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CHARLES B. ROBISON, Case Editor

EVIDENCE—TESTIMONY OF ACCOMPLICE—CORROBORATION. — [Illinois] The credibility of the testimony of an accomplice has given rise to various rules governing its weight in convictions based almost wholly upon such evidence. In a recent Illinois case, *People* v. *Karatz,* 365 Ill. 255, 5 N. E. (2d) 842 (1937), it was stated that a conviction procured on the uncorroborated testimony of an accomplice "will not be molested where the facts and circumstances testified to by such accomplice, when weighted and tested according to the established rules applicable thereto, are sufficient to prove guilt beyond a reasonable doubt." In this case, however, there was evidence strongly tending to corroborate the accomplice. The court also remarked that the law was well settled that the record must be free from substantial and prejudicial error. *People* v. *Gordon,* 344 Ill. 422, 176 N. E. 722 (1931) noted (1932) 22 J. Crim. L. 743. The "established rules applicable thereto" have reference to the Illinois practice that the jury should be instructed to consider the testimony of an accomplice with great care and caution (*Hoyt* v. *People,* 140 Ill. 588, 30 N. E. 315 (1892)), and should not give it the same effect as that of other witnesses. *People* v. *Rongetti,* 338 Ill. 56, 170 N. E. 14 (1930); *People* v. *Lawson,* 345 Ill. 428, 178 N. E. 62 (1931).

A substantial number of states have the same rule, that a conviction can be had without corroboration if the testimony proves guilt beyond a reasonable doubt. *State* v. *Cianflone,* 98 Conn. 454, 120 Atl. 347 (1923); *Caldwell* v. *State,* 50 Fla. 4, 39 So. 188 (1905); *Stone* v. *State,* 118 Ga. 705, 45 S. E. 630 (1903); *State* v. *Vandeveer,* 119 Kan. 674, 240 Pac. 407 (1925); *Commonwealth* v. *Bosworth,* 39 Mass. 397 (1839); *People* v. *Nunn,* 120 Mich. 530, 79 N. W. 800 (1899); *State* v. *Shaffer,* 253 Mo. 320, 161 S. W. 805 (1913); *State* v. *Broke,* 99 Ore. 310, 195 Pac. 583 (1921); *State* v. *Sowell,* 85 S. C. 278, 67 S. E. 316 (1910); *Draper* v. *Commonwealth,* 132 Va. 648, 11 S. E. 471 (1922); *State* v. *Stapp,* 65 Wash. 438, 118 Pac. 337 (1911). This is the rule prevailing in the federal courts. *Ahearn* v. *United States,* 158 Fed. 606 (C. C. A. 2d, 1907), *cert. denied,* 208 U. S. 615 (1908); *Caminetti* v. *United States,* 242 U. S. 470 (1917). Connecticut, in the case cited, treated the accomplice the same as any other witness. In England the rule is that the judge should tell the jury that it is within their legal province to convict upon the uncorroborated evidence, but he should warn them of the

dangers of such testimony. If he fails to give warning the conviction will not stand. *Rex* v. *Baskerville* [1916] 2 K. B. 658; Note, *Corroboration of Accomplice's Testimony* (1934) 77 L. J. 336. The same rule obtains in Canada. See Greenshields, *The Accomplice as a Witness* (1929) 7 Can. B. Rev. 520, 528 *et seq.*

