In the Supreme Court of the United States

October term, 1941.

No. 782

JACK T. SKINNER, *Petitioner,*

vs.

STATE OF OKLAHOMA, ex rel. MAC Q. WILLIAMSON, Attorney General, *Respondent.*

ANSWER BRIEF OF STATE OF OKLAHOMA, EX REL. MAC Q. WILLIAMSON, ATTORNEY GENERAL, RESPONDENT.

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ISSUES

The issues as stated by the petitioner are clear-cut. His statement of the case is substantially correct, and the respondent has nothing to add thereto. There is no dispute as to the sufficiency of the evidence considered at the trial of the case in the trial court in Oklahoma. The only issue, or issues, to be determined is the validity, or constitutionality, of the 1935 enactment of the Legislature, referred to and discussed in the petitioner's brief and hereinafter referred to as the Oklahoma Habitual Criminal Sterilization Act, by which name it is authorized to be called by Section 1 of the Act. The contentions of the petitioner, as set forth in his Petition for Writ of Certiorari, are:

(1) The Oklahoma Habitual Criminal Sterilization Act is violative of the 14th amendment of the Constitution of the United States, in that it deprives the petitioner of "life, liberty, or property, without due process of law" and denies him "equal protection of the laws."

(2) The Oklahoma Habitual Criminal Sterilization Act is violative of the 5th amendment (Bill of Rights) of the Constitution of the United States, in that the petitioner has been made "subject for the same offense to be twice put in jeopardy of life or limb."

(3) The Oklahoma Habitual Criminal Sterilization Act violates Section 10 of Article 1 of the Constitution of the United States in that said Act is a bill of attainder and an ex post facto law.

(4) The Supreme Court of the State of Oklahoma erred in holding that the Legislature of the State of Oklahoma "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."

In the trial court the petitioner raised the question that the Oklahoma Habitual Criminal Sterilization Act was violative of the 8th amendment (Bill of Rights) of the Constitution of the United States in that it provided for the infliction of a cruel and unusual punishment, which contention he has apparently abandoned, this contention

not being set forth in his Petition for Writ of Certiorari and not being argued in his brief. Only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered by this Court. Paragraph 2 of Rule No. 38 of the *Rules of the Supreme Court of the United States; General Talking Pictures Corporation* v. *Western Electric Company, Inc., et al.*, 58 S. Ct. 849, 304 U. S 175, 82 L Ed. 1273. Consequently this brief will be confined to the four contentions above set forth, which are the only ones argued by the petitioner.

I

ARGUMENT AND AUTHORITIES

The Oklahoma Habitual Criminal Sterilization Act does not deprive the petitioner of "life, liberty, or property, without due process of law" and does not deny to him "equal protection of the laws" in violation of the 14th Amendment of the Constitution of the United States.

We first call attention to the fact that the said 1935 Act of the Oklahoma Legislature does not even purport to impose a punishment or penalty, but is purely an eugenic measure and an exercise of the police power of the State of Oklahoma. This is obvious when the entire Act is considered. It is not necessary for the Legislature to state specifically that the said Act is a police measure. The entire Act, and all of its provisions, must be considered as an entirety to ascertain the purpose of the legislation.

In the case of *Packard Motor Car Company* v. *United States,* 39 F.2d 991, it was said:

> "It is a well established principle in the exposition of the statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole. United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844; Hellmich v. Hellman, 276 U S. 233, 48 S. Ct 244, 72 L. Ed. 544, 56 A. L. R. 379."

Consideration of all of the provisions of said Act clearly discloses that its objective is similar to that of the

sterilization law involved in the case of *State* v. *Troutman,* 50 Idaho 673, 299 Pac. 688, where it was said:

