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

By Ben B. Lindsey.
This is the Second of Two Articles by Judge Lindsey.

In the Chancery Court procedure against adult offenders we seldom if ever swear any witnesses. Everybody is so ready to tell the truth that the very thought of perjury or the danger of perjury—a crime so common to all criminal procedure, is never involved. The very nature and purpose of the procedure tends to lift the spell of fear that is mostly responsible for lies and perjury in courts. It is a cooperative and administrative, rather than a vindictive, legal procedure.

Mr. Harry Burlew, the Chief Detective of the Department Stores of Denver, has testified on more than one occasion that he much prefers this Chancery procedure to the criminal court procedure, unless it be a case against a chronic shoplifter or professional criminal. Even here, as to some of the more innocent parties involved or milder type of first offenders, he much prefers this procedure not only as a preventing repetition of the offense in protecting society but as a means of doing equity and justice to the victims of the offenders as well as to any members of society dependent on the offenders and to the offenders themselves in their own redemption to good citizenship. And the State has an asset to conserve in each citizen—that he be useful and valuable to society.

I may also say in this connection, that there has never been the slightest difficulty in agreeing upon the value of the property or assessment of damages. This is penal and corrective as to the offender and remedial as to the victim. This is also quite generally true under our chancery procedure for the class of felonies relating to domestic responsibilities under our non-support and desertion laws.

The offender under our Chancery procedure is placed on probation under a system of probation, that unlike criminal
court procedure is consistent from the beginning with the whole theory and idea of probation.

He is subject to the Court's order to do justice under conditions imposed in the interest of justice to all parties concerned. When the female shoplifter was dealt with, the conditions of the Chancellor's order were that the property with value be returned, that the children be looked after; and time is given for compliance. If this order is violated, the penalty is simply limited to the Chancery Court's power to punish for contempt or violation of its orders. This punishment of course is much more limited than the heavy penal sentence that may be given in felony cases. If there is a repetition of the offense the Chancellor's order may direct a criminal proceeding subject to the severer penalties. It must be remembered that the cases brought under this procedure are only those selected by the state's representative—the district attorney, himself—after the preliminary investigations by the probation officers as to the causes of the offense and the particular individuals involved, their responsibilities for others in society dependent upon them, and as to how these causes and individuals differ from other cases involving similar acts. It is under the theory of law, which justifies him upon behalf of the state in first electing to thus proceed, and also the right of the offender to consent to this procedure. Thus he voluntarily waives his rights under the criminal law in behalf of his interest under the chancery procedure. "His rights" are of no value to him except to punish him—then why question such legislation as violating "his sacred rights under the Constitution?"

The State may forgive the offender by its pardons. It may refuse to proceed at all with any procedure whatever. The statutes relating to criminals in Colorado provide only that the District Attorney may file an information for crime against an offender. If he does, the court may punish the offenders by one year in the penitentiary or ten years, for precisely the same offense. Thus the state legally treats all offenders for precisely the same acts differently under a much less satisfactory procedure. Then why may not the Courts by a far more scientific administration of justice under our chancery procedure do the same thing?

In our Family Court we recently tried two young women offenders. One was twenty-six and the other twenty-two years
of age. They had been apprehended by department store detectives. Their total pilferings from the stores amounted to about $400.00. Investigation of the case disclosed that they were not professionals. The younger woman was approaching childbirth. Her poverty interfered with the many things she wished to get for her coming child. The desires of the older woman for the children she already had, which she could not supply from her limited purse, and the very definite twelve year old type of mind in both cases, all combined to appeal to the humane attitude of our District Attorney. He accepted the petition of the department store detective that these cases be brought under the chancery procedure in the Juvenile and Family Court of Denver. This was not only for the reasons referred to, but primarily because there were involved the rights of children born and unborn. They were entitled to their mothers, just as the department store was entitled to the protection of its property. There were so many equities to be adjusted that the Criminal Court procedure was not equipped to act as efficiently as Chancery Court.

Was it not more important to save these young mothers to their children under the probationary orders of the Court and redeem them to good citizenship, than by imprisonment to visit the mere vengeance of the State upon them, in which case the State would commit the injustice of legally stealing them from their children? Surely these mothers were very precious possessions to these children. That possession should no more be legally taken away from them than the property should be taken from the store. The Chancery procedure furnishes a way by which the rights of all involved may be considered and real justice done.

