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## Criminal Law—Good Time Statutes—*Menard v. Nichols*

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Student Contribution

**Criminal Law — Good Time Statutes — Menard v. Nichols**

Since the primary purpose of incarceration in prison is the rehabilitation of the prisoner, abuses resulting from sentencing criminals to definite and fixed sentences made it necessary to modify the law in some manner. In 1817 New York passed a "good time" law, empowering the "inspectors of the prison to reduce the sentence of any convict sentenced to imprisonment for not less than five years, one-fourth, upon certificate of the principal keeper and other satisfactory evidence, 'that such prisoner has behaved well. . . .'"<sup>1</sup> Pennsylvania tried a system as early as 1790 whereby a prisoner might be released by the judge who sentenced him if he showed signs of reformation.<sup>2</sup> As a historical innovation and an ingenious philosophy which greatly influenced the American parole system, the system for preparing convicts for their return to society devised by Alexander Maconochie stands out above all others. Convicts were passed through various grades of servitude, without a definite sentence, each carrying with it an increasing degree of responsibility until that stage was reached where the prisoner could be released under supervision, or with certain restraints.<sup>3</sup> By 1868 there were 24 states with good time statutes, and every state had some provision for release on good time by 1940.<sup>4</sup>

The general principle of the good time laws is that a prescribed body such as a parole board is authorized to release the prisoner in less time than the sentence imposed upon a finding that the prisoner has met prescribed standards of good behavior. A usual procedure is to allow a credit of one month for the first year, two months for the second year, and so on, up to six months for the sixth and each succeeding year.<sup>5</sup> Being statutory, good time laws are subject to many variations.<sup>6</sup>

<sup>1</sup> IV Survey of Release Procedures 15.

<sup>2</sup> McKELVEY, AMERICAN PRISONS (1936).

<sup>3</sup> *ibid.*

<sup>4</sup> SUTHERLAND, PRINCIPLES OF CRIMINOLOGY (5th ed. 1955).

<sup>5</sup> Colo. R.S. § 105-4-4 (1953).

<sup>6</sup> Another of the more typical statutes is that of California; Cal. Pen. Code § 2920 (Supp. 1958):

In addition to what is termed "statutory good time", there are many provisions for so-called "incentive" or "merit" good time and "industrial" good time. These provisions yield extra credits to those prisoners who "surpass the general average"<sup>7</sup> in conduct or who occupy the position of trusty.<sup>8</sup> "Industrial" good time may be awarded either by additional credits towards diminution<sup>9</sup> or by pecuniary remuneration.<sup>10</sup> Both of these two types of allowances are discretionary with the administrative body designated by statute.

Some states provide for different credits depending on whether the prisoner is a felon or misdemeanor.<sup>11</sup> New York provides for a maximum of ten days credit per month which is discretionary with the commissioner of correction and whose decision is subject to the review of the governor.<sup>12</sup> This provision is for those prisoners of the state prisons. There is a discretionary five days per

No. of years of Sentence	Good time that may be earned	Total goodtime that may be earned	Time to be served if full credits earned
1st yr.	2 mos.	2 mos.	10 mos.
2nd yr.	2 mos.	4 mos.	1 yr. 8 mos.
3rd yr.	4 mos.	8 mos.	2 yr. 4 mos.
4th yr.	4 mos.	1 yr.	3 yr.
5th yr.	5 mos.	1 yr. 5 mos.	3 yr. 7 mos.
6th yr.	5 mos.	1 yr. 10 mos.	4 yr. 2 mos.
7th yr.	5 mos.	2 yr. 3 mos.	4 yr. 9 mos.
8th yr.	5 mos.	2 yr. 8 mos.	5 yr. 4 mos.
9th yr.	5 mos.	3 yr. 1 mos.	5 yr. 11 mos.
10th yr.	5 mos.	3 yr. 6 mos.	6 yr. 6 mos.

<sup>7</sup> Wis. Stat. Ann. § 53.12 (1958) provides that: ". . . every inmate whose diligence in labor or study surpasses the general average is entitled to a diminution at the rate of one day for each 6 days during which he shows such diligence."

<sup>8</sup> Colo. R. S. § 105-4-7 (1953), provides that trusty prisoners may earn up to and in addition to 10 days per month served; see also, Ill. Rev. Stat. c. 75, § 29 (1957), provides that if the prisoner shows exemplary conduct, he may qualify for an increased rate of credit under the merit good behavior allowance rate, which is discretionary with the warden.

