In the

Supreme Court of the United States

Number 782—March Term 1942.

JACK T. SKINNER, *Petitioner,*

VERSUS

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

BRIEF OF PETITIONER.

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Statement of Case.

MAY IT PLEASE THE COURT:

Your Petitioner respectfully shows that heretofore, on the 12th day of July, 1937, he was ordered by judgment of the District Court of Pittsburg County, Oklahoma, to be rendered sexually sterile (R. 18). The proceeding was had by virtue of a certain act of the Leislature of the State of Oklahoma, appearing in Chapter 26, Article 1, of the Session Laws of the State of Oklahoma (Oklahoma Statutes 1941, Title 57, Sections 171-195) (Pet. 6-12).

The Act provides generally that persons sentenced to serve a term in the penal institutions in the State of Oklahoma who had been twice, or more times, convicted prior thereto for the commission of felonies involving moral turpitude should be termed habitual criminals (Sec. 3 of the Act); further, that one so adjudged an habitual criminal might upon trial before the District Courts of Oklahoma be ordered to be rendered sexually sterile by an operation of

vasectomy upon a male, and salpingectomy upon a female (Sec. 4 of the Act).

The Petitioner was confined to the State Penitentiary under a sentence imposed upon October 15, 1934 (R. 2).

The proceedings provided called for a trial by jury to determine *(1)* whether the defendant was an habitual criminal as defined by the act, and *(2)* whether the operation could be performed without injury to the health of such defendant.

The Act excepted from the definition of "habitual criminals" those violating prohibition laws, revenue acts, embezzlement, or political offenses.

Upon trial the court submitted to the jury but one question; that is, whether the operation could be performed without injury to the health of the defendant. The jury determined that it could be done (R. 11).

The case was appealed to the Supreme Court of the State of Oklahoma (R. 20), he having by answer and plea in bar raised in the trial court the defenses appearing in the application for writ of certiorari filed herein.

Upon consideration of the appeal the judgment of the lower court was affirmed on the 18th day of February, 1941, by an opinion of five judges of the Court (R. 24) to which affirmance four judges dissented (R. 34).

(These opinions have not yet been officially reported but may be found in 115 P. (2d) 123, *et seq.)*

In due course a petition for rehearing was filed and thereafter denied on the 8th day of July, 1941 (R. 39).

An appeal was perfected to Your Honors' court by record filed herein, on December 4, 1941, your Docket Number 782.

ARGUMENT *and* CITATION *of* AUTHORITIES.

There is a certain embarrassment encompassing counsel for Petitioner in the preparation of this brief, in that it will necessarily involve repetition of certain suggestions appearing in the brief filed in support of the petition for writ of certiorari. We hope for a kindly appreciation of these conditions at your hands.

As hereinbefore suggested, the Act became a part of the Laws of the State of Oklahoma by virtue of an act of the Legislature of 1935. The portions of this act we deem essential are:

> "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 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 commission 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 there-

in 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 sterile, 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."

An analysis of the Act indicates that the Legislature, by Section 3, divided criminals into two classes—the habitual and non-habitual criminals; that this classification depended upon a numerical factor in that those having been *three* times convicted of crimes involving moral turpitude, *after three separate* trials were deemed habitual. Had they been convicted of a greater number of offenses by virtue of indictments charging more than one offense with shall we say, two separate trials, they would not be habitual criminals.

Those convicted of violations of prohibitory laws, revenue acts, embezzlement, or political offenses were excluded from the definition of habitual criminals—it would make no difference how great the number of their convictions.

The reason given by the majority opinion of the State Supreme Court was based upon the following excerpt of its opinion (R. 31).

> "We must, therefore, assume that the Legislature had before it statistics, scientific works, and information from which it found as a fact that habitual criminals are more likely than not to beget children of like criminal tendencies who will probably become a burden upon society. 6 R. C. L. 111; 11 Am. Jur. 820. Based

upon such a presumptive finding of fact, the legislation was enacted. * * *"

It is hard for us to determine why the classification may not be deemed arbitrary.

It, of course, could not be presumed that the Legislature intended either to establish an aristocracy of crime, relieving favored ones of the burdens borne by those less fortunate—since the measure was purely eugenic, if the State's contentions be upheld. The exception must have been for some, to us, obscure reason, hidden in the hygenic formulae.

It could not possibly be because criminals of this class are lacking in procreative capacity. The public prints have acquainted us with the fact that over-lords of vice in the prohibition days were frequently fathers. It hasn't been long since Capone's son was married.

