the time when the verdict was rendered and the jury polled. In the same conversation the Judge expressed his opinion to counsel, that even they might be in danger of violence should they be present at the reception of the verdict. Under these circumstances they agreed with the Judge, that neither I nor they should be present at the rendition of the verdict."

"I knew nothing of this conversation, nor of any agreement made by my said counsel with the Judge, until after the rendition of the verdict and sentence of death had been pronounced."

"Pursuant to this conversation, I was not brought into court at the time of the rendition of the verdict, and I was not present when the verdict was received and the jury was discharged, nor was any of my counsel present when the verdict was received and the jury discharged."

"I did not give to my counsel nor to any one else, authority to waive my right to be present at the reception of the verdict, or to agree that I should not be present at that time, nor were they in any way authorized or empowered to waive my right so to be present; nor did I authorize my counsel, or any of them, to be absent from the court room at the reception of the verdict, or to agree that they or any of them might be absent at that time. My counsel were induced to make the aforesaid agreement as to my absence and their absence at the reception of the verdict, solely because of the statement made to them by the Presiding Judge, and their belief that if I were present at the time of the reception of the verdict and it should be one of acquittal or of disagreement, it might subject me and them to serious bodily harm, and even to the loss of life."

"Besides Messrs. Rosser and Arnold, I had as counsel Morris Brandon, Esq., and Herbert J. Haas, Esq. Neither of them was present when the verdict was received and the jury discharged. Neither the conversation with Judge Roan, nor the

purport thereof, was communicated to Messrs. Brandon and Haas, nor did they have any knowledge thereof, until after sentence of death had been pronounced against me."

Mob Action After the Charge and at the Reception of the Verdict.

"After the jury had been finally charged by the Court and the case had been submitted to it, when Mr. Dorsey, the Solicitor General, left the court room, a large crowd on the outside of the Court House and in the streets, greeted him with loud and boisterous applause, clapping their hands and yelling 'Hurrah for Dorsey,' placed him upon their shoulders, and carried him across the street into a building, where his office is located. The crowd did not wholly disperse during the interval between the submission of the case to the jury and the return of the jury to the court room with its verdict, but during the entire period a large crowd was gathered in the immediate vicinity of the Court House. When it was announced that the jury had agreed upon a verdict, a signal was given from within the court room to the crowd on the outside to that effect, and the crowd outside raised a mighty shout of approval, and cheered while the polling of the jury proceeded. Before more than one juror had been polled, the applause was so loud and the noise was so great, that the further polling of the jury had to be stopped, so that order might be restored, and the noise and cheering from without was such, that it was difficult for the Presiding Judge to hear the responses of the jurors as they were being polled, although he was only ten feet distant from the jury."

"All of this occurred during my involuntary absence from the court room, I being at the time in the custody of the Sheriff of Fulton County and incarcerated in the jail of said County, my absence from the court room, and that of my counsel, hav-

ing been requested by the Court because of the fear of the Court that violence might be done to me and my counsel had I or my said counsel been in court at the time of the rendition of the verdict."

"Thereafter, on August 26, 1913, I was sentenced to death by said Superior Court of Fulton County, Georgia, and remanded to the custody of C. Wheeler Mangum, Sheriff and ex-officio jailer as aforesaid, said Court being at that time without jurisdiction over me or over the cause in which said verdict was rendered, because of my involuntary absence from the court at the time of the rendition of the verdict and of the polling and discharge of the jury, said trial having thereby become a nullity and the proceedings of Hon. L. Roan, Presiding Judge, in receiving said verdict and polling the jury and discharging it, being *coram non judice* and devoid of due process of law."

Proceedings in the State Court After the Verdict.

The petition then states the subsequent history of the case as follows (*Rec. pp. 5 and 6*):

On August 26, 1913, Frank's counsel filed a motion for a new trial. This was denied on October 21, 1913, Hon. L. S. Roan, the Presiding Judge, on denying the motion, saying, that the jury had found the defendant guilty; that he had thought about the case more than any other that he had ever tried; that he was not certain of the appellant's guilt; that with all the thought he had put on the case he was not fully convinced that he was innocent or guilty, but that he did not have to be convinced; that there was no room to doubt

that the jury was, and that he felt it his duty to order that the motion for a new trial be overruled.

