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Clipping inside Law School Account Book

Text of U.S. Supreme Court's Decision in Sco...

WASHINGTON—The text of the Supreme Court Decision in the Scottsboro case, read by Justice Sutherland, follows:

These cases were argued together and submitted for decision as one case.

The petitioners, hereinafter referred to as defendants, are Negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned in a State court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty.

There is a further recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed.

During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then, of course, anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here, both sides accepted that as a correct statement of the facts concerning the matter.

There was a severance upon the request of the State, and the defendants were tried in three several groups as indicated above. As each of the three cases was called for trial, each defendant was arraigned, and, having the indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day.

Death Penalty Imposed Upon All Defendants

Under the Alabama statute the punishment for rape is to be fixed by the jury, and in its discretion may be from ten years' imprisonment to death. The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the State Supreme Court. Chief Justice Anderson thought the defendants had not been accorded a fair trial and strongly dissented. (224 Ala. 524; id. 531; id. 540.)

In this court the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment, specifically as follows: (1) they were not given a fair, impartial, and deliberate trial; (2) ...

... have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. With any er... the State court involving alleged contravention of the State statutes or Constitution, ... of course, have nothing to do. The sole inquiry which we are permitted make is whether the Federal Constitution was contravened (Rogers v. Peck, 199 U.S. 42..., 434; Hebert v. Louisiana, 272 U.S. 312, 316); and as to that, we confine ourselves, as already suggested, to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

Defendants Not asked If They Could Get Counsel

First—The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with.

That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf.

This was pointed out by Chief Justice Anderson in the course of his dissenting opinion.

"They were non-residents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other States, and time has demonstrated that **they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay ... the trial of the cases judging ... from the number and activity ... counsel that appeared immediately or shortly after their conviction.**" (224 Ala., at pp. 554-555.)

It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

April 6, six days after indictment, the trials began. When the first case was called, the court inquired whether the parties were ready for trial. The State's Attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. ...dy, a Tennessee lawyer not a member of the local bar, ... the court, say... employ... in-

... merely came down here as a friend of the people who are interested and not as paid counsel, and certainly I haven't any money to pay them and nobody I am interested in that had me to come down here has put up any funds of money to come down here and pay counsel.

"If they should do it I would be glad to turn it over—a counsel, but I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation for it and not being familiar with the procedure in Alabama. * * *"

Mr. Roddy later observed:

"If there is anything I can do to be of help to them, I will be glad to do it; I am interested to that extent.

Appointment of Counsel Referred to as "Casual"

"The Court—Well, gentlemen, if Mr. Roddy only appears as assistant that way, I think it is proper that I appoint members of this bar to represent them; I expect that is right. If Mr. Roddy will appear, I wouldn't, of course; I would not appoint anybody. I don't see, Mr. Roddy, how I can make a qualified appointment or a limited appointment. Of course, I don't mean to cut off your assistance in any way. Well, gentlemen, I think you understand it.

"Mr. Moody—I am willing to go ahead and help Mr. Roddy in anything I can do about it under the circumstances.

"The Court—All right, all the lawyers that will; of course, I would not require a lawyer to appear if——

"Mr. Moody—I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do.

"The Court—All right."

And in this casual fashion the matter of counsel in a capital case was disposed of.

It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court.

Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel.

Action of Trial Judge Called "Expansive Gesture"

How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with ... individual ...

No opportunity to do so was given. Defendants were immediately hurried to trial.

Authorities Are Quoted To Uphold Court's View

Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: " * * * the record indicates that the appearance was rather pro forma than zealous and active. * * *"

Under the circumstances disclosed we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities.

This conclusion finds ample support in the reasoning of an overwhelming array of State decisions, among which we cite the following: Sheppard v. State, 165 Ga. 460, 464; Relford v. State, 140 Ga. 777; McArver v. State, 114 Ga. 514; Sanchez v. State, 199 Ind. 235, 246; Batchelor v. State 189 Ind. 69, 76; Michell v. Commonwealth, 225 Ky. 83; Jackson v. Commonwealth, 215 Ky. 800; State v. Collins, 104 La. ...; State v. Pool, 50 La. Ann ...; People ex rel Burgess v. R...; 66 How Pr. (N. Y.) 67H; State ex rel Tucker v. Davis, 9 Okla. Cr. 9.; Commonwealth v. O'Keefe, 298 Pa. 169; Shaffer v. Territory, 14 Ariz. 329, 333.

