Cleveland State Law Review

Volume 21
Issue 2 *Legal Profession Problems Symposium*

Article

1972

Banishment from the Kingdom of Lake (County)

Nelson G. Karl

Banishment From The Kingdom of Lake (County)

*Nelson G. Karl**

ON THE 19TH DAY OF MAY, 1971, the Supreme Court of Ohio denied habeas corpus relief to Michael Edsall, a fourteen year old boy who had been banished from Lake County, Ohio.[1]

The facts in this case of Mike Edsall are simple. Mike had been truant from school for a number of days. Upon his return, the school authorities dealt with his truancy in traditional fashion by suspending Mike from school for a specified number of days. During this period of suspension, Mike was found on school grounds. He was warned that if he were found on school grounds again during the suspension period, he would be turned over to the juvenile court. Mike failed to heed these warnings and the following day was again found on school grounds. As a result of these transgressions the school authorities filed a complaint in the Juvenile Court of Lake County.[2] In May, 1970, the Juvenile Court adjudicated Mike a delinquent and sentenced him to 30 days in the detention home. By this time, Mike's parents had moved to an adjoining county and the Court proceeded to suspend the 30 day sentence and placed Mike on probation in the custody of his parents, conditioned on Mike remaining outside Lake County unless in the company of his parents. The probation order and the banishment from Lake County did not contain a termination date. On July 6, 1970, Mike was again found in Lake County where he was napping on the couch in a private home owned by friends. Mike was taken into custody for probation violation and was again before the Juvenile Court on July 9, 1970. The Court revoked his probation for violation of its terms and conditions, and Mike was ordered to serve his 30 day sentence in the detention home.[3]

In denying habeas corpus relief to Mike Edsall, the Ohio Supreme Court concluded that the Juvenile Court had jurisdiction over both the person of Mike Edsall and the subject matter, and that an appeal from the decision would have been the appropriate means by which the order of the Juvenile Court could be reviewed.[4] But in so doing, the Supreme Court avoided dealing with the substantive issue of whether "banishment" was a valid order of a court.

---

*Member of the Ohio Bar; partner in the law firm of Rudd, Karl, Sheerer & Lybarger, of Cleveland, Ohio.

[1] In re Edsall, 26 Ohio St.2d 145, 269 N.E.2d 848 (1971).

[2] Ohio v. Edsall, Juvenile Court, Lake County, Ohio Case No. 16-542 (1970).

[3] *Id.*

[4] In re Edsall, 26 Ohio St.2d 145, 269 N.E.2d 848 (1971).

Historical Aspects of Banishment Briefly Noted

Although this decision was dispositive of the case of Mike Edsall, it did not determine whether a court had authority to issue an order of banishment or exile. Banishment has been defined in Webster's New 20th Century Dictionary, Second Edition, to mean:

> To condemn to leave one's country by authority of the sovereign or government, either temporarily or for life; to exile. Syn. exile, expel.

Black's Law Dictionary in quoting from *U. S. v. JuToy,*[5] defines banishment as:

> . . . punishment inflicted upon criminals by compelling them to quit a city, place or country, for a specific period of time, or for life.

The concept of banishment is hardly new. Banishment was employed extensively in ancient Rome. It was statutory in England for the Crown to transport prisoners beyond the seas for life for certain felonies.[6] "Banishment" was first known in England as "abjuration," where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom and not return without permission. This was not viewed as a punishment but as a condition of pardon.[7]

The twelfth section of the English Habeas Corpus Act of 1679,[8] one of the three great muniments of English liberty ever enacted, held that:

> The subject of this realm, that now is or hereafter shall be an inhabitant or resident of this kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, shall nay be sent prisoner into Scotland, Ireland, Jersey, Guernsye, Tangier, or into parts, garrisons, islands, or places beyond the seas . . . and that every such imprisonment is hereby enacted and adjudged to be illegal.

The section went on to provide:

> The person or persons who knowingly frame, contrive, write, seal, or countersign any warrant for such commitment or in any way advising, aiding, or assisting therein . . . shall be disabled thenceforth to bear any office or trust or profit within said realm of England, dominion of Wales, or town of Berwick-upon-Tweed . . . and be incapable of any pardon from the King, his heirs and successors.

Although exile has never been made a part of the statutory or common law of the United States, nevertheless the concept is hardly new in this country. It is a matter of common knowledge that countless courts in the various states have banished from their territorial jurisdictions persons considered to be undesirable and a blight on

---

[5] United States v. JuToy, 198 U.S. 253, 269 (1905).

[6] Rex v. Lewis, 1 Moody cc 372 (1832).

[7] 6 C.J. Banishment § 1178 (1916).

