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the legislature to exercise the power is an encroachment upon the powers of the judiciary and unconstitutional.

It appears that the court, recognizing the general rules applicable to the situation, but wishing to decide the question fairly, has manufactured a distinction between judgments wherein private interests are involved and those involving only public interests. This amazing distinction seems to have never been recognized before. From a study of various authorities,¹³ it is safe to say that no such distinction exists. If a judgment has been entered, it is immaterial whether the interests therein involved are public or private it follows as a fixed and basic principle of constitutional law that the legislature cannot reverse the judgment.

W. Reese Hitchens

PROBATION ON CONDITION PRISONER LEAVE STATE

In a recent Michigan case¹ where the defendant, convicted of a violation of the Michigan liquor law, was sentenced to pay a fine and within thirty days leave the state for a period of probation, which was fixed at five years, the Supreme Court reversed the sentence of the lower court and remanded the case for imposition of a legal sentence. The appellate court held that the sentence was not authorized specifically by statute and was contrary to public policy. What would be the result if a similar case arose in Pennsylvania today?

The Michigan statute in terms gives the court the power to impose such lawful conditions of probation as the circumstances of the case may require or warrant² except in cases of murder, treason, robbery while armed, or break-

¹³Including Black, Cooley, White, Ruling Case Law, Corpus Juris, etc.

¹People v. Baum, 231 N. W. 95 (Mich. 1930).

²Mich. Public Acts 1927, Number 175, c. 11, Sec. 2.

ing and entering a dwelling house at night and in the cases of those who are likely again to engage in criminal conduct and those twice convicted of felony.

Pennsylvania has a similar statute granting power to the court to suspend the imposition of the sentence, and place the defendant on probation, on such terms and conditions as it may deem right and proper in any case where a person shall be convicted of any crime, except murder, administering poison, kidnapping, incest, sodomy, assault with intent to rape, arson or burglary of an inhabited dwelling house if it does not appear to the said court that the defendant has ever before been imprisoned for crime and where said court believes that the character of the defendant and the circumstances of the case are such that he or she is not likely again to engage in an offensive course of conduct and the public good does not demand or require that the defendant should suffer the penalty imposed by law.³ An examination of these two statutes does not disclose any material distinctions.

There are two possible attacks to be made on the legality of such punishment, viz: unconstitutionality and public policy. The federal constitution and the majority of state constitutions have sections prohibiting "cruel and unusual punishments".⁴ Exact classification of punishments within the meaning of such sections are rare⁵ but these provisions seem to be enacted primarily to abolish punishment involving physical torture.⁶ It seems that such constitutional prohibitions are directed against any cruel or degrading punishment not known to the common law, and probably also any degrading punishments which, in the particular state, had become obsolete when its constitution was adopted.⁷

³West St. 5502; 1909, P. L. 495.

⁴United States Constit. Amend. VIII; Mich. Constit. Article 2, Sect. 15.

⁵Wilkerson v. U. S., 99 U. S. 130, 135, 136 (1878).

⁶Legarda v. Valdez, 1 Phila. Rep. 146 (1902); People v. Morris, 80 Mich. 634, 45 N. W. 591 (1890).

⁷Black's Constit. Law, 510.

The Constitution of Pennsylvania omits the word "unusual" in its section and prohibits only "cruel" punishments.⁸ It seems that although such a punishment may be unusual in that it had become obsolete when the Pennsylvania constitution was adopted, since the constitution omits the term "unusual" we may fairly conclude that such sentence should not be unconstitutional on the ground that it was expressly prohibited by its language. It is clear that this mode of punishment does not violate the constitutional provision directed against "cruel" punishments because it cannot be said that a probational period beyond the limits of a state involves physical torture.⁹

Banishment was a common punishment in Rome and was prevalent throughout the Roman law.¹⁰

The common law did not favor banishment as a punishment and it was said "no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal * * * except by the judgment of his peers or the law of the land."¹¹ Some punishments consist in exile or banishment, by abjuration of the realm, or transportation * * *¹² Banishment or exile seems to have been used in England at one time to punish a person for a crime in those cases where the ordinary punishment was death, but where the court did not wish to impose the capital punishment because of the prisoner's position in the government or church.¹³ In 1700 an act was passed in Pennsylvania whereby it was provided that where a prisoner was convicted of theft and sentenced to wear a badge of thievery for six months, the court could banish the prisoner forever on the second fail-

⁸Penna. Const., Art. 1, Sect. 13.

⁹See *Fong Yue Ting v. U. S.*, 149 U. S. 698, 730, 13 Sup. Ct. 1013, 1028 (1892); *In Re Look Tin Sing*, 21 Fed. 905, 910 (1884); *State v. Smith*, 1 Bailey 283, 287 (S. C. 1829). But Cf. dissent in *U. S. v. Jue Toy*, 198 U. S. 253, 279, 25 Sup. Ct. 644, 653 (1904).

¹⁰Radin on Roman Law, 470.

¹¹Black. Com. 137.

¹²Black. Com. 377.

¹³2 Pitchairn's Criminal Trials, 494 (1606).

ure to wear the badge. This statute was repealed five years later.¹⁴

The Michigan case was reversed on the ground it was against public policy; the court arguing it meant sending dangerous citizens into sister states. Perhaps the court overlooked the fact that the statute particularly excepts criminals convicted of certain flagitious and immoral crimes and probation on any condition may not be granted to them.¹⁵

What of the fact that a prisoner is not compelled to go—but as between two evils he chooses the lesser and of his own volition makes his exit? Is it not expedient for a first offender to go to another state and reform himself into a law-abiding citizen where the stigma of his past cannot follow and be prejudicial to his opportunities? Also there seems to be no sentiment expressed against the constitutionality or against the policy of a governor pardoning a prisoner on condition that he leave the state.¹⁶ One New York case held it a valid condition where the governor pardoned a prisoner with the proviso that he leave the country.¹⁷

Despite the fact that such punishment was odious to the English common law, and that the common law of Pennsylvania is composed "partly of the common law of England and partly of our own usages,"¹⁸ if such a case arose within this jurisdiction today, it should be decided contrary to the Michigan case.

Herbert Horn

¹⁴II Pa. Statutes at Large 10 and note.

¹⁵supra, note 3.

¹⁶60 A. L. R. 1415; *Com. v. Haggerty*, 4 Brewster (Pa.) 326 (1869). As to such conditional pardon in England, see 29 Cyc. 571 note 60.

¹⁷*People v. Potter*, 1 Park, Crim. Rep. (N. Y.) 47 (1829); *Flavell's Case*, 8 W. & S. (Pa.) 197 (1844).

¹⁸*Com. v. Degrange*, 97 Pa. Super. Ct. 181 (1929); *Guardians of Poor v. Greene*, 5 Binney 554 (1813); *Com. v. Lehigh Valley R. R.*, 165 Pa. 162 (1894).