

1951

# State of Utah v. August Schrieber : Brief of Appellant

Utah Supreme Court

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Grant MacFarlane; Clifford L. Ashton; Attorneys for Appellant;

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7737

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# In the Supreme Court of the State of Utah

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STATE OF UTAH,

*Respondent,*

vs.

AUGUST SCHRIEBER,

*Defendant and Appellant.*

} Case No.  
7737

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## BRIEF OF APPELLANT

**FILED**

SEP 28 1951

Clerk, Supreme Court, Utah

GRANT MACFARLANE,  
CLIFFORD L. ASHTON,

*Attorneys for Appellant.*

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vs.

AUGUST SCHRIEBER,

*Defendant and Appellant.*

} Case No.  
7737

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This is an appeal from an order of the Third Judicial District Court granting a petition made by Brigham E. Roberts, District Attorney for the Third Judicial District, to vacate and set aside an order of dismissal and discharge in the case of *State of Utah v. August Schrieber*. The facts essential to this appeal are as follows:

The appellant, defendant below, a duly licensed and registered naturopathic physician and surgeon in the State of Utah, was on the 18th day of March, 1949, found guilty by a jury of the crime of abortion (R. 40). On May 14, 1949, defendant was sentenced by the Honorable Charles G. Cowley, sitting in the Third Judicial District Court, to serve an indeterminate term of not less than two nor more than ten years in the Utah State Prison. On the same day Judge Cowley suspended sentence upon defendant and placed defendant on probation under the custody of the Adult Probation and Parole Department of the State of Utah (R. 54). Subsequent to May 14, 1949, as a result of the trial of said action, the defendant became seriously ill, having what is known to the medical profession as acute paroxysmal tachycardia, which is a disease caused by extreme emotional stress.

During the period from May 14, 1949, to October 20, 1949, defendant suffered two heart attacks and his condition grew increasingly worse; he was unable to work regularly and during a large part of said time was confined to bed. Defendant was advised by his doctor, Dr. William Henning, that there was a possibility of his health improving by going to a place with a lower altitude. At that time defendant's six-year old son, Paul A. Schrieber, was also in poor health, having an excessive number of white corpuscles in his blood for a boy of that age. Defendant believed that a change of climate would also benefit the health of his son. During the period of his probation defendant had completely and fully complied with the conditions of

his probation and had conducted himself in a lawful and creditable manner. He had resumed his practice to the extent his poor health permitted.

In October, 1949, defendant made application through his attorney Herbert B. Maw to the Third Judicial District Court for an order setting aside his conviction, dismissing the action and discharging him from custody. The motion described the physical condition of the defendant and his son and stated that his purpose for desiring to be discharged from custody was to allow him to go to Florida with his family for purposes of his health. The motion was accompanied by a report of the Adult Probation and Parole Department of the State of Utah, signed by its probation officer, stating that the defendant had completely and fully complied with the conditions of his probation and had conducted himself in a lawful and creditable manner and that the department would support whatever action the court felt justified in taking regarding setting aside of defendant's conviction. The court, the Honorable Ray Van Cott, Jr., discussed the motion on several occasions with the defendant's attorney, Herbert B. Maw. Defendant was not present at any discussion except for the hearing on the motion on October 20, 1949.

On October 20, 1949, the court heard the evidence in support of defendant's motion, and made and entered its order setting aside the conviction, dismissing the case and discharging the defendant (R. 63, 64). The written order provided as follows:



“IN THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH

“STATE OF UTAH,

*Plaintiff,*

vs.

AUGUST SCHRIEBER,

*Defendant.*

ORDER  
Case No.  
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“WHEREAS, the Adult Probation and Parole Department of the State of Utah, which has charge of the above-named defendant, August Schrieber, has represented to the Court that said defendant has complied with all of the conditions of his probation since his conviction on March 18, 1949, and has indicated to the Court its concurrence in the action herein taken and indicated by the attached report and,

“Whereas, it appears to the Court that the said defendant has very poor health, having recently suffered from two severe heart attacks which reduced his blood pressure from a normal of 140 to 92 and increased his heart beats from a normal 72 to 126 and,