Other states hold that there must be corroboration—with or without the aid of statute. A typical statute provides that the corroborating testimony must tend to connect the defendant with the offense; if it merely shows the commission of the offense or the circumstances thereof, it is not sufficient. ALA. CODE Ann. (Mitchie, 1928) §5635; ARK. DIG. STAT. (Crawford & Moses, 1921) §3181; CAL. PEN. CODE (Deering, 1931) §1111; N. Y. CRIM. CODE (Gilbert, 1936) §399; S. D. COMP. LAWS (1929) §4882; TEX. ANN. CODE CRIM. PROC. (Vernon, 1936) art. 718. In such jurisdictions the question remains as to what is sufficient corroboration. The following examples will suffice to show the general requirements of sufficiency. It is not essential that the corroborative evidence in and of itself be sufficient to warrant a verdict, or that it corroborate in every detail (*Dixon* v. *State,* 116 Ga. 186, 42 S. E. 357 (1902)); it need go only to some material part of the accomplice's testimony (*State* v. *Jones,* 115 Iowa 115, 88 N. W. 196 (1901); *Drew* v. *State,* 65 P. (2d) 549 (Okla. Cr. App. 1937)), but it should tend in some degree to show the guilt of the accused. *State* v. *Clements,* 82 Minn. 434, 85 N. W. 229 (1901). A grave suspicion of guilt is not enough. *Harrel* v. *State,* 121 Ga. 607, 49 S. E. 703 (1905). However, the corroboration is sufficient if it shows the accomplice testified truly in some particulars and justifies the inference that he testified truly in others. *Keliher* v. *United States,* 193 Fed. 8 (C. C. A. 1st, 1912); *State* v. *Arhontis,* 196 Iowa 223, 194 N. W. 209 (1923). California, having a statute like that above, requires the corroboration to be effective for more than merely raising a suspicion of guilt (*People* v. *Davis,* 210 Cal. 540, 293 Pac. 32 (1930)), though it is sufficient if the connection of the defendant with the commission of the offense may be inferred therefrom. *People* v. *Whittaker,* 63 P. (2d) 1202 (Cal. App. 1937); *People* v. *Rokes,* 64 P. (2d) 746 (Cal. App. 1937) (admissions of defendants); *Hargett* v. *State,* 189 S. E. 675 (Ga. App. 1937) (slight evidence from extraneous source). New York, following its statute, states that the corroboration must lead to the inference that a crime was committed and that the accused was implicated. *People* v. *Evans,* 143 N. Y. S. 49 (1913). But though the statute provides that the corroboration must go to the extent of connecting defendant with the crime, the court has said that this need not show the commission of the crime, nor defendant's connection therewith, nor need it be restricted to any particular point, but is sufficient if it merely tends to connect him in such a way as may reasonably satisfy the jury that the accomplice is telling the truth. *People v. Crum,* 272 N. Y. 348, 6 N. E. (2d) 51 (1937); *People* v. *Dixon,* 231 N. Y. 111, 131 N. E. 752 (1921). Montana holds that the statute is satisfied if the independent evidence tends to connect the defendant with the crime. *State* v. *Ritz,* 65 Mont. 180, 211 Pac. 298 (1922). *Accord:*

Shields v. *Commonwealth,* 203 Ky. 118, 261 S. W. 865 (1924).

Such are the rules governing the testimony of an accomplice. Which rule is wisest is hard to say. It seems that no state allows a conviction solely on the uncorroborated testimony of an accomplice unless it alone proves guilt beyond a reasonable doubt. Most states require that it be considered with grave caution and suspicion, and, as in Illinois, it is reversible error not to so instruct the jury. Except in a very few jurisdictions the testimony cannot be considered in the same light as that of any other witness. On the other hand are those states requiring corrobation. Yet, even when a statute enforces this rule, it is found that the slightest corroboration is sufficient—it need go only to some material fact or tend to connect the defendant with the commission of the crime. The strict limitations imposed by those states such as Illinois, compared with the extreme laxity of such states as California or New York, leads one to conclude that after all, the rules tend to merge and the same result is ultimately reached, whichever is applied.

CHARLES B. ROBISON.

WITNESSES — BASTARDY PROCEEDINGS—TESTIMONY BY WIFE OF NON-ACCESS OF HUSBAND. — [Pennsylvania] Prosecutrix, a married woman, in a prosecution for fornication and bastardy, and failure to support an illegitimate child, testified as *sole* witness that she had intercourse with the defendant as a result of which a child was born, and that she had been separated from her husband for a period of three and one-half years during which time she had neither seen nor had sexual relations with him. Defendant was convicted upon this testimony. On appeal, reversed. *Held:* A wife whose husband is living and undivorced cannot be permitted to bastardize her child by testifying to her husband's non-access. *Commonwealth* v. *Di Matteo,* 188 Atl. 425 (Pa. 1936).

A strong presumption has always existed that a child born of a married woman, whose husband is alive, is legitimate. See Note (1931) 25 Ill. L. Rev. 561. Prior to the eighteenth century, however, there was no definite rule concerning the testimony of either spouse to prove non-access of husband as evidence of a child's illegitimacy. 4 WIGMORE, EVIDENCE (2d. ed. 1923) §2063. Lord Mansfield in *Goodright* v. *Moss,* 2 Cowp. 591 (1777), set forth for the first time, as *obiter dictum,* the rule that "Declarations of a father or mother cannot be admitted to bastardize the issue born after marriage." This rule, stated to be predicated upon "decency, morality and policy," has been severely condemned by Professor Wigmore. 4 WIGMORE §2063-64. However, the fact remains that Lord Mansfield's rule has been accepted in many jurisdictions in this country. Illustrative of these are Iowa and Texas. In *Craven* v. *Selby,* 216 Iowa 505, 246 N. W. 821 (1933), a suit to partition property, the court held that a wife cannot establish the illegitimacy of her son born in wedlock by testifying to the non-access of her husband. In *United States Fidelity and Guarantee Co.* v. *Henderson,* 53 S. W. (2d) 811 (Tex. Civ. App. 1932) a proceeding to set aside a compensation award, the English rule and the underlying reasons therefor were unequivocally adopted.