> "Briefly, the act as amended creates the state board of eugenics composed of the State Public Health Adviser, and the Superintendents of the Northern Idaho Sanitarium, the State School and Colony at Nampa, the Idaho Insane Asylum, the Idaho Industrial Training School, and the *warden of the penitentiary.* It requires that said superintendent of each of the state institutions report quarterly to the board of eugenics all persons who are feeble-minded, insane, epileptic, *habitual criminals,* moral degenerates, and sexual perverts, who are, or in their opinion are likely to become, a menace to society.
>
> "The law requires the board to inquire into the innate traits, the mental and physical conditions, the personal records, and family traits and histories of all persons so reported, and if after such examination a majority of said board are of opinion procreation by such person would produce a child having inherited tendency to feeble-mindedness, etc., or would probably become a social menace or ward of the state, and there is no probability that the condition of such person so investigated will improve, the board shall make an order embodying its conclusions and specifying the type of sterilization as may be deemed best suited to the condition of such person. The findings and conclusions of the board shall be in writing. A copy of the order shall be served on the person affected unless insane or feeble-minded in which case it must be served upon his guardian or nearest kin. If the person whose condition has been examined and his legal guardian or nearest known kin consents in writing to the operation advised, it shall be performed under the direction of the state board of health adviser.

> "If consent in writing is not given, the board of eugenics shall file its findings, conclusions, and order in the district court as a basis and pleading upon which summons shall issue and trial be had as to whether the findings, conclusions, and order of the board shall be affirmed by the court.
>
> "All the safeguards are afforded to the person concerned as fully as are afforded by a proceeding at law, with right of full review by appeal from the district court to the supreme court."

The Court held in the case last mentioned that the sterilization law therein involved not to be "unconstitutional as contravening guaranties of life, liberty, and pursuit of happiness and safety, but reasonable act protective of general welfare within state's police power" and also held that the law was not unconstitutional "as not affording equal protection of the law."

With regard to one of the contentions of the appellant, the Court said:

> "It is contended that the constitutional safeguards in a criminal prosecution are violated. We find this proceeding is in no sense a criminal prosecution."

The Oklahoma Act is patently a police measure and is not designed to penalize or punish an habitual criminal as defined by the Act. This is so apparent from an examination of the provisions of the Act that no further citation of authority is required. There then arises the question as to whether or not the said Act is a proper and

reasonable exercise of the police power of the State of Oklahoma. In this connection, attention is called to the case of *Smith* v. *Command,* 231 Mich. 409, 204 N. W. 140, 40 A. L. R. 515, where it was said:

> "It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare Acting for the public good, the state, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility? * * * It is a right which this statute, enacted for the common welfare, denies to him. The facts and conditions which we have here related were all before the Michigan Legislature. Under the existing circumstances, it was not only its undoubted right, but it was its duty, to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feeble-minded, the idiots, and the imbeciles.
>
> "Thus far we have been attempting to show that this statute, measured by the purpose for which it was enacted and the conditions which warranted it, and justified by the findings of biological science, is a proper and reasonable exercise of the police power of the state."

Cooley on Constitutional Limitations (8th Edition), page 1231, states the following rules:

> "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion. *But a large*

discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. (Italics ours)

"That the legislature directs its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, does not render its action obnoxious to the equal protection clause of the Federal Constitution; and it is not, of itself, a valid objection to a police regulation that it is made applicable only to a segregated area or district."

In *Ruling Case Law,* Volume 6 (Constitutional Law), it is said:

"The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds, is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it, or to substitute their opinion for the judgment of the legislature. Courts are not at liberty to declare statutes invalid although they may be harsh, and may create hardships or inconvenience, or are oppressive or are mischievous in their effects and burdensome on the people and of doubtful propriety. The Courts are not the guardians of the rights of the people against oppressive legislation which does not violate the provisions of the constitution. The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves or of their legislative representatives." (P. 106, 107, sec. 105).

"Legislative acts within the power of the legislative body are not subject to revision or control by the Courts, on the ground of inexpediency, injustice or impropriety, or because they are contrary to the principles of natural justice, or are based on con-

ceptions of morality with which the courts may disagree, or even because they create unjust differences not prohibited by the constitution. The justice or injustice of statutory provisions is a question for the legislature, not for the court." (P. 107, sec. 106).

"The propriety, wisdom and expediency of legislation is exclusively a legislative question, and the courts will not declare a statute invalid because in their judgment it may be unwise or detrimental to the best interests of the state. The courts can have no concern as to the expediency, the wisdom, or the necessity for the enactment of laws. Or, as has been said, the courts do not sit to review the wisdom of legislative acts, and it is not for the court to decide whether a law is needed and advisable in the general government of the people Constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The only question for the courts to decide is one of power, not of expediency, and statutes will not be declared void simply because, in the opinion of the court, they are unwise." (P. 107-109, sec. 107).