“Whereas, it appears that the defendant’s six year old son, Paul A. Schrieber, has poor health because of an excessive number of white corpuscles in his blood, numbering about 13,600 while a normal count for a boy his age is about 7,500 and,

“Whereas, it seems apparent that both the defendant and his son must move to a warmer climate and a lower altitude if they are to enjoy a restoration of their health and,

"Whereas, the defendant is a duly licensed and registered naturopathic physician and surgeon not only in the State of Utah but also in the States of South Carolina and Florida and is anxious to permanently leave the State of Utah for the purpose of taking up residence and carrying on his profession in the State of Florida, a State which has the altitude and climate essential to the health of defendant and his son and,

"Whereas, it is the opinion of the Court that it will be compatible with the public interest if said defendant is permitted to move to the State of Florida and carry on his profession in that State, now therefore,

"IT IS ORDERED, ADJUDGED AND DECREED that the conviction of the defendant, August Schrieber, in the above-entitled case be set aside and that the said action against said defendant be dismissed and that said defendant be discharged from further supervision of the Parole Department of the State of Utah.

"Dated the 20th day of October, 1949.

BY THE COURT:

/s/ RAY VAN COTT,  
JUDGE."

There is some disagreement as to the meaning of that order and the circumstances and representations leading up to it. It appears that defendant intended to go to Florida and remain there indefinitely depending upon whether there was an improvement in his health. He believed that he could resume his medical practice there. The court, the Honorable Ray Van Cott, Jr., had the impression that defendant intended and agreed to permanently depart from

and remain outside of the State of Utah, despite the condition of his health; such a condition if it existed was not, however, included in either the written order of October 20, 1949 nor the minute order of that date. There is nothing to indicate that defendant's purpose in leaving was intended to be made a mandatory condition of the order. Pursuant to the October 20, 1949 order defendant managed to close the practice he had attempted to carry while ill prior to the order; he had closed his office, stored his equipment, and packed his furniture, all within less than two weeks. Communications were had with a man in Florida for procuring an apartment.

Defendant's health took a turn for the worse, however, and from October 20, 1949 until around December 6, 1949 the greatest part of defendant's time was spent confined to bed under the care of Dr. Henning. As soon as his health permitted defendant left, with his family, for Florida. That was on or about the 9th day of December, 1949 (R. 84).

In the fall of 1950 defendant's health was still poor. During his eight-month stay in Florida he had been unable to work, and the greatest part of that stay was spent by him in the hospital. His condition was in fact worse than it had been in Utah. He decided to go to California for treatments. On his way to California in November, 1950, defendant stopped over in Salt Lake City. On the advice of his attorney he went to see the Honorable Albert H. Ellett, presiding judge of the Third Judicial District Court and the judge of the Criminal Division of said court. His purpose in seeing the Judge was to determine the ex-

act meaning and status of the order of October 20, 1949. Judge Ellett recounted the occasion of defendant's visit and inquiry as follows: (R. 80-86.)

"The Doctor came in my office and told me he could not longer live in Florida and was going to California, and asked if he was in violation of the order or law in passing through Utah.

"At that time I told him the case had been dismissed, he was a free man, he could pass through Utah as often as he wanted to, and stay in Utah as long as he wanted to—there was no order of the court to prohibit it" (R. 103, 104).

Defendant went on with his family to California to see if the climate and treatments would improve his health. He was sick all the time he was in California. Early in 1951 defendant returned to the State of Utah with his family. Defendant's health had not improved in Florida and both defendant and his wife were anxious to remain in Utah. His wife was a Utah girl by birth, having sisters and an aged mother and father in the Salt Lake area. It was her desire to be close to her family in the event that anything happened to defendant.

From the time of his return in January, 1951, defendant's health showed a gradual improvement and it was defendant's intention to resume his practice in the event that his recovery continued.

