WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume XXVIII DECEMBER, 1942 Number 1

DISCRETIONARY RELIEF FROM CONSEQUENCES OF CRIMINAL CONVICTIONS IN MISSOURI PART ONE

EARL T. CRAWFORD*

I. METHODS OF SECURING RELIEF

Two general sources exist from which a person convicted of crime may obtain, in a proper case, complete or partial relief from the legal consequences of his conviction. First, he may apply to the trial court. Relief may be awarded to him in several forms. The court may simply withhold the imposition of sentence; it may suspend its execution, if imposed; it may put the defendant on probation; or it may grant him a bench parole.[1]

If the defendant should fail in his efforts to obtain the court's favorable action on his application for his choice of the above possible avenues of relief, he may resort, sooner or later, to the second general source—the action of the chief executive. So far as this state is concerned, the governor, in his discretion, may grant him a pardon, either absolute or conditional, put him on parole, or commute his sentence, absolutely or conditionally, or give him a reprieve.[2]

* Member of Missouri State Board of Probation and Parole; member of the Missouri and Kansas bars; LL.B., Washington Univ., 1928; LL.M., Northwestern Univ., 1935.

1. R. S. Mo. 1939, §9156. "The circuit and criminal courts of this state, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court, may place on probation any defendant eligible for judicial parole under §§4199-4211, inclusive, of Article 18, Chapter 30, R. S. Mo. 1939. After a conviction, or a plea of guilty, the courts and boards of parole named in this section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said §§4199-4211, inclusive, and may also place the defendant on probation."

2. Mo. Const. 1875, Art. V, §8.

In recent years, a third source has come into existence in many states in the form of the institution known as the parole board. Such a board was created by statute in Missouri in 1937.[3] It does not, however, except in cases where the guilty person has been committed to a reformatory for juveniles,[4] have the authority to award any relief to the applicant. It merely acts as an advisory board to the governor and recommends to him those persons found and deemed proper for parole. But in certain cities and counties, special parole boards have been created,[5] consisting of the various judges of the courts of criminal jurisdiction and generally some other official, having the power to grant paroles to persons convicted of certain offenses in such counties and cities.[6]

The Various Methods Distinguished

For obvious reasons, there is no need to point out the difference between a stay of the imposition of sentence and the suspension of the execution of sentence. The former may be included in that form of judicial relief usually designated as probation, and the latter in that designated as a bench parole.[7] Each

3. Mo. Laws, 1937, p. 400, §5, now R. S. Mo. 1939 §9160. Prior to the enactment of this law, the State Prison Board had the power to investigate, hear and recommend inmates to the Governor for parole. Laws, 1917, p. 155. And before the creation of the prison board, the law provided for a pardon attorney, who should examine, index, and report to the Governor on all applications for pardons submitted to him by the Governor. Laws 1901, p. 178.

4. See R. S. Mo. 1939, §9157, vesting in such board the powers and duties relative to paroles, commutations of sentence, pardons and reprieves which were previously vested in the commissioners of the department of penal institutions and the Intermediate Reformatory Parole Board. While the statutes vesting the power of parole and commutation, etc. in the department of penal institutions were not re-enacted when the present parole board was created, they are nevertheless still effective because of the language of §9157, and are as follows: R. S. Mo. 1929, §8369, (State Industrial Home for Girls); R. S. Mo. 1929, §8382, (State Industrial Home for Negro Girls); and R. S. Mo. 1929, §8353, (The Missouri Training School for Boys).

5. In circuits of one county, having a city of 300,000 to 600,000 inhabitants, such board consists of the prosecuting attorney and the several judges of the circuit court. R. S. Mo. 1939, §9170. In circuits of one county, having a city of 75,000 to 200,000 inhabitants, the board consists of the judge or judges of the circuit court of said county and the sheriff. R. S. Mo. 1939, §9175. And in circuits composed of only one county, having 60,000 to 200,000 inhabitants, and no city of the first class, the parole board consists of the judges of the circuit court of such county. R. S. Mo. 1939, §9175.

6. For the power of such boards to parole, See R. S. Mo. 1939, §§4199-4211, inclusive.

7. See note 15, infra. Also, see State v. Abbott (1911) 87 S. C. 466, 70 S. E. 6. That probation is the postponement of final judgment or sen-

is a means by which the defendant is given another chance, so long as he will abide by the terms and conditions upon which the court withholds the infliction of the lawful punishment prescribed for the crime he has committed. Technically speaking, however, since a parole is a conditional pardon,[8] the designation of the relief afforded by the court as a "parole" is a misnomer, although for all practical purposes, the action of the court in granting the defendant freedom from punishment pending good behavior, may well be designated as a "judicial parole,"[9] in contradistinction to paroles granted by the chief executive. Yet the judicial parole, if the imposition of sentence is stayed or postponed, in its ultimate effect amounts simply to probation. It is, therefore, apparent that there is considerable confusion concerning the distinction between paroles by the court and probation. While similar in many ways, technically, they are different. A parole, for one thing, presupposes a preliminary period of incarceration before the offender is released under supervision, while a person placed on probation may never have been imprisoned.

A pardon, a parole, a commutation of sentence, and a reprieve are all acts of grace proceeding from the governor. The former is an act which exempts the individual to whom it is granted, from the punishment which the law inflicts for the crime he has committed.[10] A parole is a form of conditional pardon, by which the convict is released before the expiration of his sentence, to remain subject during the remainder thereof to the supervision of the public authority and to be returned to imprisonment upon the violation of the condition of his release.[11] On the other hand, a commutation is the substitution of a lower for a higher grade of punishment,[12] and a reprieve is the withdrawing of a sentence

tence in a criminal case, giving the offender an opportunity to improve his conduct and to re-adjust himself to the community, often on conditions imposed by the court and under the guidance and supervision of the court, see II Attorney General's Survey of Release Procedures, p. 1 (Dept. of Justice, 1939).

