IN THE MATTER OF A REFERENCE AS TO THE EFFECT OF THE EXERCISE BY HIS EXCELLENCY THE GOVERNOR GENERAL OF THE ROYAL PREROGATIVE OF MERCY UPON DEPORTATION PROCEEDINGS.

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*Mar. 15.
*Mar. 29.

Crown—Criminal law—Immigration—Release of convict from prison prior to completion of term of sentence without his consent—Validity and effect—"Endured the punishment adjudged" (Cr. C., s. 1078)—Expiry of sentence or term of imprisonment within s. 43 of Immigration Act—Liability to deportation proceedings upon serving sentence or upon release from prison prior to expiry of term of sentence.

The act of clemency by the Governor General, in the exercise of the royal prerogative of mercy, in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the convict's consent.

A convict so released would not be deemed to have "endured the punishment adjudged," within the meaning of s. 1078 of the *Cr. Code.*

The sentence or term of imprisonment of a convict so released would be deemed to have expired, within the meaning of s. 43 of the *Immigration Act,* R.S.C., 1927, c. 93.

If a convict be other than a Canadian citizen and be subject to be deported under s. 42 of the *Immigration Act* as belonging to that one of the "prohibited or undesirable classes" which is defined by the words (in s. 40), "any person who has been convicted of a criminal offence in Canada," he does not cease to be so subject to be deported, upon serving his sentence in full or upon his release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence. The question is one of construction of the language of s. 40, and, in view of the fact that the liability to proceedings under s. 42 is not contemplated by the Act as one of the penal consequences of a conviction for a criminal offence, that this liability is not attached *de jure* to the fact of conviction but is placed by the Act under the control of an administrative discretion, and in view of the unrestricted language of s. 43, there is no admissible ground for a construction requiring a restriction of the words of s. 40 by exclud-

*PRESENT:—Duff C.J. and Rinfret, Lamont, Smith, Cannon and Crocket JJ.

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ing from their scope cases where the punishment adjudged has been endured or has been remitted through an exercise of the royal clemency. (*Immigration Act,* ss. 40, 42, 43; *Cr. Code,* ss. 1076, 1078; *The Queen* v. *Vine,* L.R. 10 Q.B. 195; *Hays* v. *Justices of the Tower,* 24 Q.B.D. 561; *Leyman* v. *Latimer,* L.R. 3 Ex. D. 15, 352, discussed. *Marion* v. *Campbell,* [1932] Can. S.C.R. 433, at 451, referred to).

REFERENCE by His Excellency The Governor General in Council to the Supreme Court of Canada, for hearing and consideration, pursuant to the authority conferred by s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35, of certain important questions of law. The questions are set out at the beginning of the judgment now reported.

I. F. Hellmuth K.C. and *C. B. Smith K.C.* for the Crown.

J. Shirley Denison K.C. and *R. D. Williams contra.*

The judgment of the court was delivered by

DUFF C.J.—We have to give our opinions in answer to certain Interrogatories addressed to us by His Excellency the Governor General in Council. They are as follows:—

1. Is it competent to the Governor General in the exercise of His Majesty's royal prerogative of mercy, to release from prison without his consent a convict undergoing sentence for a criminal offence (*a*) conditionally, (*b*) unconditionally?

2. Would a convict so released, whether with or without his consent, be deemed to have "endured the punishment adjudged," within the meaning of section 1078 of the *Criminal Code?*

3. Would the sentence or term of imprisonment of a convict so released be deemed to have expired, within the meaning of section 43 of the *Immigration Act,* Revised Statutes of Canada, 1927, chapter 93?

4. If such a convict be other than a Canadian citizen, and be, by reason of having been convicted of a criminal offence in Canada, subject to be deported under the provisions of section 42 of the *Immigration Act,* would he cease to be so subject

(1) upon serving his sentence in full,

(2) upon release from prison in the exercise of the royal prerogative prior to the expiration of his sentence (*a*) conditionally, (*b*) unconditionally?

These Interrogatories, speaking broadly, concern the effect of the release of a convict from prison who is undergoing a sentence for a criminal offence by an act of clemency in exercise of the royal prerogative. We will first say a word about the legal character of such a release.

