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Criminal Law -- Suspended Sentence -- Banishment as Condition

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Criminal Law—Suspended Sentence—Banishment as Condition

The *feme* defendant, convicted in the Superior Court of violating the prohibition laws, was sentenced to two years imprisonment, capias to issue at the discretion of the solicitor, if at the end of sixty days the defendant was found within the state. The defendant left the state within the sixty days, but, four years after her conviction and two years after her return to the state, on a motion of the solicitor, while she awaited trial on another prohibition charge, the sentence was ordered under the previous judgment. Both the judgment[1] and the order[2] were affirmed on appeal.

It is suggested in a Tennessee decision[3] that the suspended sentence having developed in England as an aid to substantial justice in lieu of criminal appeals, it is now properly employed only as an incident of procedure. An appellate court, however, cannot grant reprieve to a guilty prisoner, and trial courts have found this a desirable method of meeting frequently occurring situations.[4]

Definite probation systems have been adopted by thirty-three states[5] in which the use of the suspended sentence is directed to the end of achieving the reformation of certain offenders, but, in North Carolina, due to the absence of any law[6] regulating its use the trial judge[7] may use his own discretion as to whether the circumstances

[1] Except the provision that the capias was to issue at the discretion of the solicitor, which was held to be without authority, the power to issue the capias remaining in the court. State v. McAfee, 189 N. C. 320, 127 S. E. 204 (1925).

[2] State v. McAfee, 198 N. C. 507, 152 S. E. 391 (1930).

[3] A Tennessee court has no power to suspend sentence as a reformatory measure. Spencer v. State, 125 Tenn. 64, 140 S. W. 597, 37 L. R. A. (N. S.) 680 (1911).

[4] Under extenuating circumstances, especially in the case of young and first offenders, the interests of society and the offender are often best served not by exacting the prescribed penalty, but by granting conditional freedom.

[5] In thirty-two states probation laws apply to both adults and children; in fifteen states there are juvenile probation laws only; Wyoming has only adult probation. *National Directory of Probation Officers,* The National Probation Ass'n (1928).

A Pennsylvania act of June 19, 1911, provides that a court may suspend sentence when the prisoner has not been previously imprisoned, when his character and the circumstances are such as to make a recurrence of the offense unlikely, and when no duty to protect society is violated thereby, and that a convict on probation may be dismissed when he has met the conditions. *The Report of the Crimes Survey Committee,* The Law Ass'n of Philadelphia (1926).

[6] Public policy would probably prohibit its use in the case of the graver offenses.

[7] The sentence may be suspended by a Justice of the Peace, State v. Griffis, 117 N. C. 709, 23 S. E. 164 (1895); a municipal judge, State v. Greer, 173 N. C. 759, 92 S. E. 147 (1917); or a recorder, State v. Tripp, 168 N. C. 150, 83 S. E. 630 (1914).

warrant a reprieve,[8] he may suspend sentence indefinitely,[9] and he may impose conditions[10] limited only by the court's conscience and imagination. Although a sentence of banishment is void, a sentence suspended on condition that the defendant leave the state and never return has been upheld on the grounds that the exile was voluntary.[11] By this reasoning it is obvious that any condition may be adjudged legal, and the prisoner may be confronted with unusual and cruel alternatives[12] to the prescribed punishment. It is further left to the discretion of the court whether a given act amounts to a breach of the condition,[13] and, if so, whether the promised punishment will be imposed.[14]

[8] There are no statutory regulations, and the circumstances under which the reprieve was granted do not appear in the opinions of the Supreme Court, but sentence has been suspended where offenders were guilty of assault with a deadly weapon, State v. Hardin, 183 N. C. 815, 112 S. E. 593 (1922); operating a disorderly house, State v. Hatley, 110 N. C. 522, 14 S. E. 751 (1892); libel, State v. Sanders, 153 N. C. 624, 69 S. E. 272 (1910); trespass to land, State v. Griffis, *supra* note 7.

[9] The cases cited in note 8, *supra*, illustrate situations in which the sentence may be executed whenever the conditions are breached (Some courts hold that sentence may not be suspended indefinitely. Ex parte Bugg, 163 Mo. App. 44, 145 S. W. 831 [1912].), but the court sometimes stipulates a definite period for performance, as where the defendant was required to show for two years that he had not violated the prohibition laws, State v. Greer, *supra* note 7.

