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In the Supreme Court

of the United States

OCTOBER TERM, 1941

No. 782

JACK T. SKINNER, *Petitioner,*

VERSUS

STATE OF OKLAHOMA, *EX REL.* MAC Q. WILLIAMSON, ATTORNEY GENERAL.

Petition for Writ of Certiorari and Brief in Support Thereof.

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GUY L. ANDREWS,
Attorney for Petitioner.

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JACK T. SKINNER, *Petitioner,*

vs.

STATE OF OKLAHOMA, *EX REL.* MAC Q. WILLIAMSON, ATTORNEY GENERAL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petitioner, Jack T. Skinner, respectfully shows to this Honorable Court;

Summary Statement of the Matter Involved.

A.

That heretofore, to-wit: on the 12th day of July, 1937, he was, by judgment of the District Court of Pittsburg County, Oklahoma, ordered to be rendered sexually sterile (R. 18).

That the proceeding was had by virtue of a certain Act of the Legislature of the State of Oklahoma, appearing in Chapter 26, Article 1, of the Session Laws of said State

for the year 1935. (Harlow's Annotated Supplement, Section 5039 to 5044y.)

That such Act provided generally that any person sentenced to serve a term of imprisonment in a penal institution of the State of Oklahoma who should have been twice, or more times, convicted to final judgment for the commission of crimes amounting to felonies involving moral turpitude, separately brought and tried either in the State of Oklahoma, or in any other State of the United States, and thereafter convicted in the State of Oklahoma for the commission of a crime amounting to moral turpitude and sentenced to serve a term of imprisonment in the Oklahoma State Penitentiary, or the State Reformatory, or any other like penal institution, should be deemed an habitual criminal. (Section 3 of the Act; Section 5044c Harlow's Supplement.)

It further provided that one so adjudged an habitual criminal might, upon trial before any District Court in Oklahoma be ordered to be rendered sexually sterile; if a male by performing an operation of vasectomy, and, if a female, an operation of salpingectomy. (Section 4 of the Act; Section 5044d Harlow's Supplement.)

Said Act became effective July 29, 1935.

Your Petitioner was confined in the State Penitentiary at McAlester, Oklahoma, under a sentence imposed on October 15, 1934 (R. 2).

The procedure provided for in the Act permitted a trial by jury to determine (1) whether the defendant proceeded against was an habitual criminal as defined in the Act; and (2) whether the operation could be performed without danger to the general health of such defendant.

The District Court submitted to the jury the second proposition above stated and the jury determined that it could be done without injury to his health (R. 11).

The Act excepted from the definition of "habitual criminal" those violating prohibitory laws, revenue acts, embezzlement, or political offenses. (Section 24a of the Act. Section 5044y Harlow's Annotated Supplement.)

Thereafter, in due course, this Petitioner caused said judgment to be appealed to the Supreme Court of the State of Oklahoma (R. 20), he having, by answer and plea in bar, raised the questions hereinafter set forth as reasons why Petitioner prays this writ.

Thereafter, upon consideration of said Supreme Court, the judgment of the lower court was affirmed in an opinion handed down on the 18th day of February, 1941, in which opinion five judges concurred (R 24) and four filed their dissenting opinion (R. 34).

Thereafter, in due course, a petition for rehearing was filed by your Petitioner, which petition for rehearing was denied on the 8th day of July, 1941 (R. 39), and such judgment upon such last named date became final so far as concerns the tribunals of the State of Oklahoma.

Notice of intention to appeal to this Honorable Court, and a request for a stay of execution was filed and granted on the 5th day of August, 1941 (R. 40), and such execution was stayed until the 8th day of October following.

Thereafter, an extension of time having been granted by the Honorable Justice Stanley Reed within which this petitioner might file his petition for a Writ of Certiorari, the judgment not having been executed, a further stay of execution was granted until the 8th day of December, 1941 (R. 41).

Reasons Relied on for the Allowance of the Writ.

B.