The terms of Art. 5 of the Instructions to His Excellency suggest that all remissions, total or partial, of penalties, other than pecuniary penalties or forfeitures of property, take effect as "free" pardons or pardons "subject to lawful conditions." It has been more than once held in the United States that an unconditional release from prison (unconditional, that is to say, in the sense of being subject to no express condition) by the President of the United States in exercise of the pardoning power with which he is invested under the constitution necessarily implies a "free" pardon of the offence. (For example, *Hoffman* v. *Coster* (1); *Jones* v. *Harris* (2).

On the other hand, there is the great authority of Hawkins' Pleas of the Crown that the act of clemency may be limited to pardoning the "execution." "It hath been clearly adjudged," it is said (Book 2, ch. 37, s. 12), "that the King may, if he think fit, pardon the execution, and no more." In this view it would appear that the effect (as regards the offence) of the unconditional remission of the punishment, or of a conditional remission where the condition has been performed, is a question of intention; and it is upon this assumption that the practice in Canada has proceeded. A release from prison, pursuant to a valid act of clemency, necessarily involves a remission, total or partial, of the punishment awarded, but we see no reason to think that the assumption alluded to above on which the Canadian practice has been based is not well grounded.

The Interrogatories speak of releases which are conditional and releases which are unconditional. In the case of a conditional release, the condition may be of such a character as to involve the voluntary act of the convict himself. In other words, such that the performance of it can only be effected with the consent of the convict. We assume from the course of the argument before us that the real purpose of the Interrogatories is to elicit the opinion of the court as to the effect, in respect of the matters set forth

(1) (1837) 2 Whar. 453. (2) (1846) 1 Strob. 160.

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therein, of a release from prison of a convict before the expiration of the term of imprisonment imposed by his sentence in pursuance of a valid exercise of the royal prerogative; and it would serve no useful purpose in these circumstances to explore the various hypotheses suggested by the term "conditional release"; and we beg the leave of Your Excellency to limit our answers accordingly.

Interrogatory numbered one we shall treat as addressed to the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict. The answer to the interrogatory so put is in the affirmative.

The contention that a free pardon of a convict takes effect, as in the case of a private gift, only upon acceptance by the grantee has been based upon passages in books of authority which seem to say that a free pardon can be waived by the grantee, e.g., in 2 Hawkins P.C., ch. 37, ss. 58-9:

> As to the third general point, *viz.* Whether a pardon may be waived.
>
> 58. I take it to be agreed, that a general pardon by parliament cannot be waived, because no one by his admittance can give a court a power to proceed against him, when it appears there is no law to punish him.
>
> 59. But it is certain, that a man may waive the benefit of a pardon under the great seal; as where one who has such a pardon doth not plead it, but takes the general issue, after which he shall not resort to the pardon.

We think the passages in the books in which it is laid down that a pardon can be waived, strictly turn upon the necessities of pleading, and that a doctrine more consonant with the true nature of the King's prerogative is set forth in a decision of the reign of Edward IV, reported in Jenkins, 145 Eng. R., No. 62, p. 90. The report is in a paragraph and is in these words:

> If the King pardons a felon, and it is shewn to the court; and yet the felon pleads not guilty, and waives the pardon, he shall not be hanged; for it is the King's will that he shall not; and the King has an interest in the life of his subject. The books to the contrary are to be understood, where the charter of pardon is not shewn to the court.

The nature of prerogative is, in our opinion, rightly set forth by Mr. Dicey at p. 420 of his Law of the Constitution (8th ed.):

> The "prerogative" appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, "the

sovereign," or, if not strictly the "sovereign" in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power.

By the terms of the Instructions to His Excellency he is directed, before pardoning or reprieving an offender, to receive first, in capital cases, the advice of the Privy Council, and in other cases, of one at least of his Ministers; and in modern times all such advice is, of course, given subject to the accountability of the Council or the Ministers to the House of Commons. A sentence in the judgment of Holmes J., speaking for the Supreme Court of the United States in *Biddle* v. *Perovich* (1) applies equally to the exercise of the prerogative of mercy in Canada. A pardon, said that most learned and eminent judge,

> is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

We think it is not consistent with this view of the nature of the prerogative in question to regard an unconditional pardon as in the same category, in point of law, as an act of benevolence proceeding from a private person.

We do not think the authorities require us to hold that an unconditional pardon of an offence can take effect only upon acceptance by the grantee; and that, for example, a convict under the capital sentence can, in point of law, insist on being hanged, so that the only escape from such a result is by statute or by a colourable and unconstitutional exercise of the prerogative in granting successive reprieves.