On May 29, 1951, Brigham E. Roberts, District Attorney for the Third Judicial District Court, filed a petition with the court to vacate and set aside the order of October 20, 1949, on the ground that the defendant had returned

to Utah in violation of a condition of the order of dismissal and on the further ground that said order made pursuant to Section 105-36-17, Utah Code Annotated 1943, as amended by Chapter 24, Laws of 1943, was in conflict with Article VII, Section 12 of the Utah Constitution (R. 57, 58). Defendant answered said petition denying that he was in violation of the said order, denying that said order violated Article VII, Section 12 of the Utah Constitution and affirmatively alleging that the petition or order to show cause issued pursuant thereto violated the 5th Amendment to the Constitution of the United States so placing defendant in double jeopardy and that the order of October 20, 1949 was final and absolute and divested the court of jurisdiction over defendant (R. 72, 73). The matter was set down for hearing for June 9, 1951. At that time the defendant appeared with his attorneys Grant Macfarlane and Herbert B. Maw. The District Attorney for the Third Judicial District, Brigham E. Roberts, appeared for the State of Utah and offered as his sole and only witnesses the defendant, August Schrieber and Herbert B. Maw. Defendant offered, in addition to himself, the following witnesses: LeVon Schrieber, his wife, Dr. William Henning and Judge A. H. Ellett. In addition to the foregoing there was offered and received in evidence a record of the proceedings leading up to and including the order of October 20, 1949. The court, by the Honorable Ray Van Cott, Jr., having heard and considered the evidence, made his order setting aside and revoking the order of October 20, 1949 and placing the defendant in the custody of the State Adult Probation and Parole Department (R. 74). The pertinent provisions of the court's opinion are as follows:

“Mr. Macfarlane, I am of the opinion that the act under which I took proceedings is constitutional. I am not disturbed about that. But I have been for a long time, since shortly after the granting of this order, I have been of the opinion that *I was misled, I was imposed upon, and a fraud and deceit practiced upon me by the defendant*, and I think that is shown by the fact that after he got the order that there was no intention to move from the State of Utah. And it was only when the whip that I used through Mr. Maw, his attorney, by making threat I would take action then that I propose to take now, that he even left the State of Utah (R. 107, 108).

\* \* \* \* \*

“I want to say, with reference to the District Attorney and Probation Department, they have no responsibility in the granting of this order.

“I have heretofore stated in reference to parties who asked me in reference to the matter, the obligation was solely mine, and I took it upon the fact I thought I was doing the right thing, and I wasn’t of the opinion it would be a popular idea in taking the action I did,—it would probably be an unpopular idea.

“I don’t believe the defendant ever did intend to leave, and I am of the opinion that that court that grants an order, and revokes a conviction and sets it aside, *upon fraud and deceit or misrepresentation by a defendant*, who has no intention to comply with it, we are not divested of our authority in that regard (R. 108, 109).

\* \* \* \* \*

“And everyone here today admits the reason the order was signed was Dr. Schrieber had poor health and had to leave the State of Utah, and he had, with me, understood it would be permanent, he was not coming back here to live, and practice, or do otherwise (R. 110).

\* \* \* \* \*

"While it isn't called fraud, it all goes back to the fact of what was the understanding, what has been the compliance with that understanding, that is my language, Mr. Macfarlane, when I used the words 'fraud and deceit' at the beginning of it, it shows no intention of good faith, there was never any intention right at the inception of the order, there was a violation, Dr. Schrieber was on his feet the 20th of October, 1949, and, from all I could tell, looked the same as he did today, and the other man—the doctor testified today, the other man was here in court, and all this illness occurred sometime after the order of the court was granted (R. 111, 112).

\* \* \* \* \*

"Mr. Macfarlane, that order isn't letter perfect. There wasn't an understanding when he would leave, that is what the law would imply, no date was fixed when he should leave.

"The matter dragged on to the latter part of October, all of November, and reports came to me, by various people, the man was purported to be in Salt Lake, and I would convey that to Governor Maw, and he said, 'I will see Dr. Schrieber'. And finally, I said to Governor Maw, 'This man isn't leaving, and I am getting doubts about this matter' (R. 112).

\* \* \* \* \*

"Governor Maw, the reports I got during that period of October, November and December, came to me, I would say not from enemies of Dr. Schrieber, but by officials of this State, and those persons I am sure would not have any occasion to go to Dr. Schrieber's home, and if he saw Dr. Schrieber it would be on the street. I know the man, and I am positive—he is here in the court-room—I am practically sure he would never have any occasion to go to Dr. Schrieber's home, whether he got his infor-

mation directly by having seen him, or having someone tell him, I don't know which—but he was an official of the State, and reported that to me. I have never had a private citizen call me with reference to this matter” (R. 114).