"LEGISLATIVE DETERMINATION OF FACTS. On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. Under the American system of government

by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare must be accepted as tending to promote the common welfare whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. As a general rule, therefore, it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is conclusive, and the courts do not have jurisdiction or power to re-open the question or make new findings of fact." (P. 111-112, sec. 111).

"JUDICIAL REVIEW OF LEGISLATIVE DETERMINATION AS TO FACTS. Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous. Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, its findings are not subject to judicial review, nor is there any right to a trial by jury as to the facts within the scope of legislative determination. In such cases the courts have no power to determine the merits of conflicting theories, nor to conduct an investigation of facts which may enter into questions of public policy or expediency, and to sustain or frustrate the legislation according to whether the courts happen to approve or disapprove of the de-

termination of such questions of fact by the legislature. This principle has been applied to statutes relating to various subjects, such as the mode of executing death sentences, the testing of milch cows with tuberculin, and the compulsory vaccination of school children." (P 114, Sec. 113).

"JUDICIAL NOTICE OF FACTS INVOLVED IN CONSTITUTIONALITY OF STATUTES. In applying the constitutional limitation of reasonableness in the exercise of the police power, courts may determine from an inspection of the provisions of a statute under consideration whether it properly relates to matters within the limits of the police power, but in the exercise of this revisory power they are limited to a consideration of the language of the statute itself and to such facts as may be noticed judicially, and consequently they cannot consider evidence aliened to show the invalidity of the statute Therefore, the general rule is that in determining the vaidity of a statute, the court will treat the question as one of law, resort being had to extrinsic considerations only to the extent that the facts are, or may become, a matter of judicial knowledge." (P 115, Sec. 114).

"NATURE OF POLICE POWER. The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, and at times the most insistent, and always one of the least limitable of the powers of government." (P. 183-184, Sec. 182).

"DIFFICULTY OF DEFINITION. While there have been many attempts to define the police power it has not yet received a full and complete definition. The difficulty has been frequently commented on, and it has been said that the police power is from its nature incapable of any exact definition or limitation, because none can foresee the ever-changing conditions which may call for its exercise. The boundary line which divides the police power of the state from the other functions of government is often difficult to discern, and the limitations of the power have never been drawn with exactness. It has been said repeatedly that it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." (P. 184-185, Sec. 183).

"PLASTICITY OF POLICE POWER. The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions. It is very broad and comprehensive, and is liberally understood and applied. The changing conditions of society may make it imperative for the state to exercise additional powers, and the welfare of society may demand that the state should assume such powers." (P. 189, Sec. 188).

This Court upheld a sterilization law enacted by the Legislature of Virginia, in the case of *Buck* v. *Bell,* 47 S. Ct 584, 274 U. S. 200, 71 L. Ed. 1000, where it was said:

"The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It

certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. *The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.* Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. Three generations of imbeciles are enough."

16 *Corpus Juris Secundum,* 1141, Section 567, states the following definition:

"A widely accepted definition is that of Judge Cooley to the effect that due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs."

There is nothing in the Oklahoma Habitual Criminal Sterilization Law which deprives any person of a hearing, after due notice thereof, which the petitioner does not deny he has had. He is given the right of a jury trial, and is entitled to appeal to the Supreme Court of Oklahoma. Thus all of his rights are safeguarded and protected. In this connection, we quote from the opinion in the case of *State* v. *Troutman,* supra:

> "It is claimed due process of law is not afforded. The proceeding is pursuant to summons duly issued and served, and every safeguard known to a regular and orderly hearing in a court with right of appeal is afforded. The act not only affords due process but unless written assent is procured requires a complete open judicial proceeding."

In *Smith* v. *Command,* supra, the 11th paragraph of the syllabus is as follows:

> "A statute providing for sterilization of feeble-minded persons which provides for notice of time and place of hearing by personal service not only on the feeble-minded persons, but upon other interested persons, with opportunity to defend and right to appeal, does not deprive such persons of rights without due process of law."