[8] The English Statute of 31 Car. II. C. 2, (1679) is the original and prominent habeas corpus act. This act was the forerunner of similar statutes enacted in all the United States and is regarded as the great constitutional guaranty of personal liberty. *c.f.,* H. Cooper, *Habeas Corpus in Peru: Myth and Reality,* 20 CLEVE. ST. L. REV. 603 (1971).

the landscape, such as drunks, vagrants and other persons who can generally fit the classification of being a nuisance. In their endeavor to cleanse their communities, courts have seen fit to order loiterers and so called disturbers of the peace and alleged hoodlums to "stay out of town." Perhaps such court orders are throw backs to the law of the old west portrayed in cinema and on television where the gun-slinging sheriff apprehends a trouble maker and orders him to "stay out of Dodge City." However, only a few such cases have found their way to the appellate courts for review so as to establish a body of applicable law. This is not too difficult to understand when we consider the mechanism of a court ordered banishment which is ordinarily a form of probation as an alternative to serving time in jail. In most cases, the defendant is only too happy to accept exile as a substitute for imprisonment. Consequently, few courts have had the opportunity to examine the legal issues involved, and the substantive issues offered the Supreme Court of Ohio in the case of *In re Edsall,*[9] would have constituted a case of first impression in Ohio.

Early United States Decisions

The first reported United States case wrestling with the question of exile was *United States v. Fong Yue Ting,*[10] decided by the United States Supreme Court in 1893.

Ting was an alien resident of the United States fighting deportation under the Act of 1892 affecting the rights of Chinese laborers to reside in the United States. A due process argument based on the 14th Amendment was advanced by Mr. Joseph H. Choate, but the Court held that every sovereign nation has the power to forbid the entrance of foreigners within its dominions. But the Court, even at that time, clearly distinguished the rights of a citizen from those of a foreigner. The thrust of the decision was predicated on the fact that Ting was an alien and thus may be expelled or deported when the government so chooses. The question of deportations and the rights of aliens are outside the scope of this article and the Ting case is reported only insofar as it deals with the concept of exile.

The first reported decision found in the United States involving a citizen was *State v. Baker,*[11] decided in 1900 by the Supreme Court of South Carolina. After a conviction for grand larceny, the sentence of imprisonment contained the provision: "After you have served five years, you will be released with the understanding you leave the state and never set foot in it again." The Supreme Court held that the sentencing court had no power to impose banishment from the state upon a defendant convicted of grand larceny. The Court reached these conclusions, not on constitutional grounds, but by reasoning that banishment was not a punishment authorized by the

---

[9] In re Edsall, 26 Ohio St.2d 145, 269 N.E.2d 848 (1971).
[10] 149 U.S. 698 (1892).
[11] 58 S.C. 111, 36 S.E. 501 (1900).

statutory or common law of the State of South Carolina. In accord with this holding was the case of *Hoggett v. State*,[12] decided in 1912 in Mississippi where it was held that the suspension of a sentence on condition that the defendant leave the country was void.

Consideration of the Right of Assemblage

An order of banishment or exile must be considered within the context of at least three amendments to the United States Constitution. Banishment involves the right of assembly guaranteed by the First Amendment,[13] the right to be secure in one's person guaranteed by the Fourth Amendment,[14] and due process of law as guaranteed by the Fourteenth Amendment.[15]

It was held in *United Mineworkers of America v. Illinois Bar Association*,[16] that laws which actually affect exercises of the right to assemble peacefully . . . cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence, or even because said laws do in fact provide a helpful means of dealing with such an evil. The Court further held that the right to assemble peacefully was among the most precious of the liberties safeguarded by the Bill of Rights.

The fact situations where courts have paid homage to the right of assemblage range far and wide. A federal district court in Maryland upheld the right of a practicing nudist to apply for employment as a police officer.[17] The court held that to do otherwise would be an infringement on his rights of association. Another federal district court held unconstitutional a Georgia statute prohibiting police officers from forming or belonging to a labor union as a violation of First Amendment rights of assembly.[18] The right of assembly is so sacrosanct that it includes the inanimate within its ambit. In *Hague v. Committee for Industrial Organizations*,[19] Justice Stone incorporated parks and streets into the First Amendment when he wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, rights and liberties of citizens.

The rights of freedom of assemblage has gathered in its wings political groups of all hues. When a legislative committee in the State of Florida required the production of the membership records of the

---

[12] 101 Miss. 69, 57 S. 811 (1912).
[13] U.S. CONST. amend I.
[14] U.S. CONST. amend. IV.
[15] U.S. CONST. amend XIV.
[16] 389 U.S. 217 (1967).
[17] Bruns v. Pomerleau, 319 F. Supp. 58 (D. Md. 1970).
[18] Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971).
[19] 307 U.S. 496, 515 (1939).

