



11-1-1925

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Recommended Citation

Ben B. Lindsey, *Trial of Criminal Cases and Adult Probation in the Chancery Court*, 1 Notre Dame L. Rev. 1 (1925).

Available at: <http://scholarship.law.nd.edu/ndlr/vol1/iss1/1>

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THE NOTRE DAME LAWYER

A Monthly Law Review

"Law is the perfection of human reason"

Volume I

November, 1925

Number 1

THE TRIAL OF CRIMINAL CASES AND ADULT PROBATION IN THE CHANCERY COURT

By BEN B. LINDSEY.

This is the first of two articles by Judge Lindsey. The second will appear in the next issue of The Notre Dame Lawyer.

The principle of probation, as applied to offenders against the state—whether such offenders be adults or minors—was originally applied in a limited way to proceedings in criminal courts. As with all reforms, it came first in a rather limited fashion—generally as to misdemeanors and first offenders; gradually it was extended to more serious offenses.

Probation involved the prime purpose of the state to protect society. But as a part of that purpose, it was thus admitted by the state that the best protection for society included a wise plan for the redemption of the individual to society. Experience had forced upon the state the all too apparent fact that many persons committed to prison were returned to society as worse offenders and society thereby became a greater victim because of a "remedy" that only involved mere punishment of the individual. The very fact that the offender had been a convict so handicapped him in the process of rehabilitation that its very discouragement was a prolific cause for his return to crime. One of the purposes of probation was to spare the offender this stigma.

The principle of probation as to most cases could be much better administered through what is known as a criminal court procedure, providing, of course, that there are no constitutional or other legal difficulties in the way. Of course many such will at once suggest themselves.

I am frank to say that I have not pursued this inquiry to as great an extent as I am hoping to do, but that my investigations of the whole subject have gone beyond those made by most of my brother members of the bar. It has, I am happy to say, enabled us to indulge in some experimentation through statutes, providing such a change, already on the statute books of the state of Colorado—statutes that I believe do not exist as yet in any other state in this union. These statutes are known as—

The Redemption of Offenders Act—Session Laws 1909—Pages 478-483, Compiled Laws of Colorado 1921—Sections 6508-6515.

The civil or chancery court procedure concerning Contributory Dependency and Delinquency, Session Laws of Colorado 1909, page 336, Compiled Laws of Colorado Sec. 644.

The Colorado Master of Discipline Act, Session Laws 1909 pages 339-340. Compiled Laws of Colorado 1921, Section 670.

We have had these three so-called Chancery Court Acts in actual force and effect in Colorado for about sixteen years. So far no case concerning their legality or constitutionality has reached the Supreme Court of the state.

The Colorado laws referred to, broadly speaking, came under that principle of law generally known as *parens patriae*. I have sought to translate it as the *over-parenthood* or *super-parenthood* of the state. This power is frequently referred to as the power of the chancery court. Is this literally true? I doubt it. I think the confusion comes because it has a power that legislatures have naturally conferred upon courts having chancery jurisdiction. These courts proceed to exercise it under the rules, regulations and practice pertaining to such a court. This is because its purpose is more in harmony with the chancery courts where the hardships and rigors of the common law were supposed to be mitigated in the appeal to the "King's conscience"—now it is the "state's conscience". Here judges are freer to do equity and justice between all parties and with reference to the causes and circumstances of each offense regardless of inflexible rules and ancient precedents based on different conditions of another day.

This power of *parens patriae*, according to some research on the question, seems to be a power of the people, residing in its legislative bodies, to be by them conferred at will upon a court.

Here it was to be exercised in dealing with children (that included all minors) and among adults, those non compos mentis, or incapable of caring for themselves, thus always in a large measure irresponsible for their conduct.

Modern research is convincing me that the old test of minority by the chronological age under 21 years is not without its absurdities. By this fixed standard, the state assumes that persons under the age of 21, because of their lack of years and opportunity for the education of experience should not be held to the same accountability as those over 21, and therefore such people were generally known legally as "infants". It was sometimes modified or regulated by statute. In the case of females, girls of 18 in some states seem to have been assumed, by some such modifications, to have had more intelligence than boys and therefore they were exempt from its definitions three years earlier than the boys—and could deal with property as adults. As to responsibility for crime, the original common law rule fixing it at seven was by statute raised to ten or even 14 years, in some states.

This limited and arbitrary test fixed by the chronological age of 21 in these days of mental testers, psychologists, psychiatrists and specialists, would seem to be rather absurd. Modern research has added the mental or psychological age to the chronological age and the I. Q. is as much a part of the case worker's record in dealing with the individual as the date shown by the birth certificate itself. To this has been added the biological or physiological age which is now being fairly well determined by certain stigmata and physical development, along with the time of the first appearance of natural functions—as maturity for example—in either boys or girls. This may vary over a period of years and have much to do with conduct. To these ages referred to others are being added from time to time, so that the time may come when the much studied and inspected offender minor adult may be judged with reference to a number of ages.