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice.

The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.

Constitution of Alabama Cited with Relation to Case

As the court said Commonwealth v. O'Keefe, 298 Ia. 169, 173:

"It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.

"A prompt and vigorous administration of the criminal law is commendable and we have no desire to clog the wheels of ju... What we here decide is th... force a defendant, charged w... a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case."

Compare Reliford v. State, 140 Ga. 777, 778.

Second—The Constitution of Alabama provides that in all criminal prosecutions the accused shall enjoy the right to ...

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ottsboro Case and Dissenting Opinion

ion of Pennsylvania of 1776 cle IX) had also declared to ame effect.

d in the case of Pennsylvania, rly as 1701, the Pennsylvania er (Article V) declared that criminals shall have the same leges of Witnesses and Coun- s their prosecutors"; and was also a provision in the sylvania statute of May 31, (Dallas, laws of Pennsylvania, 1781, Volume 1, 6134), that apital cases learned counsel d be assigned to the prison-

Delaware the Constitution of (Article XXV), adopted the non law of England, but ex- ly excepted such parts as repugnant to the rights and leges contained in the Dec- ion of Rights; and the Dec- ion of Rights, which was ted on Sept. 11, 1776, pro- d (Article XIV), "That in all ecutions for criminal offenses, y Man hath a right * * * to llowed Counsel * * *"

addition, Pennsylvania's ter already referred to, was cable in Delaware. The origi- Constitution of New Jersey 76 (Article XVI) contained a ision like that of the Penn- ania Charter, to the effect all criminals should be ad- ed to the same privileges of sel as their prosecutors. The nal Constitution of North lina (1776) did not contain gua tee, but C. 115, Par. ess. s, North Carolina 1777 th rolina Revenue Laws, -1796, Volume 1, 316) pro- d * * * that every person sed of any crime or misde- nor whatsoever, shall be en- d to council in all matters h may be necessary for his nse, as well to facts as to * * *"

rly State Constitutions oted on Subject

milarly, in South Carolina the nal Constitution of 1776 did contain the provision as to sel, but it was provided as y as 1731 (act of Aug. 20, 1731, XLIII. Grimke, S. Car. Pub. s, 1682-1790, P. 130) that every on charged with treason, mur- felony, or other capital of- e should be admitted to make defense by counsel learned in law.

Virginia there was no consti- onal provision on the subject as early as August, 1734 (C. Par. III, Laws of Va., 8th II, Hening's Stat. at Large, 4, p. 404), there was an act aring that in all trials for tal offenses the prisoner, up- is petition to the court, should llowed counsel.

ne original Constitution of necticut (Art. I, Par. 9) con- ed a provision that "In all inal prosecutions, the ac- d shall have the right to be rd by himself and by counsel;" this Constitution was not pted until 1818. However, it ears that the English com- n law rule had been rejected ractice long prior to 1796. (See haniah Swift's "A System of Laws of The State of Con- ticut," printed at Windham by n Bryne, 1795-1796, Vol. II, 5, "Of Crimes and Punish- nts," C. XXIV, "Of Trials," pp. -399.)

ght to Have Counsel ognized

vides in explicit terms that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *" and said that since no part of this important amendment could be regarded as superfluous, the obvious inference is that in the sense of the Constitution due process of law was not intended to include, ex vi termini, the institution and procedure of a grand jury in any case; and that the same phrase, employed in the Fourteenth Amendment to restrain the action of the States, was to be interpreted as having been used in the same sense and with no greater extent; and that if it had been the purpose of that amendment to perpetuate the institution of the grand jury in the States, it would have embodied, as did the Fifth Amendment, an express declaration to that effect.

The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the Hurtado case, if it stood alone, it would be difficult to justify the conclusion that the right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause.

But the Hurtado case does not stand alone. In the later case of Chicago, Burlington, &c., R'd v. Chicago, 166 U.S. 226, 241, this count held that a judgment of a State court even though authorized by statute, by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. This holding was followed in Norwood v. Baker, 172 U. S. 269, 277; Smyth vs. Ames, 169 U.S. 466, 524; and San Diego Land Company v. National City, 174 U.S. 739, 754.