## STATEMENT OF POINTS RELIED UPON

### I.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO VACATE THE ORDER OF OCTOBER 20, 1949, THAT BEING A FINAL, UNCONDITIONAL AND VALID ORDER.

### II.

THE EVIDENCE AND INFORMATION UPON WHICH THE TRIAL COURT VACATED THE ORDER OF OCTOBER 20, 1949, IS IMMATERIAL AND IRRELEVANT AND DOES NOT CONSTITUTE GOOD AND SUFFICIENT GROUNDS FOR REVOCATION.

### III.

THE COURT ERRED IN BASING ITS FINDING AS TO FRAUD AND MISREPRESENTATION ON EXTRAJUDICIAL UTTERANCES AND STATEMENTS.



## ARGUMENT

## I.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO VACATE THE ORDER OF OCTOBER 20, 1949, THAT BEING A FINAL, UNCONDITIONAL AND VALID ORDER.

- A. *The order of October 20 and the statute pursuant to which it was made are valid.*

Inasmuch as the trial court did not base its order vacating the order of October 20, 1949, on the invalidity of the order and the statute pursuant to which it was made, it does not seem necessary to discuss that question at length. It is to be noted, however, that the invalidity of the statute was asserted by the District Attorney in his petition to vacate the order as one of the grounds thereof, and a brief discussion of that question appears appropriate.

The order of October 20, 1949 was made pursuant to the following provisions of Section 105-36-17, Utah Code Annotated 1943, as amended by Chapter 24, Laws of 1943:

“\* \* \* Where it appears to the court from the report of the probation agent in charge of the defendant, or otherwise, that the defendant has complied with the conditions of such probation, the court may if it be compatible with the public interest either upon motion of the district attorney or of its own motion terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant.”

Prior to the enactment of the 1943 amendment the courts had no power to dismiss an action and discharge a

defendant subsequent to sentence of said defendant solely upon grounds of good behaviour and public policy. It seems clear that the purpose of the amendment was to allow the district courts to finally and completely discharge and release a defendant and relinquish jurisdiction over him where the conduct of the defendant during his term of probation was in compliance with the terms of the probation and nothing appeared to show that defendant was not ready to resume his position in society. Clearly the provision was intended as a benefit to a deserving defendant as a means of rehabilitating him; it certainly was not intended as a means of restraining a defendant's rehabilitation by banishing him from the state.

The question is raised whether the above quoted amendment violates Article VII, Section 12 of the Utah Constitution. It is apparent upon a reading of that section that the amendment does not violate the constitutional provision. Article VII, Section 12 of the Utah Constitution provides as follows:

"Sec. 12 [Board of pardons. Respites and reprieves.]

*"Until otherwise provided by law, the Governor, Justices of the Supreme Court and Attorney-General shall constitute a Board of Pardons, a majority of whom, including the Governor, upon such conditions, and with such limitations and restrictions as they deem proper, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full*

hearing before the Board, in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the Board, with the reasons therefor in each case, together with the dissent of any member who may disagree, shall be reduced to writing, and filed with all papers used upon the hearing, in the office of the Secretary of State."

The critical words of Section 12 are "*Until otherwise provided by law.*" By this constitutional provision it was manifestly intended that the legislature be empowered to make subsequent changes and additions with respect to the pardoning power and the power to discharge a defendant from custody and terminate sentence. When the legislature made the 1943 amendment it was acting pursuant to constitutional authority. Even if this were not the case it is submitted that the courts would have the power pursuant to legislative enactment to dismiss actions and discharge defendants. There is technically a distinction to be drawn between the power to pardon and commute sentence and the power to dismiss an action and discharge a defendant from jurisdiction. The latter has always been a judicial power. The following authorities establish that such power may be validly vested in the courts:

15 *Am. Jur.*, Criminal Law, Section 449;  
Annotation, 26 *A. L. R.*, 400.

