

complicates the issue of this case but adds to the confusion prevalent under the Clayton Act generally. The rule was first employed by the court under the Sherman Act.²² One of the objectives of the Clayton Act was to supplement this act with prohibitions of practices not specifically condemned under prior anti-trust legislation. Thus the application of the rule of reason defeats the legislative attempt unconditionally to prohibit these practices.²³ If the lessening of competition must be such as injuriously to affect the public, then the interpretation of the expression is entirely different from that employed by the Commission. The Commission is equipped to apply interpretation based on statistics of sales and business practice. There can be no efficient action by the Commission on the vague and perplexing question of public interest, for this question cannot be answered solely on a consideration of all the facts, but must include a consideration of circumstances not within the provisions of the statute. The statute declares the public interest so far as the Commission is concerned and it is empowered to determine only the fact of a violation and to base its order on such fact. If the court adopts a construction which the Commission cannot follow, the benefits of administrative action are lost. For judicial review in this event amounts to a rehearing of the case before the court.

The *International Shoe Company* case, through its application of the doctrine that the transaction must be prejudicial to the public to constitute a violation of the statute, and through its exercise of unlimited power of review, not only usurps the Commission's fact-finding power, but practically negatives the effect of section 7. The case may be considered as expressing the judicial view that sound policy requires the recognition of the industrial trend. So regarded it is a doubtful policy in the face of the declared legislative view to the contrary.

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THE JUVENILE COURT AS A POSSIBLE ADMINISTRATIVE BODY

The possibility of dealing with juvenile delinquency and dependency by administrative action may seem a far cry, but it is

²² *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 60, ". . . it was intended that the standard of reason which had applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

²³ See *Swift and Co. v. Fed. Trade Com.*, *supra* note 9.

no more of a departure from the present system of juvenile courts than was the present system from the formal criminal procedure. To understand this first transition is to contemplate with growing interest the possible transition from court to administrative body.

The formal process of a juvenile court proceeding is begun by the filing of a petition. This, considering Missouri as an example, contains a simple statement of facts bringing the child within the statutory definition of dependency or delinquency. In St. Louis it is always filed by the probation officer, but in many jurisdictions it may be filed by any reputable citizen having knowledge of the circumstances. The petition need not have the particularity of a criminal information and is generally not called an information as it would be in a criminal case.¹ An attempted statement of facts though obviously demurrable for insufficiency confers jurisdiction on the court sufficient to withstand an attack by habeas corpus.² In the State of Washington a child thought to be a juvenile delinquent may not be taken into custody and detained without a complaint being filed.³ Upon this point, however, there was a vigorous dissent on the ground that a complaint should be necessary to sustain a commitment, but not mere custody by the juvenile court for the purpose of questioning, since the proceeding is not in any sense criminal in nature. This case is probably the exception, and is not law in Missouri.

Thus a change to administrative action would involve little change so far as the complaint is concerned. It depends upon the type of administrative procedure whether or not a written complaint is required. Many boards have the power by their own motion to have individuals brought before them.⁴

The great number of cases which are adjusted informally, after the attention of the probation officer is brought to them, is one very strong reason for urging the workability of a juvenile board rather than a court. Frequently an interview with the child and the parties interested results in a satisfactory adjustment of the case. The probation officer may merely warn the child, or he may have the child come back and report at intervals for a short period. It was found that over half of the cases are successfully disposed of in this way in St. Louis. Probably the community in which the greatest number of cases is handled

¹ *State v. Johnson* (1923) 196 Iowa 300, 194 N. W. 202; *LOU, JUVENILE COURTS IN THE U. S.* (1927) 99.

² *Ex parte Guitierrez* (1920) 46 Cal. App. 94, 188 Pac. 1004.

³ *Weber v. Doust* (1914) 81 Wash. 668, 143 Pac. 148.