<sup>9</sup> Neb. Rev. Stat. § 83-449 (Reissue 1943) *supra*, note 7.

<sup>10</sup> Colo. R.S. § 105-4-17, 105-5-9, 105-5-10 (1953); Ill. Rev. Stat. § 108-89 (1957).

<sup>11</sup> Wis. Stats. Ann. § 56.19 (1958).

<sup>12</sup> N.Y. Correction Law, § 230.

month maximum for inmates of county jails or farms,<sup>13</sup> while yet another provision pertains solely to Elmira Reformatory.<sup>14</sup>

Under the federal criminal code a prisoner is entitled to statutory good time from five to ten days per month depending on the length of the sentence.<sup>15</sup> Another section provides for industrial credits and credits for outstanding performance in institutional operations at the discretion of the Attorney General.<sup>16</sup>

### NEBRASKA

Statutory good time in Nebraska is provided for in Section 29-2632, R. R. S. 1943:

Every convict who is now or may hereafter be confined in the Nebraska State Penitentiary, shall be entitled to the diminution of time from his sentence as follows: Two months on the first year, two months on the second year, three months on the third year, four months on the fourth year, and a like diminution of time for each succeeding year of time of his sentence and pro rata for any part of a year where the sentence is for more or less than one year. Such diminution of time is to be credited on the sentence at the time of admission to the institution, but subject to forfeiture as provided in Section 29-2633.

Exemplary good time allowance is set forth in Sec. 83-450:

The Board of Control may grant to prisoners, who occupy a position classified by the Board of Control as being entitled to that privilege, a diminution of time from their sentences, in addition to that provided for in section 29-2632, according to general rules to be prescribed by the Board. The grants shall be conditioned on good behavior, a cheerful compliance with rules, diligence in work, and fidelity to trust. A diminution of time granted under this section shall not exceed the rate of two months for each year.

Industrial good time allowance is set forth in Sec. 83-440:

The amount of good time allowed to prisoners in road camps or other places outside of the state penitentiary or reformatory while engaged in public work, shall be equal to the time the prisoners shall have served in the road camps or other places. The usual parole privilege of prisoners serving in road camps or other places shall not be affected by such service.

<sup>13</sup> *ibid*, § 250.

<sup>14</sup> *ibid*, § 296.

<sup>15</sup> 62 Stat. 853, 18 U.S.C.A. § 4161 (1948).

<sup>16</sup> 62 Stat. 853, 18 U.S.C.A. § 4162 (1948).

In *State ex. rel. Menard v. Nichols*<sup>17</sup> the Supreme Court of Nebraska held that sections 83-450 and 83-440, R. R. S. 1943, are in pari materia, and the limitation of two months for each year contained in 83-450 is the maximum credit that can be allowed under either or both of these sections of the Nebraska Statutes. The relator, an inmate of the Nebraska State Reformatory, instituted a habeas corpus proceeding against the superintendent of the Reformatory demanding his immediate release from such institution because he was illegally held. The trial court found for the relator.

The basic issue raised by the case was the proper computation of credits under the Nebraska good time laws as authorized by sections 83-450 and 83-440.<sup>18</sup> In order that the Supreme Court's opinion may be best analyzed, it is necessary to look at the history of these two statutes.

Originally in 1915, 83-450<sup>19</sup> provided for diminution of time from sentence at the rate of one month for each year of the sentence as follows:

The Board of Commissioners of State Institutions is hereby authorized to grant to prisoners employed outside of the prison enclosure and to prisoners making satisfactory progress in the prison school, a diminution of time from their sentences, in addition to that provided in Section 657 of the Criminal Code of Nebraska, such grants to be conducted on good behavior, a cheerful compliance with the rules, diligence in work, and fidelity to trust; but each additional diminution shall not exceed the rate of one month for each year of the sentence.

83-440 first appeared<sup>20</sup> as a part of provisions regulating the employment of convicts and to provide convict labor on roads and other public works. Section 9 then appeared in the following language:

The amount of good time allowed to prisoners in road camps or other places outside of the penitentiary or reformatory while engaged in such public work shall be equal to the time, day by day, such prisoner shall have served in such camps or other places. The usual parole privilege of prisoners serving in such road camps or other places shall not be altered or abridged by reason of such service.

<sup>17</sup> 167 Neb. 144, 91 N.W.2d 308 (1958).