Is it not then true that under the doctrine of *parens patriae*—the application of which has been mostly limited to the state's regulation of the labor, education, conduct or morals of persons under 21 years of age, or adult persons non compos mentis, must now, in the light of modern science be extended in accord with

its research and findings? In a measure from one angle, this has been done in the struggle for legislation such as the eight-hour employer's liability, accident, compensation, and other social laws, because it must be conceded that in the unequal contest between the man who has nothing but his muscles and the man who has the tools and the capital to control the opportunity for the use of that muscle, the state must protect the under-dog, as it were—the one who is not competent to face the unequal struggle of mere contract or barter without this protecting arm of the state. Such changes are being accepted by the courts, notwithstanding seeming divergence from ancient precedents, just as they are accepting the changes caused by child welfare legislation. Even the milder and more acceptable class of child welfare legislation has had to run its gauntlet of opposition from precedent, prejudice, or indifference of some courts and misunderstandings of some judges, and only after its ups and downs and often unnecessary amendments to statutes, which if understood should have been sufficient in the first case, is only gradually coming to be finally accepted and firmly imbedded in our system of jurisprudence in the more modern struggle for real justice.

Why may not then, in the light of this more modern understanding of injustice, make an effort to deal more and more with the people rather than to be limited merely to the things they do? May we not confidently hope for an equal acceptance by the courts of a procedure designed to help, to strengthen, to rehabilitate, to salvage and to save citizenship from its struggle with modern evils? And may not this be a means first always to protect society from the mal-conduct of the weak, or vicious, regardless of age, under what we may, for convenience, call a chancery court procedure rather than a criminal court procedure? Is it not merely an extension of the state's power of *parens patriae*? Why should the state be confined in its use to the two circumstances heretofore recognized, i. e., (a) the chronological age limit of 21, and (b) a state of non compos mentis, or in popular terms, children and insane people?

A comparison of types of cases under our earlier criminal court procedures and under our chancery court procedure will be

interesting. It may also furnish the best method of explaining its operation and purposes.

In 1883, there was published in London a very interesting little volume, called *Old Bailey Experiences*. The author inscribed himself "The Old School-master". When I visited England in 1918 I made some inquiry regarding this book. One explanation I received for its anonymity was that it was not so much the modesty of the author as his timidity. It constituted a severe indictment of Criminal Court methods. Its publication threatened their wrath. The author was a schoolmaster, not a lawyer. At that time lawyers had too much respect for the courts to have indulged in such contemptuous conduct.

One of the cases that excited the old schoolmaster's indignation was a felony charge against a young woman. She was recently a mother. She had attempted to steal a bolt of cloth from a shop-keeper in Ludgate Street. Mark you—it was an *attempt to steal*—. The day after this offense she was hailed before the Old Bailey Court. Here there ensued a rather pathetic scene. It was the desperate plea of the girl mother to be spared because of the suckling babe that she carried in her arms. But it is recorded by the old schoolmaster that his Lordship on the bench was obdurate to all entreaties for mercy. There had been much theft by young women and the shop keepers demanded a victim. Notwithstanding the rights of the baby to its mother—of which it was about to be robbed—a far greater robbery than the attempt to steal the cloth—the mother suffered the penalty attaching to over two hundred crimes at that time. She was taken at once to Tyburn Prison and there next morning "hanged by the neck until dead".

A reading of that book over twenty years ago moved me profoundly. This case involved tremendous issues of justice and injustice. The shop-keeper was entitled to his bolt of cloth. But was not the suckling child entitled to its mother? Both were innocent of this girl's intended crime and both were entitled to protection against such weakness. To adjust these equities the State proceeded to hang the girl. Could savagery be more absurd? But the majesty of the law and the courts was entitled to such respect one risked one's liberty to protest. Then and now, except in Colorado, the state was limited in its

affections to the man who owned the bolt of cloth. Its laws permitted not the slightest regard for the baby, entitled to its mother. This severity of common law criminal procedure of course was greatly mitigated in these hundred years. But has it been as much mitigated as we are led to believe? And whatever its mitigation as to severity of mere punishment, what about the stupidity of its attitude—its methods?