8. See note 11, infra.

9. R. S. Mo. 1939 §9156, speaks of "judicial paroles"; so does R. S. Mo. 1939 §4199.

10. State v. Asher (Mo. 1922) 246 S. W. 911; also, see Lime v. Blagg (1939) 345 Mo. 1, 131 S. W. (2d) 583, and Hughes v. State Board of Health (Mo. 1942) 159 S. W. (2d) 277.

11. State v. Asher (Mo. 1922) 246 S. W. 911.

12. Ex parte Webbe (Mo. 1929), 30 S. W. (2d) 612, Lime v. Blagg (1939) 345 Mo. 1, 131 S. W. (2d) 583.

for an interval of time, whereby its execution is suspended. The ultimate execution of the sentence and judgment of the court is not abrogated in case of a reprieve but merely delayed.[13] A pardon wipes the sentence out completely so far as punishment is concerned, while a parole is simply the release of the convict from the punishment so long as he fulfills the conditions attached, and it in no way destroys the sentence. Because of the practice of granting pardons and commutations on condition, actually there is little real difference between either form of relief and a parole. Basically, each is an executive order.

Historical Origins of the Methods

The courts of general criminal jurisdiction, under the early common law, exercised the power to suspend sentences. This practice seems to have had its origin in an effort by the English courts to relieve the defendant from the hardships resulting from the peculiar rules of criminal procedure prevailing under the common law when the court had no power to grant a new trial and the verdict was not reviewable on the facts by a higher court.[14] Similarly, it would also appear that the early English courts had the power not only to suspend sentence but also to stay the execution thereof, although this latter power may have been the result of early statutes. Out of the exercise of these two powers grew the modern practice known as probation, and the judicial or bench parole.[15]

In England, from time immemorial, the pardoning power has been exercised by the king, and such power has always been regarded as a necessary attribute of sovereignty.[16] And, to go a step further, the remission of guilt has likewise been regarded as an attribute of the Deity; consequently, since the king claimed the right to rule by divine appointment, the exercise of this attribute of the Deity came about logically. With the formation of the state governments in America, it was a natural step to vest the pardoning power in the governor. Out of this power arises the power of parole, commutation, and reprieve.

13. Lime v. Blagg (1939) 345 Mo. 1, 131 S. W. (2d) 583.
14. 15 Am. Juris. 135, §480.
15. See II Attorney General's Survey of Release Procedures (Dept. of Justice, 1939), p. 3.
16. Jamison v. Flanner (1924) 116 Kan. 624, 228 Pac. 82, 35 A. L. R. 421. Also, see State v. Woolery (1860) 29 Mo. 300.

Sources of the Power to Award Relief

(a) *The Governor.* By virtue of the constitution of Missouri,[17] the governor of the state is expressly given the power to grant reprieves, commutations and pardons, after conviction,[18] for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. And the legislature has, by a superfluous statute, also attempted to vest the pardoning power in the governor in all cases in which he is authorized by the constitution "to grant pardons" with such conditions and under such restrictions as he may think proper.[19]

No provision will be found in the constitution expressly granting to the governor the power to parole. It has, however, been held by the courts that a parole is a conditional pardon,[20] and that the granting of a parole by the governor is merely the exercise of the power vested in him by the constitution with respect to the issuance of conditional pardons.[21] This conclusion was reached where an information was filed, alleging that the defendant "was duly discharged from said penitentiary of the state of Missouri under parole of the governor," whereas the Habitual Criminal Act[22] under which the defendant was charged, used the words "shall be discharged either upon pardon or upon compliance with the sentence" in speaking of a prior conviction.[23] The court rejected the argument in this case that the information was defective because the word "parole" was used instead of the word "pardon" and accordingly held that the power to pardon included the power to parole.

The power to grant a parole may also be supported by the constitutional power of the governor to grant conditional par-

17. Const. 1875, Art. V. §8. Also, see State v. Woolery (1860) 29 Mo. 800; Ex parte Collins (1887) 94 Mo. 22; Jacobs v. Crawford (1925) 308 Mo. 302, 272 S. W. 931. This power was originally vested in the governor by Art. IV, §6, Const. 1820, and then by Art. V, §6, Const. 1865.

18. "After conviction" means after the return of a verdict of guilty. Ex parte Collins (1887) 94 Mo. 22.

19. R. S. Mo. 1939, §4188.

20. State v. Asher (Mo. 1922), 246 S. W. 911, quoting 29 Cyc. 1562. That a parole is not a form of conditional pardon, see Weihofen, Consolidation of Pardon and Parole: A Wrong Approach (1940) 30 Jour. Crim. Law and Crimin. 534.

21. State v. Asher (Mo. 1922) 246 S. W. 911.

22. R. S. Mo. 1919, §3702 now R. S. Mo. 1939, §4854.

23. State v. Asher (Mo. 1922) 246 S. W. 911.

dons and commutations.[24] Basically, there is little or no difference between these three methods of executive clemency. Each is fundamentally the granting of leniency upon condition by an executive order, whether such order be called a pardon, a parole or a commutation.

(b) *The Courts.*—The pardoning power belongs exclusively to the executive department of the state government.[25] The reason for this rule is found in the nature of our governmental system.[26] Consequently, it is not within the power of the trial court to suspend its sentence indefinitely or to order an indefinite stay of execution, if sentence be already imposed.[27] The recognition of

24. Mo. Const. (1875) Art. V, §8. Most conditional commutations are now granted under what is generally referred to as the seven-twelfths rule, under which a period of seven months is considered as one year on the inmate's sentence for commutation purposes. The following is a brief statement of the rule's origin: "In 1918 the number of inmates in the penitentiary became so great that adequate housing facilities for the care and custody of these inmates was a tremendous problem. In order to alleviate this condition it was agreed between the Governor and the members of the Penal Board, who at that time served as the Parole Board, that all inmates who conducted themselves properly in the institution would be granted a merit release, after having served seven-twelfths of their sentence.

