2-1-1954

Criminal Law -- Banishment

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Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol32/iss2/9
The recent Virginia decision represents the broad and salutary general philosophy that the courts, absent some clear restriction of law or of public policy, ought not to block the attainment of human desires. For so long a time as we shall have to operate under the present Section 122, it is to be hoped that this philosophy will prevail in its interpretation.

J. V. Hunter

Criminal Law—Banishment

Recently a sentence of two years on the roads was suspended on condition that the defendant leave the State of North Carolina for two years. The Supreme Court of this State held that this was in all practical effect a sentence of banishment, and as such, was void.¹ What then is banishment, and how does it fit into our legal scheme of things?

In one form or another, banishment, or transportation,² has been known in Europe from ancient times as a punishment for crime. In one form, deportatio, it was introduced by Augustus into the Roman law of that age and, gradually superseding exile,³ was by no means an uncommon punishment.⁴ In another form, abjuration, it was known in the kingdoms founded upon the wreckage of Imperial Rome⁵ and later appeared in the early Anglo-Saxon laws of Alfred.⁶ The accused would flee to a sanctuary, which generally was holy ground, where he would confess his crime and swear to leave the realm, on no occasion to return without permission from the Crown. This, Blackstone points out, was not strictly a punishment, but rather was in the nature of a

²It is unnecessary to distinguish here between banishment and transportation since the result in each is the same. Technically, however, banishment “is inflicted principally upon political offenders, ‘transportation’ being the word used to express a similar punishment of ordinary criminals. Banishment, however, merely forbids the return of the person banished before the expiration of the sentence, while transportation involves the idea of deprivation of liberty after the convict arrives at the place to which he has been carried.” BLACK’S LAW DICTIONARY, Banishment (4th ed. 1951).
³Buckland, A Text-Book of Roman Law 98 (1921).
condition to pardon.\textsuperscript{7} Because abjuration offered a means of escaping, with one's head, the consequences of his crime, it became more an incentive to crime than a deterrent, and for this reason it was abolished in 1604.\textsuperscript{8} It had one important effect, however: it established the validity of the sovereign's attaching to a pardon the condition that one pardoned leave a prescribed place, either for a specified term or for life.\textsuperscript{9}

From the reign of Charles II, banishment became a not infrequent condition and has consistently been held valid since that time in the courts of both Great Britain\textsuperscript{10} and the United States.\textsuperscript{11} The usual approach by the bench in recognizing its validity as a condition is that the power of the sovereign (or in the United States, the executive) to grant a pardon includes the lesser power to grant a conditional pardon, so long as it is neither immoral, illegal, nor impossible of performance.\textsuperscript{12} Since such a condition is obviously neither immoral nor impossible, it was argued in Ex parte Snyder\textsuperscript{13} that a condition that the parolee leave the State of Oklahoma for twenty years was in conflict with the Constitution of that State, which provides that "no person shall be transported out of the state for any offense committed within the state."\textsuperscript{14} It was held, however, that this was not involuntary transportation. Rather, "the parole with all the conditions set forth therein was a matter which

\textsuperscript{7} 4 BLACKSTONE'S COMMENTARIES 332 (Sharswood's Ed. 1885); 8 C.J.S., Banishment p. 385 (1938).

\textsuperscript{8} "So much of all statutes as concerneth abjured persons and sanctuaries... shall stand repealed and be void." 1 JAMES I, c. 25, §34 (1604). See also 20 JAMES I, c. 18 (1624).

\textsuperscript{9} 8 C. J. S., Banishment p. 385 (1938). See also 7 BACON'S ABRIDGMENT 412, as quoted in 4 BLACKSTONE'S COMMENTARIES 40 (Sharswood's Ed. 1885). "It seems agreed that the king may extend his mercy on whatever terms he pleases, and consequently may annex to his pardon any condition that he thinks fit."

\textsuperscript{10} In one of the very earliest reported cases, the condition was that the criminal "go beyond the seas for five years." Copeland's Case, J. Kel. 45, 84 Eng. Rep. 1075 (1665).