Once I faced this issue in the case of a young woman whose case bore striking analogies to this tragedy of the last century. Her offense also consisted of pilfering from a shop-keeper. She was the oldest of the family of six children. Her parents came to Colorado from a disease-breeding tenement district on the West Side of New York City. There the mother had contracted tuberculosis. The hope for relief afforded by Denver's climate was the lure to our state. The father secured employment in the engine rooms of one of our utility corporations. Here through the carelessness of one of his fellow workers, an explosion occurred. The result was a fatherless family of six. The mother was already struggling with tuberculosis for the life that was left to her. All of these things furnished the environment that made a severer temptation in this girl's life than would have existed in a life where they were lacking. Nevertheless, this girl of our modern times, without friends or money to give bond, was at once taken to jail. Here she became "the pretty young shop girl" of a sob story in a newspaper that carried her photograph, complete identity, etc. The story made fine copy. It was death to the girl. After sixty days in jail her spirit was so broken, her pride so humbled that she tried to ease her pain by the river route. By a curious co-incidence, she was rescued by the police officer who first arrested her. Thus her life was saved. But for this act of the same policeman in saving her she would have shared the fate of her sister offender of nearly a hundred years before.

Nothing was accomplished by either of these criminal court procedures except to add to the difficulties of society instead of correcting them. The state was and still is utterly oblivious to its own crimes in such cases. One of the crimes was against the women, the other against those dependent upon them. Those depending upon such offenders are entitled to their love.

and support. None of them had ever committed any crime against the state. The indictment in both cases should have been against the state for its own high crime and misdemeanors. Only ignorance, silly precedent and superstition can account for such stupidities when with a little thought, care, and consideration for real justice, such a course as that followed by the state in such cases is wholly unnecessary, either to protect society or to gain respect for law or justice. It really does just the opposite.

Now then, under Colorado's more modern procedure in equity or chancery, the District Attorney is given the right to consider all the circumstances that have been here described, and in the interest of justice, he may elect in such a case to file a procedure in the Juvenile and Family Court of Denver. Here this procedure is entitled "THE PEOPLE IN THE INTEREST OF (MARY JONES)"—not "against Mary Jones"—"UPON THE PETITION OF (JOHN BROWN) DEPARTMENT STORE DETECTIVE, PETITIONER, AND CONCERNING THE DENVER DRY GOODS STORE, RESPONDENT." The Petition then briefly recites the circumstances of the case, as have been disclosed by the evidence, prior investigation and visitation of the probation officer, with references to the cause of the offense—environment, home conditions, temptations, etc. etc. It is further recited that in order that justice may be done to all parties concerned, and the State may have a chance to redeem its citizen, as well as to redeem the property of its citizen, as taken from the Dry Goods Store, the Judge, sitting as a Chancellor, is asked to take jurisdiction.

Summons, citation or notice is then issued both to the offender Mary Jones, and the victim, the Dry Goods Co. Upon the motion of the District Attorney, the case then proceeds in the chancery rather than in the Criminal Court. An affidavit may be filed, representing to the Court that the offender may, unless apprehended and put under bond, become a fugitive, in which event, the offender may be placed under bond or, in default thereof, committed to jail. While this right exists I have never known it to be availed of in a case of this kind. Generally all that is done is to fix the time for the hearing in the Judge's Chambers. Here all the parties assemble around the Judge's table in as in-

formal fashion as they would in the trial of a child. Seldom, if ever is a single witness sworn on rule of evidence so much as thought of. Every one may talk, say what he pleases, so long as all don't talk at once and we get the absolute truth, which is rare in criminal cases.

At the time of this hearing, the offender, in *whose interest* the procedure is brought, may, refuse to go further upon expressing a desire not to be bound by any such proceeding, whereupon the Court shall dismiss it, which merely remands it to the old-time procedure, or the Court, representing the State, may, after hearing the statement of the District Attorney, refuse to accept jurisdiction and remand the case to the criminal court. Obviously, this has never been done in a case of this kind. The provisions are part of the effort to escape constitutional objections that might be raised to such procedure. Such provisions concern the rights of offenders, but not always their best interests. There is quite a difference between one's legal rights and one's real interest. Such is the purpose of this new procedure. That it is successful is already determined. No case under the law has yet reached the Supreme Court of the State. This is for the very good reason that the work is almost entirely administrative rather than judicial and is to help people and not to hurt them. It is preceded by a careful investigation into the *causes* of the crime, the particular character of the offense as well as the individual, with reference solely and exclusively to each particular case. It is not bound by any laws or rules (as in Criminal procedures) that govern every case concerning a certain thing the person did, without regard to who the person is, or why he did it. It is therefore a procedure primarily to help people, not to hurt them and to do equity and justice by all parties involved by the act done by an individual whether they are parties to the procedure or not, that is, the public and the dependent and innocent children or dependent parents, and the stockholders of the department store. We have found such victims in their property offenses especially are much more interested in having their property than in having vengeance.