⁴ *FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* (1928) sec. 82.

in this way is Denver, where ninety per cent are so disposed of.⁵ It was stated by the Chief Probation Officer in St. Louis that he considered these adjustments the most satisfactory because, among other reasons, they prevent the child's name from getting into the court records. Since this adjustment with absolutely no formality whatsoever is conceded to be so valuable in innumerable cases, there is no reason why an administrative board could not handle all the cases on the same basis, with perhaps a provision that a serious offender be turned over to the criminal courts at the discretion of the chief officer of the board, who would, of course, be specially trained for the position.

The belief that such an informal adjustment for all cases would provide an opportunity for a child to be committed to an institution unjustly is groundless, because the possibility of a child being "framed" under the existing procedure is slight. If the person complaining to the probation officer is not known to him, the probation officer investigates the complaint to be sure that it is not the result of spite. Such investigation is equally feasible for an administrative board.

One way in which the juvenile court of today does not differ greatly from a formal court is in its retention of the power to punish for contempt. By judicial decision the juvenile court has an inherent right to punish violations of its orders as contempt.⁶ A number of states expressly give the court this power.⁷ But most administrative authorities cannot themselves penalize disobedience, and must invoke the aid of a court.⁸ If the power is considered of sufficient importance, it could be preserved to a juvenile board by the proper legislative action.

Under the present procedure, after a preliminary investigation has been had and a date set for the hearing, a warrant or summons is served by the probation officer requiring the parent or guardian to be in court with the child at the time set. A summons is less formal than a warrant in that it does not constitute an arrest, but a failure to obey it constitutes contempt. This warrant or summons as a general rule is necessary.⁹ There is some authority to the effect that both parents are entitled to a warrant or summons.¹⁰ In St. Louis it is always attempted to

⁵ LOU, *op. cit.* 124.

⁶ U. S. v. Lattimer (1915) 44 App. D. C. 81.

⁷ LOU, *op. cit.* c. 7.

⁸ FREUND, *op. cit.* sec. 90; *contra*: Ex parte Sanford (1911) 236 Mo. 665, 139 S. W. 376.

⁹ Karrib v. Bailey (1921) 212 Mich. 502, 180 N. W. 386. Parents waived right to notice and hearing of proceedings, and child was at the hearing, but summons held necessary since it was to apprise the parents of the nature of the charge, not only to tell them the time of hearing.

¹⁰ Ex parte Solberg (N. D. 1925) 203 N. W. 898.

have both parents served, but if it is impossible to reach one the court is conceded to have jurisdiction none the less. Parents who attend the hearing without having had a warrant or summons cannot advance that fact later to overthrow the court's jurisdiction.¹¹ Unusual is the case that asserts that the jurisdiction of the juvenile court attaches without regard to the citation of the parent, because the latter is entitled to his day in court to demand custody of the child.¹² Of course a mere commitment pending proceedings for final disposition will not be void on its face because of lack of notice to the parents.¹³ If there were a juvenile board instead of a court, the warrant and summons would be replaced by a notice of hearing which would not differ essentially from the present procedure. The informality of some administrative notices, as in tax assessment cases, would not be possible, because the nature of the determination of children's cases is such that it requires personal notice to the parties interested.

The court hearing itself is the most interesting part of the present juvenile procedure. The statutes generally provide that the hearings are to be informal or summary in nature and conducted under such rules as the court may prescribe. The object of the simple procedure is to prevent confusing the child's mind. It has been held that the regular processes of law provided to produce evidence and to aid courts in testing and weighing it will not be disregarded in juvenile procedure.¹⁴ A short statement of the cases in which this conclusion was announced will illustrate the limitations upon the informality of proceedings in the juvenile court. A child was declared dependent by the court because of its mother's cruelty. Various people had told the judge confidentially that its home was not a suitable place for it. The parents were not allowed to be represented by counsel and no opportunity for cross-examination was given. The decision of commitment by the juvenile court was reversed on the ground that only technicalities of procedure, and not rules protecting substantive rights, could be disregarded. As an abstract concept, this is beyond criticism; but in practice it is found that courts tend to consider matters really procedural, such as rules of evidence, as "substantive rights." An official properly trained should be allowed great latitude in determining the facts of the cases and should not be unduly hampered by technicalities of procedure masquerading as privileges. The use of adminis-

¹¹ *In re Turner* (1915) 94 Kan. 115, 145 Pac. 871.