Exceptions Are Found To Hurtado Ruling

Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment Congress is prohibited in specific terms from abridging the rights. Gitlow v. New York, 268 U.S. 652, 666; Stromberg v. California, 283 U.S. 368; Near v. Minnesota, 283 U.S. 697,707.

These later cases establish that notwithstanding the sweeping character of the language in the Hurtado case, the rule laid down is not without exceptions. The rule is an aid to construction and in some instances may be conclusive; but it must yield to more compelling considerations whenever such considerations exist. The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (Herbert v. Louisiana, 272 U.S. 312,316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although specifically dealt with part of the Feder

the danger of conviction because he does not know how to establish his innocence.

If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or Federal court were arbitrarily to refuse to hear a party by counsel employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

The decisions all point to that conclusion. In the Cooke v. United States, 267 U.S. 537, it was held that where a contempt was not in open court, due process of law required charges and a reasonable opportunity to defend or explain. The court added, "We think this includes the assistance of counsel, if requested * * *."

In numerous other cases the court, in determining that due process was accorded, has frequently stressed the fact that the defendant had the aid of counsel. So, for example, Felts v. Murphy, 201 U.S. 123, 129; Frank v. Mangum, 236 U.S. 309, 344; Kelley v. Oregon, 273 U.S. 579, 591.

Judge Ordered Counsel in Deportation Case

In ex parte Hidekuni Iwata, 219 Fed. 610, 611, the Federal district judge enumerated among the elements necessary to due process of law in a deportation case the opportunity at some stage of the hearing to secure and have the advice and assistance of counsel.

In ex parte Chin Loy You, 223 Fed. 833, also a deportation case, the district judge held that under the particular circumstances of the case the prisoner, having seasonably made demand, was entitled to confer with and have the aid of counsel. Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the judge said * * * but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."

In ex parte Riggins, 134 Fed. 404, 418, a case involving the due process clause of the Fourteenth Amendment, the court said, by way of illustration, that if the State should deprive a person of the benefit of counsel, it would not be due process of law.

Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege and, after discussing the development of the English law upon the subject, says: "With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." In Cooley's Constitutional Limitations (eighth edition) 700, the same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel as necessarily included in due process of law. 2 Story on the Constitution (fourth edition), Section 1949, page 668.

decisions which refer variably recognize of counsel as

Cites State Decisions on Assignment of Counsel

Let us suppose the extreme case of a prisoner charged with a capital offense, who is deaf and dumb, illiterate and feeble-minded, unable to employ counsel, with the whole power of the State arrayed against him, prosecuted by counsel for the State without assignment of counsel for his defense, tried, convicted and sentenced to death.

Such a result, which, if carried into execution, would be little short of judicial murder, it cannot be doubted would be a gross violation of the guarantee of due process of law; and we venture to think that no Appellate Court, State or Federal, would hesitate so to decide. See Stephenson v. State, 4 O. App. 128; Williams v. State, 163 Ark. 623, 628; Grogan v. Commonwealth, 222 Ky. 484, 485; Mullen v. State, 28 Okla. Cr. 218, 230; Williams v. Commonwealth, (Ky.), 110 S. W. 339, 340.

The duty of the trial court to appoint counsel under such circumstances is clear, as it is clear under circumstances such as are disclosed by the record here; and its power to do so, even in the absence of a statute, cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment. See Cooley, Constitutional Limitations, supra, 700 and note.

The United States by statute and every State in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most States the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number of capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right.

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

Justice Butler Dissents

Justice Butler's dissenting op ion read:

The court putting aside—t are utterly without merit — other claims that the const tional rights of petitioners infringed, grounds its opinion Judgment upon a single ass of fact. It is that peti "were denied the right of c with the accustomed incide consultation and opportuni preparation for trial." If true, they were denied du cess of law and are enti have the judgments agai reversed.

But no such denial is s the record.

Nine defendants, includi terson, were accused in dictment and he was a arately indicted

...s which we shall con... the second, in respect of the de... nial of counsel; and it becomes unnecessary to discuss the facts of the case or the circumstances surrounding the prosecution except in so far as they reflect light upon that question.

