"The act expressly declares that in ascertaining the proceeds of the prison system over and above the cost of maintenance and operation, the Prison Commission shall not consider nor charge any interest upon the value of the prison system. The proceeds of the prison system, net or gross, are inseparably connected with the productive power of the people's investment in the prison property. The net proceeds of the system's business does not measure the value of the convict's labor. Labor is but one element of production; capital is another; the produce measures the productive value of both combined, and neither separately. To say that the convicts shall receive the net results of this joint application of labor is to say that the convict shall receive as a gratuity a portion of the public property because the investment and its production belong to the state.

"It seems clear to us, and we hold, that the attempt of the Legislature through the bill to give convicts a usufructary interest in public property is unconstitutional and void because in contravention of the letter and spirit of Section 3 of our Bill of Rights, wherein it is declared:

" 'All freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.'

"Returning to the question of the power of the Legislature to compensate a convict by distributing to him out of the net proceeds of the prison system an amount of money equal to the value of his labor, as provided in the bill, we hold that this cannot be done.

"Section 51 of Article 3 of the Constitution of Texas provides:

" 'The Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever . . .'

"Section 6 of Article 16 of the Constitution of Texas provides:

" 'No appropriation for private or individual purposes shall be made. A regular statement, under oath, and an account of the receipts and expenditures of all public money shall be published annually, in such manner as shall be prescribed by law.'

"In their bearing upon the questions here involved, we regard the foregoing constitutional provisions as meaning, in the substance, the same thing. If the profits or revenue arising to the state by reason of the operation of the prison system is 'public money,' then clearly the bill makes a grant or authorizes the making of a grant of 'public money' to an individual or association of individuals in contravention of Sec. 51 of

Art. 3; likewise it makes an 'appropriation for private or individual purposes' contrary to the provisions of Sec. 6, Art. 16. Principle and authority unite to force the conclusion that this revenue is 'public money.'

"Involuntary servitude as a punishment for crime whereof the party shall have been duly convicted is authorized by the Constitution of the United States—Art. 3, paragraph 1—and by the Constitution of Texas—Harris' Constitution—page 114. Under the authority of the Constitutions, the legislature of this state at an early day enacted what is now Article 72 of the Penal Code, which reads as follows:

" 'Whenever the penalty prescribed for an offense is imprisonment for a term of years in the penitentiary, imprisonment at hard labor is intended.'

"This provision of law has never been repealed and is in force now. The state thus acquires an ownership in the services of all persons convicted of crime and duly sentenced therefor, which guarded by certain humanitarian principles, is treated and protected as valuable property—cases cited.

"In the case last cited, it is said:

" 'The first object of punishment is the protection of society; the reformation of prisoners is only subsidiary and incidental to this. Their conviction has subjected them to a constitutional, involuntary servitude; *and their labor and the proceeds of it belong to the state.*'

"The express declaration of our own Constitution supports the reasoning of the cases cited above.

"Section 3 of Article 16 provides:

" 'The Legislature shall make provision whereby persons convicted of misdemeanors and committed to the county jails in default of payment of fines and cost, shall be required to discharge such fines and costs by manual labor, under such regulations as may be prescribed by law.'

"There can be no doubt, therefore, that the labor of those convicted of misdemeanors is public property. If the labor of a misdemeanor convict is public property, how can it be said that the labor of the felon is not of the same character?

"Section 24 of Article 16 declares that:

" 'The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures, and convict labor to all these purposes.'

"This provision of the Constitution makes no distinction between the labor of convicts of the different grades and, since it commands the Legislature to provide for the utilization of fines, forfeitures and *any or all convict* labor in the construction of public works, it clearly and directly recognizes the labor and its proceeds as belonging to the public. Again, this and other constitutional provisions gives the Legislature the same power over the disposition of *fines* and *forfeitures* as over the disposition of convict *labor,* and that *fines* belong to the public is not even an open question. Speaking of *fines,* Justice Stayton of the Supreme Court, in the case of *N. & T. C. Ry. Co.* v. *Harry & Bros.,* 63 Tex. 261, said:

" 'Section 24, Article 16, of the Constitution evidently refers only to such fines and forfeitures as under the law may inure to the public; such as fines imposed as punishment for crime . . .'