N.A.A.C.P., the Supreme Court of the United States reversed a finding of contempt and held that the freedom to engage in associations for the advancement of beliefs and ideas in an inseparable aspect of the liberty assured by freedom of association.[20] The following year, the Supreme Court considered a case where a passport was denied to a member of the Communist party who refused to yield his membership. The Court held that the right to travel is a fundamental personal liberty and cannot be arbitrarily curtailed.[21] In another case involving communists, the Supreme Court struck down a portion of the Subversive Activities Control Act providing that when a communist-action organization is under a final order to register, it is unlawful for any member of the organization to engage in employment in a defense facility. The Court found that freedom of association protected by the First Amendment is as basic as the right to travel.[22] In *Brandenburg v. Ohio*,[23] the Supreme Court considered a case involving the Ku Klux Klan that was shocking on its facts. The defendant, a leader of the Klan, addressed a Klan rally where a large wooden cross was burned and where firearms were carried. His remarks included "Bury the niggers," and "Send the Jews back to Israel." He was convicted under Ohio's criminal syndicalism statute. The Supreme Court reversed the conviction on the basis of freedom of speech and assembly. The Court held in a per curiam opinion that the right of peaceable assembly is a right cognate to those of free speech and press and equally fundamental.

In Ohio, a municipal court found an ordinance unconstitutional which prohibited the congregation in or about any place where prostitution was carried on for the reason that the ordinance violated one's right of free and peaceful assembly.[24] It was held in Texas that the right of assembly may be regulated but cannot be denied.[25] A Mississippi court held that although a municipality might encounter considerable difficulty in maintaining peace in the event of man's disorders, it has no reason to deny, even in part, the citizens of a city the right to assemble peacefully when public disorder is not threatened.[26] The court found it to be the character of rights granted under this amendment and not that of limitations of government which has the greatest significance under the Federal Constitution. As stated in *Shelton v. Tucker*,[27] even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means

---

[20] Gibson v. Florida Legislative Investigating Comm., 372 U.S. 539 (1963).

[21] Aptheker v. Secretary of State, 387 U.S. 500 (1964).

[22] United States v. Robel, 389 U.S. 528 (1967).

[23] 395 U.S. 444 (1969).

[24] City of Dayton v. Allen, 28 Ohio Misc. 181 (1971).

[25] Geissler v. Coussoulis, 424 S.W.2d 709 (Tex. Civ. App. 1967).

[26] Robinson v. Coopwood, 292 F.Supp 926 (D. Miss. 1968), *aff'd*, 415 F.2d 1377 (5th Cir. 1969).

[27] 364 U.S. 479 (1960).

which broadly stifle fundamental personal liberties when the end can be more narrowly achieved. In *Alves v. Justice Court of Chico Judicial District*,[28] the court struck down a curfew ordinance and held:

> The general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation. Any regulation to the contrary will be stricken down as an arbitrary invasion of the inherent personal rights and liberties of all citizens . . .

The right of peaceful assembly set forth by the First Amendment has been fully and completely recognized as a cornerstone of our American system. It is difficult to conceive a more absolute denial of the right of assembly than banishment; Yet the constitutional issues have never been dealt with in a reported decision.

Banishment Visited and Revisited

The Supreme Court of North Carolina held in 1953 that the sentence of banishment was impliedly prohibited by public policy and a sentence of such character was void.[29] Although the Court did not attempt to base its ruling on constitutional considerations, it did make reference in its dictum to the fact that throughout the ages, the lot of the exile has been hard. Justice Parker went on to state, "There comes ringing down the centuries the words of the Psalmists: 'By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion.' It is not a sound policy to make other states a dumping ground for our criminals."

The constitutional issues were advanced in Michigan when the Supreme Court of Michigan considered the case of *People v. Baum*.[30] Baum had been convicted of violating the liquor laws in the State of Michigan and was ordered to pay a fine and to leave the state for a period of five years. Baum claimed that his rights under the First and Fourteenth Amendments were violated. The Court refused to decide the case on the constitutional issues raised, but further expanded the rhetoric and reasoning on the question of banishment when it reversed the sentencing court. The Court in *Baum* commented on the practice in England where certain persons were banished to the colonies. It went on to comment that one state cannot dump its undesirables upon another. Such an act would incite dissention, provoke retaliation and disturb the fundamental quality of political rights among the states. The Court further found that there was no authority by statute for such an order and that banishment was prohibited as a matter of public policy. A similar result was obtained in Maryland where the Court of Appeals held that the trial court was without power to suspend a sentence on condition that the defendant return to Puerto Rico for a period of 10 years.[31]

---

[28] 148 Cal. App.2d 419, 306 P.2d 601 (1957).
[29] State v. Doughtie, 237 N.C. 368, 74 S.E.2d 922 (1953).
[30] 251 Mich. 187, 231 N.W. 95 (1930).
[31] Bird v. Maryland, 231 Md. 432, 190 A.2d 804 (1963).