White Boys Thrown From Train in Fight

The record shows that on the day when the offense is said to have been committed, these defendants, together with a number of other Negroes, were upon a freight train on its way through Alabama. On the same train were seven white boys and the two white girls. A fight took place between the Negroes and the white boys, in the course of which the white boys, with the exception of one named Gilley, were thrown off the train.

A message was sent ahead, reporting the fight, and asking that every Negro be gotten off the train. The participants in the fight, and the two girls, were in an open gondola car. The two girls testified that each of them was assaulted by six different Negroes in turn, and they identified the seven defendants as having been among the number. None of the white boys was called to testify, with the exception of Gilley, who was called in rebuttal.

Before the train reached Scottsboro, Ala., a Sheriff's posse seized the defendants and two other Negroes. Both girls and the Negroes then were taken to Scottsboro, the county seat. Word of their coming had preceded them, and they were met at Scottsboro by a large crowd. It does not sufficiently appear that the defendants were seriously threatened with, or that they were actually in danger of, mob violence; but it does appear that the attitude of the community was one of great hostility.

The Sheriff thought it necessary to call for the militia to assist in safeguarding the prisoners. Chief Justice Anderson pointed out in his opinion that every step taken from the arrest and arraignment to the sentence was accompanied by the military.

Soldiers Kept in Charge of Prisoners Continually

Soldiers took the defendants to Gadsden for safekeeping, brought them back to Scottsboro for arraignment, returned them to Gadsden for safekeeping while awaiting trial a few days later, and guarded the court house and grounds at every stage of the proceedings. It is perfectly apparent that the proceedings, from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment.

During the entire time the defendants were closely confined or were under military guard. The record does not disclose their ages, except that one of them was 13 and another only 14 or 15 years of age; but the record clearly indicates that most, if not all, of them were youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other States, where alone members of their families resided.

However guilty defendants upon due inquiry might prove to

... Named

"Th... you appear for these d... then I will not appsel; if local counsel n to appear and assist ... the circumstances ..but I will not appoint

"Mr. Rodd Honor has appointed co that correct?

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"Mr. Rodden, I don't appear as coit I do want to stay in abe ruled out in this case.

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"Mr. Roddt appear here through the y of your Honor.

"The Courourse, I give you that rig* *"

And then ently addressing all the s present, the court inquir

"* * * we/you all willing to assist?

"Mr. Moour Honor appointed us a we have been proceeding every line we known abouder your Honor's appoint

"The Coue only thing I am trying to, if counsel appears for defendants I don't want pose on you all, but if you fe counsel from Chattanooga

"Mr. Moo see his situation, of coand I have not run out of hing yet. Of course, if Honor purposes to appoint Mr. Parks, I am willing to g with it. Most of the bave been down and conferred these defendants in this caseey did not know what else t

"The Coufhe thing I did not want toose on the members of the if counsel unqualifiedly ars; if you all feel like Mroddy is only interested in mited way to assist, then In't care to appoint—

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"The Cou... hat is what I was trying to a... in, Mr. Parks.

"Mr. Par... of course, if they have couns... don't see the necessity of ... court appointing anybody; if ... y haven't counsel, of course, ... nk it is up to the court to ap... counsel to represent them.

"The Co... I think you are right abou... Mr. Parks, and that is the ... n I was trying to get an exp... from Mr. Roddy.

"Mr. Ro... think Mr. Parks is entirely ... bout it; if I was paid down ... nd employed, it would be ... nt thing, but I have not ... this case for trial and h... been called into it by pe... are interested in these b... Chattanooga.

"Now, th... not given me an oppor... prepare the case and ... familiar with the proced... abama, but I

...cally named and assigned... that this action of the tr... ge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial.

It is true that he said that before doing so he had understood Mr. Roddy would be employed as counsel for the defendants. This the lawyer in question, of his own accord, frankly stated to the court; and no doubt he acted with the utmost good faith. Probably other members of the bar had a like understanding.

In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment **until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense**, although they were as much entitled to such aid during that period as at the trial itself. (People ex rel. Burgess v. Risley, 66 Howe Pr. (N. Y.) 67; Batchelor v. State, 189, Ind. 69, 76.)

Proper Representation Declared Not Accorded

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the colloquy printed above, Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested; that he thought the boys would be better off if he should step entirely out of the case.

Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, "All right, all the lawyers that will; of course, I would not require a lawyer to appear if ——"

And Mr. Moody continued, "I am willing to do that for him as a member of the bar; I will go ahead and help do anything I can do."

With this dubious understanding the trials immediately proceeded. The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime, regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defence and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate.

we ...

The question, howeve... which it is our duty, and within ... power, to decide, is whether ... denial of the assistance of c... se contravenes the due proces... of the Fourteenth Amend... the Federal Constitution.

If recognition of the ... of a defendant charged wi... felony to have the aid of ... depended upon the exis... of a similar right at commo... as it existed in England when ... Constitution was adopted, there ... would be great difficulty in main... ning it as necessary to due proc...s.

Right to Have Counsel Traced Back to Blackstone

Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. After the revolution of 1688, the rule was abolished as to treason, but was otherwise steadily adhered to until 1836, when by act of Parliament the full right was granted in respect of felonies generally — 1 Cooley's Constitutional Limitations (8th Ed.), 693, et seq. and notes.

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and some times passionately assailed by English statesmen and lawyers.

As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law.

"For upon what face of reason," he says, "Can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" (4 Blackstone 355).

One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. (I Cooley's Constitutional Limitations Supra). But how can a judge, whose functions are purely judicial, affectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

Colonial Authorities Are Cited by Court

The rule was rejected by the Colonies. Before the adoption of the Federal Constitution the Constitution of Maryland had declared "that, in all criminal prosecutions, every man hath a right * * * to be allowed counsel; * * *" (Article XIX Constitution of 1776). The Constitution of Massachusetts, adopted in 1780 (Part The First Article XII), the Constitution of New Hampshire, adopted in 1794 (Part I, Article XV), the Constitution of New York of 1777 (Article XXXIV), and the Con-

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...ided th... ...rson shall be ... advocating or defending his cause before any court or tribunal, either by himself or counsel, or both." What the practice was prior to 1798 we are unable to discover.

The first Constitution adopted by Rhode Island was in 1842, and this Constitution contained the usual guarantee in respect of the assistance of counsel in criminal prosecutions. As early as 1798 it was provided by statute, in the very language of the Sixth Amendment to the Federal Constitution, that "in all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense; * * *" An act Declaratory of certain Rights of the People of this State, Sec. 6, Rev. Pub. Laws, Rhode Island and Providence Plantations, 1798.

Furthermore, while the statute itself is not available, it is recorded as a matter of history that in 1668 or 1669 the Colonial Assembly enacted that any person who was indicted might employ an attorney to plead in his behalf. (1 Arnold, history of Rhode Island, 336.)

It thus appears that in at least twelve of the thirteen Colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes; and this court seems to have been of the opinion that this was true in all the Colonies. In Holden v. Hardy, 169 U.S. 366, 386, Mr. Justice Brown, writing for the court, said:

"The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American Colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. (Lowe v. Kansas, 163 U.S. 81, 85). Compare Murray's Lessee et al v. Hoboken Land and Improvement Company, 18 How., 272, 276-277; Twining v. New Jersey, 211, U.S. 78, 100-101. Plainly, as appears from the foregoing, this test, as thus qualified, has not been met in the present case.

Cites California Case Previously Decided

We do not overlook the case of Hurtado vs. California, 110 U. S. 516, where this court determined that due process of law does not require an indictment by a grand jury as a prerequisite to prosecution by a State for murder.

In support of that conclusion the court (pp. 534-535) referred to the fact that the Fifth Amendment in addition to containing the due process of law clause, pro-

...that ... be observed ... Twining v. New Je... 78, 99, where Mr. Justice ... speaking for the court, said ...: "* * * it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against State action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226. If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law."

While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.

It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decision. In Holden v. Hardy, 169 U.S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

And Mr. Justice Field, in an earlier case, Galpin v. Page, 18 Wall 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. "Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered." Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so.

Court Holds Layman Must Have Counsel

What, then, does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces

...ate, 51 Ga. 567, 568; ... v. Moore, 165 Ga. 460; State v. Moore, 61 Kan. 732; State v. Ferris, 16 La. Ann. ...; State v. Simpson, 38 La. Ann. ...; State v. Briggs, 58 W.Va. ...