It is hard to conceive of any peculiar physical immunization appertaining to this ilk that would prevent them from transmitting their criminal characteristics, if the less notable birds of prey transmit their "criminal tendencies", as suggested in the majority opinion.

In attempting to sustain the Legislature the Supreme Court of Oklahoma says (R. 29) (Italics ours):

> "Defendant argues that the failure to provide a hearing on the question of whether he will likely beget criminal children shows that the Legislature had no eugenic purpose in mind. But that does not negative a eugenic intention, because the omission of such a finding *simply shows that the Legislature was satisfied that criminal tendencies in all such persons are inheritable.* * * *"

Since we must be sure the measure was actuated by no desire to unduly favor the bootlegger, the traitor, or es-

pecially the embezzler, whose pathway is too often marked by the broken lives and fortunes of victims who trusted him, then in order to relieve the Act of the charge of arbitrary classification we must find that this class of criminals are not likely "to beget children of like criminal tendencies who will probably become a burden upon society."

We respectfully urge that this asks more than any logical concept of the problem can justify.

Conceding it was an attempt to in some measure "preserve public health, morals, safety, and welfare", why should the retroactive effect of the legislation be made to apply only to those convicted at least once in Oklahoma? Would not the three convictions in another state be just as likely to produce the deplorable result? Why not in one comprehensive swoop embrace all of those who have anywhere, or at any time, heard the three sentences pronounced upon them for "crimes involving moral turpitude"? Remember, it is sustained purely upon the basis of "eugenics" —a rather vague and indefinite term. So far as we have been able to find, the courts have never defined or limited it.

The Petitioner complains:

I.

Because the Supreme Court of the State of Oklahoma erred in holding that the Act did not violate the Fourteenth Amendment of the Constitution of the United States providing 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." (Petition in error.)

Due process of law as interpreted by this Honorable Court means more than a mechanical observance of the hollow formulae of process.

The objection urged goes to the substantive character of due process, and challenges the State's declaration of its police power.

As long ago as *Davidson* v. *New Orleans,* 96 U. S. 97, Mr. Justice MILLER caused the Court to say:

> "* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'No state shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. * * *"

This was cited with approval and added to in *Hagar* v. *Reclamation District,* 111 U. S 701, when Mr. Justice FIELDS said:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the form of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* v. *California (Ante,* 232). * * *"

The statute under consideration is not akin, unless perhaps in the judicial declaration of its purposes, to any statute upon a similar subject that has come to our notice.

The statutes that have been considered have, without exception, been declared invalid when the act did not provide for hearing; and not infrequently because of the equal protection of the law provision of the Constitution had been contravened.

Such a statute was considered in *Davis* v. *Berry,* 216 Fed. 413, arising under the laws of Iowa and authorizing the sterilization of idiots, feebleminded, drunkards, drug fiends, epileptics, syphilitics, and moral and sexual perverts, and was mandatory as to criminals twice convicted of felonies. The court held the act violated the constitutional provisions against cruel and unusual punishment. Further, the failure of the statute to advise victim of the proceedings until he or she was ordered to submit, was contrary to the due process provision of the law. The court said:

> "One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial."

The case is interesting in that there is a discussion of some of the phases of similar provisions in ancient laws.

In *Smith* v. *Board of Examiners,* 88 Atl. 963, a statute was considered which provided for sterilization of epileptics confined in charitable institutions. It was voided because of the Fourteenth Amendment of the Federal Constitution.

In *Osborne* v *Thompson,* 169 N. Y. Supp. 638 the court held unconstitutional a statute similar to the New Jersey statute just mentioned because of a denial of equal protection of the law, and because not within the proper exercise of police power. The case was later affirmed in 171 N. Y. Supp. 1094.

In *Williams* v. *Smith* (190 Ind. 526), 131 N. E. 2, the statute was held invalid. The court saying (51 A. L. R. 863):

> "In the instant case the prisoner has no opportunity to cross examine the expert to decide that this operation shall be performed upon him. He has no chance to bring experts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And, wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the 14th Amendment to the Federal Constitution in that it denied appellee due process. * * * The trial court was correct in enjoining appellant from performing or causing to be performed, the operation of vasectomy upon appellee."

No statute that we have ever found has ever been upheld unless the state was required to show, at least by preponderance of the evidence, that the condition complained of was one that could be transmitted and that respondent was capable of procreation

That was true in the case sustained by this Court, *Buck* v. *Bell,* 272 U. S. 200, 71 L. ed. 1000.