"And in the case *Ex Parte Smythe,* 120 S. W. 201, the Court of Criminal Appeals said:

" 'It clearly follows that, when the fine is imposed, said fine becomes the money of the State of Texas.'

"In the case of *Williams* v. *Middlesex County,* 4 Metc. 78, the Supreme Judicial Court of Massachusetts said:

" '. . . We think that this provision for payment to the convict was intended to be in the nature of a gratuity, to be paid for *services which he was required to perform in execution of his* sentence, independent of any such allowance in money.'

"Speaking of the pardoning power of the Governor, the Court of Criminal Appeals in the case of *Ex Parte Mann,* 46 S. W. 829, said:

" 'His pardoning power or his power to remit fines, forfeitures, and penalties, can go no further than the *public may be interested.*'

"The public is interested in all punishment for crime by fine or by imprisonment at hard labor; it is interested not only in the *confinement* of the prisoner, but in his *labor* as well.

"Convict labor being public property, that its proceeds cannot be given away by the Legislature seems apparent from the express provisions of Section 51, Article 3; Section 6 of Article 16, and Section 3 of Article 1 of the Constitution.

"But the vice of the bill under consideration, from a legal standpoint, strikes deeper than the mere attempt to reward the convict himself for good behavior; it goes further and attempts in a measure to compensate the members of his family for the deprivation of the convict's services. We might grant that the convict himself in working out his sentence performs a public service; we might go further and grant that the convict himself can be compensated for his own labor performed in the execution of his sentence; and yet with these admissions, the bill would be clearly unconstitutional because it goes further than seeking to compensate the convict himself for his own services, and provides a gratuitous donation to individuals other than convicts. That this cannot be done is conclusively established by the decisions of the Court of Criminal Appeals of this state.

"There is still another respect in which the effect of the act of the Legislature under consideration amounts to the granting away of public property and public funds for private use. By virtue of the terms of Chapter 74 of the acts of the 30th Legislature, and by virture of the terms of Chapter 24 of the acts of the 31st Legislature 'all of the net revenues and income which may be derived or received' by the Board of Prison Commissioners 'from year to year from any and all sources whatsoever, and remaining after the payment of the current expenses and necessary improvement of every character which may be incurred by said Board or under its direction, pursuant to law, in such current year are pledged to the payment of twenty bonds, each for the principal sum of $10,000.00, bearing interest at the rate of 5 per cent per annum, and known as the Penitentiary Railroad Bonds. These bonds and interest coupons belong to the permanent school fund of the state. As a matter of course, the permanent school fund, together with all securities held by it, is public property, and if the pledge of the net revenues of the

prison system is a valid security for the payment of the railroad bonds, then there can be no question but that any act of the Legislature which directly or indirectly destroys this particular security, destroys public property.

"The act of the Legislature under consideration diverts the net revenues of the system from the payment of these bonds and interest to a gratuituous distribution amongst the convicts and their relatives, and as stated before, if the bonds were held by private individuals, there can be no doubt but that this would be an unconstitutional diversion. It is unnecessary in this connection to decide whether or not the permanent school fund and the custodians thereof would stand in the same position that the private holders of such bonds would occupy. It is sufficient for the condemnation of this act to say that by such a diversion of the net revenues the public's interest in the permanent school fund is impaired, and to that extent a portion of public property and of public funds are sought to be donated as a gratuity to particular individuals, or a class of individuals for private purposes, and not in consideration of public services.