This practice was continued until June, 1930, at which time instead of granting an outright release there were certain conditions imposed upon those released by this method. Failure on the part of the subjects to comply with the imposed conditions resulted in the revocation of their commutation and their return to the penitentiary. This method of automatically releasing prisoners after they had served seven-twelfths of their sentence continued until January 10, 1939. On that date the members of the Penal Board, the members of the Board of Probation and Parole, in joint session with Honorable Lloyd C. Stark, Governor of Missouri, approved and adopted the following changes and rules and regulations governing the release of inmates from the Missouri State Penitentiary on conditional commutation:

1. Any person or persons who is now or may hereafter be incarcerated in the Missouri State Penitentiary, having been convicted, sentenced and committed for the crime of Rape, Kidnapping, Murder, Driving while Intoxicated, or Stealing Livestock, shall not be granted automatic release on conditional commutation after having served seven-twelfths of his sentence, less the additional time allowed by the Penal Board for good behavior and farm time, but that person must be heard and recommended for release by the Board of Probation and Parole, and said release approved by the Governor.

2. Any person or persons who is now or may hereafter be incarcerated in the Missouri State Penitentiary, having been previously convicted of two or more felonies, shall not be granted an automatic release on conditional commutation, * * * but that person must be heard and recommended for release by the Board of Probation, and said recommendation approved by the Governor." See Report of Board of Probation and Parole, State of Missouri, for September 6, 1937, to December 31, 1940, pages 31-33, inclusive.

25. State v. Grant (1883) 79 Mo. 113.

26. State v. Grant (1883) 79 Mo. 113; Ex parte Thornberry (1923) 300 Mo. 661, 254 S. W. 1087.

27. Ex parte Cornwall (1909) 223 Mo. 259, 122 S. W. 666, Ex parte Brown (Mo. App. 1927) 297 S. W. 445.

this power in the court would violate the basic principle of our government and allow the court to exercise the pardoning power,[28] for, at least in the absence of an enabling statute, a court's power in the administration of the criminal law is limited to the imposition of the sentence upon the conviction of the accused. Hence, the trial court could not, for example, incorporate in its judgment the provision that a stay of execution would be granted until six o'clock of the afternoon of the day on which sentence was rendered and that if the defendant should be found in the county thereafter, he should be committed to the penitentiary pursuant to the sentence theretofore passed.[29]

In this connection, it is interesting to note that in most, if not all jurisdictions, the criminal courts of general jurisdiction possess the inherent power to suspend sentence for a definite period that is, for a reasonable period of time. Some sanction the suspension of sentences for an indefinite time, but Missouri does not fall within this category.

The courts in Missouri are expressly authorized to grant judicial paroles, place persons on probation, or suspend the imposition or execution of sentence. For instance, one statute gives to the circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, the power to parole persons convicted of a violation of the criminal laws of this state.[30] Another statutes gives the judge of the juvenile court the power to suspend the execution of sentence in cases of delinquent children.[31] And, as we have previously pointed out,[32] the circuit and criminal courts and the court of criminal correction for St. Louis are given statutory authorization to place defendants on probation or suspend the imposition or execution of sentence.[33] Yet none of these legislative grants of the authority to suspend punishment contains a limitation as to the length of the suspensory period. One may venture the conjecture that the

28. Ex parte Thornberry (1923) 300 Mo. 661, 254 S. W. 1087. Also see State ex rel Browning v. Kelly (1925) 309 Mo. 465, 274 S. W. 731; State v. Hockett (1908) 129 Mo. App. 639, 108 S. W. 599.

29. Ex parte Thornberry (1923) 300 Mo. 661, 254 S. W. 1087. Also, see Ex parte Bugg (1912) 163 Mo. App. 44, 145 S. W. 831.

30. R. S. Mo. 1939 §4199; also, see R. S. Mo. 1939 §4200, which forbids more than two paroles to the same person under the same judgment.

31. R. S. Mo. 1939 §9680, (applying to juvenile courts in counties of 50,000 or over.)

32. See note 1, supra.

33. R. S. Mo. 1939 §9156.

legislature, in order to meet the legal objection to an indefinite stay of imposition or execution of sentence, enacted the statute fixing a period beyond which no judicial parole shall be continued.[34] This statute would seem sufficient to remove any form of judicial relief which withholds the execution of sentence, whether it be a parole or a stay of execution, from susceptibility to the charge of infringement upon the pardoning power of the chief executive, where the stay is for an indefinite period of time. In other words, by limiting in this manner the parole or probationary period, the suspension of sentence or punishment, as a matter fact, cannot be of indefinite duration, even though the court places no termination date in its order of suspension. But, the enactment of the statutes vesting the power of judicial parole, of probation, of suspension of sentence or the stay of the execution thereof, in the courts, should be of itself sufficient to give them the power to award all the relief commonly attached to such forms of relief and consequently confer upon them the power to relieve the defendant indefinitely from the lawful punishment prescribed for his offense.

