

court may constitutionally refuse to enforce a cause of action derived from foreign law, it may not thereby destroy the cause of action in the courts of another state. If this is a correct statement of the law, then the most the state courts in Texas could constitutionally have done would have been to refuse to enforce the assignees' cause of action. Or, if the assignees had been defendants relying on a defense valid under foreign law but regarded by the Texas state court as contrary to its public policy, the court would have had either to dismiss the action or to recognize the foreign law.<sup>26</sup> The assignees would still have had a cause of action in another state. If the state courts of Texas could not constitutionally deprive the assignees of their cause of action in another state, it may well be questioned whether an application of the interpleader act reaching this result in a federal court (applying state law) is constitutional.

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**Constitutional Law—Civil Rights—Validity of Blanket Legislative Provision for Sterilization of Habitual Criminals—[Oklahoma].**—The Oklahoma Habitual Criminal Sterilization Act<sup>2</sup> provides that anyone judged to be an "habitual criminal" shall be rendered sexually sterile.<sup>2</sup> The act defines an habitual criminal as one who has been convicted two or more times for the commission of a felony involving moral turpitude. In a proceeding under the act initiated by the attorney general, the defendant, an inmate of the Oklahoma state penitentiary, admitted a record of three convictions—one for stealing chickens and two for robbery with firearms—all of which were committed prior to the passage of the act. The jury determined in accordance with the act 1) that the defendant was an habitual criminal as defined by the act and 2) that he might be sterilized without detriment to his general health. From a judgment ordering his sterilization, the defendant appealed with alternative contentions: if the act be considered a penal measure it should be invalidated as a cruel and unusual punishment prohibited by the state constitution and as an *ex post facto* law prohibited by the federal constitution. If, on the other hand, the act be considered a eugenic measure, it should be held invalid under the due process clause of both the federal and state constitutions because it does not require a finding by the court or jury that by the laws of heredity the defendant is the probable potential parent of children with criminal tendencies. *Held*, that the act is a eugenic measure and that the legislative determination that habitual criminals possess an inheritable tendency to crime which will be passed on to their

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Galveston, Harrisburg & San Antonio R. Co. v. Wallace, 223 U.S. 481, 490 (1912); or a refusal to enforce foreign claims on the ground that the procedure of the forum is inappropriate, Slater v. Mexican Nat'l R. Co., 194 U.S. 120, 128-29 (1904); or a refusal to enforce foreign claims because the forum has no court which can exercise jurisdiction over the controversy, Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142, 148-49 (1907); or a refusal to enforce foreign claims because the doctrine of *forum non conveniens* is held applicable, Rogers v. Guaranty Trust Co., 288 U.S. 123, 131 (1933).

<sup>26</sup> Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 150 (1934); see Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145, 160 (1932); Modern Woodmen of America v. Mixer, 267 U.S. 544, 550-51 (1925); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924); consult Goodrich, *Conflict of Laws* 261-62 (2d ed. 1938).

<sup>1</sup> Okla. Stat. Ann. (Harlow, Supp. 1940) § 5044.

<sup>2</sup> The operation to be performed is vasectomy in the male, and salpingectomy in the female.

children is not unreasonable. Judgment affirmed, two judges dissenting. *Skinner v. State ex rel. Williamson*.<sup>3</sup>

In declaring the Oklahoma Habitual Criminal Sterilization Act constitutional the court in the instant case appears to be the first to uphold a blanket compulsory sterilization measure, whether applying to mental defectives or to habitual criminals.<sup>4</sup> The corresponding Oklahoma statute for the sterilization of mental defectives<sup>5</sup> requires the court or jury to make an independent finding that each defendant in a sterilization proceeding is a potential parent of socially inadequate children. The blanket provision of the habitual criminal statute is especially severe in view of the fact that there is considerably less scientific evidence of the inheritability of criminal traits than of the inheritability of insanity or feeble-mindedness;<sup>6</sup> consequently a court finding seems an even more necessary safeguard in the former case than in the latter.

The Virginia mental defective sterilization statute, upheld as constitutional by the United States Supreme Court in *Buck v. Bell*,<sup>7</sup> has served as a standard by which the constitutionality of similar state legislation has been determined.<sup>8</sup> The Virginia statute provided for an administrative finding, subject to review by the courts, that the mental defective was "the probable potential parent of socially inadequate offspring, likewise afflicted."<sup>9</sup> A similar finding of a judicial or administrative nature is quite generally required by states having legislation providing for the compulsory sterilization of mental defectives.<sup>10</sup>

Similarly, in the case of legislation providing for the compulsory sterilization of criminals, as contrasted with mental defectives, there is almost unanimous adherence

<sup>3</sup> 115 P. (2d) 123 (Okla. 1941).