The statute there provided for an intelligent and scientific inquiry to determine whether or not the defendant could in fact transmit to offspring mental or physical characteristics imposing unnecessary burdens upon society.

The case of *In re: Main,* 162 Okl. 65, largely relied on in the majority opinion provides (Oklahoma Statutes 1941, Title 35, Secions 141, *et seq.)* that whenever the superintendent of the hospital for the insane at (naming all points in the State of Oklahoma where located), or any other such institution supported in whole, or in part, from public funds, shall be of the opinion that it is to the best interest of the *patient mentioned* and *of society* that any male patient under the age of sixty-five, or female person under the age of forty-seven, and which are *about to be discharged* from said institution shall be sexually sterilized; the superintendent is authorized to perform, or cause to be performed, the operation of sterilization on any such *patient afflicted with hereditary form of insanity* that are recurrent, idiocy, imbecility, feeblemindedness, or epilepsy, provided, such superintendent shall have first complied with the requirements of the act.

The succeeding section requires the superintendent to present to the Board of Affairs a petition stating the facts to be considered and the reason for his opinion that *society and the patient* will be best served by the operation. This petition is served upon the patient, a guardian is provided for and allowed compensation, a hearing is had before a board authorized to "receive and consider as evidence at said hearing the commitment papers and other records of said patient with or in any of the aforesaid institutions after certification by the superintendent, *together with such other and legal evidence as may be offered by any party to the proceedings.* The board is authorized to deny the petition, 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 offsprings likewise afflicted", and that the operation

can be done without injury to the health, they may order it to be performed. (Italics ours.)

In other words there is here recognized the limitations of age, a judicial finding is required that the patient is in fact afflicted with injurious characteristics that may be inherited; the mouth of the defendant is not closed by happenings, it may be disjointed or long removed from each other, no one of which may bear any relation to the other and which have not necessarily sprung from any common contributing cause. There is no conclusive numerical yardstick.

An appeal is then provided for, reaching eventually to the Supreme Court of the State.

No such salutatory provision is found in the act under consideration.

As was said in the application for the writ, it erects an arbitrary numerical standard, and with this measuring stick determines conclusively two facts: *(1)* that the defendant is capable of procreation, and *(2)* that his offspring will inherit criminal tendencies provided the defendant has not been convicted of bootlegging, smuggling, treason, or embezzlement—or to give the exact verbiage of the Act: "provided he is not convicted of offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."

It is, we respectfully urge, especially to be borne in mind that no regard is provided in the act for proof of any *fact that might relieve the defendant of the humiliation* and mental suffering resulting from his sterilization.

As was said in *Davis* v. *Berry,* 216 Fed. 413, it "is unusual, ignominous, degrading * * *, it continues during the life of the defendant, involving humiliation and mental suffering."

No requirement of any showing provided for in the Virginia sterilization act under which the *Buck* v. *Bell* case, *supra,* was considered "that it is for the best interest of patient and of society, that the inmate" should be sterilized.

If it is a civil action, the mutilation should be inflicted only if someone should be benefitted by it. If the public safety, health, or morals were the sole object, should not the defendant be allowed to show that the operation would be futile, that perchance he was incapable of exercising the power of procreation, either through prior destruction of the transmitting glands by reason of age, or any other sufficient cause. Indeed, if the law be literally construed, the defendant could not show that he had been subjected to the very operation sought to be performed at some prior period! There are but two questions to be answered: *(1)* have you three times been convicted, once in the State of Oklahoma, and *(2)* will your health be endangered?

Does this measure to the standard of protection given by the due process clause?

The majority opinion appealed from, we respectfully suggest begged the question when it said (R. 32):

> "We think no one would doubt that this court should sustain the present law if it required a third finding to the effect that the accused is the potential parent of offspring with inherited criminal tendencies. But in the very nature of the case, testimony by expert witnesses on this question would be highly speculative and a finding by a jury or court, based upon such testimony, would likewise be speculative. The opinion of the experts would probably be based, in part at least, upon data that was available to, and considered by the Legislature at the time of enacting the law. If a court or jury can make a finding of fact based upon such speculative evidence, we see no reason why the Legislature (fol. 56) cannot find or assume facts,

based upon the same speculative evidence, as a basis for the exercise of the police power."

If this is a civil action, it seeks to deprive a defendant of the use of the faculties given him by nature. To say that he will not be allowed to defend himself because the only evidence that can be produced (in the opinion of the judges concurring) is speculative violates every concept of civil or criminal law underlying our judicial structure.