In the body of the opinion it was said:

> "Nor does this statute violate the 'due process of law' clause of the Constitution. It requires ample notice of the time and place of hearing by personal service, not only on the alleged defective, but upon the prosecuting attorney of the county, upon the relatives, father, mother, wife, or child of the defective, or upon the person with whom he resides,

> or at whose house he may be; and, in case no relatives can be found, service is required upon a guardian ad litem appointed by the court to receive such notice and to represent the defective at the hearing. Regular proceedings are followed, and opportunities to defend with the right of appeal are provided Nothing further is required by the 'due process of law' clause of the Constitution."

We submit that the Oklahoma Habitual Criminal Sterilization Act does not deprive the petitioner of life, liberty, or property, without due process of law, either under the Federal Constitution or the Oklahoma Constitution.

We also submit that the petitioner has not been and is not being denied equal protection of the laws of the State of Oklahoma. 16 *Corpus Juris Secundum,* 997, states the following rule:

> "Discrimination alone, irrespective of its basis or effect, is not the test of denial of equal protection of the laws by a statute."

The petitioner cannot complain about equal protection of the laws, merely because other persons are not within the class in which he is included. He is placed in the same category as those similarly situated, and he is subject to nothing more than others who have been thrice convicted of crimes involving moral turpitude.

The petitioner cites on page 13 of his brief the case of *Davis* v. *Berry,* 216 Fed. 413, in support of his conten-

tion that the Oklahoma Habitual Criminal Sterilization Act is repugnant to the "due process of law" provisions of the Constitution of the United States. The decision in that case is clearly distinguishable and is not applicable to the Oklahoma Act, the said decision being based upon the failure of the Act there involved to require a hearing or to give the prisoner an opportunity to produce evidence, which is not true of the Oklahoma Act. We quote from the Court's opinion in said case.

> "And it is of no importance in argument whether the prison physician does this on his own motion or under an order of the state board of parole. The hearing is by an administrative board or officer There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or, if produced, they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners take assumed names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony. These are inquiries that must be held in the open with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence

> and examine laws of other states without notice, and in the prisoner's absence, and determine these questions. And if determined adversely, the prisoner has no remedy, but must submit to the operation.
>
> "In the case at bar the hearing was a private hearing, and the prisoner first knew of it when advised of the order Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that some time in the proceedings he must be confronted by his accuser and given a public hearing."

The Oklahoma Act gives the defendant a public hearing, with a right to trial by jury and appeal to the Supreme Court of the State. Thus it will be seen that the decision in *Davis* v. *Berry*, supra, can have no application to the Oklahoma Act.

The petitioner also cites the case of *Smith* v. *Board of Examiners*, 88 Atl 963, on page 13 of his brief, but significantly he does not recite the reason for the Court's decision in the case, which was, as will be seen from an examination of the Court's opinion, because the Act was limited to inmates of charitable institutions and was not made applicable to persons outside charitable institutions We quote from the Court's opinion in the case:

> "Turning our attention now to the classification on which the present statute is based, and laying aside criminals and persons confined in penal institutions with which we have no present concern, it will be seen that—as to epileptics, with which alone we have to do—the force of the statute falls wholly upon such epileptics as are 'inmates confined in the several

> charitable institutions in the counties and state.' It must be apparent that the class thus selected is singularly narrow when the broad purpose of the statute and the avowed object sought to be accomplished by it are considered. The objection, however, is not that the class is small as compared with the magnitude of the purpose in view, which is nothing less than the artificial improvement of society at large, but that it is singularly inept for the accomplishment of that purpose in this respect, viz., that if such object requires the sterilization of the class so selected, then a fortiorari does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions."

The same thing is true of the case of *Osborn* v. *Thomson,* 169 N. Y. Supp. 638, cited by the petitioner on page 14 of his brief. The third paragraph of the syllabus of said case is as follows:

> "Public Health Law, §§ 350-353, as added by Laws 1912, c 445, providing for operations for prevention of procreation by certain feeble-minded persons and criminals when confined in state institutions, is unconstitutional and void, as not providing equal protection of the laws, in that it does not apply to persons of identical tendency not confined in state institutions."

The reasoning of the State Supreme Courts in the two cases last mentioned is contrary to the views of the Supreme Court of the United States as expressed in the case of *Buck* v. *Bell,* supra, where it was said:

> "But, it is said, however it might be if this reasoning were applied generally, it fails when it is con-

> fined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow Of course, so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."