\textsuperscript{11} State v. Fuller, 1 McCord 178 (S. C. 1821); State v. Chancellor, 1 Strob. 347 (S. C. 1847); State v. Barnes, 32 S. C. 14, 10 S. E. 611, 17 Am. St. Rep. 832 (1889); Ex parte Hawkins, 61 Ark. 321, 33 S.W. 106 (1895); Ex parte Snyder, 81 Okla. Cr. Rep. 34, 159 P. 2d 752 (1945). The above pardons were all granted on condition that the prisoner leave the state. Perhaps the most interesting condition was that "on or before the last of the said month of April," the prisoner was to "depart from and out of the United States of America, and never return to the same"—this from a state court. It was upheld on the ground that, while the governor's authority did not extend beyond the borders of the state, it was sufficient validly to impose such a condition. People v. Potter, 1 Parker, C.R. 47 (N. Y. 1845). The same conclusion has been reached in a Federal court. Kavalin v. White, 44 F. 2d 49 (10th Cir. 1930).

\textsuperscript{12} Kavalin v. White, supra note 11. The power to grant pardons is provided the governor by every state constitution. Power to grant conditional pardons is generally granted by statute, but may be found in some state constitutions. For example, the governor of North Carolina may grant pardons "subject to such conditions, restrictions, and limitations as he thinks proper and necessary..." N. C. CONST. Art. III, § 6; N. C. GEN. STAT. § 147-25 (1952).

\textsuperscript{13} Ex parte Snyder, 81 Okla. Cr. Rep. 34, 159 P. 2d 752 (1945).

\textsuperscript{14} OKLA. CONST. Art. II, § 29.
the petitioner could accept or reject. He voluntarily left the state," hence, a lawful condition. It is upon this peg that most courts hang their decisions.

On the other hand, banishment as a direct punishment has found a less ready acceptance in the English-speaking world, although it is today an integral part of the law of several nations, among which are Spain,16 France,16 Italy,17 and the Philippines.18 While it was definitely known as a punishment in England in the Twelfth and Thirteenth Centuries, it had become obsolescent by 1300, not being revived until the practice of transporting criminals to the colonies was begun in 1597.19 In that year a statute was passed providing that convicted rogues, vagabonds, and beggars "be banished out of this realm and all domynions thereof."20 From that time until 1864, Parliament at frequent intervals passed new statutes reaffirming the use of this punishment.

In the United States, however, banishment has not found even that passing measure of acceptance. American decisions have held invalid not only banishment from the country21 and the state,22 but also banishment from the county,23 city,24 and neighborhood25 as well. In fact,

18 Legarda v. Valdez, 1 Philippine 146 (1902).
19 Ibid.
20 3 HODSWORTH, HISTORY OF ENGLISH LAW 304 (3rd ed. 1923).
21 39 ELIZ. I, c. 4 (1597); see also 14 CAR. II, c. 12, §§ 16, 23 (1662), reenacting the original statute. At this early date (1662), America was the principal recipient of banished convicts. After a lapse of forty-six years, transportation to America was restored on a greatly extended scale by 4 GEO. I, c. 11 (1717), but was of course halted by the American Revolution. This practice was continued, Australia being the chief recipient, until it was gradually abolished between 1853 and 1864, primarily because of objections by the colonies themselves to receiving convicts sentenced to them. IVES, A HISTORY OF PENAL METHODS 109, 146 (1914). See also 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 482 (1883).
22 In People v. Lopez, 81 Cal. App. 100, 253 Pac. 169 (1927), the trial court declared that "after sentence has been served, the defendant is to be deported to Mexico." The appellate court said, "there is no authority of law by which the state courts can make a valid order of this character. . . . It follows, therefore, that the judgment is void." Id. at 103, 253 Pac. at 171.
23 People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930). The defendant was ordered by the trial court to "leave the State of Michigan within thirty days and not return for the period of probation," which was five years. The Supreme Court said (in reversing) in unequivocal terms that "to permit one state to dump its convict criminals into another would entitle the state believing itself injured thereby to exercise its police and military power, in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the Union itself." Id. at 189, 231 N.W. at 96.
24 Ex parte Scarborough, 76 Cal. App. 2d 648, 173 P. 2d 825 (1946). "The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city." Id. at 652, 173 P. 2d at 827.
25 Ibid.
26 People v. Smith et al., 252 Mich. 4, 232 N.W. 397 (1930). The defendants were placed on probation and ordered to move out of the neighborhood in which they lived. Held, that part of the order "was without authority of law." Id. at 5, 232 N.W. 397.
the constitutions of several states expressly forbid it, and in states not having such provisions, it is recognized that historically, banishment was unknown to the common law, and must therefore have statutory sanction before being legally imposed. While no state has such a statute, there seems to be little doubt that in those states having no constitutional prohibitions against it, such a statute would receive approval in the courts, as several cases and text-writers have intimated. It is not likely that a statute of this type would be held unconstitutional on the ground that it authorizes cruel and unusual punishment, since it has been established on numerous occasions that, while as a punishment banishment is unusual, it cannot be considered cruel.