The record clearly shows that the court followed the statute in considering and making its order of October 20, 1949. The requirements of Section 105-36-17 as to a favorable probation report were met. The report of the pro-

bation officer affirmatively stated that defendant had complied with the conditions of his probation and had conducted himself in a lawful and creditable manner and that the probation office would support the action taken by the court. The trial court's order was based upon findings that defendant had complied with the conditions of his probation and dismissal of defendant and discharge of him was compatible with the public interest. There is no evidence to show that defendant was not, both on October 20, 1949 and subsequent thereto, deserving of an opportunity to resume his position in society within the meaning and purpose of said statutory provision. It seems justifiable and extremely important, therefore, to emphasize that all of the mandatory and substantive requirements and conditions for issuance of the order of October 20, 1949 existed and were fulfilled. The order was, therefore, valid.

B. *The order of October 20, 1949 was final and unconditional and divested the court of the jurisdiction over the defendant.*

Neither the written order of October 20, 1949, signed by the Honorable Ray Van Cott, Jr., nor the minute order of the same date imposes as a condition of dismissal and discharge that defendant be permanently banished from the State of Utah. The charging portion of the October 20th written order is found in the last paragraph, which provides as follows:

“It is ORDERED, ADJUDGED and DECREED that the conviction of the defendant, August Schriber, in the above entitled case be set aside and that the said action against said defendant be dismissed

and that said defendant be discharged from further supervision of the Parole Department of the State of Utah."

The paragraphs prior to the above quoted paragraph of the order merely recite that the statutory grounds for issuance of the order had been fulfilled and defendant's purpose for seeking the order.

There can be no question but what the defendant, August Schrieber, had intentions of leaving the State of Utah for purposes of his health and the health of his son and that his intention was to remain away from the State of Utah if his health demanded it. It is true, therefore, that the defendant's *purpose* in applying for dismissal of the action and discharge from custody was that he might leave the state for his health. There is no evidence to show that defendant agreed never to return to the State of Utah and agreed that that be a part of the order. In order to leave the state it was necessary for him to procure authority, and one manner for doing that was by the application which he filed with the court. It is a mistake, however, to distort and confuse defendant's object in procuring the order of dismissal into a mandatory condition of the order.

Despite the clear and unqualified language of the order of October 20, 1949 and the minute order, the trial court vacated the order on the ground that a condition thereof, i. e. banishment from the State of Utah permanently, had been violated. The Judge stated that this condition constituted his understanding of the order. The error of this result is apparent. It is a stringently enforced rule

that parole or extrinsic evidence is not admissible to contradict, impeach, vary or explain judicial records, such records importing verity.

32 C. J. S., Evidence, Section 865;  
 20 Am. Jur., Evidence, Section 1164;  
 Annotation, 10 A. L. R. 1502;  
 Annotation, 50 L. R. A. (N. S.) 104.

Under the foregoing principle of law the courts have uniformly held that the intention or understanding of a court in making an order cannot be proved by parole evidence for the purpose of varying or contradicting or adding to the clear and unambiguous language of the written order;

*Campbell v. Nunn*, 78 Utah 316, 2 P. (2d) 899;  
*Northern Assurance Company of London v. Grand View Building Association*, 183 U. S. 308, 22 S. Ct. 133;  
*Blue Mountain Iron and Steel Company v. Partner*, 31 F. 57, (4th Cir.);  
*Krause v. Yorke*, 89 F. Supp. 91;  
*Ex Parte Clark*, 60 Cal. App. (2d) 21, 140 P. (2d) 92;  
*Johnson v. State*, 87 Ark. 45, 112 S. W. 143;  
*Boyd County v. Ross*, 95 Ky. 167, 25 S. W. 8;  
*Medlin v. Platte County*, 8 Mo. 235, 40 Am. Dec. 135;  
*Ramis Heat and Power Company v. The City of Seattle*, 113 Wash. 95, 193 P. 233;  
*In re Kehl's Estate*, 254 N. W. 639;  
*Lipsitz v. First National Bank*, 288 S. W. 609;  
*Colonial Trust Company v. Hill County*, 27 S. W. (2d) 144;  
*Brandon v. Brandon*, 135 S. W. (2d) 929;

*Brooks v. Miami Bank and Trust Co.*, 156  
Southern 757;

*Ludlow v. Johnson*, 3 Ohio 553, 17 Am. Dec. 609.