Your Petitioner prays the Writ of Certiorari because the decision of the Supreme Court of the State of Oklahoma has decided a Federal question of substance adversely to the contentions of this Petitioner in a manner not heretofore determined by this Honorable Court, and not in accord with the applicable decisions of this Honorable Court, in this, to-wit:

I.

That the Supreme Court of the State of Oklahoma erred in holding that the Act of sterilization did not violate the Fourteenth Amendment of the Constitution of the United States that provides in part as follows:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II.

That the Supreme Court of the State of Oklahoma erred in that it held that under the provisions of such Act of the Legislature of the State of Oklahoma, your Petitioner was not being deprived of his liberty without due process of law, and was twice put in jeopardy for the same offense in violation of Article 5 of the Bill of Rights of the Constitution of the United States.

III.

That the Supreme Court of the State of Oklahoma erred in that it held such Act of the Legislature of the State of Oklahoma was not in violation of Section 10 of Article 1

of the Constitution of the United States that provides in part as follows:

"No state shall * * * pass any bill of attainder * * * ex post facto law or * * *."

IV.

The Supreme Court of the State of Oklahoma erred in that it held that the Legislature of said State could confer upon the District Courts of that State the power to inflict additional punishment for offenses committed outside of the territorial limits of said State.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Oklahoma commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings in the case numbered and entitled Jack T. Skinner, Plaintiff in Error, vs. State of Oklahoma, ex rel. Mac Q. Williamson, Attorney General, Docket No. 28,229; and that the said judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court.

That your Petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper; and

Your Petitioner will ever pray.

JACK T. SKINNER,
By GUY L. ANDREWS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion referred to as supporting the convictions of the petitioner was filed in the Supreme Court of Oklahoma, February 18, 1941 (R. 24). The dissenting opinion was filed the same day (R. 34). Neither opinion is yet in the official reports, but may be found in Pacific Reports (2d), Vol. 115, page 123.

The Statute under consideration was enacted by the Fifteenth Legislature of the State of Oklahoma and appears in the Session Laws of 1935, chapter 26, article 1, page 94, of the official compilation.

In the following discussion wherever portions of the text are capitalized, or italicized, such will be done by us, unless otherwise indicated.

The law enacted, so far as it appeals to us as essential will be copied herein.

The title of the Act, so far as indicates its purposes, reads:

> "An Act to be known and cited as the Oklahoma Habitual Criminal Sterilization Act; providing for and authorizing operations of vasectomy and salpingectomy to be performed upon habitual criminals; defining habitual criminals; conferring jurisdiction upon the District Courts of this State to hear and determine actions instituted and carried on under and pursuant to the provisions thereof; providing and prescribing the pleading and practice and rules of procedure in actions instituted and carried on under and pursuant to the provisions thereof; providing for a person adjudged to be an habitual criminal and upon whom it is adjudged that an operation for vasectomy or salpingectomy be performed to be taken into and held in custody until such operation has been performed. * * *"

The text of the Act, so far as seems to us germane, is as follows:

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. Oklahoma Habitual Criminal Sterilization Act.

This Act shall be known and may be cited as the 'Oklahoma Habitual Criminal Sterilization Act.'

Section 2. District Court—Jurisdiction—Procedure.

Jurisdiction is hereby conferred upon and vested in the district courts of the State of Oklahoma to hear and determine all cases arising under and pursuant to the provisions of this Act. And for the trial of such cases, the practice and procedure shall be that now or hereafter provided for in the Code of Civil Procedure of this State, so far as same may be applicable to and not inconsistent with the provisions of this Act.

Section 3. Habitual Criminal Defined.

Where used in this Act and for the purposes of this Act the term 'habitual criminal' refers to and shall mean: a person, male or female, who, having been twice or more times convicted to final judgment for the commission of crimes amounting to felonies involving moral turpitude, separately brought and tried, either in a court of competent jurisdiction of this State or in any other state of the United States, is thereafter convicted to final judgment in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, or the Oklahoma State Reformatory, or any other penal institution now or hereafter established and maintained by the State of Oklahoma.