It may be remarked here that in facing many expected obstacles and objections encountered, it was hopeless to make a start with this Chancery procedure in criminal cases against adults except at first through a rather limited application. Thus the language of the Act limits its application to misdemeanors. In practice that has not seriously affected its operation in many cases of felony, as for example in the case just cited. This is because just as in the case of criminal procedures, the District Attorney may and often does of his own motion, reduce the of-
fense from a felony to a misdemeanor. He has exercised the same rights in many cases brought under this law. Once again, our statutes as to informations or prosecutions for crimes do not say the District Attorney shall file an information for crime, it says he may do so. In no case has it ever been necessary to enforce penalty, provided under the Court's chancery court power to punish for contempt. The orders have been gladly obeyed. The loyalty, gratitude and response of those who have been thus forgiven by the state, as a wise father forgives a child in its first offense, has been so successful and satisfactory that I haven't any doubt that when this act is amended as to many details that have been suggested in practice under it, the Legislature will definitely extend its provisions to a certain class of felonies.

This has already been done in our special act providing for a chancery court procedure against adult offenders guilty of such felonies as non-support and desertion and a type of case which would otherwise come under the statutory rape laws. This statute has been the one most employed by the District Attorneys in the Juvenile and Family Court of Denver. It is administered in this Court where the jurisdiction is exclusive.

Again concrete cases may best explain its operation. The present District Attorney of Denver, Mr. Foster Cline, who was for many years deputy District Attorney, and has had large experience in that office, has only recently recommended that practically all felony cases of non-support and desertion, and the milder type of so-called statutory rape cases, especially those involving pregnancy, be brought under this Chancery Court Act in the Juvenile and Family Court.—The great increase of cases of this kind, not only in the Domestic Relations Division of the Juvenile and Family Court of Denver, but in similar cases all over this country, would seem to call for this procedure as furnishing the remedy which Courts must sustain, if the accumulating burdens of these Courts are to be satisfactorily administered.

Such cases are also entitled "THE PEOPLE IN THE IN-TEREST OF THE CHILD (born or unborn, as the case may be) UPON THE PETITION OF ANY PERSON". Such person is usually a probation officer or social worker under this
separate Chancery Act. They do not necessarily have to consult the district attorney in its filing. This is a great relief to that officer and his overworked office. Years of practice under the act have caused him to welcome this feature in such cases. In actual practice in Denver, since our statute provides that a deputy district attorney shall be in attendance upon the Court when ordered, the deputy from that office is often consulted. In exceptional or contested cases his aid and assistance is very necessary. In practice this officer sits more with than in the Court. His function is not so much that of a prosecutor, but as an assistant and advisor to all concerned. The Court may act without his presence, but generally has some consultation with him concerning difficult or contested cases.

The petitions in all these chancery court proceedings are addressed or assumed to be addressed to the chancellor. An affidavit may be filed that there is danger of flight of the respondent when he may be at once apprehended and brought before the Court and required to give bond if it seems necessary to insure his attendance at the hearing of the petition. He files no pleadings. His appearance assumes an issue on the petition. He may file an answer if he wishes but it is never done. The record assumes he denies the allegations of the petition unless he admits it. There are no court costs on either side. The procedures concern the protection of children—born and unborn—and their mother. The main thing is to get the money for their support, not the state's support.

The Judge of the Court has a right to remand the case to the Criminal Court at the preliminary hearing, if he sees fit. This has been done in very few cases. They were cases that threatened serious contentions. The respondent offender was not handicapped in any way. His case was simply remanded to the District Attorney for action in the Criminal Court. This means that it may be refiled by that officer in the Criminal divisions of the same Family Court—for it also has such jurisdiction—or it may be filed in the regular Criminal Court. Where this has been done, there generally follows a “howl” from what is now the “defendant” to get back into the Chancery Court. In that court there are no such probationary provisions or administrative work that he finds in the Chancery Court. All of these are
really intended to help him do his duty instead of hurting or hampering him in his duty, as in case of locking him up in jail or the penitentiary where he is not able to help himself, much less his wife or child. The penalty in those cases where one must be applied is merely the power of the Chancery Court to punish for contempt those who violate its orders. This has had to be used in very few cases and then by short jail sentences. It must be remembered that if this violation of the court's orders is a repetition of offenses the criminal procedure may be resorted to. In about five hundred cases in our Family Court under this procedure during the past year, which would otherwise have been brought as felony cases in the Criminal Court we have saved this County some $50,000.00 as measured by the ordinary trial of felony cases that must be before a jury and which generally requires an average of not less than a day's time and generally a day and a half to dispose of.