It has been suggested that partial remissions of punishment can validly take effect only as conditional pardons. This view was advanced by Mr. Taney, Attorney-General (afterwards Chief Justice) of the United States, in his very able argument in *United States* v. *Wilson* (2). But, although the learning on the subject of pardon seems to have been very diligently collected for the purposes of the argument in that case, no authority was adduced in support of this proposition; and we have found none.

Moreover, the statements in the books to the effect that a conditional pardon is operative only with the consent of the grantee are illustrated by references to cases in which the condition is in the nature of a substituted punishment.

(1) (1927) 274 U.S. 480, at 486. (2) (1833) 7 Peters 150, at 155-8.

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At common law, the King cannot commute the sentence of the court by the substitution of another and different penalty, because he has no power at common law to compel the convict, against his will, to submit to a punishment which has not been imposed upon him by a court of law. (See the opinion of Sir A. E. Cockburn and Sir Richard Bethell, May 3d, 1854, Forsyth, 462,3.) Obviously, in the simple case of a partial remission, which is, in terms, unconditional, the convict is not subjected to any penalty or punishment beyond that which the sentence of the court has awarded against him. We do not pursue the discussion further.

"So far as a pardon legitimately cuts down a penalty," said Holmes J. in the judgment (1) already quoted in part, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

We think this is indisputable.

As to the second Interrogatory, we think it is clear that the phrase "punishment adjudged" in s. 1078 of the *Criminal Code* does not describe a punishment reduced by an act of the royal clemency but is intended to designate the punishment nominated by the original sentence.

For the purpose of considering the questions raised by the Interrogatories numbered 3 and 4, it will be necessary to refer briefly to the enactments of the *Immigration Act*.

By s. 40 (R.S.C., 1927, ch. 93) provision is made for complaint to the Minister of Immigration of the presence in Canada of persons of specified descriptions ("other than a Canadian citizen or person having Canadian domicile") by "any officer cognizant thereof" and by "the clerk, secretary or other official of any municipality in Canada wherein such person may be." Such classes of persons include (*inter alia*) the inmates and managers of houses of prostitution, persons practising or sharing in the earnings of prostitution, persons importing or attempting to import any person for the purpose of prostitution or other immoral purpose, and any person who "enters or remains in Canada contrary to any provision of this Act," and any person "who has been convicted of a criminal offence in Canada,"

(1) *Biddle* v. *Perovich*, (1927) 274 U.S. 480, at 486-7.

or who "has become an inmate of a penitentiary, gaol, reformatory, prison."

Section 42 empowers the Minister of Immigration or his Deputy to order any person, in respect of whom a complaint has been received alleging such person to belong to "any prohibited or undesirable class," to be taken into custody and detained for an investigation of the facts alleged in the complaint by a Board of Inquiry. By the same section, if the Board is satisfied that such person belongs to "any of the prohibited or undesirable classes" mentioned in ss. 40 and 41, such person "shall be" deported forthwith, subject to a right of appeal to the Minister.

It seems to be clear that any one of the classes of persons in respect of whom it is the duty of the proper official "to send a written complaint to the Minister" pursuant to the provisions of s. 40 is a "prohibited or undesirable" class within the meaning of s. 42. *Ex facie,* therefore, a person who has been convicted of a criminal offence in Canada, and a person who is an inmate of a penitentiary, jail, reformatory or prison in Canada and in respect of whom "a written complaint" has been "sent" to the Minister pursuant to s. 40, is a person in relation to whom the powers of the Minister and Deputy Minister, under the first subsection of s. 42, may be exercised. That is to say, such person may be placed in custody and detained for an investigation of the facts alleged in the complaint against him. Furthermore, as observed above, if the allegations are established to the satisfaction of the investigating tribunal the statute directs that, subject to an appeal to the Miniser, such person shall be deported.

S. 43 is in these terms:

Whenever any person other than a Canadian citizen, or a person having Canadian domicile, has become an inmate of a penitentiary, gaol, reformatory or prison, the Minister of Justice may, upon the request of the Minister of Immigration and Colonization, issue an order to the warden or governor of such penitentiary, gaol, reformatory or prison, which order may be in the form F in the schedule to this Act, commanding him after the sentence or term of imprisonment of such person has expired to detain such person for, and deliver him to, the officer named in the warrant issued by the Deputy Minister, which warrant may be in the form G in the schedule to this Act, with a view to the deportation of such person.