Section 4. Sexual Sterilization.

Any person proceeded against and pursuant to the provisions of this Act and adjudged to be an habitual

criminal as herein defined, shall upon the adjudication thereof becoming final be rendered sexually sterile. And to render such person sexually sterile, if a male, there shall be performed upon him an operation of vasectomy, and if a female, there shall be performed upon her an operation of salpingectomy.

Section 5. County Attorney to Notify Attorney General of Conviction—Duties of Wardens and Officers.

Whenever any person is convicted in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and is sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, it shall be the duty of the County Attorney of the County in which the conviction is had—if he be in possession of information to the effect or have reason to believe that the person convicted has the status of an habitual criminal as herein defined—to within thirty days from the date said conviction becomes final make in writing and transmit to the Attorney General of this State a statement setting forth therein such information and his reasons for believing said convicted person to have such status.

And, whenever any person, being convicted in a court of competent jurisdiction of this State for the commision of a crime amounting to a felony and being sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, is committed to and received at said penitentiary, reformatory, or other penal institution, to undergo and serve said term of imprisonment, it shall be the duty of the warden or other officer in charge of such prison to forthwith and without unnecessary delay investigate and ascertain from any and all sources available to him whether said convicted person has the

status of an habitual criminal as herein defined; and said warden or other officer in charge of such prison shall forthwith and without unnecessary delay make in writing and transmit to the Attorney General of this State a report of his investigation, setting forth therein such information as he may have tending to show or establish said convicted person to be such an habitual criminal.

Section 6. Attorney General—Duties.

Whenever it shall be brought to the attention of the Attorney General of this State through information furnished him by a County Attorney, or by a warden or other officer in charge of a penal institution, of this State, or through information furnished him from any reliable source, that any person has the status of an habitual criminal as herein defined, said Attorney General shall forthwith and without unnecessary delay investigate with a view to ascertaining whether it may be established by competent proof that such person is such an habitual criminal.

And when and if the Attorney General shall be satisfied that it may be established by competent proof that any person is an habitual criminal as herein defined, he shall forthwith and without unnecessary delay commence a proceeding against such person by filing a petition in the office of the Clerk of the district court of the county in which the person proceeded against may be found and served with summons, and causing a summons for such person to be issued in the proceedings, by the clerk of said court.

Section 7. Petition—Summons.

In proceedings commenced and carried on under and pursuant to the provisions of this Act the State of Oklahoma shall be the plaintiff and the person against whom such proceedings are instituted shall be the defendant.

Petitions filed in such proceedings must contain:

First. The name of the court, and the county in which the proceedings is commenced, and the names of the parties, plaintiff and defendant, followed by the word 'petition'.

Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

Third. A demand of judgment authorizing and ordering the sexual sterilization of the person against whom the proceeding is commenced. * * *''

The remainder of the section deals with service and return of summons.

Section 8 provides for an answer to be in writing and shall be filed within twenty days after the day on which the summons is returnable.

Section 9 provides that the petition and answer shall constitute the only pleading allowed.

Section 10 deals with the continuances.

Section 11 provides for a trial by the court unless a jury is demanded in writing not less than ten days before the day assigned for trial.

The Act then follows:

''*Section 12. Judgment.*

In event the court or jury, as the case may be, find the defendant not to be an habitual criminal, as herein defined, the court shall render judgment denying the plaintiff's petition. But if the court or jury, as the case may be, find the defendant to be such an habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that event the court shall render judgment to the effect that said defendant be rendered sexually sterile.

In cases wherein judgment is rendered to the effect that a defendant be rendered sexually sterile the court rendering such judgment shall as a part of the judgment, designate and appoint some capable and competent surgeon duly qualified and licensed under the laws of this State to practice surgery, to perform the operation of sterilization ordered and specified in said judgments, and, shall designate and fix the time, which shall not be less than twenty days from the day the judgment is rendered, for such operation to be performed.

Section 13. Execution of Judgment.