The whole psychology of the case differs, in the Chancery Court where the procedure is simple, inexpensive and far more effective for the real purpose intended.

In cases of what would otherwise be statutory rape cases, the fact of facing the penitentiary for a term of years immediately caused the accused to put up a vigorous defense with the usual perjuries attendant thereon. In ninety-five out of one hundred similar cases in the criminal court, he would probably "lie like a gentleman" in such affairs. When he finds that he is not facing the penitentiary, but merely a civil liability to pay for the support of the mother during her period of pregnancy, and that the proceeding is in the secret confidence of the chancellor's chambers as secluded as a doctor's office, it is at times most pathetic to see how willing men are to tell the truth and to do their duty, as compared to how doggedly and determinedly they are to avoid it under criminal court procedures.

As a Judge of Criminal Court, trying statutory rape cases some years ago I investigated a ten years' record of such cases in our Criminal Court in Denver. I did not find one case in which the accused had not denied the charge, in most cases upon oath. In eight per cent of all such cases the accused was gaily acquitted by the jury and the woman or girl was left without any remedy whatever against the man.
This Chancery procedure is also employed mostly in contributory delinquency of dependency cases against parents where what is needed is not so much a fine or jail sentence, but the kindly but firm direction of the court, through the educational and helpful work of its visitation and probation officers. In none of these Chancery cases is there any charge, stigma or conviction for crime. It is more of an administrative procedure in which an effort is being made by the state, under this more elastic and flexible process, to do equity and justice with reference to each particular case, not so much governed by the thing the person did, but as to who the person is, the conditions or environment of his life, with the causes of his behavior or conduct and its effect, not only on the immediate sufferers, but also those drawn in by the State's Criminal Court method—as the innocent children of the offending mothers in the cases referred to.

It is needless to say that the violent or vicious cases of statutory or common law rape are not brought under this Act any more than the severer cases against dangerous criminals are brought under its companion act—known as the Redemption of Offenders Act. But when it is known that perhaps half of all our criminal cases in Denver come under the class of cases so well fitted to this Chancery procedure, it is safe to say that its more general use and adoption would save more than half the expense and perhaps the time of our present criminal courts, with far better results in the interest of a more modern and more real justice. Thus we have only one of its advantages in an elasticity and flexibility that is absolutely unknown, with nothing like the same satisfaction under criminal procedure.

The Third Chancery Court Act, while popularly known as the Master of Discipline Act of 1909 (See Session Laws) is an extension of the powers of a Referee in a Chancery Court. It has been very helpful in large counties where the county seat is far removed from what is often the largest town in the county. Under this Act, the Court may appoint an assistant judge who need not be an attorney. This Judge is known as Master of Discipline—or, for all purposes, he may be equally called assistant judge. He or she may hear Chancery Court cases, whether against adults or children. There is, of course the usual procedure of reporting the findings of the Judge of the Court.
Where the Act has been used, there is perhaps not one exception to such findings in a hundred cases. We thus have guaranteed by the legislature itself—should there be any question about it—the right of the chancellor to use the chancery court powers, generally employed in cases where the Court is dealing with property assets, to deal also with people as assets of the state.

Time and space do not permit taking up all the suggested objections or answering all the questions that might justly present themselves. It is sufficient to say that in Colorado—though it be the first state in the Union, and so far as I know, the only state in the Union that has exercised its power of *parens patriae* in thus dealing with adults through its Chancery Court rather than through its Criminal Court this system has shown itself to be efficient and just.

I think it is important to say in conclusion that we had great difficulty at first in getting our District Attorneys to accept this procedure. It has been more generally accepted in the contributory dependency and delinquency procedures which included certain cases of felony, as already described. Only recently is it being more generously accepted in Denver as applicable to those cases contemplated by the Redemption of Offenders Act. It was all very slow at first to make headway against the conservatism—in some cases and ignorance, indifference and prejudice in others—that usually mark every effort to change ancient traditions, rules and precedents. But the law like every other science is fully capable of change and progress. Moreover it has already within it the seeds of this germination in an extension of the power of *parens patriae* in the light of modern conditions, knowledge and understanding.