Chief among the objections that would probably arise would be that it is contrary to sound public policy and that it violates Article IV, § 2, of the United States Constitution, dealing with the rights of citizenship. It is highly doubtful whether such a sentence would serve any practical purpose, however, since once beyond the borders of the state, the convict would be beyond any effort of the state either to restrain him or to aid in his rehabilitation.

The practical equivalent of banishment has of course been accomplished by means other than direct sentence, a practice which has led to conflicting and sometimes confusing decisions. This is as true in North Carolina as elsewhere. For example, where the defendant’s sentence was suspended for thirty days upon payment of costs with the further provision that “if thereafter the defendant be found within the State of North Carolina, capias shall issue . . . and upon apprehension the defendant shall be committed to serve the sentence imposed,” the court held that this was not a suspension of sentence on condition that the defendant leave the state to avoid imposition of the sentence. Again, where the court ordered that the defendants “be imprisoned for twelve months in the county jail, but if the defendants leave the state”...
within thirty days, no capias to issue, the court held that this was not a sentence of banishment. But recently in *State v. Doughtie*, the court said,

A sentence of banishment is undoubtedly void. A sentence suspended on condition that the defendant leave the State of North Carolina is in all practical effect a sentence of banishment. It gives the defendant no opportunity to avoid serving the road sentence except by exile.

This would seem to indicate a trend by the court away from sentences and conditions that by subtle interpretation result in banishment. It certainly seems to recognize the fact that the place for the State's criminals is within the borders of the State. Otherwise, these unwilling expatriates would be foisted upon the no less unwilling citizens of other states and any duty to restrain or rehabilitate them would go unattended.

**Myron C. Banks**

**Labor Law—the Bargainability of Company Housing**

Is company housing a subject of mandatory collective bargaining within the purview of the terms "wages" and "conditions of employment" as used in Section 9 (a) of the Labor-Management Relations Act? In recent cases before the Courts of Appeals, a conflict has arisen, the Fourth Circuit holding that company housing is and the Fifth Circuit that it is not bargainable.

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34 State v. Hatley *et al.*, 110 N. C. 522, 14 S.E. 751 (1892). See also Ex parte Hinson, 156 N. C. 250, 252, 72 S.E. 310, 311 (1911), where defendant was told that if she left the county and did not return, she would not be imprisoned, and the clerk was directed not to issue capias for fifteen days, the court said, "The opportunity which withholding of the capias afforded defendant to escape was not a decree of banishment. There was nothing requiring her to leave. If she left, it was of her own free will and accord." Could this course be called strictly voluntary, when the only other course open to the defendant is a term in jail?


36 237 N. C. 368, 74 S.E. 2d 923 (1953).

37 Yet the court indicates that this decision does not bear directly on the decisions reached in State v. Hatley, 110 N. C. 522, 14 S.E. 751 (1892); Ex parte Hinson, 156 N. C. 250, 72 S.E. 310 (1911); and State v. McAfee, 189 N. C. 320, 127 S.E. 204 (1925).

For other reasons holding invalid a suspension of sentence on condition that the defendant leave a specified locale, see: Ex parte Scarborough, 73 Cal. App. 2d 648, 173 P. 2d 825 (1946) ("Unlawful increase of punishment not provided by statute"); Ex parte Sheehan, 100 Mont. 244, 49 P. 2d 438 (1935) ("in nature of a pardon on condition . . . the court sought to exercise a power which the Constitution reposes in the Governor and the board of pardons"); State v. Doughtie, *supra* note 35 ("It is not sound public policy").


3 N. L. R. B. v. Bemis Bros. Bag Co., 206 F. 2d 33 (5th Cir. 1953). The Fifth Circuit did conclude, however, that the subject might be bargainable under proper circumstances.