<sup>18</sup> *ibid.*, at 145.

<sup>19</sup> Originally, Neb. Laws c. 6240 pp. 558, 559 (1915).

<sup>20</sup> Neb. Laws c. 285, p. 932 (1921).

As pointed out previously, Section 29-2632 is classified as statutory good time because of the wording that "Every convict . . . shall be entitled . . . .":

The tendency of the courts seems to be, if possible, to construe the statutes as entitling the prisoner to the benefits of the statute as a matter of right and not as a favor. Other courts hold that while good conduct statutes do not confer any legal right on the prisoner, they confer on him a privilege of which he may avail himself, and of which he cannot be deprived except as provided by the statute.<sup>21</sup>

Therefore, so long as the inmate assumes a proper posture, he will receive some good time allowance.

The day by day public works allowance under 83-440 is also mandatory for those inmates engaged in extra-prison public work. The unequivocal language of the section is that "The amount of good time . . . shall be equal . . . ." As with the wording in Section 29-2632, the use of the word *shall* makes the provision a must.<sup>22</sup> Thus, a prisoner is entitled, upon entrance to a reformatory or the state penitentiary and subject to the qualification that his subsequent conduct is free from infractions of the rules, to the automatic good time of Section 29-2632 plus an accumulation of credits according to the number of days spent on public works labor.

As to Section 83-450, extra good time allowances at the option of the Board of Control, the provisions use the discretionary *may*. Of further interest and importance in this section is the last sentence which states that any credits for good time to be granted *under this section* shall not exceed two months for one year. Therefore, it does not seem likely that the legislature would have intended that 83-440 should be limited by 83-450. The legislature would have mentioned 83-440 as they did 29-2632 if that section were to be limited by 83-450. Since the legislature is presumed to know of any prior legislation pertaining to the same material,<sup>23</sup> they knew there was a limitation established in 1915 under 83-450; and if they wanted the day for day public works credit to be so limited, all they had to do was say so.

The Supreme Court held that the two sections, 83-450 and 83-440, are in *pari materia*.<sup>24</sup> As in the case of all other rules of

<sup>21</sup> 41 Am. Jur. Prisons and Prisoners § 44 (1942).

<sup>22</sup> IV Works of Jeremy Bentham, p. 230.

<sup>23</sup> Roy v. Bladen School District, 165 Neb. 170, 84 N.W.2d 119 (1957).

<sup>24</sup> 167 Neb. 144, 91 N.W.2d 308 (1958). "All statutes in *pari materia* must be considered together and construed as if they were one law and effect given to each provision."

statutory construction, the necessity of applying the rule as to the construction of statutes in *pari materia* exists only where the terms of the statute to be construed are ambiguous or its significance doubtful.<sup>25</sup> Statutes in *pari materia* may not be resorted to in order to control the clear language of the statute under consideration.<sup>26</sup> These two sections of the Nebraska Statutes are not ambiguous. They merely articulate the rewards for various activities in the curriculum of the penal institutions. The legislature has said that you may receive so much credit per year under section 29-2632 plus so much credit if you fall within the category of public works convict labor under 83-440 plus so much credit to those prisoners “. . . who occupy a position classified by the Board of Control as being entitled to that privilege . . .” under 83-450.<sup>27</sup> How else may effect be given to each provision of the statutes?<sup>28</sup>

A similar problem of statutory interpretation was confronted by the Arizona Court in *Beaty v. Shute*,<sup>28a</sup> and the answer given was in accord with the above stated reasoning. The court was faced with the problem of construing sections 5318 and 5319, R. C. 1928, the pertinent parts of which are as follows:

Sec. 5318. The board shall require of every able-bodied convict as many hours of faithful labor in each day . . . and every convict faithfully performing such labor and being in all respects obedient to the rules . . . shall be allowed from his term a deduction. . . .

<sup>25</sup> *Hamilton v. Rathbone*, 175 U.S. 414, 20 Sup. Ct. 131 (1899); *Barrett v. First Nat. Bank*, 297 Mo. 397, 249 S.W. 619 (1923), affirmed, 263 U.S. 640 (1924).

<sup>26</sup> *Palmer v. Van Santvoord*, 153 N.Y. 612, 47 N.E. 915 (1897).

<sup>27</sup> The Board of Control adopted certain rules governing good time allowances under authority of Neb. Rev. Stat. § 83-450 (Reissue of 1958) on May 6, 1955, the pertinent parts being:

“All prisoners who are assigned to a prison industry or school program of the institution, as determined by the Classification Committee, may earn two and one-half (2½) days per month under the provision of this act.