[10] Sentence is most frequently suspended on condition of good behavior, State v. Everett, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848 (1913), but sentences have been suspended on condition that the prisoner leave the county and never return, Ex parte Hinson, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 352 (1911), that he pay the costs, State v. Griffis, *supra* note 7, that he pay the costs for himself and another, State v. Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260 (1894), that he keep the peace and not libel certain persons, State v. Sanders, *supra* note 8, that he show compliance with the prohibition laws for two years, State v. Greer, *supra* note 7. For comments upon North Carolina cases, see (1922) 1 N. C. L. Rev. 116 and (1928) 6 N. C. L. Rev. 327.

[11] State v. Hatley, *supra* note 8. There would seem to be some doubt whether leaving and remaining out of the state could be called strictly voluntary, when the only other course open to the prisoner is a term in jail. The South Carolina court takes this view in State v. Baker, 58 S. C. 111, 36 S. E. 501 (1900), where imprisonment was to be for five years if the convict left the state immediately thereafter, if not for two additional years, the court holding the condition involved perpetual banishment, and was therefore void: A condition in a sentence that the offender leave the county was held void in Hoggett v. State, 101 Miss. 269, 57 So. 811 (1912), but the Arkansas court holds that a governor may pardon on such a condition, Ex parte Hawkins, 61 Ark., 321, 33 S. W. 106, 30 L. R. A. 736, 54 Am. St. Rep. 209 (1895).

[12] A suspended sentence is not an alternative judgment, State v. Hatley, *supra* note 8, but it does offer a practical alternative to the prisoner.

[13] State v. Hoggard, 180 N. C. 678, 103 S. E. 891 (1920).

[14] In State v. Sanders, *supra* note 8, the court remarks on the fact that capias did not issue on an unequivocal breach of condition, and in the instant case the defendant operated a shop a few blocks from the court house for two years in open violation of the condition that she remain out of the state.

The Supreme Court, while recognizing the legality of suspending sentence, has not commended the practice,[15] but has indicated that evils would result from its indiscriminate use.[16] With the law governing the suspended sentence in its present state there is no assurance either to the community or to the convicted that under given circumstances sentence will be suspended, or on what conditions, or for what period, or that on a breach of condition the offender will be disciplined. The instant case suggests the need of a definite system of regulations designed to carry out the purpose of the suspended sentence, and to minimize the likelihood of its abuse.

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Damages—Carriers—Measure of Damages for Loss of Small Part of Shipment in Bulk

In a recent case the facts showed that the plaintiff purchased a carload of coal, while in transit. On arrival at destination there was a shortage of 5,500 pounds. At the time of arrival, plaintiff had not sold any of the coal. The shortage did not interfere with the maintenance of his usual stock, and no sales were lost as a result of it. The plaintiff did not go into the retail market to replace the shortage. Held, that the measure of damages was the wholesale price.[1]

It is the avowed aim of the courts in actions founded on contract to place the party injured in as good position pecuniarily as he would have occupied had the breach not occurred,[2] and damages are awarded, in the absence of special circumstances with this principle in mind.

The pertinent statutory expression is found in the so-called Cummins Act[3] which provides that the holder of a bill of lading for interstate rail shipment is entitled to recover for the "full actual loss" to his property. By judicial interpretation this has come to mean that such loss is to be ascertained with reference to the value at point of destination.[4]

[15] State v. Hatley, *supra* note 8.
[16] State v. Griffis, *supra* note 7; State v. Hilton, 151 N. C. 687, 65 S. E. 1011 (1909); State v. Everett, *supra* note 10.
[1] Illinois Cent. R. Co. v. Crail, 50 Sup. Ct. 180 (1930).
[2] Seaboard Air Line R. R. v. U. S., 261 U. S. 299, 43 Sup. Ct. 354, 67 L. ed. 664 (1922).
[3] 34 Stat. 593, 49 U. S. C. A. §20 (11).
[4] Chicago, etc. Ry. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, 40 Sup. Ct. 504, 64 L. ed. 801 (1919).