In *Central Lumber Company* v. *South Dakota,* 33 S Ct. 66, 226 U S. 157, 160, 57 L Ed 164, 169, this Court said that the State "may direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses" And in *Rosenthal* v. *New York,* 33 S Ct 27, 226 U S 260, 271, 57 L. Ed. 212, 217, it was held that "the Federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment."

The legislative enactment involved in the case of *Williams* v. *Smith,* 190 Ind. 526, 131 N. E 2, cited by the petitioner on page 14 of his brief, was similar to the one involved in *Davis* v. *Berry,* supra, in that it did not give the prisoner an opportunity to be heard, which, as has heretofore been pointed out, is not true of the Oklahoma Act involved in this case, for it (the Oklahoma Act) affords

him a public hearing with a right of jury trial and subsequent appeal to the Supreme Court of the State of Oklahoma.

The petitioner also cites the cases of *Manley* v. *State of Georgia,* 272 U. S. 1, 73 L. Ed. 575; *McFarland* v. *American Sugar Refining Company,* 241 U. S. 79, 60 L. Ed. 899, *Bailey* v. *Alabama,* 219 U. S. 219, 55 L. Ed. 191; and *Meyer* v. *Nebraska,* 262 U. S. 390, 67 L. Ed. 1042. In all of these cases, this Court adhered to the principle that a legislative presumption, or classification, must bear a rational connection with the ultimate results sought, with which we thoroughly agree. We assert that this principle was fully observed in the enactment of the legislation involved in this case. Three or more convictions of crimes involving moral turpitude certainly establish an individual as an habitual criminal whose criminal tendencies should not, in the sound exercise of the discretion a State may employ in determining what is best suited to provide for the future welfare of its citizenship, be passed on to posterity. We earnestly submit that there is not only reasonable, but almost certain, belief that children inherit the traits and characteristics of each and both of their parents, and to say that there is no reasonable relation or connection between the confirmed criminal traits of one who has been thrice convicted and those which might be passed on through in-

heritance almost borders on the absurd, it being common knowledge that bad traits as well as good traits are inheritable. The four cases last mentioned and cited by the petitioner do not even purport to deal with inheritable tendencies.

II

The Oklahoma Habitual Criminal Sterilization Act does not place the petitioner twice in jeopardy of life or limb for the same offense in violation of the 5th Amendment of the Constitution of the United States.

The 5th amendment of the Constitution of the United States provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

The Oklahoma Act does not even purport to punish an habitual criminal for prior offenses, as has been heretofore stated. It is strictly a police measure, and is not penal in nature. Its objective is not to jeopardize a person's "life or limb" and there clearly is no legislative intent to inflict an additional punishment for a crime previously committed. Its only purpose, as has been heretofore stated, is eugenic, and there is no element of punishment for a crime which has been previously punished.

III

The Oklahoma Habitual Criminal Sterilization Act does not violate Section 10 of Article 1 of the Constitution of the United States as being a Bill of Attainder or Ex Post Facto Law.

Section 10 of Article 1 of the *Federal Constitution* provides that no State shall "pass any Bill of Attainder" or "ex post facto law."

There is no merit to the contention that said Act is a bill of attainder. 16 *Corpus Juris Secundum*, 902 § 452, defines a bill of attainder as "a legislative act which inflicts punishment without a judicial trial." Even though it be assumed that the Act inflicts a punishment, which this respondent denies, full provision is made for a judicial hearing, with a right to trial by jury, and appeal to the Supreme Court of the State of Oklahoma.

The petitioner admits that his contention that the Act is an ex post facto law is dependent upon whether or not the legislation is penal or eugenic (p. 24 of the Petition for Writ of Certiorari and Brief in Support Thereof). He concedes that this contention cannot be upheld or sustained if the legislation is eugenic and an exercise of the police power of the State. He cites no cases or other authorities in support of his contention that the legislation is designed as a penalty rather than a police measure. If the Act is to be sustained as a police

measure, as it undoubtedly is, then it makes no difference where the offenses making the subject an habitual criminal were committed, whether in Florida, Texas, Oregon or Maine. Offenses, and convictions therefor, prove the criminal tendencies of the accused and he is none the less a confirmed criminal merely because one or more of his offenses were against the citizens of other states and were not all perpetrated against the citizenship of Oklahoma As to the contention that the third or last conviction must be in Oklahoma under the terms of Section 3 of the Act, it is sufficient to say that the State of Oklahoma may, under its police powers, require at least one of the three requisite convictions to be in accordance with the procedure Oklahoma follows in determining whether a person is guilty of a crime.