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In ... e light of the fact outlined in th... forepart of this opinion—the i... orance and illiteracy of the defen... nts, their youth, the circums... nces of public hostility, the impri... nment and the close surveilla... e of the defendants by the milit... y forces, the fact that their frien... and families were all in other States and communication with ... em necessarily difficult, and above all, that they stood in deadly per... il of their lives—we think the failur... e of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity should be given, to employ counsel, as the trial court evidently did assum... we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

Whether this would be so in other criminal prosecutions, or under other circumstances, we need not now determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard." In Holden vs. Hardy, supra.

In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary to the constitutional right to be heard by counsel. Compare Carpenter and Sprague vs. Dane County, 9 Wis. 274; County of Dane vs. Smith, 13 Wis. 585, 586. Hendr... 265, 2... vs. The State, 130 Ind. ... Fla. 21, ...; Cutts vs. State, 54 ... 76 Cal. People vs. Goldenson, State, 99... 344; Delk vs. The ...a. 667, 669-670.

In Hen... x v. The State, supra, there was no statute authorizing the assignment of an attorney to defend an indigent person accused of crime, but the court held that such an assignment was necessary to accomplish the ends of public justice, and that the court possessed the inherent power to make it.

"Where ... prisoner," the court said (P. ...), "without legal knowledge, is confined in jail, absent from his friends, without the aid of legal advice or the means of investigation ... the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel. * * * Such a trial is ... far removed from an ex parte proceeding."

that ... ably att... in a ... e trial to ascertain ... guilt or innocence of many accused.

Wems and Norris were tried first. Patterson was tried next on the separate indictment. Then five were tried. These eight were found guilty. The other defendant, Roy Wright, was tried last, and acquitted. The convicted defendants took the three cases to the State Supreme Court where the judgment as to Williams was reversed and those against the seven petitioners were affirmed.

There were three painstaking opinions, a different justice writing for the court in each case. (224 Ala. 524, 532, 540.) Many of the numerous questions decided were raised at the trial and reflect upon defendants' counsel much credit for zeal and diligence on behalf of their clients.

Seven justices heard the cases. The Chief Justice, alone dissenting, did not find any contention for the accused sufficient in itself to warrant a reversal, but alluded to a number of considerations which he deemed sufficient when taken together to warrant the conclusion that the defendants did not have a fair trial.

Declares that Defendants Were Ably Represented

The court said (p. 553): "We think it a bit inaccurate to say Mr. Roddy appeared only as amicus curiae. (This refers to a remark in the dissenting opinion.) He expressly announced he was there from the beginning at the instance of friends of the accused; but not being paid counsel, asked to appear not as employed counsel, but to aid local counsel appointed by the court, and was permitted so to appear.

"The defendants were represented as shown by the record and pursuant to appointment of the court by Hon. Milo Moody, an able member of the local bar of long and successful experience in the trial of criminal as well as civil cases. We do not regard the representation of the accused by counsel as pro forma.

"A very rigorous and rigid cross-examination was made of the State's witnesses, the alleged victims of rape, especially in the cases first tried. A reading of the records discloses why experienced counsel would not travel over all the same ground in each case."

The informality disclosed by the colloquy between court and counsel, which is quoted in the opinion of this court and so heavily leaned on, is not entitled to any weight. It must be inferred from the record that Mr. Roddy at all times was in touch with the defendants and the people who procured him to act for them. Mr. Moody and others of the local bar also acted for defendants at the time of the first arraignment and, as appears from the part of the record that is quoted in the opinion, thereafter proceeded in the discharge of their duty including conferences with the defendants.

There is not the slightest ground to suppose that Roddy or Moody were by fear or in any manner restrained from full performance of their duty. Indeed it appears that the State, by proper and adequate show of its purpose and power to preserve order, furnished adequate protection to them and the defendants.

Holds Three Defendants Testified Against Others

When the first case was called

Continued on Next Page

ELECTION OF CLERK IS CALLED ILLEGAL

Colmar Manor Town Office Declared Vacant—Mayor and Council Installed.

By a Staff Correspondent of The Star.

COLMAR MANOR, Md., July 15.—Announcement that E. Charvoz, who polled 332 votes to 160 received by V. E. Barry for the office of town clerk at the recent local elections, had been found to be ineligible for the office was made at the organization of the new mayor and council Saturday night in the Wilson Avenue Baptist Church by Joseph Moran, chairman of the board of election supervisors.