¹² *Bleier v. Crouse* (1920) 13 Ohio App. 69.

¹³ *People ex rel. Riesner v. N. Y. Nursery and Child's Hospital* (1920) 230 N. Y. 119, 129 N. E. 341.

¹⁴ *In re Hill* (Cal. App. 1926) 247 Pac. 591.

trative boards would have this advantage over the present system.

The hearings in juvenile courts are private, and only those interested are allowed in the court room. A public hearing cannot be claimed as a constitutional right because there is no prosecution for crime. On the same theory the allowance of lawyers is not a matter of constitutional right.¹⁵ In St. Louis, however, the parties may insist that they be represented by a lawyer, although it is said that their insistence upon having one is more likely to prejudice their case than help it. As a practical matter, a lawyer is really a useless adjunct in a juvenile court because it is the social and psychological background of the child that is important, and not a technical argument as to its legal rights. Since there is no right to be represented by counsel in all administrative proceedings, it is possible that a statute providing for a juvenile board would do away with this right to be represented by counsel which still exists in some jurisdictions.

Statutes not providing for a jury trial in children's cases have been almost universally upheld.¹⁶ A number of states have considered it necessary to preserve the constitutional rights, if not of the child, at least of the parent. These statutes usually provide that the child, parent or any person interested may demand trial by a jury of six or twelve, or that the court may, on its own motion, order it. This applies to both dependency and delinquency cases. A trial by a jury of six provided for by statute has been held constitutional in Illinois,¹⁷ but unconstitutional in Michigan.¹⁸ It has been pointed out that the service of a jury in most juvenile court cases is largely perfunctory now because the jury usually accept the decision of the judge as indicated by his attitude toward the case.¹⁹ If it is so perfunctory, there would be little hardship in the change to an administrative board where there would be no jury. The abolition of a jury in children's cases would to a great degree destroy the tendency on the part of many juvenile courts to treat the proceeding as criminal and the child as a criminal, when to do so is in direct contravention to the intention behind juvenile legislation. The method of giving jurisdiction in children's cases to criminal courts is conceded to be bad.²⁰ The bare possibility of the child

¹⁵ Lou, *op. cit.* 137.

¹⁶ Bryant v. Brown (Miss. 1928) 118 So. 184; Lou, *op. cit.* 136.

¹⁷ Lindsay v. Lindsay (1913) 257 Ill. 328, 100 N. E. 892.

¹⁸ Robison v. Wayne Circuit Judges (1908) 151 Mich. 315, 115 N. W. 682.

The theory of the court was that the accused in a criminal prosecution has the right to trial by jury of twelve men.

¹⁹ Lou, *op. cit.* 136.

²⁰ Flexner and Oppenheimer, *Legal Aspects of the Juvenile Court* (1922) 57 AM. L. REV. 65.

being considered as a criminal should be wiped out by the change of jurisdiction to the administrative board.

The application of rules of evidence in the juvenile court has been carried over to a rather marked extent from formal criminal procedure. A child can be found delinquent or dependent and its parents deprived of its custody only according to the rules of evidence.²¹ It is customary for judges in the St. Louis Juvenile Court to rule out evidence as being in violation of the hearsay rule even when the testimony is given by the probation officer and appears to be good evidence. Any difference between the allegations of delinquency and the evidence has been held immaterial if the evidence tends in any way to show delinquency.²² The St. Louis Probation Officer indicated that such variance would probably be fatal in the St. Louis Juvenile Court, but that any chance of such variance was avoided by quoting the statutory definition of delinquency, which is decidedly complete, in the petition.²³ An extreme case goes so far as to say that a conviction of delinquency may be sustained although the petition fails to charge delinquency.²⁴ This decision, when considered, seems thoroughly sensible because, since the child's welfare is the primary consideration, whatever appears on the trial should be considered in determining what is to be done with him, and a mere technical variance between the petition and the evidence should be disregarded. This particular difficulty would be largely overcome in the case of a juvenile board, because a petition could be made unnecessary by statute and the findings of fact by the board could be made practically conclusive, as in hearings before the Interstate Commerce Commission.