The cause was then taken on writ of error to the Supreme Court of Georgia, where, on February 17, 1914, a judgment was rendered affirming the judgment of conviction of the Superior Court of Fulton County and denying appellant's motion for a new trial. (*Frank* v. *State, 141 Ga. 243.*)

On April 16, 1914, the appellant filed his motion in the Superior Court of Fulton County, Georgia, to set aside the verdict rendered against him, on the grounds above stated, namely, that he was involuntarily absent from the court when the verdict against him was received and the jury discharged, in violation of his constitutional rights, and that he was deprived of a fair and impartial trial, of due process of law, and of the equal protection of the laws; that he did not waive the right to be present at the reception of the verdict, and did not authorize the waiver of such right on his behalf by his counsel or by any other person, nor consent that he should not be present at the rendition of the verdict, or that his counsel should be absent at the time; that any agreement made by his counsel in his absence and without his knowledge or consent, that he should not be present at the time of the rendition of the verdict, was of no legal force or effect, and that by reason of the premises the verdict rendered against him was a nullity.

The State of Georgia, by the Solicitor General, demurred to this petition, and on June 6, 1914, it was dismissed on the demurrer, and judgment was rendered against the appellant.

The judgment was then taken by writ of error to the Supreme Court of Georgia, where, on No-

vember 14, 1914, a judgment was rendered by that court which affirmed the judgment of the Superior Court of Fulton County sustaining the State's demurrer and dismissing the appellant's motion to set aside the verdict.

The grounds of this judgment are to be found in the opinion, *Rec. pp. 22-39.* They are, in substance, (1) that a person accused of crime has a right to be present at the time of the rendition of the verdict against him, but such right is an incident of the trial; (2) that his absence at the time of the rendition of the verdict was a mere irregularity that can be waived by him; (3) that under the laws of Georgia a motion for a new trial is an available remedy by which to attack a verdict rendered in the absence of one accused of crime; (4) that after the making of a motion for a new trial and the affirmance of judgment denying the same by the Supreme Court, a motion made thereafter to set aside the verdict on the ground that the accused had been absent from the court room when the verdict was rendered, comes too late.

Under previous decisions of the Supreme Court of Georgia, and under the practice which had prevailed throughout the State prior to the rendering of the opinion just referred to, the proper procedure for attacking as a nullity a verdict rendered in the absence of a prisoner had been held to be a motion to set aside the verdict. A motion for a new trial had been treated as not being the proper remedy. The former decisions of the Supreme Court of Georgia were unanimous decisions, and, under the laws of that State, had the force of a statute until reversed by a full bench, after argument, on a request for review granted by the court.

No previous decision of the Supreme Court of Georgia, nor of the Court of Appeals of that State, these courts being its only appellate courts and its highest courts, had ever declared that a motion to set aside as a nullity a verdict rendered in a prisoner's absence was not a valid remedy to attack such verdict. The decision of the Supreme Court of Georgia in appellant's case, which determined that a motion for a new trial was an available remedy in such a case, and denied appellant's right to move to set aside the verdict on the grounds hereinbefore stated, was the first decision of this kind ever rendered by that court or by the Court of Appeals of Georgia.

The appellant contends that this decision had the effect of depriving him of a substantial right given to him by the laws in force at the time to which his alleged guilt related, and at the time of the reception of the verdict against him and the presentation and decision of the motion for a new trial, and took from him a right which at all of these times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law, in violation of the prohibition contained in Article I, Section 10, of the Constitution of the United States, and is illegal and void; and likewise deprived him of due process of law and of the equal protection of the laws.

Efforts to Review Decision by Writ of Error.

On November 18, 1914, appellant applied to the Supreme Court of Georgia for a writ of error to this Court, for a review of the judgment which had denied his motion to set aside the verdict, and on the same day this application was denied.