It seems clear from the foregoing authorities that it was improper for the trial court to consider matters outside the record and written order in determining whether or not the order was conditioned upon permanent banishment from the State of Utah. The court's ruling was based on an oral understanding of the Judge as to the conditions of the order. This understanding does not even assume the weight and dignity of parole evidence. The Judge's statement as to his own understanding was not subject to any of the rights which the law gives to the defendant. It was not subject to cross-examination and was not submitted to an impartial trial of fact. It is submitted that the trial judge's finding based on his own understanding is clearly error. The court can readily conceive of the miscarriage of justice which would ensue from a practice whereby a judge could change the terms of a written order or judgment on the basis of his own memory and understanding as to the conditions of such order or judgment long after the issuance of the same and without availing a party of the opportunity to challenge or test the verity of the understanding.

Certainly if the written order of October 20, 1949, is considered on its face it is final and unconditional and divested the court of jurisdiction over defendant. It would follow on well settled principles that the trial court had no jurisdiction to subsequently vacate it and set it aside.

A decision which is substantially on all fours with the instant case is *In re Flint*, . . . Utah . . . , 71 Pac. 531. In that case defendant was convicted of the crime of forgery on February 25, 1902. The court made an order directing that defendant appear March 5, 1902 for sentence. The case was continued and March 12, 1902 fixed as the time for pronouncing sentence. On March 12 the court made the following order:

“The defendant having been convicted of the crime of forgery, and being now before the court to receive sentence, and the court being sufficiently advised, it is ordered that sentence be, and the same is hereby suspended, and the defendant permitted to go upon his own recognizance.”

That was in effect an order of dismissal and discharge. Thereafter, the District Attorney made a motion for an order directing defendant to appear for sentencing. The court ordered defendant to appear for sentencing on January 12, 1903. The defendant appeared and objected to further proceedings on the ground that the order was final and that the court thereby divested itself of jurisdiction. The court overruled defendant's objection and sentenced defendant to a term of one year in prison and committed him to the proper officers.

Defendant thereupon filed a petition for a writ of habeas corpus setting forth the foregoing facts. The Supreme Court granted the petition and upon hearing ordered that defendant be discharged. The court held that the order of March 12, 1902 was in effect an order of dismissal and discharge and that once having discharged defendant the court could not reassume jurisdiction. The court said:



“But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep a defendant in a state of suspense and uncertainty and long after he has been discharged from custody have him rearrested and impose a sentence of either fine or imprisonment upon him.

“When the court suspended judgment indefinitely, and ordered the defendant discharged from custody, it no longer had jurisdiction over him and all subsequent proceedings in the premises were unauthorized by law, and are therefore void.”

- C. *The condition of banishment which the Judge allegedly imposed upon the order of October 20, 1949 was contrary to law and public policy and void.*

The great weight of authority is that a court does not have the power to sentence or order a defendant banished permanently from the state.

*People v. Baum*, 251 Mich. 187, 231 N. W. 95;  
*State v. Baker*, 58 S. Car. 111, 36 S. E. 501;  
*Haggett v. State*, 101 Miss. 269, 57 Southern  
 811;  
*People v. Lopez*, 253 P. 169;  
*Ex Parte Scarborough*, 173 P. (2d) 825.

The compelling reasons for the above stated principle are obvious. A sentence or order of a court banishing a defendant from the state is prohibited by public policy as tending to incite dissension among the states, provoke retaliation, and disturb the fundamental equality of political rights among the states which is the basis of the Union.

In addition to the foregoing reasons, appellant submits that banishment permanently from the State of Utah would,

if imposed as a valid condition of the order of October 20, 1949, impose upon defendant a greater punishment than his crime warranted. Although appellant has been unable to find any cases, it is submitted that in principle such a holding clearly violates the Fifth Amendment to the Constitution of the United States in that it subjects defendant to double jeopardy by imposing a new and different sentence upon defendant than the one originally ordered.