<sup>4</sup> A Nebraska statute provides that male sex offenders shall be castrated. Neb. Comp. Stat. (1929) § 83-1504. It does not appear, at least from reported court decisions, that this provision has ever been enforced; probably its validity is too much doubted. 10 Neb. Law Bull. 164, 167 (1931). Likewise, there seems to have been no effort to enforce a California statute which provides for compulsory sterilization of those guilty of carnal abuse of a female child. Calif. Pen. Code (Deering, 1937) § 645. Both provisions require a court order and make the operation part of the sentence.

<sup>5</sup> Okla. Stat. (Harlow, 1931) §§ 5039-44, upheld as constitutional in *In re Main*, 162 Okla. 65, 19 P. (2d) 153 (1933).

<sup>6</sup> Jennings, *Eugenics*, 5 Encyc. Soc. Sci. 617 (1931); Landman, *The Human Sterilization Movement*, 24 J. of Crim. L. & Criminology 400 (1933); Committee of the American Neurological Association, *Eugenical Sterilization* (1936), digested in Myerson, *Summary of the Report of the American Neurological Association, Eugenical Sterilization*, 1 Am. J. Med. Juris. 253 (1938); Landman, *History of Human Sterilization in the United States*, 23 Ill. L. Rev. 463 (1929).

<sup>7</sup> 274 U.S. 200 (1927).

<sup>8</sup> Schoenbach, *Sterilization Laws—Their Constitutionality—Their Social and Scientific Basis*, 17 Boston U.L. Rev. 246, 250 (1937).

<sup>9</sup> Va. Code Ann. (Michie & Sublett, 1936) § 1095h-m.

<sup>10</sup> The statutes of Wisconsin and South Dakota are unique, in not requiring the finding to be in terms of inheritability. The former, Wis. Stat. (1939) § 46.12, requires the investigating board to determine when procreation is "inadvisable." The latter, S. D. Comp. Laws (1939) §§ 30.0501-14, requires a finding as to whether the defective can properly perform the duties of a parent.

to the rule that there must be an administrative or judicial finding that the children of the criminal will probably have socially undesirable tendencies. The only exceptions appear to be measures applying to sex criminals or to criminals who are sexually degenerate; the former type of criminals may be sterilized in Nebraska,<sup>11</sup> and both types in California,<sup>12</sup> without any finding of a eugenic nature. It does not appear that any sterilizations have been performed under these acts,<sup>13</sup> or that the constitutionality of the acts has been contested.

Apart from these unused statutes, the Oklahoma Habitual Criminal Sterilization Act is the only statute making habitual criminal status rather than the inheritability of criminal traits the condition for sterilization. In view of the widespread insistence upon an administrative or judicial finding of the inheritability of a defendant's undesirable traits, it is difficult to justify its absence in the Oklahoma statute, unless recent research in genetics reveals that criminal traits are invariably inheritable. Recent research indicates, if anything, the contrary. The American Neurological Association Committee for the Investigation of Sterilization, after extensive research, has categorically denied the existence of any scientific basis for the sterilization of criminals.<sup>14</sup> Professor Hooton, who is generally regarded as representing an extreme position, goes no further than to say that crime is the result of the impact of environment on low-class human organisms.<sup>15</sup>

The position of the court in the instant case is that, since there is "some"<sup>16</sup> scientific evidence to support the legislative finding, the court should not disturb it. This position is justified on the ground that a judicial finding, necessarily based on highly speculative evidence, could add nothing to the legislative determination "based upon the same speculative evidence."<sup>17</sup> This argument ignores the possibility of administrative or judicial findings on such matters as the persistence of criminal traits throughout several generations, the circumstances under which the crimes were committed, and questions analogous to those considered in the determination of parole risk.