On November 21, 1914, the appellant applied to Mr. Justice Lamar, the Justice of this Court assigned to the Fifth Circuit, which includes the State of Georgia, for a writ of error to review the judgment. This application was denied on November 23, 1914. A similar application was made to Mr. Justice Holmes, who denied the same on November 25, 1914; and an application having thereafter been made to Mr. Chief Justice White, on reference thereof to the full bench of this Court it was denied on December 7, 1914, without opinion.

Having thus exhausted all of his remedies in the Courts of Georgia, and by applications for writ of error to this Court, to review the judgment denying his motion to set aside the verdict rendered against him, and having been afforded no adequate and efficient means for asserting and obtaining his rights under the Constitution under a writ of error, the appellant filed his petition in the United States District Court for the Northern District of Georgia, to be discharged from custody because of the nullity of the verdict received in his absence, and of the judgment rendered thereon and his commitment thereunder. In substantiation of his contention that the Superior Court of Fulton County, Georgia, wherein he was convicted of the crime of murder, had lost jurisdiction over him, he averred:

APPELLANT'S GROUNDS FOR ASSERTING THE NULLITY OF VERDICT AND JUDGMENT.

"(1) The reception, in my absence, of the verdict convicting me of the crime of murder, tended to deprive me of my life and liberty without due

process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, the protection of which I expressly invoke.

(2) I had the right to be present at every stage of my trial, including the reception of the verdict, the polling of the jury and the discharge of the jury, this right being a fundamental right essential to due process of law.

(3) My involuntary absence at the time of the reception of the verdict and the polling of the jury, deprived me of the opportunity to be heard which constitutes an essential prerequisite to due process of law.

(4) This opportunity to be heard, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

(5) My right to be present during the entire trial, including the time of the rendition of the verdict, was one which neither I nor my counsel could waive or abjure.

(6) My counsel having had no express or implied authority from me to waive my presence at the time of the rendition of the verdict, and it being in any event beyond my constitutional power to give them such authority, their consent to the reception of the verdict in my absence was a nullity.

(7) Since neither I nor my counsel could expressly waive my right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any pretended ratification by me or acquiescence on my part in any action taken by my counsel.

(8) My involuntary absence at the reception of the verdict, constituting as it did an infraction of due process of law, incapable of being waived, directly or indirectly, expressly or impliedly, before

or after the rendition of the verdict, the failure to raise the jurisdictional question on my motion for a new trial, did not deprive me of my constitutional right to attack as a nullity the verdict rendered against me and the judgment based thereon.

(9) My trial did not proceed in accordance with the orderly processes of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to me, and whose conduct, intimidated the Court and jury and unduly influenced them, and neutralized and overpowered their judicial functions, and, for that reason also, I was deprived of due process of law and of the equal protection of the law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, the protection of which I expressly invoke."

GROUNDS OF DENIAL OF RELIEF BY JUDGE NEWMAN.

Judge Newman, on denying the application for a writ of *habeas corpus*, rendered an opinion, in which, after stating the various applications that had been made to this Court for the allowance of a writ of error to the Supreme Court of Georgia to review its action on the motion to set aside the verdict rendered against the appellant, said:

"How this court could be justified in issuing this writ when this record is disclosed to it, I am unable to see. If this writ should issue, notwithstanding all that has occurred, and this applicant should be brought into court, the only thing the court here could do would be to hear evidence and determine whether this applicant had been denied the equal protection of the laws and due process of law, and consequently should be discharged. It seems to me that this would be the exercise by this court of supervisory power over the action of the State courts in a manner not warranted by

the Constitution or the laws of the United States. Also the court would be considering the matter as proper for hearing and decision here in the face of the decisions of two Justices of the Supreme Court —indeed of the entire court—to the effect, as stated, that no Federal question remained for consideration or now exists in the case. I am not aware of any precedent for such action in a case like this on the part of this court, and none has been referred to by counsel for the appellant who have so ably presented and argued this case. *No question whatever is made about the jurisdiction of the court trying the case originally and subsequently reviewing it on writ of error.* Believing from the petition itself, therefore, that the appellant is not entitled to the writ of *habeas corpus* or to the relief prayed, the application for the same is denied."