The reports of the probation officer alone are not considered sufficient legal evidence to support a delinquency judgment.²⁵ It is customary for the probation officer and his assistants to make a thorough social investigation, but they also attempt to have witnesses, complainant, parents and other interested parties in court. Witnesses may be sworn at the discretion of the judge, but this is seldom done in St. Louis.

It would be exceedingly advantageous in many children's cases to ignore technical rules of evidence. Facts brought in by social investigators should be sufficient. These, interpreted by an administrative official qualified by study of psychiatry, should form the basis of a very efficient proceeding.

²¹ *Lou, op. cit.* 138.

²² *State ex rel. Berry v. Superior Court* (Wash. 1926) 245 Pac. 409.

²³ *R. S. Mo.* (1919) sec. 2591; amended, *Mo. Laws* 1923, p. 153.

²⁴ *Davis v. State* (Tex. Crim. App. 1930) 21 S. W. (2d) 1068.

²⁵ *State v. Freeman* (1928) 81 Mont. 132, 262 Pac. 168.

The right of appeal is another legal incident that has been carried over into the present juvenile system. In most states special provisions are made in the law for appeals from decisions of the juvenile court.²⁶ When no such provisions exist it has been held by a number of courts that, since proceedings under juvenile court laws are purely special and statutory, no appeal lies unless the right is given by the state by necessary implication.²⁷ Other states, however, imply an appeal on the theory that parents cannot be deprived of the custody of their children without one.²⁸ In Texas the statute allows an appeal but sets out no provisions governing it, and it has been held that appeals may be taken under the usual procedure in criminal cases.²⁹ This is another example of the unfortunate tendency to treat the juvenile proceeding as criminal. In Tennessee the appellate jurisdiction is invoked by certiorari and supersedeas, no right of appeal or writ of error being provided.³⁰ The remedy of habeas corpus is not proper if the statute provides an appeal.³¹ The use of habeas corpus is further limited in that it does not lie after commitment on the ground of irregularities in the trial, but only for want of jurisdiction in the court which rendered the judgment.³² In lieu of an appeal, Michigan provides for a rehearing in the juvenile court, at which the first judge is disqualified from sitting.³³ Even with a juvenile board it would be necessary to provide for some sort of review. The present procedure in that regard would probably be changed very little. It would be advisable to have the general rule that an administrative board's findings of fact are fairly conclusive, so that the judge in the higher court would in most cases be precluded from destroying the constructive work of the board.

The record which goes up on juvenile appeals is similar to that in any ordinary case. It should include the title of the court, the facts on which the court's jurisdiction rested, the filing of the petition stating the facts constituting delinquency, the violation of the specified law, or a statement that the child is incorrigible or otherwise delinquent within the statute, and the order committing the child to an institution. Failure to make

²⁶ R. S. Mo. (1919) sec. 2610; Lou, *op. cit.* 139.

²⁷ Commonwealth v. Youngblut (1914) 159 Ky. 87, 166 S. W. 808; State v. Zenzen (Minn. 1929) 227 N. W. 356.

²⁸ In re Farnsworth (Idaho 1928) 266 Pac. 421.

²⁹ Ex parte Brooks (1919) 85 Tex. Crim. 252, 211 S. W. 592.

³⁰ State v. Bockman (1918) 139 Tenn. 432, 201 S. W. 741.

³¹ Stoker v. Gowans (1915) 45 Utah 556, 147 Pac. 991; Hill v. Pierce (1924) 113 Ore. 386, 231 Pac. 652.

³² In re Wolff (1920) 183 Cal. 602, 192 Pac. 33; McDonald v. Short (1921) 190 Ind. 338, 130 N. E. 536.