2. Such order of the Minister of Justice shall be sufficient authority to the warden or governor of the penitentiary, gaol, reformatory or prison, as the case may be, to detain and deliver such person to the officer named in the warrant of the Deputy Minister as aforesaid, and such warden or

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governor shall obey such order, and such warrant of the Deputy Minister shall be sufficient authority to the officer named therein to detain such person in his custody, or in custody at any immigrant station, until such person is delivered to the authorized agent of the transportation company which brought such person into Canada, with a view to deportation as herein provided.

This section, it will be noticed, deals specifically with the procedure applicable where the person to be deported is an inmate of a penitentiary, jail, reformatory or prison. In such case the Minister of Justice is, in a word, authorized, upon the request of the Minister of Immigration, to direct the warden or governor of the place of detention to detain the inmate after " the sentence or term of imprisonment of such person has expired," and to deliver such person to the officer named in a warrant issued by the Deputy Minister of Immigration with a view to deportation.

As to Interrogatory No. 3, it appears to us that, according to a natural reading of the words, the phrase " sentence or term of imprisonment," in s. 43, is intended to embrace both the case where the convict has undergone the full term of imprisonment imposed by the sentence and the case where the term of imprisonment imposed has been reduced by the operation of some general statutory provision or by a valid act of clemency. In this view the order of the Minister of Justice under s. 43, in form F, may, where the term of imprisonment imposed by the sentence has been brought to an end by an act of clemency, authorize the detention of the person to whom the order relates by the warden or governor and delivery of him to the officer named in the warrant.

The answer to Interrogatory No. 3, ought, therefore, to be in the affirmative.

The question to which Interrogatory No. 4 is directed is whether or not a convict, after serving his sentence in full, or upon his release prior to the expiry of his sentence under a conditional or unconditional act of clemency in exercise of the royal prerogative, becomes removed from the category of persons belonging to that one of the " prohibited or undesirable classes " mentioned in ss. 40 and 41 which is defined by the words " any person who has been convicted of a criminal offence in Canada."

The neat point is whether the service of the term of the sentence, or the release pursuant to the exercise of the royal

clemency, has the effect of making inappropriate to such person the description found in the words quoted from s. 40. In examining this question, three sections of the *Criminal Code* are material,—ss. 1076, 1078 and 1080, the relevant parts of which it will be convenient to reproduce textually:

1076. The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some other person than the Crown.

2. Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall, as to the offence of which he has been convicted, have the same effect as a pardon of such offender under the great seal.

1078. When any offender has been convicted of an offence not punishable with death, and has endured the punishment adjudged, or has been convicted of an offence punishable with death and the sentence of death has been commuted, and the offender has *endured the punishment* to which his sentence was *commuted,* the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal.

1080. Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy.

Where the convict has served his sentence in full he falls within s. 1078 as a person who "has endured the punishment adjudged" and it follows, therefore, that the "punishment so endured" has, "as to the offence whereof the offender was * * * convicted * * * the like effect and consequences as a pardon under the great seal."

Where the convict has been released by an unconditional act of clemency, or by a conditional one in respect of which the condition has been performed, it is argued that, here again, this has, as to the offence in respect of which the conviction was obtained, "the same effect as a pardon" of the offender "under the great seal."

It may be conceded, for the purpose only of simplifying the immediate discussion, that the release from custody involves a free pardon or a conditional pardon (the condition of which has been purged) within the meaning of s. 1076; so that the precise point to which we are to address ourselves is whether or not a pardon under the great seal of a

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person convicted of a criminal offence within the meaning of s. 40 has the effect of exempting such person from the provisions of ss. 42 and 43.

A pardon under the great seal

> if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, its puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property. (Chitty, Prerogatives of the Crown, p. 102);
>
> takes away *poenam et culpam;* (2 Hale P.C. 278);
>
> does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness * * * (2 Hawkins P.C., s. 48).

The question before us is, in truth, a question of statutory construction. We have to consider whether, having regard to the scope and purpose of the *Immigration Act,* the literal meaning of the words in s. 40 is displaced by force of the rule of law that a pardon under the great seal wipes out the offence of the grantee in the sense conveyed in the passages quoted.