Upon judgment being rendered to the effect that a defendant be rendered sexually sterile, the defendant if at large shall by order of the court made and entered in the cause, be committed to the custody of the sheriff of the county in which the cause is pending and be by said sheriff held in the county jail until such time as the operation of sterilization provided for in the judgment is performed. And a copy of said order duly certified by the court clerk shall be sufficient warrant and authority for said sheriff to apprehend, take into custody, and so hold and detain said defendant; Provided, however, that a defendant so taken into custody shall be entitled to be admitted to bail, and the court in making said order shall fix the amount of the bail. Bonds in such cases shall be submitted to the court or judge thereof for approval and shall be conditioned that the defendant will appear and will submit himself or herself, as the case may be, for all purposes provided and specified in the judgment rendered."

Section 14 deals with notice to be given the surgeon and the surgeon's duties in the premises.

Section 15 is as follows:

"*Section 15. Orders in Support of Judgment.*

"The court may at the time of rendering judgment to the effect that a defendant be rendered sexually ster-

> ile, make any and all orders and directions designed to be of aid and assistance in carrying out and enforcing any and all provisions of said judgment."

Sections 16, 17 and 18 deal with appeals; Sections 19 and 20 with the surgeon's fees and the payment of claims. Section 21 exempts the surgeon from any liability; 22 and 23 have to do with the routine procedure; 24 with the construction of the Act and 24A reads as follows:

> "*Section 24A. Offenses Excepted From Act.*
>
> "Provided, that offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.
>
> "Approved May 14, 1935."

The record in the instant case discloses a filing of a petition against Jack T. Skinner by the Attorney General in the District Court of Pittsburg County, Oklahoma, on the 12th day of June, 1936. The essential portions of the petition were:

> "That the said Jack T. Skinner is an habitual criminal, having been convicted three times to final judgment for the commission of crimes amounting to felony and involving moral turpitude. Said cases being separately brought and tried in courts of competent jurisdiction of the State of Oklahoma; and the said defendant being sentenced therefor to serve terms of imprisonment in the Oklahoma State Reformatory and the Oklahoma State Penitentiary; and that said defendant is now confined in the Oklahoma State Penitentiary; at McAlester, Oklahoma; and the said defendant has been convicted in the following cases, to-wit: * * *"

It then alleges him to have been sentenced to serve a term of eleven months in the Oklahoma State Reformatory

at Granite, Oklahoma, for the crime of stealing chickens in the year 1926; that in 1929 he was convicted for the crime of robbery with fire arms; that in 1934 he was convicted of the crime of robbery with fire arms.

The petition further alleges that the operation of vasectomy could be performed without injury to his general health; and closes with a prayer for such an order (R. 1).

The defendant appeared specially and alleged that involuntarily and under compulsion he filed his plea and answer.

His first substantial plea was in fact a demurrer to the petition, though embodied in the answer. He then plead generally the unconstitutionality of the Act, bottoming such plea on the Constitution of the State of Oklahoma and the Constitution and Laws of the United States of America.

In Section 3 he plead that as to the offenses alleged in sub-paragraph A and B of the State's petition he had paid the full penalty under the laws in existence at the time the offenses were committed, and the conviction had; that the date of his last conviction (October 15, 1934) was prior to the passage of the Act under consideration and plead that the Act would have no application to him; that the imposition of sentence under the Habitual Criminal Act would be subjecting him to double jeopardy.

Petitioner further pleads that the Act is void under the Fifth Amendment of the Constitution of the United States; that the Act is violative of article 8, known as the Eighth Amendment of the Constitution of the United States. That the Act is violative of what is usually known as the "Due process of Law" provision of the Constitution of the United States; and that it deprived him of equal protection of the laws; that while a jury might be demanded under the

terms of the Act the matters left to the discretion of the jury were so limited as to amount to an arbitrary denial of his rights, and an arbitrary imposition of additional punishment and penalty without due process of law (R. 4).

The court instructed the jury in part as follows:

"6.

The Court instructs you that under the laws and the evidence herein the defendant herein is an habitual criminal (R. 11).