"It will be noted in this connection that the act is *ex post facto* in effect as applied to those convicts who are now serving their terms in the penitentiary, and if we should be in error upon the proposition that the appropriation is not made in consideration of public services as to those who may in the future become convicts, still it certainly is true that those who have already been convicted of crime and are now serving the execution of their sentences, will not and cannot, perform public services in return for the compensation. Their status has been fixed by pre-existing law; by pre-existing law they have been condemned to serve terms in the penitentiary, and to perform hard labor throughout such terms. An act of the Legislature of the kind under consideration passed after their commitment, if valid, would work an amendment of the judgment of a court rendered in due course, and establishing their rights and obligations. It is not possible, therefore, that those who have heretofore been convicted could return a public service in consideration of the appropriation, but on the other hand, the statute, if effective, would work a commutation or a lightening of their sentences.

"We hold, therefore, that the act of the 33rd Legislature under consideration, is unconstitutional and void, in that it violates Section 3 of the Bill of Rights by giving persons convicted of crime and sentenced to the penitentiary, a special and exclusive right and privilege in public property not in consideration of public services.

"And that said act, together with that portion of the existing prison law, which seeks to authorize the payment of per diem compensation to convicts for good behavior are unconstitutional and void as being in contravention of Section 51 of Article 3, and Section 6 of Article 16 of the Constitution, because said enactments seek to make an appropriation or grant of public funds to an individual or association of individuals for private purposes.

"The state has a legal right to imprison a person convicted of crime and to take the products of his labor.

"There are two elements in each judgment or decree of the court

consigning a committed person to the penitentiary which operates in favor of the state and adversely to the defendant. They are:

(a) The state secures the right to imprison the felon for the period of time found by the jury.
(b) The state secures the right to place the convict at hard labor for the period of time named in the jury's verdict and to retain the proceeds of that labor.

"To be briefer still, the state under the judgment obtains the right to make the convict:

(a) A prisoner; and,
(b) A slave.

"The convict, by the judgment and decree of the court, loses:

(a) His freedom; and, (b) the proceeds of his labor.

"Such is the legal effect of the judgments and decrees by which the state holds the four thousand convicts in her penitentiaries at this time. This character of right so obtained by the state is one which has come down to us along with the other principles of our government from time immemorial.

"These rights of the state are vested rights under the Constitution, and may only be interfered with, ameliorated or lessened by an exercise of the pardoning power, which resides alone in the Governor and may not be interfered with in any manner by the legislative department of the government.

"The present bill would fix the rights of the state as follows:

(a) To imprison the convict (b) at hard labor, (c) the proceeds of which labor shall not be the property of the state, but shall be the property of the convict or his relatives.

"The result of the enactment of this law then would be, as to the four thousand convicts already in prison, to amend the judgments sentencing each of said convicts to prison and to destroy the rights of the state to the extent of bestowing upon the convict or upon his relatives all the proceeds of his labor exclusive of his cost and maintenance, and of taking such proceeds from the state. If it be said that the bestowal of the proceeds of the labor of the convict upon himself or upon his relatives is an amelioration of the punishment, then the act of the Legislature has the effect of bestowing upon each convict now in prison a pardon and commutation of sentence to the extent specified. In other words the present act, in so far as the convicts already in the penitentiary are concerned, is an invasion upon the pardoning power of the Governor and an encroachment upon the executive authority, because it changes, modifies and ameliorates the punishment prescribed by the judgment of the court, and undertakes to substitute a new and different punishment therefor for the crime to that provided by the existing law at the time the convict received his sentence. It is a clear legislative encroachment upon the executive authority of the Governor to issue pardons and grant commutations of sen-

tence, and as such, under the authorities we have heretofore cited, is, as to all convicts in prison, unconstitutional and void. In any event, House Bill No. 18 proposes a change in the punishment prescribed by law at the time each of the convicts now incarcerated in the prison was convicted, and as such, is, as to each of the convicts, retroactive and in violation of the Constitution of the state.

"Upon examining House Bill No. 18 it will be found that the provisions there made for disposing of the funds of the prison system are entirely inconsistent with the provisions of Section 2 of Chapter 57 providing for the payment of interest and creating a sinking fund out of the proceeds of the prison system, and therefore under the plainest and most familiar rule of construction House Bill 18 would be held to repeal said Section 2 of Chapter 57."[100]

[100]Opinion passed upon and approved by the department of the Attorney General, August 22, 1913.

(To be Continued)