We would not deprive the poorest beggar, or the most prosperous tycoon of a dime or a dollar without some showing that some person or the public was entitled to demand it. He is not being punished they claim. Society is to be benefitted, yet, whether man or woman, whether young or old, whether capable or incapable of procreation, our "civil proceeding" will arbitrarily reach out and deprive him of "the right to beget children * * * one of the highest natural and inherent rights protected by * * * the Fourteenth Amendment of the Constitution of the United States relating to due process." (Dissenting opinion—R. 34-35.)

If it is not intended as punishment, if it is not penal in its nature, can we inflict the humiliation and degradation without we know of some justifying cause?

"The hearing provided by the Act doesn't provide for inquiry into any possible criminal *traits* of the person informed against ('traits' and 'acts' are not synonymous). Requires no finding determining such traits are transmittable to his posterity, nor whether by accident, disease, age, infirmity, or for other reason such person is reasonably capable of producing offspring * * *." (Dissenting opinion, R. 35-36.)

As before suggested it can be sustained only upon the assumption that it is conclusively established by reason

of three convictions: *(1)* that the defendant is capable of begetting of offspring, and *(2)* that the traits he will transmit are criminal ones.

To constitute due process of law conformity must be had to the established and fundamental rules governing the competency of evidence. A legislature may not enact an arbitrary or unreasonable standard and so deprive an accused of a reasonable opportunity to submit pertinent facts bearing upon the issues. It may make the existence of one fact presumptive evidence of the existence of another; but they are not allowed to shackle the litigant so that he may not show the truth if the presumption is erroneous.

This Honorable Court had under consideration the case of *Manley* v. *State of Georgia,* 272 U. S. 1, 73 L. ed. 575, under a statute of that State 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 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."

In the body of the opinion the following language is used:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred.

"If the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. 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. *Bailey* v. *Alabama,* 219 U. S. 219, 233, *et seq.,* 55 L. ed. 191, 198, 31 Sup. Ct. Rep. 145. *Mere*

legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.''

In *McFarland* v. *American Sugar Refining Company,* 241 U. S. 79, 60 L. ed. 899, was considered a suit by the refining company against the Inspector of Sugar Refining, the Governor and Attorney General of Louisiana to prevent the enforcement of an act of the General Assembly of the State which declared in part:

> ''Any person engaged in the public refining of sugar within the State who shall systematically pay in Louisiana less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or conspiracy in restraint of trade and commerce.''

It provided for a penalty of $500.00 and revocation of license. Further provided that if the refinery were shut down for more than a year this would be presumed to be for the purpose of violating the act, etc.

Section 1 of the act further made reports of Legislative Committee of the State and of the Senate or House of Representatives of the United States prima facie evidence of the facts set forth therein.

The suit was brought primarily to have the act declared invalid.

Mr. Justice HOLMES wrote the opinion. He says in part:

> ''The answer is signed by the attorney general of the state; and if he were authorized to interpret the meaning of the other voice of the state heard in act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff

is the only one to whom the act could apply, and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity, since it made the legislation necessary. If the connection were omitted, it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way.

* * * * * * *

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, J. & K. C. R. Co.* v. *Turnpseed,* 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

There is one phrase in the first portion cited that impresses us:

> "The answer is signed by the attorney general of the state; and if he were authorized to interpret the meaning of the other voice of the state heard in Act No. 10, would seem to import that the latter *was a bill of pains and penalties disguised in general words.*"

This verbiage impresses us as being peculiarly applicable to the instant case.

In *Bailey* v. *Alabama,* 219 U. S. 219, 55 L. ed. 191, this Court considered an act of the Alabama Legislature declaring "Any person who with the intent to injure or defraud his employer enters into a contract in writing for the performance of any act or service and thereby obtains money or other personal property from such employer and with like intent, without just cause, and without refunding such money or paying for such property, refuses or fails to perform such acts or services" shall be punished by a fine, etc.; and further providing, "the refusal or failure of any person who enters into such contract to perform such act or service * * * or refund such money or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord and defraud him."

A rule of evidence in force in Alabama prevented a person from testifying to his uncommunicated motives, purposes or intents.

Bailey was convicted, the case was appealed and in the opinion was discussed at length the facts and legal phases and held that the act deprived Bailey of his liberty without due process of law because the presumption was in fact a conclusive presumption.