A problem of interpretation aris-

ing under the non-access rule is whether a wife is precluded from giving only *direct* testimony of non-access of her husband, or whether she is also precluded from testifying to collateral facts from which non-access may be inferred. In *Franks* v. *State,* 26 Ala. 430, 161 So. 549 (1935), it was stated that "She may testify to circumstances from which non-access may be inferred, but she may not testify that her spouse is not the father." *Accord: Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842 (1918); *State* v. *Green,* 210 N. C. 162, 185 S. E. 670 (1936). This interpretation of the Mansfield rule permits the wife to do indirectly what she could not do directly. See criticism in 4 WIGMORE §2064. A more reasonable interpretation is taken by other courts in prohibiting testimony of collateral facts as well as direct evidence showing non-access. *In re Wright's Estate,* 237 Mich. 375, 211 N. W. 746 (1927); *Scanlon* v. *Walshe,* 118 Md. 131, 31 Atl. 498 (1895); *In re McDermott's Estate,* 125 Neb. 179, 249 N. W. 555 (1933); *Bell* v. *Territory,* 8 Okla. 75, 56 Pac. 853 (1899); *Richter* v. *Richter,* 117 Ore. 673, 245 Pac. 321 (1926); *Koenig* v. *State,* 215 Wis. 658, 255 N. W. 727 (1934). The Kentucky court, in *Veron's Adm'r* v. *Veron,* 228 Ky. 56, 14 S. W. (2d) 185 (1925), intimated that the wife may testify only where there is other testimony showing non-access of the husband. In Kansas the law is unsettled. In *Lynch* v. *Rosenberger,* 121 Kan. 601, 249 Pac. 682 (1926), an action for partition of a deceased's estate, the testimony of the mother was admissible to prove non-access. This case, using Professor Wigmore's arguments, attacks the Mansfield rule. "In our opinion the so-called Lord Mansfield rule is artificial and unsound. Being so, it should neither be used to suppress the truth nor to prevent substantial justice." However, in *Martin* v. *Stillie,* 129 Kan. 19; 281 Pac. 925 (1925), an action for the recovery of real property, the court reverted to the Mansfield doctrine in its entirety. It may be significant to add that the court felt that the action had become a public nuisance; perhaps the old rule was revived only to suppress further litigation.

From time to time statutes have been passed in the various states affecting the admissibility of the kind of testimony in question. Some of these are Bastardy Acts with provisions for competent witnesses. Others are general evidence statutes liberalizing common-law precedent. In *State* v. *Soyka,* 181 Minn. 533, 233 N. W. 300 (1930), a statute made every person of sufficient understanding, including the parties, competent to testify in any action. MINN. STAT. (Mason, 1927) §9814. Under this provision both husband and wife were held competent to give evidence that the former was not the father of a child of the wife. *In re McNamara's Estate,* 181 Cal. 82, 183 Pac. 552 (1919), cites the California Code of Civil Procedure (Deering, 1931) §1879, providing that "all persons, without exception . . ." may be witnesses, and holds that on the basis of this statute a wife is to be permitted to testify to the non-access of her husband. *In re Wray's Estate,* 93 Mont. 525, 19 P. (2d) 1051 (1933), involving a statute similar to the one in California (MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §10534), and also a bastardy statute permitting rebuttal of the presumption of legitimacy (*Id.* §5832) specifically

