January 2009

Whitehead Virginia Supreme Court Brief

IN THE

Supreme Court of Appeals of Virginia

AT STAUNTON

September Term, 1925

CARRIE BUCK, BY ETC., APPELLANT,

v.

DR. J. H. BELL, SUPERINTENDENT OF STATE COLONY FOR EPILEPTICS AND FEEBLE-MINDED, APPELLEE.

REPLY BRIEF FOR APPELLANT.

Even if the State had the power (which is denied) to determine by legislative enactment that both appellant and society would be benefited by sterilizing appellant by means of the surgical operation known as salpingectomy, and then discharging her from the State Colony, Virginia has not undertaken to do so. On the contrary, the Act of Assembly makes these facts a subject for judicial determination. In other words, the Court must be satisfied that the welfare of the inmate and of society will be promoted by said operation before it can order it performed.

Independently of the fact whether or not the evidence in this case tends to show that both appellant and society will be benefited by the operation ordered to be performed upon appellant, by the Circuit Court of Amherst County, it is submitted this statute denies to appellant the due process of law guaranteed her by the U. S. Constitution, in that it creates a rule of evidence applicable to proceedings under this act which is repug-

nant to the long settled and well established maxims of the law obtaining in cases of this general character and class.

DUE PROCESS OF LAW.

The principle of due process of law had its origin in England as a protection of the individual against the government. In this country the requirement is intended to have the same effect.

Judge Cooley in his work on Constitutional Limitations, Sec. 356, states the law as follows:

> "Due process of law in each particular case means such exercise of government as settled maxims of the law permit and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

This subject is dealt with at great length in Vol. 6 Ruling Case Law, where many decided cases are cited to sustain the text.

> "The term 'due process of law' includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the 'process.' In other words, 'process' is the mode by which the purpose of the law may be effected. The protection extends to the rights in the broadest sense of the term. In determining whether the requirement has been observed regard must be had rather to the substance than to the form, for the mere form of the proceedings cannot convert the process used into due process of law, if the necessary result is illegal." 6 R. C. L., Sec. 433.

> "Due process of law means something more, however, than the actual existing law of the land. If it were otherwise it is obvious that a guaranty as to due process of law would be no restraint upon legislative power. Therefore not everything which may pass under the form of legislative enactment can be considered the law of the land. Nor can a state make everything due process of law which by its own legislation it declares to be such." 6 R. C. L., Sec. 435.

> "The Constitution does not declare what principles are to be applied to ascertain whether there has been due process of law, but there are certain immutable principles of justice which inhere in every idea of free government which no state can disregard. . . . It has been said that the fundamental principles referred to are those principles of judicial procedure which existed and were recognized in the courts of England and American colonies prior to the adoption of Federal and State Constitutions and that no change in procedure can be made which disregards those fundamental principles." 6 R. C. L., Sec. 432.

In *Munn* v. *Illinois*, 94 U. S. 143, the Court, in dealing with the due process clause of the Fourteenth Amendment as it affected human rights, defined the meaning of the term deprivation of life and said:

> "The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The deprivation not only of life but whatever God has given to everyone with life is protected by the provision in question."

The operation of salpingectomy clearly comes within this definition. It is a surgical operation which renders a woman sterile. The question for this Court is, does the Virginia statute afford to the appellant in this case that due process of law guaranteed by the United States Constitution? The mere fact of establishing a tribunal to order the operation performed is not sufficient. The hearing must be according to established maxims of the law. In a proceeding under this statute a rule of evidence is created wholly new to cases involving deprivation of life. It makes *ex parte* records admissible without opportunity for cross-examination; permits the Court to

base its findings on the mental condition of members of appellant's family, remote ancestors and collateral kin, and on theories of experts based on hearsay statements, all of which is repugnant to the "settled maxims of the law."

This order of the Court requires appellant to submit to a surgical operation involving the opening up of her abdominal cavity, confinement in the hospital and suffering pain against her desire and over her protest. It is said the operation is a simple one. No operation of this magnitude is a simple matter. Even in these days of arseptic surgery wounds become infected and the patients die. It is not a question of the right of appellant or anyone for her to consent to the operation, appellant in this proceeding is resisting the right of Dr. Bell to operate upon her.

But it is said that appellant must incur this hazard for the purpose of benefiting society. The evidence to support the idea that society will be benefited by the operation is made up almost entirely of the life histories of notorious families of degenerates in no way connected with appellant. It is obvious that appellant was afforded no opportunity to disprove a single statement made by witnesses about the life histories of the Callicac and Juke families. Nevertheless these matters are made legal evidence by the statute and are the basis for the finding that society will be benefited by having appellant submit to this operation.

In dealing with the rule of evidence protected by the due process clause of the Fourteenth Amendment, the Circuit Court of Marion County, Oregon, in the case of *Jacob Cline* v. *The State Board of Eugenics*, a sterilization case arising under a law similar to the Virginia law, said:

> "Unquestionably this case belongs to the class requiring strict rules of procedure, for it is the class providing the direct consequences, namely, the deprivation of life. In such cases the settled maxims of the law require the application of rules of evidence demanding at every stage of procedure *proof beyond a reasonable doubt.*"

No such safeguard is provided in the Virginia law. On the contrary, the bars are let down and the most startling charts and statistics which have no connection whatever with appellant are permitted under this law to be introduced as evidence and to form the basis for the finding of the Court that society will be benefited by performing the operation of salpingectomy upon appellant.

The order for the operation could not be entered unless the Court should find that both appellant and society would be benefited thereby. The Oregon Court said that proof of these facts must be beyond a reasonable doubt.

Certain it is that in no other case involving the deprivation of life would evidence of the character permitted in this case be held legal. Nevertheless the statute makes it legal evidence.

The answer to our protest against this sort of proceedings is that the State in the exercise of its police powers is the sole judge of what is best and proper for its citizens and can say on what state of facts it shall base its order carrying out its policy.

If this is true, then judicial trials are a farce and the courts have become mere executives to carry into effect the legislative sentence. This is a denial of due process of law, because it is destructive of those "immutable principles of justice which inhere in every idea of free government, which no state can disregard."

I. P. Whitehead,
Counsel for Appellant.

September 8th, 1925.