Thereafter, as has been already stated, an appeal from the judgment of the United States District Court for the Northern District of Georgia was allowed by Mr. Justice Lamar, pursuant to the provisions of the Act of Congress of March 10, 1908, Chapter 76 (35 Statutes at Large, p. 40).

In support of his appeal the appellant presents the following (*Rec. pp. 226-229*):

ASSIGNMENTS OF ERROR.

"*First.*—The said District Court of the United States erred in holding that the appellant's application and the exhibits and records therein referred to did not make a case wherein the said Court could properly allow the issuance of the writ of *habeas corpus* prayed for.

Second.—The said District Court of the United States erred in holding, that the denial by the Supreme Court of the United States and by the sev-

eral Justices thereof of appellant's application for a writ of error to the Supreme Court of Georgia, to review the judgment of that court affirming the judgment of the Superior Court of Fulton County, Georgia, denying the appellant's motion to set aside the verdict rendered in the said court convicting him of murder, deprived this appellant of his right to the issuance of a writ of *habeas corpus* as prayed for.

Third.—The said District Court of the United States erred in holding that it could not entertain the petition of the appellant for the issuance of a writ of *habeas corpus* herein because it would be the exercise by said Court of supervisory power over the action of the State courts in a manner not warranted by the Constitution or the laws of the United States.

Fourth.—The said District Court of the United States erred in holding, that by entertaining the appellant's petition for a writ of *habeas corpus* it would do so in the face of alleged decisions of two Justices of this Court, and of this Court, that no Federal question remained for consideration, or now exists in this cause.

Fifth.—The said District Court of the United States erred in holding, that no question was made concerning the jurisdiction of the Superior Court of Fulton County, Georgia, in trying the indictment wherein the appellant was charged with the crime of murder.

Sixth.—The said District Court of the United States erred in holding, that the appellant is not entitled to the writ of *habeas corpus* or the relief prayed for, and that his application for the same should be denied.

Seventh.—The said District Court of the United States erred in refusing to hold, that the Superior

Court of Fulton County, Georgia, lost jurisdiction over the appellant on his trial for murder in said court, because of his involuntary absence from the court at the time of the rendition of the verdict against him and of the polling and discharge of the jury, said trial having thereby become a nullity, and the proceedings of said court in receiving said verdict and polling the jury and discharging it, were *coram non judice*, and devoid of due process of law.

Eighth.—The said District Court of the United States erred in refusing to hold that the judgment pronounced against the appellant in the Superior Court of Fulton County, Georgia, whereby he was sentenced to death and under which he is now in the custody of C. Wheeler Mangum, Sheriff of Fulton County, Georgia, was a nullity, and all subsequent proceedings thereto are nullities, because at the time when said judgment was pronounced the said Superior Court of Fulton County, Georgia, had lost jurisdiction over the appellant and of this cause.

Ninth.—The said District Court of the United States erred in refusing to hold, that the reception by the Superior Court of Fulton County, Georgia, on the appellant's trial for murder in said court, in his absence, of the verdict convicting him of the crime of murder, tended to deprive him of his life and liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Tenth.—The said District Court of the United States erred in refusing to hold, that the appellant had the right to be present at every stage of his trial in the Superior Court of Fulton County, Georgia, including the reception of the verdict against him, the polling of the jury and the discharge of the jury, and that this right was a fundamental right essential to due process of law.

Eleventh.—The said District Court of the United States erred in refusing to hold, that the involuntary absence of the appellant at the time of the reception of the verdict on his trial in the Superior Court of Fulton County, Georgia, and the polling of the jury, deprived him of an opportunity to be heard, which constituted an essential prerequisite to due process of law.

Twelfth.—The said District Court of the United States erred in refusing to hold, that the appellant's opportunity to be heard on his trial in the Superior Court of Fulton County, Georgia, included the right to be brought face to face with the jury at the time of the rendition of the verdict and of the polling of the jury.

Thirteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's right to be present during the entire trial, including the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, was one which neither he nor his counsel could waive nor abjure.

Fourteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's counsel having had no express or implied authorization from him to waive his presence at the time of the rendition of the verdict against him in the Superior Court of Fulton County, Georgia, and it being in any event beyond his constitutional power to give them such authority, their consent to the reception of the verdict in his absence was a nullity.

Fifteenth.—The said District Court of the United States erred in refusing to hold that since neither the appellant nor his counsel could expressly waive his right to be present at the rendition of the verdict, that right could not be waived by implication or in consequence of any ratifica-

tion by him or acquiescence on his part in any action taken by his counsel.

Sixteenth.—The said District Court of the United States erred in refusing to hold, that the appellant's involuntary absence at the reception of the verdict rendered against him in the Superior Court of Fulton County, Georgia, constituting as it did an infraction of due process of law, incapable of being waived directly or indirectly, expressly or impliedly, before or after the rendition of the verdict, his failure to raise the jurisdictional question on his motion for a new trial did not deprive him of his constitutional right to attack as a nullity the verdict rendered against him and the judgment based thereon.

Seventeenth.—The said District Court of the United States erred in refusing to hold, that the appellant's trial in the Superior Court of Fulton County, Georgia, did not proceed in accordance with the orderly process of the law essential to a fair and impartial trial, because dominated by a mob which was hostile to him and whose conduct intimidated the court and jury and unduly influenced them and neutralized and over-powered their judicial functions, and because for that reason he was deprived of due process of law and of the equal protection of the law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Eighteenth.—The said District Court of the United States erred in refusing to hold, that the decision of the Supreme Court of Georgia, which determined that the appellant's motion to set aside the verdict rendered against him in the Superior Court of Fulton County, Georgia, on the ground of his absence at the time of the rendition of said verdict, was not an available remedy to attack such verdict but that the objection should have been raised on the motion for a new trial, deprived the

appellant of a substantial right given to him by the law in force at the time to which his alleged guilt related and at the time of the reception of the verdict against him and of the presentation and decision of the motion for a new trial made by him, and took from him a right which at all of said times was vital to the protection of his life and liberty, and constituted the passing of an *ex post facto* law in violation of the prohibition contained in Article L, Section 10, of the Constitution of the United States, and was illegal and void.

Nineteenth.—The said District Court of the United States erred in refusing to hold, that the judgment of the Supreme Court of Georgia, rendered on November 14, 1914, deprived him of due process of law, and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States, because the Court thereby in effect declared, that in order to avail himself of his aforesaid constitutional rights, to wit, the assertion of his right to due process of law and to the equal protection of the laws, he would be compelled to subject himself to a second jeopardy, thus depriving him of his aforesaid constitutional rights except on the illegal condition of the surrender by him of the right secured to all persons charged with criminal offenses in the State of Georgia under paragraph 8, section 1, Article I, of the Constitution of said State."

POINTS.

I.

The reception by the Superior Court of Fulton County of the verdict by which the appellant was condemned to death, in his absence and without his consent or authority, and in the absence of his counsel, was such a violation of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as to bring about a loss of jurisdiction of the Court and the nullification of the verdict and judgment.

Statement of Appellant's Position.

The appellant was on trial, charged with the crime of murder, a capital offense. The Constitution of Georgia (*Art. VI, § 18, par. 1*) declares that "the trial by jury, except where it is otherwise provided in the Constitution, shall remain inviolate." A jury had been empaneled to try the appellant for the crime charged in the indictment. They were by *Art. I, §2, par. 1* of the Constitution made "the judges of the law and the facts."

Under another clause, it was further declared (*Art. I, § 1, par. 4*): "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State *in person*, by attorney, *or both*," and in the very next para-

graph of that instrument, this right was emphasized by the statement: "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel."

The tribunal by which the appellant was thus to be tried, and before which he had the constitutional right to defend himself in person and by counsel, against the grave charge of which he stood indicted, consisted of the presiding judge, Hon. L. S. Roan, and a common law jury of twelve. If he was involuntarily deprived of the right of defense before this tribunal, at any stage of the trial, such deprivation constitutes, we contend, a denial of due process of law. Thus, if the entire trial had been conducted in his absence, or if he had been kept out of the court room while the witnesses of the prosecution were undergoing examination, or while the witnesses in his defense were sworn, or on alternate days, or while counsel were presenting their arguments, or whilst the court was instructing the jury, he would unquestionably have been deprived of the right to defend himself, of the opportunity to become a participant in the judicial investigation which had for its end the ascertainment of his guilt or innocence, and the determination as to whether or not his life and liberty were to be forfeited.