states that "our legislature has abrogated the common-law—or better say—the Mansfield rule." *Cf. Adams* v. *Adams,* 102 Vt. 318, 148 Atl. 287 (1930) (rule not applicable in divorce cases). In the state of Arkansas a bastardy statute makes a mother a competent witness in bastardy cases, unless she is legally incompetent in any case. ARK. DIG. STAT. (Crawford & Moses, 1921) §783. However, it was held in *Kennedy* v. *State, supra,* that to make the mother competent to testify to the non-access of her husband an express statute was necessary. Lord Mansfield is cited with approval. *Accord: Scott* v. *State,* 173 Ark. 625, 292 S. W. 979 (1927). The bastardy statute in West Virginia provides that a married woman may not accuse a person other than her husband unless she has lived apart from him for at least one year. W. VA. CODE ANN. (Mitchie, 1932) §4770. Another statute makes both "husband and wife competent and compellable witnesses to testify for and against each other to any and all relevant matters, including the fact of such marriage and the parentage of such child . . . ." *Id.* §4781. In *State* v. *Reed,* 107 W. Va. 563, 149 S. E. 669 (1929), a child had been born to prosecutrix within one year of separation from her husband. The court approved the Mansfield rule, and refused to apply the second statute mentioned above, arguing that the suit was not one in which one spouse was called to testify against the other since it was neither *against* the husband or wife, but against a third party. A similar technic was used to reach a contrary result in *State* v. *McDowell,* 101 N. C. 734, 7 S. E. 785 (1888). But in Illinois the Bastardy Statute (ILL. STATE BAR STATS. (1935) c. 17, §6), making the wife a competent witness on all issues, permits the testimony of non-access. However, when the husband of the prosecutrix testified that he was not the father, the admission of such testimony was held reversible error: "by no law has the common-law rule as to the husband been removed to allow him to testify to his non-access at the time of the conception of the child." *People* v. *Dile,* 347 Ill. 23, 179 N. E. 93 (1932).

Some states rely solely upon bastardy acts to admit testimony of non-access. In all other proceedings, however, the Mansfield rule retains its influence. In New York the non-access of a husband may be shown by a wife only in prosecutions under the Bastardy Act. The statute referable to paternity proceedings reads: "If the mother is married both she and her husband may testify to non-access." INF. CRIM. CTS. ACT (Gilbert, 1936) art. 5, §67. *In City of New York* v. *Zizzo,* 260 N. Y. S. 169 (1932), the wife's testimony was admitted. However, in the case of *In re Barthel's Estate,* 177 N. Y. S. 565 (1919), an action arising upon the distribution of an estate, the court said, "for reasons of public decency and morality, a married person cannot say that an offspring is spurious." *Cf. In re Smith's Estate,* 242 N. Y. S. 464 (1930). Indiana and Massachusetts are other states in which the Mansfield rule has a similar anomalous status. *Evans* v. *State,* 165 Ind. 369, 75 N. E. 651 (1905); *Kreighbaum* v. *Dinsmore,* 88 Ind. App. 693, 165 N. E. 526 (1929); *Commonwealth* v. *Circo,* 199 N. E. 896 (Mass. 1936); *Taylor* v. *Whittier,* 240 Mass. 514, 134 N. E. 346 (1922).

There thus seems to be a general

reluctance on the part of courts to abandon the precedent set by Lord Mansfield, especially in the absence of statutes. Does it not seem peculiar, however, that the best qualified witnesses, the husband and wife, should be prohibited from testifying as to whether or not an offspring is spurious?

GERALD MILLARD.

NATIONAL FIREARMS ACT—TAX ON DEALERS.—[Federal] The extending arm of federal control in the suppression of organized crime and the public interest therein renders significant the recent decision of the Supreme Court of the United States upholding the constitutionality of Section 2 of the National Firearms Act. 48 Stat. 1237 (1934), 26 U. S. C. A. §1132a (1935). This section imposes a $200 annual license tax on dealers handling certain types of firearms, essentially sawed-off shotguns and submachine guns, defined in Section 1. Violations of the Act are punishable by a fine of $2,000 or imprisonment for five years or both.

Petitioner, who was convicted by the District Court for Eastern Illinois of unlawfully carrying on the business of dealer in firearms without payment of the special tax, was granted *certiorari* solely on the question of the constitutionality of Section 2 of the Act, the conviction on a count involving that section alone having been sustained by the circuit court of appeals, 86 F. (2d) 486 (C. C. A. 7th, 1936). The Supreme Court held that the imposition of a $200 annual tax on dealers in firearms is constitutional as a valid exercise of the taxing power of Congress, refusing to look beyond the face of the Act to condemn it as a regulation of matters beyond the power of Congress. *Sonzinsky* v. *United States*, 57 S. Ct. 554 (1937).