It is, perhaps, almost unnecessary to observe that the group of sections under consideration is not concerned with the penal consequences of the acts of individuals. They are designed to afford to this country some protection against the presence here of classes of aliens who are referred to in the statute as "undesirable." The broad conception upon which they are based is indicated by the summary already given of the enactments of s. 40. Persons convicted of crime in this country, persons who are inmates of prisons in this country, are classed with persons who are inmates of asylums for the insane, with persons implicated in the trade of prostitution, with persons known to have been convicted elsewhere of offences involving moral turpitude, with persons who are remaining in this country in defiance of the prohibitions of the *Immigration Act.*

Moreover, the results which follow from proceedings under s. 42 are not attached to the criminal offence as a legal consequence following *de jure* upon conviction for the offence or imposable therefor at the discretion of a judicial tribunal. They follow, if they follow at all, as the result of an administrative proceeding initiated at the discretion of the Minister at the head of the Department of Immigration.

The terms of s. 43, it should be observed, are general. They apply to every person, other than a Canadian citizen or a person having a Canadian domicile, who has become an inmate of any of the institutions mentioned. The authority given to the Minister of Justice, according to the ordinary meaning of the language employed, is exercisable where the inmate is incarcerated pursuant to a sentence under a conviction for a criminal offence within the meaning of s. 40. If this be the effect of s. 43, then that section contemplates the operation of s. 42 by an order for deportation founded on a conviction for a criminal offence in Canada which is to take effect after the expiration of the sentence or term of imprisonment resulting from such conviction has been fully endured or, in the view already expressed as to the meaning of the words "sentence or term of imprisonment," after such term of imprisonment has been terminated pursuant to an act of clemency.

There is nothing in the language of the statute, or in the object or purpose of the statute, inconsistent with this view of s. 43. Any other view, indeed, would greatly restrict the scope of the section, leaving it operative only in a probably not very numerous class of cases where the convict, while serving a sentence of imprisonment for one criminal offence, has standing against him a conviction for another offence in respect of which he has neither endured the punishment adjudged nor been lawfully relieved from that punishment.

This view of section 43 is, of course, inconsistent with the contention that a conviction in respect of which the punishment has been endured or remitted by an act of clemency cannot be a foundation for proceedings under s. 42.

As to the effect of s. 40, some authorities were cited which we proceed to discuss. The first is *The Queen* v. *Vine* (1). In that case it was held that a person who had been convicted of felony and had served his sentence was disqualified from holding a licence for the selling of spirits under a statute which disqualified "every person convicted of felony." The statute of 9 Geo. IV (s. 1078, *Cr. C.*) was not referred to, but it is difficult indeed to suppose that the statute could have escaped the attention both of Mr. Poland, who acted as counsel for the applicant, and of the court. The point especially discussed was whether or not

(1) (1875) L.R. 10 Q.B. 195.

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the disqualification applied to persons convicted before the Act was passed. That was held to be so upon the explicit ground that the disqualification was not penal in its nature but was intended to protect the public from having persons of doubtful character engaged in the sale of spirits by retail.

In a subsequent case, *Hays* v. *Justices of the Tower* (1), a closely similar question arose. There, the applicant for a licence had been convicted of a felony. He had served part of his sentence and then received a "free pardon" under Her Majesty's sign manual. It was held that the statutory disqualification was inoperative by force of 7-8 Geo. IV, c. 28, s. 13, the parent enactment of s. 1076, by which a pardon under the royal sign manual has "the effect of a pardon under the great seal."

Hawkins, J., who with Pollock, B., constituted the Divisional Court before which the appeal was heard, treats the disqualification (in contradiction to the view of the court in *Regina* v. *Vine* (2)) as one of the penal consequences of the conviction and bases his judgment principally on the reason that the legislature could not have intended to impose disqualification in the case of a pardon granted upon the ground that the conviction was wrongful.

Neither of the learned judges disagrees with the decision in *Regina* v. *Vine* (2). Indeed, Hawkins J. emphatically concurs with it, and, with regard to both these licensing decisions, it should be observed that the point is considered as entirely a question of the proper construction of the licensing statute. The enactment imposing the disqualification in question there differed radically from the enactment now under consideration. In that case the disqualification took effect *ipso jure*. Here, as already observed, the existence of the conviction marks the convict as belonging to a class of persons in respect of whom the Minister of Immigration has a discretion to institute proceedings under s. 42. The legislature could hardly have conceived the possibility of such proceedings being instituted pursuant to such a conviction if there had been a pardon in consequence of established innocence.