7.

The only issue for your consideration in this case is whether or not the operation and the effects thereof of vasectomy will be detrimental to the defendant's general health." (R. 11.)

The court then submitted to the jury the following interrogatory:

"Interrogatory

"Do you find that the defendant may be sexually sterile by an operation of vasectomy to be performed upon him without detriment to his general health?"

The blank in this interrogatory was filled in with the word: "Yes", and signed: "J. J. Brewen, Foreman" (R. 14).

Motion for new trial was filed as provided by Oklahoma procedure (R. 15). This was overruled and exceptions saved by the defendant and judgment was entered in accordance with the finding of the jury upon the interrogatory (R. 17).

In due time the petitioner here, as plaintiff in error, filed his appeal in the Supreme Court of the State of Oklahoma (R. 20) and, thereafter, on the 18th day of February, 1941, by a divided court the judgment of the lower court was affirmed (R. 24).

Petition for rehearing was filed (R. 37); which petition was on the 8th day of July, 1941, by the Court denied. The stay of execution was granted on the 5th day of August, 1941 (R. 40), effective until the 8th day of October, 1941.

Thereafter, on the 8th day of October, by virtue of an order of the Justice Stanley REED, time within which to file petition for Writ of Certiorari was extended for sixty days and further stay of execution was granted by the Supreme Court of the State of Oklahoma, to be effective until the 8th day of December, 1941 (R. 43).

In analyzing the act under consideration we are impressed by its turgid inflexibility and the seemingly callous disregard of any humanitarian consideration usually appertaining to such act.

We are aware of, and sympathize with, the legislation that in fact tends to protect the public without inflicting useless wrong upon the individual.

We would have but little fault to find with the Indiana statute providing for sterility "where it is probable that the children of inmates will inherit a tendency to criminality, insanity, feeble mindedness, idiocy or imbecility"; or, even the Statute of California that provides that the operation shall not be performed unless one had been committed twice for some sexual offense, or unless three times for other crimes and *gives evidence of being a moral and sexual pervert.*

—California Statutes 1909, chapter 720.

The State of Washington prescribes it as a punishment for rape and habitual criminality to be imposed by the court in its discretion with other punishments.

—Rem. & Bal. Code, Sec. 2287.

Nor is it kin to the Statute considered by this Honorable Court in *Carrie Buck* v. *J. H. Bell,* 272 U. S. 200, 71 L. ed. 1000.

In that case an Act of Virginia, of March 30, 1924, provided for the sterilization of patients afflicted with hereditary forms of insanity, imbecility, etc.

In these statutes it presupposes intelligent and scientific inquiry for the purpose of determining whether or not a person upon whom it was sought to perform the operation causing sterility would in fact transmit to off-spring mental or physical characteristics imposing unnecessary burdens or dangers upon others.

We find nothing remotely resembling these beneficent features inherent in the Oklahoma Habitual Criminal Act.

It erects an arbitrary numerical standard and with this as a measuring stick determines CONCLUSIVELY the existence of another fact. That is, that offspring of him, or her, who has been thrice convicted, will inherit criminal tendencies, if it is an eugenic measure.

Not only this, but under the terms of Section 6 of the Act, whenever it is brought to the attention of the Attorney General through information by a duly constituted authority, or *information furnished him from any other reliable source that any person has the status of an habitual criminal* as determined by the numerical standard, it becomes his duty to reach back through whatever period of time necessary, investigate and find the facts. If when measured by the numerical standard, a culprit is found, the victim is deprived of his manhood. No statute of limitation hampers him.

Section 13 has provided that the defendant may be placed in jail; that he is unwillingly being subjected to this

mutilation is a matter of course; that resistance might be physically offered by the person complained against was contemplated; that restraint, possibly serious or extensive, might be necessary was in contemplation of the parties who prepared the bill. Therefore, orders are to be made by the court rendering the judgment and enforced by officers charged with carrying the judgment into effect, just as any other sentence imposed upon any other prisoner confined in the jail would be enforced; by whatever force is necessary. (Sec. 15 of Act.)

