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CRIMINAL LAW AND PROCEDURE - FEDERAL COURTS - RESERVATION OF POWER TO GRANT PROBATION AFTER SENTENCE BEGUN

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CRIMINAL LAW AND PROCEDURE — FEDERAL COURTS — RESERVATION OF POWER TO GRANT PROBATION AFTER SENTENCE BEGUN — The defendant was convicted of a violation of the National Motor Vehicle Act and a sentence not exceeding one year was imposed, subject to reservation of a power to grant probation later. He served a portion of the sentence. Pursuant to an investigation and report by the probation officer, the defendant was released and put on probation for the remainder of his term. *Held*, that the district court, under the National Probation Act of 1925,[1] had authority to reserve jurisdiction of the case and to release the defendant and put him on probation after he had served a portion of the sentence. *United States v. Wittmeyer*, (D. C. Nev. 1936) 16 F. Supp. 1000.

There has long been a conflict concerning the inherent power of the courts to suspend sentence indefinitely.[2] In *Ex parte United States*,[3] the United States Supreme Court held that the power to suspend indefinitely either the imposition or the execution of sentence was not inherent in the federal courts. This followed the weight of state authority.[4] After eight years effort in Congress the effect of this decision was ameliorated by the Federal Probation Act. It has been held by the lower federal courts that this act is valid and does not infringe on the constitutional pardoning power of the president.[5] Unfortunately, the probation act is not clear as to the *time* when the power to place on probation can be exercised.[6] By the great weight of authority in the state and federal courts, sentence cannot be suspended after the execution of it has begun.[7] The view of

[1] 43 Stat. L. 1259 (1925), 18 U. S. C., §§ 724-727. The heart of this act is as follows: "That the courts of the United States having original jurisdiction in criminal actions . . . shall have power, *after conviction or after a plea of guilty or nolo contendere* . . . to suspend the imposition or execution of sentence and to place the defendant upon probation." (Italics added.)

[2] The following cases held there was no power to suspend sentence indefinitely: United States v. Wilson, (C. C. D. Idaho 1891) 46 F. 748; People v. Barrett, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82 (1903); State v. Smith, 173 Ind. 388, 90 N. E. 607 (1910). *Contra*: Commonwealth v. Dowdican's Bail, 115 Mass. 133 (1874); People v. Dudley, 173 Mich. 389, 138 N. W. 1044 (1912).

[3] 242 U. S. 27, 37 S. Ct. 72 (1916).

[4] State v. Talberth, 109 Me. 575 (1912); Fuller v. State, 100 Miss. 811 (1911); Snodgrass v. State, 67 Tex. 615, 150 S. W. 162 (1912); Reese v. Olsen, 44 Utah 318, 139 P. 941 (1914). For other cases, see Ex Parte United States, Petitioner, 242 U. S. 27 at 47, 37 S. Ct. 72 (1916).

[5] Nix v. James, District Judge, (C. C. A. 9th, 1925) 7 F. (2d) 590; United States v. Mix, (D. C. Cal. 1925) 8 F. (2d) 759; Archer v. Snook, (D. C. Ga. 1926) 10 F. (2d) 567.

[6] Federal Probation Act, see portion quoted supra, note 1.

[7] Moore v. Thorn, 245 App. Div. 180, 281 N. Y. S. 49 (1935); State v. District Court, 68 Mont. 309, 218 P. 558 (1923); Archer v. Snook, (D. C. Ga. 1926) 10 F. (2d) 567; United States v. Murray, 275 U. S. 347, 48 S. Ct. 146 (1928); United States v. Cook, (C. C. A. 5th, 1927) 19 F. (2d) 826, 275 U. S. 516, 48 S. Ct. 86 (1928). But see *contra*: Antonio v. Milliken, 9 Ohio App. 357 (1918); State v. Teal, 108 S. C. 455, 95 S. E. 69 (1917); United States v. Chafina, (D. C. Ariz. 1926) 14 F. (2d) 622.

the federal courts is aptly expressed in *United States v. Gargano*,[8] where it was said, "The question thus presented upon this point has been considered settled since the Circuit Court of Appeals (Fifth Circuit) decided the case entitled United States v. Cook [9] . . . holding that the District court is not authorized to grant probation, . . . after the defendant is confined in prison in execution of that judgment." In following the decision of *United States v. Cook*, the cases hold that the courts can suspend the imposition of sentence but that they cannot suspend the execution of sentence. It is pointed out that the purpose of the probation act is to withhold the stigma of actual imprisonment. After this purpose is defeated, the majority assert that the field is covered by the Federal Parole Act [10] or by executive pardon. Although there may be an overlapping of the probation and the parole acts, it is important to note that the parole act does not apply if the sentence is for less than one year and that parole cannot be granted until one-third of the sentence has been served. There was an attempt to distinguish the principal case from similar cases on the basis that, at the time of imposing sentence in the latter, the court reserved jurisdiction. In *Archer v. Snook* [11] it was held that the court, at the time of imposing sentence, could not provide that after a portion of the term had been served the prisoner could be released on probation. If the majority are correct in their assertion that the court no longer has jurisdiction after execution of sentence, it is difficult to determine the source of their power to reserve jurisdiction. That power was not conferred by the probation act, although in view of the policy of the act the omission is unfortunate. Judge Sibley, in *Archer v. Snook*, declares that the weak point in the Federal Probation Law is the lack of a provision authorizing a sentence with a reservation of the right to put on probation after a specified part of the sentence had been served.[12] It seems that the court is here attempting to exercise a parole rather than a probationary power. This procedure is desirable under the facts of the principal case, but it does not appear that the act permits that form of probationary relief. It is to be hoped that Congress will correct that defect by amendment of the act.

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[8] United States v. Gargano, (D. C. La. 1928) 25 F. (2d) 723.

[9] (C. C. A. 5th, 1927) 19 F. (2d) 826.

[10] 36 Stat. L. 819 (1910), 18 U. S. C., §§ 714-723.

[11] (D. C. Ga. 1926) 10 F. (2d) 567.

[12] For discussion of viewpoint expressed by Judge Sibley, see 30 LAW NOTES 62 (1926).