“An additional two and one-half (2½) days per month may be earned by prisoners assigned to key positions as recommended by the Classification Committee.

“Prisoners in minimum custody, and assigned to trusty status, may earn a maximum of five (5) days per month, good time, under the same conditions when approved by the Classification Committee.”

Taken from Rep. Atty. Gen., 1957-58, p. 355.

<sup>28</sup> *Supra*, note 23.

<sup>28a</sup> 54 Ariz. 339, 95 P.2d 563 (1939).

Sec. 5319. All prisoners in the state prison, while working on the public highways, the prison farms, or holding any other position of confidence and trust, while working as trustees outside the prison walls, and without requiring armed guards, shall be allowed double time while so employed....

In construing the two sections the court held:

The obvious purpose of both sections is to encourage prisoners to observe the rules of the prison and to work faithfully, and if we were to hold the credits thereunder were concurrent, instead of cumulative, a great deal of this incentive would be removed. They were adopted at different times, and independent of each other, and neither one refers to or limits the application of the other. We think it was the intent of the legislature that the sections were meant to be cumulative in their effect, and not to run concurrently.<sup>29</sup>

In referring to this case in a subsequent opinion,<sup>30</sup> the same court stated:

In that case we said the different credits for good conduct were cumulative and that a prisoner was entitled, in addition to his straight time, to double time and to statutory time . . .<sup>31</sup>

*Beaty v. Shute* was not pointed out to the Nebraska Supreme Court in either of the briefs.

One additional point. Not only does *Menard* appear erroneous as a matter of statutory interpretation but the effect of the holding on Nebraska State Reformatory inmates was devastating.<sup>32</sup> The trust and good feeling built up between the inmates and the management was seriously impaired. A near riot occurred. Superintendent Nichols' reason for resigning was in part fear of facing the inmates. The morale was at ebb tide. Many inmates lost as high as six months good time credit, especially those who worked in places of trust like the Beatrice State Hospital for the Feeble-Minded.<sup>33</sup>

<sup>29</sup> Ibid at P.2d 565.

<sup>30</sup> Rupp v. Walker, 62 Ariz. 101, 154 P.2d 371 (1944).

<sup>31</sup> 62 Ariz. 101, 154 P.2d 371, 372.

<sup>32</sup> The opinions of an employee of the state reformatory as told to this author in an interview February 20, 1959.

<sup>33</sup> Prior to the *Menard* case the computation of credits by the Board of Control was accomplished in the manner argued for by the relator in the instant case. This is shown by the testimony of the chairman of the Board of Control, Catherine Martin, as found in 23-25:34, 6-7:35, and 9-12:35. Citations to the trial court record are from the Brief for Appellee.

Unfortunately, the 1959 Nebraska Legislature in substance codified *Menard*.<sup>34</sup> L. B. 85 which repeals 83-440 provides as follows:

Prisoners of any penal institution who are employed on public work outside their institutions may be allowed extra good time, as it is earned, day for day for the time so employed as limited by section 83-450 and not in addition thereto: Provided, where the head of an institution certifies to the Board of Pardons that certain named prisoners have volunteered their persons for medical or scientific research and that their persons were used for such purposes and the extent thereof, the Board of Pardons may, in its discretion, grant extra good time to such prisoners in addition to all other good time provided by law.

To the extent that this statute prevents another *Menard* case, it is tolerable. However, L. B. 85 leaves much to be desired. The inducement should not be to become a human guinea pig to gain credits, but it should be to develop habits, attitudes, and a sense of responsibility consistent with the mores of society. Good time allowances are not for the purposes of leniency or forgiveness: we are dealing with measures designed to facilitate the transition of the offender from regimented prison life to a mature, responsible life in the community at a time when the offender is psychologically ready. "Good behavior, a cheerful compliance with rules, diligence in work, and fidelity to trust" are all manifestations of readiness. Good time for public work should not be limited by the provisions for classified good time under 83-450.

L. B. 85 should be repealed, and a statute adopted similar to the Arizona statute as interpreted by the Arizona Court in *Beaty v. Shute*.<sup>35</sup>

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<sup>34</sup> L.B. 85, signed by the governor February 25, 1959 without an emergency clause.

<sup>35</sup> *infra*, note 31.