The stark potentialities of the Oklahoma enactment, we respectfully submit, are not found in the mandates of any other act heretofore upheld by courts of last resort.

In the following we will group the first and second contentions presented in the petition for Writ of Certiorari; that is: The Act is violative of the Fourteenth Amendment of the Constitution of the United States which provides that no person shall be deprived of "life, liberty or property without due process of law" and that no person be denied "equal protection to the laws"; and, second, that the prohibition in Article 5 of the Bill of Rights against double jeopardy is violated by the Act.

It seems to be admitted that this act can be sustained only upon the theory that it is an eugenic measure. We have difficulty in finding any indicia indicating this intent on the part of the Legislature.

An information is filed against the defendant alleging, as we have before noted, the existence of the fact of three felonious *convictions,* without regard to the nature of the crime. If a boy in his youth had stolen a chicken and later had made away with his neighbor's bird dog, worth more than twenty dollars ($20.00) and were separately convicted

for these offenses, on his release had pursued the tenor of his way without crime, or criminal indicia, till his old age, when hungry he had entered a house and taken a loaf of bread—for which he was again convicted—he would have done all those things necessary to brand him as an habitual criminal. Even though he was more than eighty years of age when the last offense was committed, and he had not felt a sexual impulse for ten years, the minions of the law under this statute would search out the ducts through which, in the long ago, the vitalizing secretions had been wont to pass and sever it, under the pretense of rendering him sterile.

When he had been informed against he was restricted by the statute to an answer equivalent to a criminal plea of "not guilty", unless we count the plea in avoidance (that is, his physical condition would not permit the operation) as another defense. The fact of other convictions is proof positive and incontrovertible. He is an habitual criminal—He *has* physical faculties sufficient to perform the functions of procreation—that the nerve and brain and blood are so vitiated that he will transmit the criminal instinct to the babe to be born!

Of course, it is conceded that the Legislature may lawfully provide that one fact when proven may be prima facie evidence of another fact; but, certainly, there must be some rational connection between them. It can't reach out into the realm of fanciful conjecture.

If it were an eugenic measure would we not expect to find within its terms some of the humanitarian provisions that mark legislation having such design.

The title of the Act gives us no indication that it was intended for eugenic purposes.

Is there any reason why the defendant should not be allowed to show that in fact such mutilation would be futile; that he couldn't exercise the power of procreation any more before than after the operation, if such were the fact; if public safety, health or morals were the sole objective embodied in the act?

Should he not be allowed to show that perchance his former convictions had been forgiven him by the jurisdiction where the judgment was rendered because it had been learned that he had been wrongfully convicted; or that the former offenses had been committed through sudden impulses of anger, or like overwhelming emotions? That his background, that his family history, that all other things surrounding him, belied the idea that he had inherited criminal instincts, or that he was inevitably bound to transmit them?

The Supreme Court of Oklahoma based its decision very largely upon its own pronouncements: *In re: Main,* 162 Okl 65.

The statute the Court had under consideration there was so vitally different from this that it is hard to see how one can be thought to support the other.

The statute supporting the judgment in the *Main* case provided (Okla. Stat. '31, Sec. 5039, *et seq.)* that:

> "*5039. Insane Patients—Sexual Sterilization Before Discharge.*
>
> "That whenever the Superintendent of the Hospital for the Insane at Norman, Oklahoma, or of the Hospital at Supply, Oklahoma, or of the Hospital for the Insane at Vinita, Oklahoma, or the Institute for Feeble Minded at Enid, Oklahoma, or of any other such institution supported in whole or in part from public funds shall be of the opinion that it is for the best in-

terest of the patients hereinafter mentioned, and of society, that any male patient under the age of 65 years, or any female under the age of 47 years, and which patients are about to be discharged from said institution, should be sexually sterilized, such superintendent is hereby authorized to perform or cause to be performed by some capable physician or surgeon the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feebleminded-ness, or epilepsy; provided that such superintendent shall have first complied with the requirements of this act."