The Supreme Court in refusing to consider the unexpressed regulatory aspects of this taxing statute merely conformed to its policy of long standing, first clearly expressed in the early case of *Veazy Bank* v. *Fenno*, 75 U. S. 533 (1869). There, in commenting upon the contested federal tax on state bank currency, the Court said, "It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation with a view to its regulation by law." Yet, since the statute on its face was no more than an excise tax, its constitutionality was sustained. Compare the statements of District Judge Ritter in another case sustaining the National Firearms Act: "The [Act] is a revenue measure. Back of it may have been a motive to prevent racketeers, bank robbers, and desperadoes from obtaining sawed-off shotguns and machine guns to run wild in crime and to enable the government to trace ownership; but where there is a power to tax, which from a reasonable construction can be construed to be the intention, the imposition of the tax is the determining feature and cannot be treated as being without the power because of the destructive effect of exercise of the authority upon the article or business connected therewith." *United States* v. *Adams*, 11 F. Supp. 216, 218 (S. D. Fla. 1935). The Court rejected defendant's contention that the Act violated the Second Amendment to the Constitution preserving the right of citizens to bear arms, stating that it refers only to the militia.

Federal regulation of other dis-

favored articles through the taxing power has long received the sanction of the Supreme Court. The suppression of oleomargarine products in favor of butter by an equalizing tax on the former was held a constitutional exercise of the federal taxing power in the famous case of *McCray* v. *United States,* 195 U. S. 27 (1904); *Vail Butterine Co.* v. *Reinecke,* 39 F. (2d) 1076 (1931); *Cf. In re Kollock,* 165 U. S. 526 (1897). And the source of federal control over narcotics is found in the several excise taxes on producers, importers, dealers, etc., of narcotic drugs imposed by the Harrison Anti-Narcotics Act. That Act was initially held constitutional in the case of *United States* v. *Doremus,* 249 U. S. 86 (1919) and has been repeatedly sustained up to the present. See *Watson* v. *United States,* 16 F. (2d) 52 (1926), *cert. denied,* 274 U. S. 739. The National Firearms Act closely follows in form the Harrison Anti-Narcotics Act as amended.

It may safely be stated that the attempts by Congress to regulate in forbidden fields through the taxing power have failed when the taxing act expresses regulation on its face. Such was the case in *United States* v. *Constantine,* 296 U. S. 287 (1935), where a special annual excise tax of $1,000 on retail liquor dealers when they operate contrary to state or municipal law was held a penalty rather than a tax, the effect being to usurp the police powers of the states, rendering the Act unconstitutional. Similar holdings may be found in the *Child Labor Tax* case, 259 U. S. 20 (1922), and *Carter* v. *Carter Coal Co.,* 298 U. S. 238 (1936) (Guffey Coal Act unconstitutional).

Although petitioner here was indicted in a second count for violation of Sections 3 and 4 of the National Firearms Act, the circuit court of appeals held that the evidence was insufficient to support a conviction thereunder. The Supreme Court thus had no opportunity to pass upon the constitutionality of these sections. Section 3 imposes a patently prohibitive tax of $200 upon each transfer of a firearm described in Section 1, and Section 4 requires identification of purchasers, including their fingerprints. Section 3 is more open to the interpretation of being a penalty than is Section 2, especially in the light of the fact that the Treasury reports for the fiscal year ending June 30, 1936, showed some revenues from the tax on dealers of $3,965, and from manufacturers $1,176, whereas but one purchaser paid the $200 transfer tax and filed his fingerprints and photograph. See N. Y. Times, November 6, 1936, at 52. This article quoted a member of the Department of Justice as saying: "We certainly don't expect gangsters to come forward to register their weapons and be fingerprinted, and a $200 tax is frankly prohibitive to private citizens. . . . The purpose of the act was to give us a check on all weapons being manufactured and to permit us to prosecute any person found in possession of an unregistered weapon."

The Supreme Court has noted, in sustaining the Harrison Anti-Narcotics Act, that its provisions have produced substantial revenue and contain no regulatory matter beyond that necessary to administer the tax. *Alston* v. *United States,* 274 U. S. 289 (1927). Since Sections 3 and 4 of the Firearms Act seemingly produce little or no revenue, and their regulatory features are more apparent than Section 2,

it is quite possible that the Court would refuse to sustain this portion of the Act.

[Recently the attorney general has asked Congress to require every owner of a rifle, shotgun, revolver or pistol to register his weapon with the bureau of internal revenue. A tax of one dollar would be payable for every firearm sold. The attorney general stated that this legislation would broaden the scope of the present Act and "would place a potent weapon against criminals in the hands of law-enforcement officers." See Chi. Daily News, May 4, 1937, at 4.]

ALVAH ROGERS, JR.