If the power to suspend sentence indefinitely is denied to courts of general criminal jurisdiction on the constitutional ground that to recognize the existence of such power as inherent in them would result in the exercise of executive power by the judiciary, the same reasoning would also seem applicable to any legislative effort to confer the power on the courts by statutory enactment; or, stated in another manner, such an attempt to confer the authority on the courts by statute would equally constitute an usurpation of the pardoning power by the legislature and the statute would be unconstitutional.[35] Such a result, however, thus

34. R. S. Mo. 1939 §4207. "No person paroled under the provisions of section 4200 of this article shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole; but if he shall have been the second time paroled the time shall be counted from date of second parole. No person paroled under the provisions of section 4203 of this article shall be granted an absolute discharge at an earlier period than two years from date of his parole, nor shall such parole continue for a longer period than ten years: *Provided, that if no absolute discharge shall be granted, nor the parole terminated within the time in this section limited, it shall be the duty of the court at the first regular term after the expiration of such time to either grant an absolute discharge or terminate the parole and order the judgment or sentence to be complied with, but if the court shall fail to take any action at such time, such failure to act shall operate as a discharge of the person paroled.*"

35. Vinson v. State (1918) 16 Ala. App. 536, 79 So. 316, State ex rel. Payne v. Anderson (1921) 43 S. D. 630, 181 N. W. 839, State ex rel.

far, does not seem to have occurred in Missouri, and the statutory authorization apparently is sufficient, as indicated by the language of the Court in one case,[36] to overcome the alleged lack of inherent power to grant indefinite suspensions of sentence.

The question has arisen whether a special judge could grant a parole in a case tried before him. In answering the inquiry, the supreme court stated that such a judge could pass on a motion for a new trial, grant an appeal, and settle the bill of exceptions, because such matters, being but procedural steps taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto; but it held that the granting of a parole had nothing to do with the ascertaining of guilt or innocence, because a parole presupposes the defendant's guilt. Moreover, by virtue of statute, an application for parole cannot be entertained until after a judgment of conviction has been rendered, and that judgment has become a finality. The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause, which culminates in a judgment of conviction,[37] nor is it incident thereto. As a result, the court held that no appeal lay from the judgment entered in this case on the pleas of guilty by the defendants. When the judge rendered judgment, his power and duties as a special judge ended and he could not thereafter parole the defendants.[38]

The trial court loses its power to grant a parole, in a felony case, on affirmance of the judgment by the supreme court.[39] This is because the supreme court is by statute directed to have its

Hallanan v. Thompson (1917) 80 W. Va. 698, 93 S. E. 810. Contra: People v. Stickle (1909) 156 Mich. 557, 121 N. W. 497, 499. ("It has never been supposed that the power of courts to suspend sentence was other than a judicial function.")

36. See Ex parte Bugg (1912) 163 Mo. App. 44, 145 S. W. 831, 832: "and to our mind it is clear, *in the absence of a statute* authorizing it, to permit a court after judgment is pronounced to indefinitely postpone its execution is in effect to permit the court to usurp the pardoning power—"

37. State ex rel. Browning v. Kelly (1925) 309 Mo. 465, 274 S. W. 731; State ex rel. Gentry v. Montgomery (1927) 317 Mo. 811, 297 S. W. 30.

38. State ex rel. Browning v. Kelly (1925) 309 Mo. 465, 274 S. W. 731.

39. R. S. Mo. 1939 §4211. "No parole shall be granted in any case where an appeal is pending, nor shall the action of any court or judge in granting or terminating a parole be subject to review by any appellate court." The trial court, may, however, parole the defendant after the appellate court affirms his conviction and orders execution of the judgment, in misdemeanor cases. State ex rel. Gentry v. Montgomery (1927) 317 Mo. 811, 297 S. W. 30.

marshal execute the sentence, and the supreme court having no authority to grant a parole, must execute the sentence according to the punishment assessed on the trial of the case. The court rejected the argument that the statute prohibiting paroles pending an appeal gave it the implied power to grant a parole after the appeal had been decided, on the ground that such a construction would curtail by implication the statute fixing its duties in regard to the execution of judgment.[40]

May the judge of a trial court, in vacation, grant paroles? In construing a statute which contained the words "the court before whom the conviction was had . . . may in his discretion, by order of record, parole such person," the supreme court held that the word "court" was used in the sense of "judge," but that it was also plain that under this section, "the judge before whom the conviction was had" is not authorized in vacation to parole the defendant, but only while sitting as a court.[41]

(c) *The Legislature.*—The pardoning power cannot be exercised by the legislature.[42] A statute providing that all persons in the state, who were under indictment for a violation of the act to regulate dramshops committed prior to a specified date, should be released from prosecution therefor, provided certain costs were paid, was held to be an unconstitutional exercise of the pardoning power. The court stated, in reaching its decision, that to sustain such a statute would be to permit the legislature to usurp an executive function.[43] Again, a statute which purported retroactively to restore civil rights lost on account of a criminal conviction,[44] was held ineffective as to rights lost before

40. Ex parte Foister (1907) 203 Mo. 687, 102 S. W. 542.

41. State ex rel. Browning v. Kelly (1925) 309 Mo. 465, 274 S. W. 731. But note R. S. Mo. 1939 §4200, that the court "or the judge thereof in vacation" may grant the defendant a parole where a jail sentence has been imposed by the Court or a justice of the peace or he has been sentenced to a juvenile reformatory.

42. State v. Sloss (1857) 25 Mo. 291; State v. Todd (1858) 26 Mo. 175; State v. Grant (1883) 79 Mo. 113.

43. "Where is the warrant in the constitution for the general assembly to direct what disposition shall be made of causes pending in the courts? Is not the exercise of such a power a judicial function? The governor can pardon both before and after conviction. His pardon before conviction being pleaded would be a defense to the accusation. Here is a prosecution pending in court and the legislature comes in and orders the party to be released from it. What is that in effect but entering a judgment of acquittal?" State v. Sloss (1857) 25 Mo. 291, 295. But note the provision in the existing constitution of the state that the pardoning power can be exercised only after conviction. See note 18, supra.