Mr. Justice HUGHES said:

"This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 749, 37 L. ed. 905, 925, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law, or a denial of the equal 192 U. S 585, 48 L ed. 575, 24 Sup. Ct. Rep. 372; *Mobile J. & K. C. R. Co.* v. *Turnipseed*, decided by this court December 19, 1910 (219 U. S. 35, *ante*, 78, 31 Sup. Ct. Rep. 136).

"The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice LURTON, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of the equal protection law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact "presumed" and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'"

Surely the facts in this case are no less compelling than those this Court here considered. Police power of the State

cannot extend so far that a defendant is precluded from showing that he should not be mutilated; that such act would merely inflict punishment upon him.

Again we suggest, in the language of Mr. Justice HOLMES, "it is a bill of pains and penalties disguised in general words."

There can be no question, surely, that an individual has a right to the possession of all of the faculties with which nature endows the human body: sight, hearing, the right to use his hands and feet are certainly rights the use of which constitute fundamental liberties protected from invasion by constitutional fiat. Why except from them the right of procreation; unless, as in the *Buck* case, or the *Main* case, there is an overwhelming reason existing in the individual himself that intimately and certainly affects the public? Could not the State more logically order amputated the gun finger of a hi-jacker?

This question is sought to be evaded by the suggestion that the operation was minor and left the patient, or victim, capable of enjoying the "sexual congress", robbing him only of the power of procreation.

There is something singularly obscene in this suggestion. It indicates a declaration that lascivious gratification is the chief reason why men and women are endowed with this urge and given the right to its proper fulfillment. Certainly it was bestowed that the human race might continue to exist. The procreative instinct that pervades all animal life makes possible our natural growth and existence. Nature, and the God of nature, didn't intend that the earth be habited by a race of eunichs.

This Honorable Court in *Meyer* v. *Nebraska,* 262 U. S. 390, 67 L. ed. 1042, at page 1045, said:

> "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 followed by a wealth of citations, then follows:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele,* 152 U. S. 133, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499."

Adopting the language of the dissenting opinion (R. 35) we respectfully suggest:

> "In the Act under consideration the Legislature has, in my judgment, restricted the power of the court in its hearing of applications filed thereunder to unreasonable, illegal and, I may add, unwise lengths * * *."

It is therefore unconstitutional and void.

II.

The Petitioner complains that he is being placed twice in jeopardy for the same offense in violation of the Bill of Rights and Article 5 thereof, and of the Constitution of the United States.

Section 6 of the Act heretofore copied in this brief provides generally that whenever it has been brought to the attention of the Attorney General by the County Attorney, or warden, or other officer in charge of the penal institution *"or through information furnished him from any reliable source, that any person has the status of an habitual criminal as herein defined"* the Attorney General shall investigate and if he satisfies himself that he can establish the fact of habitual criminality he shall commence proceedings provided by the Act. He appears to be barred by no statute of limitation. He may reach back through whatever period of time and circumstances his numerical standard may justify, if two of the offenses have been committed even prior to the founding of the State of Oklahoma it makes no difference, he measures him by this standard and without regard to the intervening lapse of years between the second and third offense, or between the third and the date of the filing of the complaint, he is brought before the court, an answer is found to the questions: Have you been convicted three times? Will it endanger his health to emasculate him? If the answer to each conforms to the requirements of the statute, he then, in not less than twenty days, is to be made sterile.

Under Section 13 he may by the sheriff be thrown in jail, a bond may be fixed, and, though the judgment purports to be a civil judgment, its execution is governed wholly by our concept of criminal procedure.

It makes no difference that he has paid in full the pen-

alties exacted by the laws when the court sought to find a measure that would satisfy the debt he owed society for his misdeeds; not because of any known benefit that society will receive by reason of the additional penalty inflicted, because it can be nothing less than a penalty — unless society is to be benefitted.

The mandate of statute so closes the mouth of the defendant that he may not even show that his former convictions had been found erroneous; that the sovereignties under which such convictions were pronounced had forgiven him because of his innocence, that the offenses in fact were not acts that betoken his normal personality, that they resulted it may be from overwhelming emotion; that in fact his family history, his background and the years of his life it may be since the commission of the offenses belies the idea of congenital criminality.

But, through sheriffs, and prisons and force he is sought out, a shamed thing, to tread the remaining years of life under clouds of renewed and added humiliation; and this, too, even though "accident, disease or age" had robbed him, or her, of sexual desire or impulse.

The words of Mr. Justice HOLMES come with redoubled force: "It is a bill of pain and penalties disguised in general words."