We shall presently show, that his involuntary absence at the time of the rendition of the verdict and the polling of the jury, in obedience to the wishes of the presiding judge, which were under the circumstances the equivalent of a command, was equally a deprivation of due process of law.

Before presenting the authorities on which we rely to substantiate that proposition, a consideration of the fundamental elements of due process,

as indicated by the decisions of this Court, will be useful.

The Essential Elements of Due Process.

Although the Court has, very wisely, refrained from attempting a comprehensive definition of due process, it has, nevertheless, determined, by a long line of decisions, that in so far it relates to legal procedure which may affect life, liberty or property, due process depends on the concurrence of two component elements, (1) notice to the person affected, of the proceedings by which he is sought to be charged or condemned, and (2) the right of the person proceeded against to a hearing or an opportunity to be heard in his defense.

We shall later under Point II indicate a third element, namely, a competent tribunal to pass on the subject-matter.

This right to be heard, or this opportunity to be heard, is not one which is limited to any particular phase of the proceeding. It is not granted, if it may be taken away or withheld at any stage of proceedings which may result in condemnation. It is co-extensive with the entire proceeding, from its beginning to its termination. Thus a party would be deprived of due process were he merely permitted to interpose an answer, and thereafter prohibited from participating in the trial of issues on which his life, liberty or property depended, or from examining and cross-examining witnesses, or from being present and heard at the various stages of the proceeding.

The right or opportunity to be heard in such a case would be idle, if accorded in the early or preliminary stages of a trial and denied at its culmin-

ation. The mere interposition of an answer or a plea, without the right of participation in the trial in all of its subsequent stages, would be the substitution of form for substance, and a disregard of the underlying purpose of legal process. The object of legal process, is not merely to bring a party into court, but to enable him, when brought there, to be present for the protection of his rights, and to meet any emergency that may arise, until judgment has been pronounced.

Hovey vs. *Elliott.*

The principle which we invoke was elaborately and lucidly considered in *Hovey* v. *Elliott, 167 U. S. 409*—a great constitutional landmark. There, the court of original jurisdiction had after the service of process and the joinder of issue stricken defendant's answer from its files, as a punishment for his contempt in refusing to obey one of its orders. In consequence, a decree *pro confesso* was entered against him. Its validity was challenged, and its nullity was adjudicated by this Court, because it was wanting in due process of law, from the instant that the defendant was debarred from being further heard in his defense. Mr. Justice White said:

"In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to

punish for a contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessary depends.

"In *McVeigh* v. *United States, 11 Wall. 259,* the court, through Mr. Justice Swayne, said (p. 267): 'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice. *Calder* v. *Bull, 3 Dallas, 388; Bonaker* v. *Evans, 16 Adolphus & Ellis, 170; Capel* v. *Child, 2 Crompton & Jervis, 574.*'

"And quoting with approval this language, in *Windsor* v. *McVeigh, 93 U. S. 274,* the court, speaking through Mr. Justice Field, again said (pp. 277, 278): 'The principle stated in this terse language

lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for *the liability and the right are inseparable.* This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. *A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether.* It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.'

"This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus Coke (*2 Inst. 346*), in commenting on the 29th chapter of Magna Charta, says: 'No man shall be disseized,

etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all), by the due course and process of law.' * * *

"Story, in his treatise on the Constitution (*vol. 2, § 1789*), speaking of the clause in the Fifth Amendment, where it is declared that no person 'shall be deprived of life, liberty or property without due process of law,' says: 'The other part of the clause is but an enlargement of the language of Magna Charta, '*nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per legem terrae*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legum terrae* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brougt in to answer thereto by due process of the common law. *So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.*'

"Can it be doubted that due process of law signifies a right to be heard in one's defence? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce

justice, courts possess the right to inflict the very wrongs which they were created to prevent."