³³ Lou, *op. cit.* 139.

findings of fact upon which the court may exercise its jurisdiction as a foundation for judgment is usually held to require reversal.³⁴ More liberal decisions hold that, on appeal, notice to parents or waiver of notice will be presumed,³⁵ and even that unfitness of the parent is to be presumed from an order depriving him of custody.³⁶ A decision that there is no presumption as to jurisdiction in support of a judgment³⁷ seems backward, as the proceedings are summary in character; but this could be remedied by a juvenile board with a jurisdiction carefully protected by statute.

A commendable point in the present procedure is that use cannot be made of juvenile court evidence in later trials occurring after the individual has become of age.³⁸ In some states this is provided by statute, while in others the records kept by the juvenile court are not subject to public inspection.

As a result of action by the juvenile court, a child may be dismissed, put on probation, placed in a home, or committed to an institution. Dismissal usually occurs in informal adjustment, or for insufficient evidence before the juvenile court itself. When conditions do not seem to warrant probation and yet the judge is unwilling to dismiss the case, he may continue it for a definite or indefinite period. The case is nominally under the court's jurisdiction and the child is in legal custody of the court, awaiting a full hearing. The case may be again brought into court without the necessity of filing a new petition.³⁹ Some cases say that once a child is committed the jurisdiction of the court is ended.⁴⁰ This ends the account of present juvenile court procedure.

There seems to be a growing current of dissatisfaction with the procedure as it now exists. It appears that there are two schools of thought on the question, one contending that the children's cases should be handled in a general court of domestic relations, and the other that the more progressive tendency toward administrative action be followed. Protagonists of the former school feel that the determination of children's cases can never be completely divorced from legal rights and obligations.⁴¹ Typical of their convictions is the desire to keep the

³⁴ *In re Hill* (Cal. App. 1926) 247 Pac. 591.

³⁵ *Gordon v. State* (Tex. Crim. App. 1920) 228 S. W. 1095.

³⁶ *Matter of Cannon* (1915) 27 Cal. App. 549, 150 Pac. 867.

³⁷ *Kelsey v. Carroll* (1913) 22 Wyo. 85, 138 Pac. 867.

³⁸ *Kozler v. N. Y. Telephone Co.* (1919) 93 N. J. 279, 108 Atl. 375.

³⁹ *LOU*, *op. cit.* 145.

⁴⁰ *Board of Children's Guardians v. Juvenile Court* (1915) 43 App. D. C. 599; *Board of Control of State Home v. Mulertz* (1916) 60 Colo. 468, 154 Pac. 742.

⁴¹ *Flexner and Oppenheimer*, *op. cit. supra* n. 20.

right of trial by jury inviolate. In marked contrast is the feeling that duties of investigation, complaint, obtaining evidence, trial, adjudication, sentence, supervision, punishment and probation are too inconsistent with each other to be placed in any one agency; that correction and reformation of incorrigible children is not a judicial function. The court is a tribunal for the judicial determination of facts at issue. It would take more than human ingenuity to harmonize the administrative function of correction with the judicial function of a court, in one institution.⁴² A former judge of the Juvenile Court of Cincinnati observes that about ninety per cent of the juvenile courts fail to avail themselves of the services of the psychologist and psychiatrist and modern facilities for diagnosis and prognosis because the judges have proceeded on the assumption that the child is a juvenile criminal and subject to trial and punishment. No assumption could be more opposed to the modern sense of justice.

The belief is current among the more advanced social workers that the work of the juvenile court will ultimately be merged into that of the administrative institutions of the community.⁴³ An administrative board created by careful legislation, headed by those who by experience and training would be in a position to handle children's cases well, seems a logical solution to the problems of the present system. The juvenile court is an anomaly; administrative action may be the cure.

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⁴² Herbert Baker, *Passing of the Juvenile Court*, THE SURVEY, vol. XLV, p. 705, Feb. 12, 1921.

⁴³ Charles Hoffman, *Saving the Child*, THE SURVEY, vol. XLV, p. 704, Feb. 12, 1921.