Washington University Law Review

Volume 11 | Issue 1

January 1925

Prohibition Against Cruel and Unusual Punishment Is Not Applicable to Sterilization of Feeble-Minded Persons

Hoye v. Kalashian, 22 R. I. 101, 46 A. 271; *Kost v. Bender,* 25 Mich. 515; *Davis Mercantile Co. v. Gillett,* 82 Fla. 340, 90 So. 189; *Peltier v. McFerson,* 67 Colo. 505, 186 P. 524; *Casner v. Schwartz,* 198 Mo. App. 236, 201 S. W. 592; *Miller v. Chinn* (Mo. App), 203 S. W. 212; *Adair v. Bank of Hickory Flat,* 115 Miss. 297, 75 So. 758; *Bute v. Williams* (Tex. C. A.), 162 S. W. 989; *Dollarhide v. Hopkins,* 72 Ill. App. 509; *Sawyer v. Wiswell,* 9 Allen 39. The following, though not negotiable instrument cases, are to the same effect: *Church v. Ruland,* 64 Pa. 432; Ely v. Wilcox, 26 Wis. 91; *Elwell v. Tatum,* 6 Tex. Civ. App. 397, 25 S. W. 434. In *Miller v. Chinn, supra,* plaintiff was not the original payee with notice of the fraud, but his agent. But the instant case is the only one in which the suit was not only brought in the name of one not a party to the original fraud, but was brought on an instrument whose payee was not the party to the fraud, but an ostensibly innocent holder. F. W. F.

CRIMINAL LAW.

Smith v. Command, Supreme Court of Michigan, June 18, 1925.

Prohibition against cruel and unusual punishment is not applicable to sterilization of feeble-minded persons.

Willie Smith, a boy of 16, was duly adjudged to be feeble-minded by the Probate Court of Wayne County. His father, with the consent of the mother, filed a petition to have him sterilized under Act. 285, Public Acts of 1923. This Act, among other things, provided that the Court may order for treatment or operation to render the defective incapable of procreation whenever it shall be found "that (a) the said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined or be rendered incapable of procreation, (b) that children procreated by such adjudged defective will have an inherited tendency to mental defectiveness, and (c) that there is no probability that the condition of said person will improve so that his or her children will not have the inherited tendency aforesaid." The proceedings resulted in an order by the Court appointing a competent physician to treat the plaintiff by X-ray or by vasectomy in order to render him incapable of procreation. To secure a reversal of this order, the plaintiff brings certiori.

Held: The Constitution of the State of Michigan, Article 2, Section 15, prohibiting cruel and unusual punishments, applies only to pun-

ishments for crimes after conviction and does not apply to sterilization of feeble-minded persons which is non-punitive.*

In declaring that portion of Act 285, Public Acts of 1923 given above, as constitutional the Court held that it was a proper and reasonable exercise of police power in view of fact that biological science has definitely demonstrated that feeble-mindedness is hereditary. This fact, now well known, with its alarming results, presents a social and economic problem of grave importance. There are in the various States of the Union many more feeble-minded people than can be segregated in State institutions. If these people can neither be segregated nor sterilized their numbers will multiply in an ever-increasing ratio. 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 right superior to the common welfare. C. J. Shaw, in *Commonwealth v. Alger,* 7 Cush. (Mass.) 53, said, "the power vests in the legislature by the constitution to make, ordain and establish all manners of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

Clearly, under such principles the instant case is correctly decided, even though it goes farther than most cases go. Acting for the public good, the State may always impose a reasonable construction upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen to beget children with an inherited tendency to crime, feeble-mindedness, idiocy or imbecility.

In deciding that the statute in question did not violate the section of the constitution which provides that cruel or unusual punishments shall not be inflicted, the Court was well within the law. The only purpose of this constitutional provision is to place a limitation upon the power of the legislature in fixing punishments for crime. There is no element of punishment involved in the sterilization of feeble-minded persons. In this respect it is analogous to compulsory vaccination. Both are non-punitive. In *Osborn v. Thomson,* 103 Mis. Rep. N. Y. 23, it is true that a somewhat similar law was declared unconstitutional. This law, however, provided only for the sterilization of such feeble-minded, epileptics, criminals and other defectives confined in the several state institutions, and exempts similar situated defectives who were cared for in their own homes or in private institutions. The Court held

*Order reversed upon other grounds than those given in this brief.

this law unconstitutional, not on the grounds or cruel or unusual punishment, but as violating the 14th amendment, which says "that no State . . . . shall deny to any persons within its jurisdiction the equal protection of the laws." In this case the Court further declares, "The operation upon feeble-minded is in no sense in the nature of a penalty, and therefore whether it is an unusual and cruel punishment is not involved."

In *Smith v. Board of Examiners,* 85 N. J. Law 48, the Board of examiners created by act to authorize and provide for the sterilization of feeble-minded, epileptics, certain criminals and other defectives, ordered that the operation of salpingectomy be performed upon one Alice Smith, an epileptic inmate of a State institution. Although this order was reversed the Court made clear that it was not upon the grounds of cruel and unusual punishment but rather because the statute in question was based upon a classification that bore no reasonable relation to the object of such police regulations and hence violated the 14th amendment.

In *Davis v. Berry* (D. C.) 216 F. 413, an act required the performance of an operation on criminals who had been convicted of a felony. This act was within the prohibition of cruel and unusual punishments, but it in no way referred to feeble-minded persons. Similarly a like act in *Mickle v. Henrich* (D. C.) 262, F. 687, applying only to persons convicted of rape, and a like act in *State v. Feilen,* 70 Wash. 65, referring to criminals only, were both found to come under this prohibition. It is plainly apparent in these cases that the constitutional inhibition against cruel and unusual punishment has no applicaiton to the surgical treatment of feeble-minded persons. W. J. P.

State ex. rel. Neill v. Nutter, Supreme Court of Appeals of West Virginia, May 12, 1925.

TRIAL — VERDICT. — Verdict returned in correct form and signed by foreman is not affected by statement of juror upon poll that he agreed thereto to get the jury together.

Suit by the State on the relation of Clyde H. Neill for mandamus to be directed to Trebey Nutter, Special Judge of the Circuit Court of Marion County. The jury having agreed to a verdict in the jury room, returned it to the court in correct form and properly signed by the foreman. Upon being polled three of the jurors stated that the verdict