44. State v. Grant (1883) 79 Mo. 113.

its passage. The court assumed that the disabilities annexed to the conviction of the crime of petty larceny formed a part of the punishment, and also, consequently, a part of the judgment. Since the Missouri Constitution forbids one department of the government to exercise any power properly belonging to either of the others, the court reasoned that any act of the legislature professedly remitting a portion of the judgment, by relieving the convict of one of the disabilities incurred, cannot be sustained, as it is a clear encroachment upon the power of the governor to pardon.[45] If the legislature could remit any portion of the sentence or judgment of a court of competent jurisdiction, there would be no obstacle to the remission of the whole sentence, as the difference is only in degree and not in kind. The court, in this case, further stated that even if the disabilities were not a part of the judgment, the result would not be altered, if it were true that nothing short of a full pardon or a reversal of the judgment could restore the convict to that which he has lost. The deprivation of all civil rights is a punishment of great severity, which but for the judgment, would not and could not have been inflicted. If then, the act of the legislature relieves the convict of a part of the punishment, it is *pro tanto*, a judgment of acquittal or *pro tanto*, a pardon, both of which are outside the legislative domain. The assertion of power on the part of the law-making branch of the government to abate any part of the punishment which the court had previously inflicted, is necessarily and logically an assertion of the power to abate the entire punishment or to absolve the party from all the consequences of the judgment.

(d) *Parole Boards.*—We have already indicated that certain parole boards have been created by statute in this state and

45. "I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction, the disabilities become welded to the crime, forming thereby an indivisible integer incapable of separation by any exertion of the legislative power. And this is especially true under a constitution such as ours. The position here taken is plainly this: That the pardoning power is vested by our constitution alone in the governor; that aside from the reversal of the judgment in a criminal cause, the only method of relief from the disabilities annexed to such judgment is by a full pardon of the offense, and that, while the crime itself remains unpardoned, the disabilities annexed thereto will remain unaltered and unaffected by any legislative act." State v. Grant (1883) 79 Mo. 113, 124.

vested with the power to parole.[46] The state board, however, is purely an advisory board,[47] except so far as the juvenile reformatories are concerned.[48] The local boards, on the other hand, can actually parole.[49]

The power vested in the state board with reference to the juvenile prisoners confined in the Boys Training School, is not designated as the power to parole. It is rather the power to give the offender a temporary release from confinement, so long as he conducts himself properly.[50] For all practical purposes, however, it is difficult to distinguish this relief from a parole. As to the inmates of the State Industrial Home for Girls,[51] and the State Industrial Home for Negro Girls,[52] the power to parole is expressly granted.

II. THE GRANTING OF RELIEF

As a Vested Right of the Prisoner

The right to a pardon or a commutation is not a vested one, which the convict can demand, but, on the contrary, is a mere

46. See note 5, supra.

47. "The Board of Probation and Parole shall have authority and it shall be its duty to study prisoners committed to State correctional institutions and penal institutions to select prisoners to be recommended to the Governor for parole, commutation of sentence, or pardon; to provide for applications for paroles, commutations of sentence, and pardons; to investigate the merits of such application; to make recommendations to the Governor relative to paroles, commutations of sentence, and pardons; to recommend conditions deemed advisable in the case of prisoners whose release on parole, commutation of sentence, or conditional pardon is recommended; . . . . . The Board may adopt rules and regulations relative to the eligibility of prisoners for parole. The Board of Probation and Parole may, at the written request of the judge or judges of a court named in Section 1 of this Act, or a board of parole authorized to serve such court, authorize parole officers appointed by said Board to act as probation officers for such court or board of parole." R. S. Mo. 1939 §9160.

48. See note 4, supra.

49. See note 6, supra.

50. R. S. Mo. 1929 §8353, continued by reference by R. S. Mo. 1939 §9157.

51. R. S. Mo. 1929 §8369. "Said board may, whenever they deem any of the inmates of said home, who have been so far reformed as to justify her discharge, liberate such inmate by dismissal, upon parole, or release her to any suitable person who will bind her in household work or in some proper art or trade, or said board may return said girl to her parents or other guardian, if they are of good moral character, or said board may place any such girl in the charge and care of any resident of this state, who is the head of a family and of good moral character, on such conditions and on such terms as the board may prescribe." This power is vested now in the parole board by virtue of R. S. Mo. 1939 §9157.

52. R. S. Mo. 1929 §8382, whose provisions are identical with those set forth in 51, supra.

matter of grace.[53] So far as he is concerned, it is a favor which may be granted to him or withheld, in the discretion of the donor. This is equally true of judicial paroles[54] and the granting of probation by the court.[55]

Further indication that the pardoning power of the governor is not a power which the convict may compel him to exercise will be found in the fact that the power of the governor to pardon is not without restriction. For instance, the constitution of the state expressly forbids its exercise in cases of treason and impeachment, and gives the legislature the power to set up regulations pertaining "to the manner of applying for pardons" for other offenses.[56] In this connection, it might be suggested that the legislative power to regulate the manner of applying for pardons may relate to pardons only and not to reprieves and commutations, as all three powers are expressly vested in the governor but only pardons are made subject to legislative regulation. An attempt is also made by statute to restrict the consideration of persons confined in the Intermediate Reformatory for Young Men, to those who have served seven-twelfths of their sentence, in an orderly and peaceable manner. It is also required that the convict shall have given evidence that he is fit to be paroled into the life of the community, and that arrangements have been made for his honorable and useful employment for at least six months in some suitable occupation and for a suitable home free from criminal influences, without expense to the state.[57] Such a statute may, however, be suspected of being un-

53. Ex parte Reno (1877) 66 Mo. 266; Lime v. Blagg (1939) 345 Mo. 1, 131 S. W. (2d) 583. But note this language from Biddle v. Perovich (1927) 274 U. S. 480: "A pardon in our day is not a private act of grace from an individual happening to possess power. It 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 the judgment fixed. See Ex parte Grossman (1925) 267 U. S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done."