"In *Galpin* v. *Page, 18 Wall. 350,* the court said (p. 368): 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been 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 can never be upheld where justice is justly administered.'

"Again, in *Ex Parte Wall. 107 U. S. 265, 289,* the court quoted with approval the observations as to 'due process of law,' made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College case*: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, *which proceeds upon inquiry and renders judgment only after trial.* The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.'"

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they *'proceed upon inquiry,'* and *'render judgment only after trial.'*"

"The necessary effect of the judgment of the Supreme Court of the District of Columbia was to

decree that a portion of the award made in favor of the defendant, in other words, his property, belonged to the complainants in the case. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law. If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, *why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law. No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression and would make it destroy great constitutional safeguards.''*

Windsor vs. *McVeigh.*

In *Windsor* v. *McVeigh, supra,* Mr. Justice Field in addition to what was quoted from his opinion in *Hovey* vs. *Elliott* (*supra*) said:

"The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its ap-

plication. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * *

"*So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose.* The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. *And the reason is, that the courts are not authorized to exert their power in that way.*

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, *according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it.* * * *

"It was not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, *and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing.* And where, as in that case, no appearance was allowed, there could be

no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. *By the act of the court, the respondent was excluded from its jurisdiction.''*

The Right to Be Heard.

If, in *Hovey* v. *Elliott,* the court had not stricken out the answer, or, if in *Windsor* v. *McVeigh,* it had not stricken out the appearance of the owner of the property which was sought to be seized, and had heard the proofs of all the parties, but had, in the one case because of the defendant's contempt of court, and in the other because of the defendant's residence within the Confederate lines, refused a hearing on the final argument, there can be no doubt but that the judgments rendered in the cases cited would have been regarded as devoid of due process of law.

It is immaterial at what stage of the litigation the right to be heard, or the opportunity to be heard, is withheld. So long as it is actually interfered with by the direct or indirect action of the court, there is a denial of due process. This rule, which has been applied in civil actions which merely affect a right of property, is of superlative importance in a criminal action which involves life and liberty. It would be of little avail in such a case, for a defendant to appear before the court and jury long enough to interpose his plea, or at such times when the court might deem it advisable or prudent for him to be present, only to be treated at all other times as a stranger to the proceedings. That would amount to a virtual withholding of that opportunity to be heard which is vitally essential to a full and unrestrained defense. Indeed, in a criminal case, the hearing to

which the accused is entitled, is the right of defense, and that is not to be limited, curtailed or circumscribed. It is not to be suddenly cut off, when he is in direst need. If he may be locked up at a time when his fate hangs trembling in the balance, and when his judges are themselves subject to interrogation, is his right of defense not taken from him? If when the jury is about to render its verdict, he is absent, and his counsel are absent, and the prosecution and a hostile mob alone are present, to confront the twelve jurors, what has become of his opportunity to be heard which is the *sine qua non* of due process? Might not the jury reach the natural conclusion that the defense had been abandoned? Or, might they not be confirmed in the fear, that a verdict in favor of the accused, might prove their own death-warrant?

The prohibitions of the Fourteenth Amendment refer to all of the instrumentalities of the State, legislative, executive and judicial, and therefore, whoever, by virtue of public position under a State government, deprives another of any right protected by that Amendment against deprivation by a State, violates the constitutional inhibition, and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Chicago Burlington & Quincy R. R. Co. v *Chicago, 166 U. S. 226.*

The cases which have thus far been cited, were all instances of an infraction of due process of law by judicial authority.