(1) (1890) 24 Q.B.D. 561. (2) (1875) L.R. 10 Q.B. 195.

The other case is *Leyman* v. *Latimer* (1), in which the passages cited above from Chitty, Hale and Hawkins were given effect to by holding that a person convicted of felony, after enduring the punishment, is, in law, no longer a "felon," by force of 9 Geo. IV, c. 32, s. 3, which is in substance re-enacted in s. 1078 of the *Criminal Code*.

The action was for libel, the alleged libel being in the description of the plaintiff, the editor of a newspaper, as a "felon editor." To the defendant's allegation, in justification, that the plaintiff had been convicted and sentenced to twelve months' hard labour, the plaintiff replied that, after his conviction, he underwent his twelve months' imprisonment and so "became as clear from the crime and its consequences as if he had received the Queen's pardon under the great seal." The case was, for convenience, tried before Lord Blackburn (then Mr. Justice Blackburn) sitting as judge without a jury, and his decision was expressed in this sentence (p. 22):

> I think that the statement in the newspaper means that he was convicted, and is literally true, and therefore the plaintiff cannot recover damages.

In the Divisional Court, Cleasby and Pollock BB. held that, in contemplation of law, the plaintiff was not at the time of the libel a "felon" and that, therefore, the allegations in the defence were no justification. But they considered it would have been a different matter if the libeller had simply declared he has been convicted of felony. The judgment reads (p. 21):

> It would have been a different matter if the defendant had written of the plaintiff that he had formerly committed a felony or been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered was withheld.

In the Court of Appeal, Bramwell, L.J., agreed with Lord Blackburn that the defendant had a valid justification in respect of the phrase "convicted felon" because it was literally true. Brett, L.J., and Cotton, L.J., disagreed upon the point of the construction of the words, holding that the question was one of fact for the jury, but Brett, L.J., is plainly in agreement with the two other distinguished common law judges in holding that, if Lord Black-

(1) (1878) L.R. 3 Ex. D. 15 and 352.

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burn's interpretation of the words were correct, the fact of the conviction was a sufficient justification. These three eminent judges are plainly in agreement with the view that, *prima facie,* the service of a sentence under a conviction for felony does not, by force of the statute of 9 Geo. IV, take the person convicted out of the category of persons who have been convicted of felony although, in point of law, it does remove him from the category of "felon."

The judgments in that case are useful in illuminating the points now before us. They seem to establish conclusively, if authority be needed for that purpose, that neither s. 1076 nor s. 1078 of the *Criminal Code* in declaring in the one case that a free or conditional pardon under the sign manual, and, in the other case, that the "enduring of the punishment adjudged," shall have the like effect and consequence as a pardon under the great seal, lays down a rigorous rule of construction which requires us to restrict the words of s. 40 by excluding from their scope cases where the punishment adjudged has been endured or where it has been remitted through an exercise of the royal clemency. Effect was given to this view by our brother Smith in his judgment in *Marion* v. *Campbell* (1).

Adverting to the consideration that the question before us is a question of the proper meaning of the language of s. 40, it seems to us, in view of the fact that the liability to proceedings under s. 42 is not contemplated by the statute as one of the penal consequences of a conviction for a criminal offence, that this liability is not attached *de jure* to the fact of conviction but is placed by the statute under the control of an administrative discretion, and in view of the unrestricted language of s. 43, there is no admissible ground for a construction effecting such an exclusion.

The answer, therefore, to the first branch of the Interrogatory numbered four is in the negative; and to the second branch, remodelled so as to read:

(2) upon release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence?

in the negative also.

(1) [1932] Can. S.C.R. 433, at 451.

The Court unanimously answered the questions as follows:

"We interpret the interrogatory numbered one as presenting the question whether or not the act of clemency in releasing a convict from prison prior to the completion of the term of his sentence may be valid and effective in law without the consent of the convict.

"The answer to the question so framed is in the affirmative.

"The answer to the interrogatory numbered two is in the negative.

"The answer to the interrogatory numbered three is in the affirmative.

"The second branch of the interrogatory numbered four we read as presenting case (2) in these terms,

"(2) Upon release from prison under a valid exercise of the royal prerogative prior to the expiration of his sentence?

"Upon this reading, the interrogatory, in both branches, is answered in the negative."