54. State v. Collins (1910) 225 Mo. 633, 125 S. W. 465. Also, note the provisions of R. S. Mo. 1939 §§4200, 4201.

55. "However, it must be pointed out that while probation is almost universally a matter of judicial discretion, parole, in most instances, is not so intimately connected with the courts." II Attorney General's Survey of Release Procedures (Department of Justice-1939) p. 2.

56. Mo. Const. 1875, Art. V, §5. Note, however, the language in Ex parte Webbe (Mo. 1929) 30 S. W. (2d) 612, quoting 20 R. C. L. 530, that "the power to commute a sentence is a part of the pardoning power and may be exercised under a general grant of that power."

57. R. S. Mo. 1929 §9120.

constitutional as an encroachment upon the power of the governor to grant pardons and commutations on such conditions as he may deem proper, unless the constitutional provision relating to the right of the legislature to regulate the manner of applying for paroles be considered as supporting the statute now in question. Nevertheless, it seems very doubtful that this statute simply regulates the manner of application rather than the power of pardon itself.

Crimes and Persons Included

The governor of Missouri can pardon only those persons who have been convicted of a violation of the law of Missouri; consequently he cannot issue a pardon relieving the convicted person from the consequences of the violation of a city ordinance. This result was reached by the court after considering the term "offenses" as used in the Missouri Constitution,[58] in the light of its context. The fact that the section which confers the pardoning power also requires the governor to communicate to the general assembly every act of his under such section, stating the name of the convict, etc., clearly indicates that the framers of the constitution had in mind only offenses against the state law.[59]

It is also apparent that a statute authorizing the courts to parole "persons" convicted of crime does not include corporations.[60] The correctness of this construction appears from the purpose of the parole law—to place the individual criminal under the supervision of the court, to the end that a good citizen might be made of him. Further indication that the parole laws refer to natural persons, who can be incarcerated in the jail or penitentiary, and not to artificial citizens, which can only respond by a fine, will be found in the language used in the statute itself which authorizes a person convicted to go at large in specified instances.[61]

Nor is the power of the courts to grant paroles applicable to all offenses. By statute,[62] certain crimes are excluded, as well as certain persons. Murder, forcible rape, arson, and robbery are

58. Mo. Const. 1875, Art. V, §8.
59. State ex rel. City of Kansas City v. Renick (1900) 157 Mo. 292, 57 S. W. 713.
60. Ibid.
61. State ex rel. Howell County v. West Plains Tel. Co. (1911) 232 Mo. 579, 135 S. W. 20.
62. R. S. Mo. 1939 §4201.

offenses for which the court cannot grant what the statute designates as a parole. This same statute limits the court's favorable action to persons of "previous good character and who shall not have been previously convicted of a felony," and further provides that the "court shall have no power to parole any person after he has been delivered to the warden." These limitations as to persons eligible for parole by the courts are also applicable to the local boards of parole existing in some counties.[63] But one might well wonder whether the power of a court to put the defendant on *probation* is subject to the aforesaid limitation, since the statute expressly limits only the power of the court to grant *paroles*. The general lack of technical accuracy and the common practice of referring to all the relief afforded by the trial court as a parole, however, might be a sufficient reason for holding that the statute applies equally to probation.

Provisions as to Physical and Mental Condition, Sex, and Age

Even though the governor can grant paroles on any condition which may seem advisable to him, including a parole terminable upon a restoration to good health,[64] under his constitutional power to pardon,[65] the legislature has authorized him by statute to grant paroles to convicts "afflicted with any disease which is of such a character as to be incurable, or where such confinement will necessarily greatly endanger or shorten the life of such convict."[66] This same statute prescribes, however, that before the governor exercises the discretionary power to grant a parole therein given him, the physician shall certify the facts to the parole board, stating the nature of the disease, and the board shall then make such endorsement thereon as the nature of the case requires, and the certificate with the board's endorsement thereon shall be laid before the governor.

Mental and physical conditions may also be factors justifying relief from the execution of the court's judgment or sentence. It is expressly provided by statute[67] that, if any person, after having been convicted of any crime or misdemeanor, become insane before execution or expiration of the sentence of the court,

63. See note 1, supra.
64. See Lime v. Blagg (1939) 345 Mo. 1, 131 S. W. (2d) 583.
65. See note 17, supra.
66. R. S. Mo. 1939, §9076, applying to the penitentiary; R. S. Mo. 1939 §9138, applying to the Intermediate Reformatory for Young Men.
67. R. S. Mo. 1939 §4191.

the governor shall inquire into the facts, and pardon such lunatic, or commute or suspend, for the time being, the execution of such sentence. It is further provided that by his warrant to the sheriff of the proper county, or the warden of the penitentiary, he shall order such lunatic conveyed to the hospital for the care and treatment of the insane, and to be kept there until restored to his reason. If the sentence of such lunatic is only suspended, it must be executed upon him after such period has expired. Further provision is also made by statute[68] that, if, after any convict be sentenced to death, the sheriff or warden having charge of his person, has cause to believe that such convict has become insane, such officer may summon a jury to inquire into such insanity. If it be found that the convict is insane, the execution of the sentence is suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme court or other court directing the execution of such convict.[69] The jury's finding must be forthwith transmitted to the governor, who, as soon as he shall be convinced of the sanity of the convict, may issue a warrant appointing the time of execution, pursuant to the sentence; or, he may, in his discretion, commute the punishment to imprisonment for life.[70]

Pregnancy is also a ground for awarding relief from the immediate execution of sentence where the female is under sentence of death. In such a case, if the officer having charge of her person has reason to suspect pregnancy, he must summon a jury of six persons, not less than three of whom are physicians,[71] and if it appear that such female convict is pregnant with child, her execution is suspended and the inquisition transmitted to the governor.[72] However, when the governor is satisfied that the cause of such suspension no longer exists, he may issue his warrant appointing a day for execution of her sentence, or he may, in his discretion, commute her punishment to life imprisonment.[73]