IV

The Supreme Court of the State of Oklahoma did not hold, and did not err in holding, that the Oklahoma Legislature conferred upon the District Courts of Oklahoma "The power to inflict additional punishment for offenses committed outside of the territorial limits of said State."

The petitioner's 4th and last contention, as the others, is based upon the assumption that the 1935 Act inflicts a punishment This assumption is false, and with this assumption the fourth contention must fall, for, as has been heretofore stated, the Act is a police measure and is not designed to inflict a penalty or punishment. It could have no other purpose.

It will be seen that all of the petitioner's contentions are hinged upon the proposition that the Oklahoma Habitual Criminal Sterilization Act is penal in nature, and is not an exercise of the police powers of the State of Oklahoma. If it were criminal in nature, then the appeal would be to the Criminal Court of Appeals of the State of Oklahoma. The petitioner has not attempted to appeal to that Court, which is the proper appellate tribunal in all criminal matters in the State of Oklahoma. He has not pursued this course of action, which he would and should do if he were correct in his assertion that the proceeding is criminal in nature The statutes of Oklahoma provide that appeals in all criminal matters must be taken

to the Criminal Court of Appeals of the State of Oklahoma, and the decisions of the Supreme Court of Oklahoma and of the Criminal Court of Appeals of Oklahoma are unanimous in holding that this is the proper course of procedure in criminal matters. This will not be denied or even questioned by the petitioner. The Legislature of Oklahoma very properly provided that this type of proceeding must be tried by the rules of civil procedure, and that appeals shall be taken to the Supreme Court of the State of Oklahoma, as in other civil matters, for the proceedings are essentially civil, and not criminal, as has been recognized by this Court and the Courts of other states in considering sterilization laws

The petitioner complains that the Oklahoma Legislature should have delegated to an administrative agency the power and duty to determine whether or not a particular person has inheritable criminal tendencies. The petitioner apparently admits that this power and duty may be delegated to a subordinate agency by the Legislature If this is true, then it must be conceded that the Legislature itself can determine these same facts, without referring such matters to a subordinate agency, for certainly the Legislature can exercise any function which it may delegate to others to perform.

The opinion of the Supreme Court of Oklahoma, which appears in the transcript of record filed in this case, beginning at page 24 of said record, is well written and is

logical in each of its details. The reasoning, which is supported both by logic and numerous authorities, is convincing to anyone who does not have a biased and prejudiced mind.

In concluding his brief in support of his Petition for Writ of Certiorari the petitioner argues that a prisoner who comes within the purview of the Act is in most cases financially unable to employ a lawyer or to procure witnesses to assist him in resisting the judgment of sexual sterilization authorized by the Act in question. The petitioner admits that this is not sufficient to invalidate the Act (page 26 of Petition for Writ of Certiorari and Brief in Support Thereof). We respectfully hasten to add that it would indeed be farcical and absurd for this to be the criterion, if the Courts based the validity of a legislative enactment upon a litigant's financial statement and his financial ability to present his side of a controversy Certainly it would not be fair to the rights of the other party to a litigation and to future litigants relying on the legislation.

In conclusion, we call attention to the well known rule that every presumption is to be indulged in favor of the validity of a statute. *Whitney* v. *People of the State of California,* 47 S Ct. 641, 274 U. S. 357, 71 L. Ed. 1095.

We further suggest and submit that if the Act cannot be applied to the petitioner because of the constitutional

inhibitions he advances, this fact does not render the Act invalid as applied to other persons not situated similarly to the petitioner.

CONCLUSION

The respondent respectfully submits that the Oklahoma Habitual Criminal Sterilization Act is not repugnant to, and does not violate, any of the constitutional provisions referred to by the petitioner, and that the said Oklahoma Act is a valid and constitutional legislative enactment, that said Act should be upheld and sustained in its entirety; and that the decision of the Supreme Court of Oklahoma in this cause should be upheld and affirmed.

Respectfully submitted,

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