FEDERAL PROBATION ACT—PROBATION AFTER COMMITMENT.—[Federal] On February 2, 1936, defendant was indicted for violation of the National Motor Vehicle Act; on February 15th he pleaded guilty and two days later the district court sentenced him to one year in the federal prison camp, but retained jurisdiction, referring the case to the probation officer. The defendant was remanded to the custody of the marshal for execution of the sentence. The probation officer made his report on July 15th and the court ordered the defendant to be placed on probation for the remainder of the sentence. The government's motion to vacate the order was denied [and an appeal was taken]. *United States* v. *Wittmeyer*, 16 F. Supp. 1000 (D. C. Nev., 1936).

Originally there was no statutory probation under the federal practice, but the courts themselves adopted their own remedy through the medium of indefinite suspension of sentence. Thus it became the practice in the case of a first offender, where the charge was not too serious, to pass sentence but suspend the execution thereof during good behavior. However, in *Ex parte United States*, 242 U. S. 27 (1916), the Supreme Court denied the federal courts' right to thus suspend sentence no matter how justifiable the circumstances. It was announced to be the court's duty to sentence and commit the defendant to prison the moment he either pleaded or was found guilty.

In 1925 Congress, by enacting the Probation Act (43 STAT. 1259 (1925), 18 U. S. C. A. §724 (1927), provided that a trial court, in the proper instances, 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 for such period and upon such terms and conditions as they may deem best." Just when Congress intended this power to be invoked may be inferred from the reports of the committee that drafted the Act: "The result of long experience with the probation system shows that it is far easier to reclaim an unhardened early offender without commitment to prison than after it." *House Report* No. 1377, 68 Cong., 2d. Sess. (1925). From this it would seem to have been the Congressional intent to keep those entitled to probation out of prison and away from experienced criminals. Has this purpose been acknowledged?

In *United States* v. *Murray*, 275 U. S. 347 (1927), the Court, in denying probation to one who had served part of his sentence, said: "Probation was not sought to shorten the term. . . . The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term

to change it." This language is undoubtedly much broader than was required for the decision, but it has been followed except in the case of the reduction of sentence in the same term. Thus in *United States* v. *Bentz,* 282 U. S. 304 (1931), where the defendant had been sentenced to ten months in prison, and in the same term, after commitment, he petitioned the court for a reduction, the sentence was reduced to six months. However, in *Mouse* v. *United States,* 14 F. (2d) 202 (D. C. Kan., 1926), and in *Davis* v. *United States,* 15 F. (2d) 697 (W. D. Ark., 1926), probation was denied the defendants because they had served part of their sentences; the trial court was held to have lost jurisdiction upon commitment of defendants and passage of the term. This position is strengthened by the case of *In re Edelson,* 15 F. Supp. 1086 (M. D. Pa. 1936), where the court was held to have the power to place the defendant on probation even after the expiration of the term *provided he had not begun service of his sentence;* and in *United States* v. *Praxulis,* 49 F. (2d) 774 (W. D. Wash. N. D. 1931), it was held where service of sentence was begun that the prisoner's remedy was either by parole or pardon.

From this it seems clear that the court's jurisdiction in the instant case ceased by the commitment of the defendant and the expiration of the term; but may the court, by merely stating to do so, reserve jurisdiction to investigate the advisability of probation? This right seems to have been denied, in substance, in *Archer* v. *Snook,* 10 F. (2d) 567 (N. D. Ga. 1926). In this case the defendant was sentenced to two years in prison but was to be placed upon probation for the remainder of the term after having served six months. In holding the order for probation void the court said that interference with the execution of sentence after commitment should not be attempted "unless by the clearest legislative warrant." This "warrant" was found to be lacking in the Probation Act. In *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2d, 1936), the court held an order for probation nugatory when service of part of the sentence was a condition precedent and was entered upon. To the same effect is *White* v. *Burke,* 43 F. (2d) 329 (C. C. A. 10th, 1930). What possible distinction can be drawn between the above sentences and the one in the instant case? Both seem to encounter the criticism of Judge Silby as expressed in the *Archer* case: "By their incarceration, the shame, stigma and criminal contact, which the probation system sought in proper cases to avoid, will have already been accomplished."

If a court invokes the authority given by the Act, its wording should be strictly followed. It is there provided that probation may be granted after conviction or after a plea of guilty. But this must be done by the suspension of either the imposition or execution of the sentence. Since imposition or execution of sentence necessarily occurs before commitment, the statute apparently requires the granting of probation prior thereto. Mere reservation of jurisdiction in the sentence itself would not seem to authorize later suspension.

JOHN MCNERNEY.