Conditions Attached—Legality

As we have elsewhere indicated,[74] the governor can, by virtue of the state constitution, grant reprieves, commutations, pardons,

68. R. S. Mo. 1939 §4192.
69. R. S. Mo. 1939 §4194.
70. R. S. Mo. 1939 §4195.
71. R. S. Mo. 1939 §4196.
72. R. S. Mo. 1939 §4197.
73. R. S. Mo. 1939 §4198.
74. See note 18, supra.

and paroles, upon such conditions and with such restrictions and limitations as he may think proper.[75] This power is also extended to the chief executive by statute,[76] although, obviously, it would seem that such a statute is unnecessary and neither adds to nor detracts from the power vested in him by the constitutional grant.[77] The courts have recognized that the governor can commute and parole upon condition, and that he may attach to a commutation or a parole granted by him, any condition he chooses, provided the condition is not illegal, immoral, or impossible of fulfillment.[78] Accordingly, a commutation of a term in the state penitentiary to a term in the reformatory at Boonville, conditioned that the inmate should comply with all the rules and regulations of that reformatory and providing that otherwise the superintendent should return him to the penitentiary, was upheld as being neither illegal, immoral, nor impossible of performance.[79] The same conclusion was reached by the court where a parole contained as one of its conditions the provision that, if the prisoner failed to meet the various conditions thereby imposed, "he may be arrested and returned to the penitentiary there to serve out the remainder of his sentence."[80] In this case, after the parole had been revoked, the prisoner sought release by a writ of habeas corpus and contended that the time that he had been out on parole should be deducted from the remainder of his sentence and that such allowance plus the benefit of the three-fourths law,[81] less good time, entitled him to a discharge sometime before he filed his petition for the writ. The court rejected this contention, stating, among other things, that "no statute has been cited which provides that the time during which a convict is at large under a parole by the governor shall be deducted from his sentence, in case such parole is revoked, nor is there any statute providing that such time shall not be deducted from such term of imprisonment. The governor was therefore free to impose his own conditions,"[82] and the penalty

75. Mo. Const. 1875, Art. V, §8.
76. R. S. Mo. 1939 §4188.
77. Jacobs v. Crawford (1925) 308 Mo. 302, 272 S. W. 931.
78. Ex parte Mounce (1925) 307 Mo. 40, 269 S. W. 385; Jacobs v. Crawford (1925) 308 Mo. 302, 272 S. W. 931; Ex parte Strauss (Mo. 1928) 7 S. W. (2d) 1000, Ex parte Webbe (Mo. 1929) 30 S. W. (2d) 612.
79. Ex parte Webbe (Mo. 1929) 30 S. W. (2d) 612.
80. Jacobs v. Crawford (1925) 308 Mo. 302, 272 S. W. 931.
81. See note 172, infra for further discussion of this law.
82. Jacobs v. Crawford (1925) 308 Mo. 302, 272 S. W. 931.

for failure to observe the conditions of the parole was that the convict should serve the remainder of his sentence.[83] The court, also has sustained as neither illegal, immoral, nor impossible of performance, the condition that the prisoner depart from and remain continuously outside of Cole County. Having voluntarily accepted the commutation with this condition a part of it, he could avail himself of its intended privilege of liberty only upon meeting the conditions prescribed therein.[84] In this connection,[85] it is interesting to note the view of the court where the defendant was charged with having violated the terms of a statute[86] making it the duty of all convicts discharged from the penitentiary to leave Jefferson City and Cole and Callaway Counties within twenty-four hours after discharge. While the statute was declared unconstitutional as a special law singling out but two of a number of counties surrounding a great penal institution, the character of the statute was strongly and successfully attacked on another ground,[87] which to some degree also might be urged

83. "When Governor Major paroled petitioner, it was upon the express condition that, if petitioner failed to observe the conditions of his parole, or the governor ordered his arrest and return to the penitentiary, petitioner should 'serve out the remainder of his sentence.' Was such remainder a term lessening from day to day, as petitioner continued to observe the conditions of his parole while remaining at large thereunder, or was it a fixed term? That it was intended to be a fixed term, not subject to diminution during the existence of the parole, is apparent from the fact that it was specified in the order granting the parole that petitioner was 'granted a commutation of sentence for the purpose of parole, without the benefit of the three-fourths law.' That simply meant that, without waiting for the application of the three-fourths law, the remainder of petitioner's sentence was conditionally commuted or wiped out as of that date. There was therefore no remainder of his sentence to be served, if he observed the conditions of his parole. . . ."

It is apparent that the governor intended to impose as one of the conditions of the parole, that the full unexpired sentence of petitioner should hang over him as a 'Sword of Damocles' to keep him faithful to the end of the period of grace. If the unexpired sentence conditionally commuted lessens from day to day while a paroled convict is at large under parole, one of the very greatest inducements to persuade such convict to remain a law abiding citizen becomes less of an inducement from day to day, and he may arrive at a period where he will calculate supposed benefits accruing from his failure to remain a law abiding citizen against the diminishing penalty for failure to live such a life." Jacobs v. Crawford, (1925) 308 Mo. 302, 272 S. W. 931, 933.

84. Ex parte Strauss (Mo. 1928) 7 S. W. (2d) 1000.

85. Ex parte Schatz (1925) 307 Mo. 67, 269 S. W. 383, 38 A. L. R. 1032.

86. R. S. Mo. 1929 §12523.

87. The statute involved placed no restrictions or limitations upon the word "discharged" used in it. Without such, the word, stated the court, has the meaning of being restored to freedom. It may not mean that the prisoner has been given the right of suffrage, or the right to hold office, if such have been taken from him by his conviction, but it does mean that

against the legality of the gubernatorial condition that the convict when paroled must depart from and remain out of Cole County. However, the applicability of the attack to one method of release and not to the other may be justified by the basic difference between a discharge and a parole or conditional commutation.