Moreover, it is doubtful whether the court was justified in rejecting the defendant's contention that the Oklahoma statute was intended as a penal measure. An author of the statute testified in the instant case that one legislative purpose was that the statute serve as a crime deterrent.<sup>18</sup> The blanket provision, in making the treatment depend upon the criminal rather than the eugenic status of an individual, appears virtually to be part of the provision for punishment. Furthermore, if the criminal sterilization act has a eugenic purpose it should be subject to the same necessity for an individual determination as is the mental defective sterilization act. And the omission in the habitual criminal act of other features of the mental defective statute—such as

<sup>11</sup> Neb. Comp. Stat. (1929) § 83-1504, discussed in note 4 supra.

<sup>12</sup> Calif. Pen. Code (Deering, 1937) § 645, discussed in note 4 supra.

<sup>13</sup> Note 4 supra; Gosney and Popenoe, *Sterilization for Human Betterment* (1931).

<sup>14</sup> Committee of the American Neurological Association, *op. cit. supra* note 6.

<sup>15</sup> Consult Hooton, *Crime and the Man* (1939).

<sup>16</sup> *Skinner v. State ex rel. Williamson*, 115 P. (2d) 123, 128 (Okla. 1941).

<sup>17</sup> *Ibid.*

<sup>18</sup> Dr. Ritzhaupt, a surgeon and a member of the Oklahoma State Senate, testified not only that criminal traits are inheritable, but also that a sterilization statute would deter people from criminal acts.

an upper age limit above which sterilization cannot be performed and a provision that the operation be performed only when the defendant is discharged from the institution of which he has been an inmate—also indicates different legislative purposes in passing the two statutes and tends to corroborate the defendant's contention that the statute is penal. The statute, if penal, is not only inapplicable to the particular case as an *ex post facto* law, but should also be held unconstitutional on the ground that the obvious humiliation of a forced sterilization is cruel and unusual punishment.<sup>29</sup>

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**Contempt—Privilege—State Court Citation for Statements in Pleadings in Federal Court—[California].**—A California superior court issued a temporary injunction restraining certain defendants, who owned a Mexican broadcasting company, from broadcasting racing results. The defendants' attorney, who also represented the alien broadcasting corporation, which had been named as defendant but had not been served, then filed suit in the federal district court to enjoin the attorney general of California and the judge of the superior court from molesting the broadcasting corporation or its agents by contempt proceedings. The grounds stated for federal jurisdiction were diversity of citizenship and the federal question raised by the allegation that the state court's temporary injunction interfered with foreign commerce subject to the jurisdiction of the Federal Communications Commission.<sup>2</sup> The temporary injunction would, the complaint stated, cause irreparable harm because of an alleged conspiracy between the attorney general and the superior court judge to delay trial until the broadcasting corporation would be ruined. The federal court dismissed the suit, upon the attorney general's and judge's motion, on the ground that the suit was against the state. Thereupon, the superior court cited the broadcasting corporation's attorney for contempt because of the allegation of conspiracy contained in the federal pleadings. On certiorari from the California Supreme Court, *held*, the superior court had jurisdiction and the allegation of conspiracy was not privileged. Judgment affirmed. *Hume v. Superior Court*.<sup>2</sup>

While the court in the instant case discussed petitioner's privilege to allege the conspiracy, it found that such charges were irrelevant to the issues before the federal court and, therefore, not privileged.<sup>3</sup> The allegations, it is true, were not pertinent to establishing the federal court's jurisdiction if that was based only on diversity of

<sup>29</sup> Okla. Const. art. 2, § 9. Similar provisions have been held to invalidate sterilization statutes as constituting cruel and unusual punishment. *Davis v. Berry*, 216 Fed. 413 (D.C. Iowa 1914); *Mickle v. Henrichs*, 262 Fed. 687 (D.C. Nev. 1918). *Contra*: *State v. Feilen*, 70 Wash. 65, 126 Pac. 75 (1912).

<sup>2</sup> 48 Stat. 1064, 1082 (1934), 47 U.S.C.A. §§ 152 (a), 303 (r) (Supp. 1940). But at the time of trial there was no controlling treaty or agreement with Mexico. Therefore, the exercise of state police power to abate a nuisance was probably proper, since federal jurisdiction over foreign radio was not then exclusive.

<sup>3</sup> 17 Cal. (2d) 506, 110 P. (2d) 669 (1941). Petitioner, a Texas attorney, was also disbarred from practicing before the superior court.

<sup>3</sup> Otherwise contemptuous statements made in pleadings are privileged only when relevant. *Works v. Superior Court*, 130 Cal. 304, 62 Pac. 507 (1900); *In re Sherwood*, 259 Pa. 254, 103 Atl. 42 (1918).