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## CONSTITUTIONAL LAW-PROCEDURAL DUE PROCESS DENIED BY MICHIGAN'S "ONE-MAN GRAND JURY"

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CONSTITUTIONAL LAW—PROCEDURAL DUE PROCESS DENIED BY MICHIGAN'S "ONE-MAN GRAND JURY"—Petitioner was summoned to appear as a witness before one of Oakland County's judges who was then acting in the capacity of "one-man grand juror."<sup>1</sup> This proceeding was attended only by petitioner, the judge grand juror, and two other circuit judges acting as advisers to the latter. The purpose was to investigate alleged misconduct on the part of law-enforcing officials through the acceptance of bribes in the form of sales of worthless "bonds" on pin-ball machines. Petitioner admitted purchasing

<sup>1</sup> Such investigatorial proceedings are authorized by Mich. Stat. Ann. (1938) §§ 28.943, 28.944, 28.945. For its origin and development see Winters, "The Michigan One-Man Grand Jury," 28 AM. JUD. SOC. J. 137 (1945).

these "bonds" but could not recall just what he had done with them when they had expired. Concluding that the petitioner's answers were evasive and that his story did not "jell" the judge immediately charged petitioner with contempt, convicted him, and sentenced him to jail—all without leaving the room. With only a part of the testimony on record the Supreme Court of Michigan denied the petitioner's motion for habeas corpus by an evenly divided court.<sup>2</sup> On certiorari, *held*, reversed, two justices dissenting. Such a conviction is unconstitutional as a denial of due process. *In re William Oliver*, (U.S. 1948) 68 S.Ct. 499.

The Court's decision does not deal directly with the validity of the one-man grand jury as a means of investigation, but it does invalidate the investigator's power to compel the witness abruptly to become a defendant in a contempt proceeding, and of conducting his trial in secret. The Fourteenth Amendment has been construed as guaranteeing to a person accused of a crime the right to a reasonable opportunity to defend himself, which includes the right to answer charges made against him,<sup>3</sup> the right to counsel,<sup>4</sup> and the right to a full hearing.<sup>5</sup> Petitioner received none of these. Although an exception has been recognized in *Ex parte Terry*,<sup>6</sup> in which contemptuous activity committed in the presence of the court tended "to destroy its authority, and, by violent means, to embarrass and obstruct its business,"<sup>7</sup> such an exception is not applicable in the principal case. Assuming that the judge was a "court," there can be no embarrassment of authority when the alleged contempt occurs in private session where the public is not allowed.<sup>8</sup> Nor did the petitioner employ any "violent" means. However, the Court placed its decision on an alternative and broader ground by holding that even if the petitioner had been given a reasonable opportunity to defend, still the secrecy of the trial was a denial of procedural due process. The decision for the first time specifically makes public trials an individual right protected against state action<sup>9</sup> by incorporating within the words of the Fourteenth Amendment that part of the Sixth Amendment which guarantees to an accused the right to a "public trial."<sup>10</sup> Justice Black, speaking for the majority, concluded that *in camera* trials were never a part of our judicial

<sup>2</sup> *In re Oliver*, 318 Mich. 7, 27 N.W. (2d) 323 (1947).

<sup>3</sup> *Hovey v. Elliot*, 167 U.S. 409, 17 S.Ct. 841 (1897).

<sup>4</sup> *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932).

<sup>5</sup> *Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773 (1938).

<sup>6</sup> 128 U.S. 289, 9 S.Ct. 77 (1888).

<sup>7</sup> *Ex parte Terry*, 128 U.S. 289 at 307, 9 S.Ct. 77 (1888). "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned . . . without any further proof or examination." 4 BLACKST. COMM. 286.

<sup>8</sup> *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390 (1925).

<sup>9</sup> The point was assumed *arguendo* in *Gaines v. Washington*, 277 U.S. 81, 48 S.Ct. 468 (1928). In the principal case at p. 513, Justice Frankfurter denied that the secrecy of a conviction was a denial of due process if the "State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding," and joined with Justice Jackson in dissenting on the ground that the question of secrecy was not litigated in the Michigan Supreme Court.

<sup>10</sup> Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." Cf. Justice Rutledge's concurring opinion to the principal case and Justice Black's dissent in *Adamson v. California*, 332 U.S. 46

system, but instead have been consistently excluded. He based this conclusion on the abuses and excesses which flowed from early use of the secret trial<sup>11</sup> and the early appearances of constitutional provisions in the United States outlawing such practices.<sup>12</sup> Coupling this historic distrust of secret proceedings with "their inherent dangers to freedom," Justice Black reasoned that "the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be sentenced thus [secretly] to prison."<sup>13</sup> Without doubt the trial was secret: only a part of the record was ever open to judicial review and neither friends, relatives, nor counsel were present.<sup>14</sup> While the conclusion of the Supreme Court seems to be a reasonable construction of the due process clause, it will probably impair in a substantial way the effectiveness of the Michigan "one-man grand jury" system.

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at 68, 67 S.Ct. 1672 (1947), where it is urged that all the Bill of Rights was intended to be incorporated in the Fourteenth Amendment.

<sup>11</sup> Found in the Spanish Inquisition, French *lettre de cachet*, and the English Court of Star Chamber. Radin, "The Right to a Public Trial," 6 TEMPLE L.Q. 381 (1932).

<sup>12</sup> Pa. Const. (1776), Declaration of Rights IX; N.C. Const. (1776), Declaration of Rights IX. It appeared in Michigan's first Constitution, Mich. Const. (1835) Art. 1, § 10.

<sup>13</sup> Principal case at 507.

<sup>14</sup> Radin, "The Right to a Public Trial," 6 TEMPLE L.Q. 381 (1932); 35 MICH. L. REV. 474 (1937).