The rules applying to conditional pardons or paroles, granted by the governor or other constitutional pardoning power, are equally applicable to paroles granted by the trial courts. Since judicial paroles are also purely matters of grace or favor, when one is accepted by the defendant, it is accepted subject to all the conditions imposed by the court, which are not illegal, immoral, or impossible of performance.[88] In this connection, the power of the court to suspend sentence or the execution of its judgment is important. In one case the court, in effect, granted an indefinite suspension of execution by ordering the release of the defendant in order that he might seek a change of climate made necessary because he was contracting tuberculosis; this action was held to be an effort of the court to usurp the pardoning power of the governor. The court, holding it invalid, stated that in the absence of some statutory provision, the judgment of a court imposing a jail sentence can be satisfied only by a

---

in all other respects he is a citizen. If before his conviction he had the constitutional right to choose his place of abode, which he undoubtedly possessed, then his discharge by the state would leave to him that right, or otherwise he would not have the privilege in this respect accorded to other citizens. Whether this man has been restored to his right to vote and hold office, and therefore repossessed of all the privileges of a citizen, is not the real question. His discharge so far reinstated him to the position of a citizen that he could go from place to place within the state and within Cole and Calloway Counties, and within the United States. For his wrong, he had paid his penalty to the satisfaction of the state, and by the state he has been discharged, i. e., restored to the right of selecting his own home anywhere within the confines of the state, or within any county therein. Other citizens of the state can live in, own property, and do business in both Cole and Calloway Counties. Is there equal protection of the rights of these citizens as compared with other citizens to preclude their residing in these particular two counties? One of the things contemplated by punishment for crime is the reformation of the citizen. Why cannot they carry out the reformation in Cole and Calloway Counties as well as in other counties of the State? If the discharged citizen becomes unsavory, he can be as well tried and punished in these two counties as elsewhere. If he does not choose to work, we have a vagrancy law of general application. Back of all this, a discharged convict is a citizen and entitled to all constitutional rights not taken from him. This law is wrong in fundamental principles, and we think clearly unconstitutional. See Ex parte Schatz (1925) 307 Mo. 67, 269 S. W. 383.

88. See note 53, supra.

compliance with its terms, and that, the defendant, consequently could be returned and required to serve the rest of his sentence.[89] Again, where the court, on a plea of guilty by the defendant, made an order that the assessing of punishment and sentence be "deferred to some future time," and the defendant contended that the court was without jurisdiction to assess the punishment later when it sought to do so, the appellate court sustained this contention.[90] It held that withholding indefinitely the sentence was an exercise of the pardoning power, which was lodged solely with another department of the government. That such power in the courts does not exist in this state, is also indicated by the very fact that, although we have a statute regulating parole, which is in effect a suspension of punishment, even this power of parole cannot be exercised until there has been a judgment or sentence. Therefore, in the light of this holding that the court could not suspend its sentence indefinitely, it could not grant a stay of execution "so long as the defendant remains out of the country."[91] Such a condition, would also appear to be illegal, since this parole is actually an order of banishment.

But the legislature has attempted to vest in the courts the power to place the defendant on probation and to suspend the imposition or execution of his sentence if he be a person eligible for judicial parole.[92] Surely, therefore, if the legislative action is effective, in order to award the relief naturally attending any of these methods, the court can impose any condition that is not illegal, immoral, or impossible of performance. The illegality of an indefinite stay or suspension is overcome by the statute previously discussed,[93] which provides for the automatic discharge of the parolee after a specified period has expired without an absolute discharge or termination being ordered by the court.

The court, or the judge thereof in vacation, is granted by statute the discretion to parole any person against whom a fine has been assessed or a jail sentence imposed by the court, or any person actually confined in jail under a judgment of a justice

89. Ex parte Bugg (1912) 163 Mo. App. 44, 145 S. W. 831.
90. State v. Hockett (1908) 129 Mo. App. 639, 108 S. W. 599 (The defendant in this case was ordered discharged as the court, by failing to impose sentence, was held to have lost all jurisdiction). For further treatment of suspension of sentence, see notes 29 to 36, supra.
91. Ex parte Thornberry (1923) 300 Mo. 661, 254 S. W. 1087.
92. R. S. Mo. 1939 §9156.
93. R. S. Mo. 1939 §4207. See note 34, supra for its provisions.

of the peace, or sentenced to a reformatory for juvenile offenders.[94] Of course, this statute too is subject to the requirement that the conditions or restrictions of the parole must not be illegal, immoral, or impossible of performance.

There are certain statutory conditions concerning the giving of a bond, the payment of costs, and other expenses, which the court may or must make a condition of the parole. For instance, one statute makes it the express duty of the trial court, where judicial paroles are granted, before or at the time of the granting, to require the defendant, with one or more sureties, to enter into a bond with the state in a sum to be fixed by the court, conditioned that he will appear in court on the first day of each regular term and every day during such term during the continuance of the parole, and that he shall not depart without leave of court.[95] Another statute makes it the duty of the court to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled is insolvent and unable either to pay or furnish security for the same.[96] A legislative enactment also requires the parolee to appear at regular intervals before the court or the judge who granted the parole, during the continuance of his parole and to furnish, at the parolee's own expense, proof that, since his parole or since the last date at which such proof had been previously furnished, he has complied with all the conditions of his release and conducted himself as a peaceable and law-abiding citizen.[97]

(To Be Concluded in The February Issue.)

94. R. S. Mo. 1939 §4200.
95. R. S. Mo. 1939 §4203.
96. R. S. Mo. 1939 §4208.
97. R. S. Mo. 1939 §4205.