The succeeding section required that the superintendent present to the Board of Affairs a petition stating the facts of the case to be considered and the ground for his opinion that the interest of society and of the patient will be best served by the operation. This petition is served upon the patient, her guardian is provided for and is allowed compensation for his services. A hearing is had before a board authorized to act "that may receive and consider as evidence at said hearing the commitment papers and other records of said patient, with or in any of the aforesaid named institutions, as certified by the superintendent, *together with such other legal evidence as may be offered by any party to the proceedings.*"

The board is authorized to deny the prayer of the petitioner or, if it shall find that the patient is "insane, idiotic, imbecilic, feebleminded or epileptic and by *the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted* * * *" and that the operation can be done without detriment to the health, an order may be entered directing it. There is regard had for the age of those concerned; there must be a judicial finding that the

patient is in fact possessed of injurious characteristics that may be transmitted. Any available evidence upon this subject is heard and considered. The mouth of the defendant is not closed by happenings that may be disjointed, long removed from each other, no one of which may have sprung from any cause contributing to any other one.

EVERY SAFEGUARD IS OFFERED TO THE DEFENDANT. It is far removed from the statute now being considered with its numerical yardstick creating, not prima facie proof, but conclusive proof of the existence of the facts necessary to convict the defendant.

To constitute due process of law there must be conformity to established and fundamental rules controlling the competency of the evidence.

The Legislature may not enact rules of evidence which are arbitrary and unreasonable and establish conclusive presumptions so as to deprive the accused of a reasonable opportunity to submit all facts bearing on the issues.

In the case of *Manley* v. *State of Georgia,* 272 U. S. 1, 73 L. ed. 575, this Honorable Court had under consideration the statute of the State of Georgia declaring:

> "Every insolvency of a bank shall be deemed fraudulent and the president and the directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

After a conviction Manley appealed to this Honorable Court. The first, second and third syllabi of the reversing opinion are as follows:

> *"Constitutional law, 830, due process—statutory presumption—validity.*
>
> "1. State legislation that proof of one fact, or group of facts, shall constitute prima facie evidence of the main or ultimate fact in issue, does not constitute a denial of due process of law if there is a rational connection between what is proof and what is to be inferred, and the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom it is raised.
>
> *"Constitutional law, 829—arbitrary presumption —invalidity.*
>
> "2. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment to the Federal Constitution.
>
> *"Constitutional law, 827—legislative fiat—sufficiency.*
>
> "3. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property."

The opinion cites:

> *Mobile J. & K. Cr. Co.* v. *Turnip Seed,* 219 U. S. 35;
> *Bailey* v. *Ala.,* 219 U. S. 219;
> *McFarland* v. *Amer. Sugar Ref. Co.,* 249 U S. 79.

It makes but litle difference under what classification the Act may be catalogued so far as concerns the petitioner's rights under this provision. As was said by this Honorable Court in *Meyer* v. *Nebraska,* 262 U. S. 390, 67 L. ed. 1042, at pages 1449-50:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen."

This text is supported by a multitude of citations.

Not only does it violate the Fourteenth Amendment but we respectfully urge that it deprives this petitioner of equal protection of the law.

May we not further suggest the unreasonable classification found in the law.

Section 24A of the Act decrees:

> "That offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement and political offenses shall not come or be considered within the terms of this act."

I have wondered upon what rational basis the Legislature could have arrived at the conclusion that all those committing minor offenses would transmit to their progeny only vices; while the dishonest financier who appropriates trusting depositors' monies in the banks, or trustees who convert funds of confiding clients, and the saboteur, and the inciter of treason could spew from his loin's only progeny blessed with virtues.

The terms of the Act exclude from its penalties the Capones, the Ponzis and the Benedict Arnolds. Is it pos-

sible that evasion of the revenue laws is so indicative of honesty and virtue that the Legislature can protect them in their social and family functions while the less versatile criminal is unsexed, without violating the equal protection clause of our Federal Constitution?

