

# Criminal Law: Inability of Federal Courts to Suspend Sentence or Grant' Probation After Service of Sentence is Begun

Daniel J. McKenna

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real property as remuneration for such services, does not prevent the right to recover in quantum meruit? Or again, will one who performs services under any other void oral contract, as one not to be performed within a year, still be able to recover? The situations are quite analogous, but yet there will probably be a clear enough distinction to keep alive the old doctrine as to recovery for such services.

C. W.

### Criminal Law: Inability of Federal Courts to Suspend Sentence or Grant Probation After Service of Sentence is Begun.

The two cases, *U.S. v. Murray* and *Cook v. U.S.*, decided simultaneously by the Supreme Court of the United States on January 3, 1928, present a neat instance of judicial interpretation of a statute, quite apart from the interest attached to one of the parties, namely, Doctor Cook, of North Pole fame.

The question presented is this:

Can a federal trial court grant probation to a prisoner after the latter has started to serve his sentence?

The answer requires an interpretation of the Probation Act of Mar. 4, 1925, c. 521, 43 Stat. 1259 (18 USCA Nos. 724-727), which provides a probation system for the federal courts.

In 1916, the Supreme Court of the United States held, in *Ex parte U.S.*, 242 U.S. 27, 61 L.Ed. 129, etc., that a federal trial court had no power of its own to suspend its own sentence and to place the defendant under probation. In that case, the Supreme Court held that the ordinary discretion of the trial court in measuring out sentence did not authorize the full withdrawal of sentence. While the latter result might be desirable and in line with the ideals of modern penology, it could not be reached by the trial court without assistance from Congress, which assistance Congress did not bestow until 1925.

The heart of the Probation 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 *nole contendere* . . . to suspend the imposition or execution of sentence and to place the defendant upon probation."

The words "suspend the imposition" plainly authorize the court to refuse to sentence the prisoner at all. Even if the court does see fit to impose sentence, it still can refuse to put the sentence into operation. But the present decision says that once the service of sentence has been entered upon by the prisoner, the trial court cannot recall and release the latter, even if done in the same term of court in which sentence was imposed. "We do not say," says Chief Justice Taft, "that the language is not broad enough to permit a possibly wider construction, but we think it not in accord with the intention of Congress."

This intention of Congress is manifest in two ways.

First. It is plain from the Committee report on the Act in question that Congress wished to provide a means of withholding the stigma of actual imprisonment in cases where there might be a chance to reclaim an useful member of society. This, in fact, is the motive behind all probation legislation. But, if any part of the sentence has

been actually served, if only during a single day, this humane purpose becomes impossible or extremely difficult. The prisoner is then branded as a felon and a gaolbird. It is therefore reasonable to say, as a number of inferior federal courts have already said, that such probation machinery ceases to operate when the prisoner begins to serve his sentence, since it then loses its efficiency.

Second. As a law stood before the enactment of the Probation Act, a prisoner serving his time could be released on parole or by executive pardon. There is no reason to assume that Congress wished to create a third method of relief, particularly since the Probation Act, in such a situation, would practically repeal the more stringent parole act. On the contrary, Congress could hardly have wished to throw upon an already overworked judiciary the gigantic task of examining probation petitions on behalf of every federal prisoner behind the bars.

DANIEL J. MCKENNA

### Highways: Contributory Negligence of Motorcyclist Attempting to Pass Automobile Making Left Turn.

The case of *Kerlinske v. Etzel*,<sup>1</sup> recently decided in the Wisconsin Supreme Court, declares that the decision in the case of *Suren v. Zuege*,<sup>2</sup> is good law and that it will not be overruled. In the latest case the plaintiff, a motorcycle officer, was following the defendant, who was driving a Ford coupe. The defendant was going up a hill in low gear, on a concrete road, called Highway 60. As the defendant neared the crest of the hill she looked back to see if anyone was approaching and seeing no one, made a left turn into a drive-way, leading to her brother's farm. As the defendant was making the left turn, a traffic officer attempted to pass the defendant's car, causing a collision, resulting in the injury of the plaintiff, for which this action was commenced. The defendant had not signified her intention to make a left turn and the traffic officer had not given a signal that he intended to pass the defendant's vehicle. The trial judge awarded damages to the plaintiff. On appeal the primary question seemed to be whether the plaintiff was guilty of contributory negligence? To which the court said, "To be sure, there is no statutory law<sup>3</sup> requiring one driving a motor vehicle on the highway to give warning of an intention to pass another vehicle. Neither is there any law requiring the driver of the vehicle ahead to give warning of an intention to turn to the left." The statute above mentioned by the court is substantially this:

<sup>1</sup> *Kerlinske v. Etzel*, — Wis. —; 215 N.W. 591, Oct. 11, 1927.

<sup>2</sup> *Suren v. Zuege*, 186 Wis. 264; 201 N.W. 722, Mar. 10, 1925.

<sup>3</sup> Section 85.01 sub. (2) Statutes of 1925.

"Every such operator or driver on overtaking any vehicle or draft animal on any highway shall pass on the left side thereof, and the operator or driver overtaken shall with all convenient speed upon signal or notice that passage is required, drive to the right of the center of the traveled part of the highway so as to allow a free passage on the left, and if necessary on account of road conditions shall stop long enough to allow the other to pass."