There is nothing in the Constitution or statutory law of this state which allows or empowers a court to permanently banish a citizen and in doing so increase the severity of the punishment prescribed by statute for his crime. Therefore, such a condition, if it were in fact a part of the order of October 20, 1949, would be invalid and unenforceable.

## II.

THE EVIDENCE AND INFORMATION UPON WHICH THE TRIAL COURT VACATED THE ORDER OF OCTOBER 20, 1949, IS IMMATERIAL AND IRRELEVANT AND DOES NOT CONSTITUTE GOOD AND SUFFICIENT GROUNDS FOR REVOCATION.

The trial court was required to find and did find, in order to grant the order of October 20, 1949, that defendant had complied with the conditions of his probation and that dismissal of the action and discharge of defendant were compatible with the public interest. Those were the substantive mandatory requirements of the statute for issuance of the order. Appellant does not believe that the October

20th order could be attacked even with respect to a material substantive requirement for issuance of the order, but that is a matter which need not be considered here. There has not been any fraud, misrepresentation or mistake either alleged or proved with respect to any matter, and particularly with respect to the material substantive requirements for issuance of the order. The case seems to represent the very situation for which the statutory amendment of 1943 was adopted. It is appellant's position therefore that because the grounds for vacating the order do not go to the material and substantive requirements for the issuance of the order that they are insufficient to justify the trial court's ruling.

### III.

#### THE COURT ERRED IN BASING ITS FINDING AS TO FRAUD AND MISREPRESENTATION ON EXTRAJUDICIAL UTTERANCES AND STATEMENTS.

As appears obvious from the record, the court's order of vacation and revocation was based on its belief that defendant had misrepresented to the court concerning his intentions to leave the State of Utah. Whatever the law may be with respect to fraud and misrepresentation constituting grounds for revocation of an order it is not necessary to determine that question here. The alleged misrepresentation and fraud were found by the court not on the basis of any evidence at the hearing, nor was misrepresentation alleged in the petition of the District Attorney for the Third Judicial District. To the contrary, the testi-

mony of the defendant, his wife, and his doctor and his attorney clearly indicate that defendant made plans to leave and was in extremely poor health and that he did leave the state as soon as his health permitted. Certainly, neither the trial court nor any other court would or could require that a man under the care of a doctor and confined to bed prejudice his life by leaving his doctor's care and his sick-bed and travel several thousand miles. What is the evidence, then, upon which the court found that defendant had misrepresented? This finding was based solely upon the Judge's understandings as he had concluded them from the statements of an unidentified public official; and the Judge did not know whether the statements of the unidentified official were based on personal observations or information acquired from others. Is there any question but what it is error for a court to make a finding of misrepresentation and fraud on the basis of information received from a person who is not named, not sworn and not examined by defendant's counsel? The authority is clear that a court cannot vacate an order except upon competent evidence showing that grounds for vacating it exist.

*Malone v. Topper*, 125 Md. 157, 93 A. 897;

*McKee v. Verner*, 239 Pa. 69, 86 A. 646;

*People Ex rel. Sweitzer v. Chicago*, 363 Ill. 409,  
2 N. E. (2d) 330;

*United States v. Ginik*, 2 Black (U. S.) 610, 17  
L. Ed. 352.

It is submitted that the court's order was not made upon competent evidence.

A finding of misrepresentation and fraud being the basis for the trial court's order of revocation and that finding being based not on competent evidence but upon extrajudicial statements and understanding, it is submitted that the court was in error.

### CONCLUSION

It appears clear that prior to October 20, 1949, defendant had every right to remain in the State of Utah and practice his profession. There was no law or order of the court to prevent him from doing so. The only requirement imposed on him was that he comply with the conditions of his probation, which he did fully and creditably. Defendant wished to leave the state for his health and that of his son. To do so the law required that he procure permission. He sought the permission in an application made to the court. The court by its written order unconditionally and finally discharged defendant and dismissed the action. But if the trial court's understanding of the order is imposed upon it, the order resulted in restricting defendant's liberties and depriving him of rights he unquestionably had before its issuance. It is submitted that the written order was final and unconditional, that it was error for the trial court to add to it on the basis of an oral understanding of the Judge, it was error for the court to find fraud and misrepresentation on the basis of incompetent evidence.

Respectfully submitted,

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