We realize that this Article to the Bill of Rights, as to a large measure of its force is intended to apply to matters in which the Federal Government is involved; but in this instance the rights violated, or that will be violated, should, we believe, be deemed vested rights. Surely the State of Oklahoma has no right to impose additional burdens, pains or penalties upon one because of convictions for offenses had in sister states. When he left the custody of such state,

whether by pardon, or service of sentence, he had the right of full, complete and personal liberty — the same right that every other citizen had.

Surely the right to breathe the air, enjoy the sunshine and pass up and down the highways of the country unafraid and untroubled is valuable; surely it is one which he can claim as vested in him, unless again forfeited by some infringement of the law.

True, it is not a right of property, but it is a right of personal liberty, more highly prized than property; and the State of Oklahoma should not be permitted to revive debts that have been paid, debts due a sovereignty other than her own and paid in full, and there make it a basis upon which additional punishment may be inflicted, under the specious guise of eugenics. The police power of the State should not be held to reach so far. Such legislation bears no reasonable relation to the health, safety, morals, or welfare of the people; this, notwithstanding discredited theorems of Cesare Lombroso and the over-zealous biological and engenic crusaders who believe his pronouncements as to the atavistic nature of criminals.

What we have said here applies largely to the third ground of the complaint:

III.

The Petitioner complains that the Act violated Section 10 of Article 1 of the Constitution of the United States, declaring in part as follows:

> "No state shall * * * pass any bill of attainder * * * expost facto law or * * *."

This, and as well the fourth ground of his complaint, as follows:

"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 Court of that State the power to inflict additional punishment for offenses committed outside of the territorial limits of said State."

Nor can it make such extra-territorial convictions a basis for additional punishment within the State.

It is certain that the enforcement of the law as it is written was really never intended.

Section 6 of the Act was probably thrown in to avoid a judicial declaration that it did not conform to the equal protection provision of the Federal Constitution. It provides no machinery by which any adequate enforcement could be had against those not found within the walls of the penitentiary, or other penal institutions. It opens, it is true, a field in which the vicious or the meddlesome might satisfy a grudge, or satiate his self-sufficient sense of superiority by pointing out the misdeeds of some hapless neighbor. But, if the State of Oklahoma should attempt to enforce the law as it is writ the judicial currents would be clogged and the orderly functions of justice be brought to a practical standstill.

We wonder if it would not be possible that a felon of treasonable instincts, convicted of treasonable acts would not be among the first of those who would take advantage of his own immunity to impose confusion upon the courts and humiliation upon the less happy culprits around him?

It impresses us that the affirming opinion in this case is based upon a concept of the infallibility of legislative bodies. It goes further than any other called to our attention in reviving the outmoded and long discarded theory that the "king can do no wrong."

Were this the law of the land the declarations of the Fourteenth Amendment were less than "sounding brass or tinkling cymbals."

The precise purpose of the Amendment is to protect the individual against legislative acts unduly intruding upon his liberty; giving to him a privilege to question such conduct in the courts of his country.

How best to promote the moral integrity of the nation is a question looming large and it is of consequence to every citizen, but the practical value of sterilization has been discounted by history and by science.

It is not hard to remember that in early English days Mr. Blackstone stated:

> "But now the general punishment of all felons is the same, namely, by hanging."
>
> —Blackstone, Book 4, page 216.

No one has suggested that hanging is less effective than emasculation, and no one has ever suggested that in this drastic period of English history there was any diminution of the quota of crime.

We may again remember that with the coming of more kindly days the felons who formerly would have been hanged became colonists in far Australia and Tasmania. There, under different *environment*, their initiative asserted itself, opportunities were seized, hardships were borne, but they have builded an empire in the South Pacific protected by manhood not less worthy than our own. Environment, not heredity, moulded them.

Where similar statutes have had wide vogue it is found to have had no appreciable effect on the incidents of crime and it often leads to sexual promiscuity and consequent spread of veneral disease.

—Richmonds Sterilization in Wisconsin, 25 J. Crim. L. 586;

Barnes on Vasectomy, 29 N. Eng. Med. Monthly, 59-62;

Fink, Causes of Crime, 210;

4 J. Crim. L. 326;

Landman — The Human Sterilization Movement, 24 J. Crim. L. 400;

Landman — Human Sterilization, 183-202.

Your Petitioner respectfully prays that this Honorable Court grant him relief from the judgment heretofore rendered against him, and that he be protected in the rights of which it seeks to deprive him.

All of which is respectfully submitted.

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