We respectfully suggest that it is arbitrary, illogical and utterly unrelated to any possible intent of enacting eugenic legislation.

The third (III) contention of the petitioner is that the Act violates section 10 of article 1, of the Federal Constitution prohibiting the states from passing any bill of attainder, or *ex post facto* law.

The answer to this question depends solely upon whether Your Honors conceive the legislation to be penal or eugenic and within the police powers of the State. If the latter, of course, this contention cannot possibly be upheld. If the former, equally, of course, it cannot be denied.

We conceive it to be penal because the Act requires the doing of things that can only mean punishment. If not penal, why the provision for imprisonment and bond? If not penal, why inflict it upon him whose habitat is the death cell? If not penal, why compel its performance upon the man who has been lacking in sexual impulses, or procreative powers, for more years than he likes to remember? Why force it upon the woman whom years and the process of nature has made barren?

It is surely not within the purview of the State's powers to mutilate human bodies by an act that is sadistic and futile but justified by declaring an eugenic intent.

For these reasons we respectfully urge that Section 10, of article 1, above mentioned forbids it.

Again the petitioner urges that it was not within the sphere of the Legislature of the State of Oklahoma to confer upon its District Courts the power to inflict additional punishment for offenses committed beyond its territorial limits. It is fundamental that the legislature may enact laws to punish crimes committed and protect persons and property, within its boundaries.

It is equally fundamental that these laws can have no extra territorial effect. When considered from this view point, in connection with the contentions of the State, the law is peculiar.

Applying the numerical yardstick, there must be three convictions had previously—it makes no difference where, except that the last one must be in the State of Oklahoma. There must be three separate trials. It wouldn't do that there be three convictions upon separate counts in the same indictment. It would seem, under this condition that this defendant could not transmit undesirable characteristics to his offsprings. But, if he should be tried separately three times, at the same term of court and three times convicted, he would inevitably transmit his degenerate tendencies and he would fall under the provisions of the Act; provided, of course, that the crimes did not include embezzlement, treason, or other exception. If, however, he is convicted once in Kentucky, a second time in Oklahoma, and a third time in Tennessee, he is not subjected to the sterilization proceeding—he can't transmit apparently unless the third offense is committed in the State of Oklahoma.

Of course the terms of the Act wholly exclude the territories of the United States and its insular possessions—why, we can't conceive.

Is it not patent under these circumstances that the defendant is being subjected to penalties not because of any Act within the jurisdiction of the Courts of Oklahoma but it is a penalty that could not be added without increasing the punishment that the courts of another state thought sufficient when measured by the offense judicially considered.

One other observation and we are through. In the practical enforcement of this Act if it be upheld the enforcement will become largely a matter of mechanical routine.

If it is civil, the attorney general can have his complaints printed and fill the blanks, cause summons to be issued and the notice given as by the statute provided.

The prisoner has only the resources of civil procedure available to him. It is well known that ninety-nine out of a hundred confined there are without pecuniary resources. He couldn't employ a lawyer, and being a civil action, the court couldn't appoint one for him, he has no means of procuring witnesses, if he could reach a physician who would be willing to make an examination of his physical and nervous condition and testify for him, in ninety-nine cases out of a hundred, he couldn't pay him. He will be as helpless as a hand-cuffed beggar. On the appointed day, by armed guards, he will be escorted to the courtroom, a prison physician will, no doubt sincerely, testify that in his judgment the operation can be performed without physical injury. A judgment will be rendered and the work will be done, by force, if necessary, and the prisoner returned to his cell. This of course is not sufficient to invalidate the Act. It is suggested as a reason why doubt should be resolved in behalf of the petitioner.

We believe this case is one calling for the exercise by this Honorable Court of its supervisory powers; that a writ of certiorari should issue; and finally that the judgment of the Supreme Court of the State of Oklahoma be reversed.

These conditions, we respectfully urge, merit the consideration of the Court: not because of any virtue within the petitioner, but because of the duty of our sovereignty to guard against an unwarranted use of its powers.

All of which is respectfully submitted.

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