An interesting case with a novel twist was decided in Kentucky in 1965 in *Weigand v. Kentucky*.[32] In this case, Weigand's probation was revoked when he violated the banishment provision of his probation. The Kentucky Court of Appeals held that the sentencing court was without power to inflict banishment in the first place. Therefore, since the terms of probation providing for banishment were void, the entire probation was invalid and Weigand must serve a prison term. Thus in effect, the Court of Appeals arrived at the same destination as the trial court incarcerating Weigand although the two courts got there by different routes. Where the trial court imposed prison for violation of probation, the Court of Appeals held that the probation itself was invalid because it was conditioned on banishment. One can surmise that Weigand had much time to reflect on his legal victory while reposing in the Kentucky jails. A contrary result was obtained in the State of California where a more tolerant court merely struck down the illegal condition of banishment but otherwise permitted the probation to continue.[33]

As early as 1937, the State of California held that the deportation of the defendant to Mexico was an invalid order.[34] In 1946, California held that habeas corpus was an appropriate procedure by which to attack an order of banishment.[35] The court further held that the prohibition against banishment from the state also applied with equal force to banishment from the city or county.[36] This California court further commented that the old Roman custom of ostracizing a citizen has never been adopted in the United States.

Another case of interest also arose in California where the prosecutor argued that the sentencing court was following a time honored and well established custom in the state, but the appellate court considered the custom to be of no significance and concluded that the order of banishment was void and against public policy.[37] Another court holding that a proceeding in habeas corpus was appropriate was the Supreme Court of Minnesota, in 1967, in the case of *State v. Halverson*.[38] Halverson was sentenced for burglary and banished from the State of Minnesota. A writ of habeas corpus was filed attacking the order of banishment. The Court held that it was beyond the power of a court to impose banishment as a condition of probation. The Court aligned itself with California rather than Ken-

---

[32] 397 S.W.2d 780 (Ky. Ct. App. 1965).

[33] People v. Blakeman, 170 Cal. App.2d 596, 339 P.2d 202 (1959); Ex parte Scarborough, 76 Cal. App.2d 648, 173 P.2d 825 (1946).

[34] California v. Lopen, 81 Cal. App. 199 (1927).

[35] Ex parte Scarborough, 76 Cal. App.2d 648, 173 P.2d 825 (1946); In re Newborn, 168 Cal. App.2d 472, 335 P.2d 948 (1959).

[36] People v. Blakeman, 170 Cal. App.2d 596, 339 P.2d 202 (1959). The Court held it was beyond the power of the Court to impose banishment from the county as a condition of protection.

[37] In re Newborn, 168 Cal. App.2d 472, 335 P.2d 948 (1959).

[38] 278 Minn. 381, 154 N.W.2d 699 (1967).

tucky in holding that the imposition of banishment was void and a separate part of the judgment of conviction and that the probation could not be revoked on the violation of the invalid condition of probation.

In 1970, a California court concluded in the case of *In re Bushman*[39] that the condition of probation was invalid as (1) it had no relation to the crime, (2) it related to conduct not itself criminal and (3) it required or forbids conduct not related to future criminality.

A case of note arising in Virginia was *Loving v. Virginia.*[40] Loving was convicted of miscegenation in the State of Virginia and received a suspended sentence on condition that he leave the state for 25 years. Although the Supreme Court of the United States reversed on other grounds,[41] it is interesting to note that the Virginia Supreme Court, while upholding the conviction for miscegenation, struck down the banishment part of the sentence as void.

Conclusion

Although the States of California and Minnesota have considered habeas corpus to be the appropriate means of testing the sentencing court's jurisdiction to impose banishment, the State of Ohio has followed a narrower construction in the *Edsall* case by holding that appeal was the procedure to pursue. Appellate courts have consistently and systematically struck down orders of banishment when they have reviewed; the rationale for such decisions being predicated on questions of public policy and lack of statutory authority. None of the reviewing courts have been willing to consider the constitutional issues involved but have decided the cases on the basis of the weight of American decisional law. Thus banishment will continue to exist until such time that the appellate courts of each of the 50 sovereign states have had the question presented to them. Until that time, and so long as the consitutional issues are not determined, and so long as persons accept the expedience of banishment in exchange for their freedom, our sentencing courts can continue to banish with impunity those persons considered undesirable.

Throughout history, men have been ostracized by insecure governments. The pages of history are replete with the banishment of well known personages. What is perhaps more tragic, however, is the banishment of large numbers of ordinary and nondescript citizens from our cities and counties. The life of the exile is indeed harsh and, in all probability, the practices of magistrate courts and other sentencing courts in ordering the expulsion of "troublemakers" and "drifters" will continue until such time that the constitutional issues have been met head on.

---

[39] 1 Cal.3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970).

[40] 206 Va. 924, 147 S.E.2d 78 (1966).

[41] Loving v. Virginia, 338 U.S. 1 (1967).