No Real Estate Equity.

Although Mr. Moran made no official explanation, merely stating there was some "irregularity" in the election, it is said the charge of ineligibility is based on the fact that Charvoz did not have equity in real estate in the town. As Barry also failed to meet this requirement Moran also declared his election "irregular" and pronounced the office of town clerk vacant. It will be filled by appointment and Burt M. Bromley, the newly elected mayor, announced that Charvoz's alleged ineligibility would be investigated, and if found true the council would "bow to the law."

Bromley immediately appointed Charvoz clerk pro tempore, however, for the meeting, at which two important committees were appointed. They were a committee on street lighting, comprising Councilmen E. R. Beckwith, George W. Cox and John N. Toverstad, and a streets and sidewalks committee, with Councilmen Cox, Beckwith and R. V. Yost as members. Cox is chairman of both committees.

The rules of order, procedure to be followed by the mayor and council and their order of business was fixed at the meeting. The latter will be posted in the town and call for the consideration of complaints and suggestions of citizens at the conclusion of all regular sessions of the town governing body.

Meeting Day Fixed.

It voted to hold regular meetings the first Tuesday in each month at "the most suitable place available."

Former Mayor John S. White, who was not a candidate for re-election, but who indorsed the candidacy of J. Ridgley Shields, whom Bromley defeated, called the meeting to order and explained that the purpose of the gathering was to induct the new mayor into office with as much formality as possible. He urged all residents of the town to support the new administration, spoke in favor of a representative citizens' association to assist the council in working for the betterment of the town and warned against haste in undertaking a program of street paving before the town is financially able to afford it.

The new mayor and council will hold a special meeting tomorrow night to complete their organization.

AGENT REVIVES MEMORY TOO LATE; MAN RELEASED

Sharpsburg Man Dismissed Second Time on Liquor Charge by Hagerstown Judge.

COLORED RESIDENTS DRIVEN FROM TOWN

Clash With Whites at Princess Anne, Md., Followed by Banishment.

By the Associated Press.

PRINCESS ANNE, Md., July 15.—Colored people were a minus quantity here yesterday, following a clash with whites Saturday night, during which the former were driven from the town with clubs, guns, billiard cues, bricks and other weapons, following a fight between a colored and a white man.

The trouble was precipitated after the fight, when an ultimatum was delivered to colored persons that they keep to one side of the main street. During sporadic outbursts, in which missiles were thrown from one side of the street to the other, a white girl was struck by a bottle said to have been thrown by a colored person.

It was then that about 200 colored people were driven from the streets and State police sent here to patrol the streets after a call from the local police force.

Whites have announced their intention of enforcing their demand that the colored people cease congregating on the streets on Saturday night.

HOLDS BALLOU'S POST.

Wilmarth Acting Superintendent of Schools for Two Weeks.

Maj. R. O. Wilmarth, assistant superintendent in charge of business affairs, today assumed the position of acting superintendent of schools for a two-week period. Maj. Wilmarth succeeds Robert L. Haycock, assistant superintendent in charge of elementary schools, as acting head of the system during the absence of Dr. Frank W. Ballou, superintendent, who is spending his vacation at Belgrade Lakes, Me.

J. J. Crane, first assistant superintendent in charge of buildings and grounds, probably will be the next school officer to substitute for the superintendent.

COLONEL TO BE RETIRED.

Ex-Chief of Infantry R. H. Allen Ends Active Service Sept. 7.

Col. Robert H. Allen, former chief of Infantry, will be transferred to the retired list September 7, on his own application, after more than 36 years' active service; Lieut. Col. David H. Bower, War Department general staff, will be similarly retired December 12 after more than 31 years' service; Maj. William W. Erwin, Calvary, under treatment at Walter Reed General Hospital, has been ordered to examination for retirement; Maj. C. Bowman, Medical Corps, at El Paso, Tex., has been ordered to Walter Reed General Hospital for treatment; Capt. Robert M. Butler, Medical Corps, at Fort George G. Meade, Md., has been ordered to his home to await retirement; Capt. Leo L. Gocker, Cavalry, has been ordered from this city to Fort Meade, S. Dak., for duty.