As further indicating the application of the prohibitions of the Fourteenth Amendment to the judgment of a court, we refer to *Scott* v. *McNeal, 154 U. S. 34.*

That case involved the validity of a decree of a court of probate appointing an administrator of the estate of a living person, made after public notice. Mr. Justice Gray laid down the rule of decision applicable, in these admirable words:

"Their prohibitions extend to all acts of the State, whether through its legislative, its executive, *or its judicial authorities. Virginia* v. *Rives, 100 U. S. 313, 318, 319; Ex parte Virginia, 100 U. S. 339, 346; Neal* v. *Delaware, 103 U. S. 370, 397.* And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank, 92 U. S. 542, 554,* repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely, 4 Wheat. 235, 244,* was intended *'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'*

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must

decide for itself the true construction of the statute. *Huntington* v. *Attrill, 146 U. S. 657, 683, 684; Mobile & Ohio Railroad* v. *Tennessee, 153 U. S. 486, 492-495.*

"No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

"The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.' *Pennoyer* v. *Neff, 95 U. S. 714, 733.*"

Standard Oil Co. vs. *Missouri.*

One of the most recent applications of this doctrine is afforded by *Standard Oil Co.* v. *Missouri, 224 U. S. 270, 280-282,* where Mr. Justice Lamar said:

"The briefs and arguments for the defendants were addressed mainly to the proposition that the fine of $50,000 was a criminal sentence in a civil suit and void because beyond the jurisdiction of the court, and, for the further reason, that the pleadings and prayer gave no notice which would support such a sentence.

1.—It is, of course, essential to the validity of any judgment that the court rendering it should

have had jurisdiction, not only of the parties, but of the subject-matter. *Chicago, B. & Q. Ry. Co.* v. *Chicago, 166 U. S. 226, 234, 247.* * * *

2.—The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.

Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor* v. *McVeigh, 93 U. S. 274, 282.* See also *Reynolds* v. *Stockton, 140 U. S. 254, 265-268. Barnes* v. *Railway, 122 U. S. 1, 14.*"

Ex parte Riggins.

The interesting case of *Ex parte Riggins, 134 Fed. Rep. 404,* although reversed on the ground that *habeas corpus* was not the proper remedy, in *Riggins* v. *United States, 199 U. S. 547,* and in its general conclusion overruled in *Hodges* v. *United States 203 U. S. 1,* on the ground that the Fourteenth and Fifteenth Amendments operate solely on State action and not on individual action) nevertheless presents a valuable and apparently sound contribution to an important aspect of the subject, which we are now considering. Riggins was indicted in the United States District Court on the charge that he had, with others, conspired to murder one Maples, a negro, by lynching him, thus depriving him of his life without due process of law. It was claimed that those engaged in the conspiracy could be proceeded against on the theory that the Fourteenth and Fifteenth Amendments operated in individual action, as well as against State action. In sustaining this view of the case, Judge Jones made the following convincing comments on the general nature of due process of law:

> "The general duty of the state to afford due process of law to all persons is discharged, in the first instance, as we have seen, by the passage of proper legislation, and providing proper modes for securing the enjoyment of life, liberty, property, and the pursuit of happiness. This, however, is in no wise true of another phase of the duty, such as arises here, when the right to have due process at the hands of the state involves the enjoyment of the due administration of judicial procedure. When that is the case, there are many things which the state and its officers

must do or cause to be done, and in individual cases, by physical and mental operations, as distinguished from the exercise of legislative or political power, before the citizen can have the enjoyment at the hands of the state of due process of law. *When the state seeks to punish the citizen for a crime, it must not only give the accused a right to appear before a lawful tribunal, but it must afford the opportunity as well. Having put the accused in jail, it must keep him safely and bring him before that tribunal. When it brings him there, it must bring his witnesses there, if they will not come. In Alabama it must confront him with a panel of his peers, from among whom he and the state elect a jury. A judge must be there to give the jury the law, and the prisoner may except and appeal, if dissatisfied with his rulings. The judge and jury must hear counsel in the prisoner's defense. Then the state must cause the jury to retire, where they will be guarded from outside influence, while they deliberate upon the guilt or innocence of the defendant, and then come again in court, in the prisoner's presence, and return a verdict. The prisoner, if dissatisfied, may poll the jury. He has the right to present whatever he can to the judge before sentence is pronounced, if found guilty, and then to have the execution of the sentence suspended until his appeal to the Supreme Court can be heard.*

Is it not clear that private individuals who overpower state officers, when they are endeavoring to protect a prisoner accused of crime, whom they have confined to the end that both he and the state may exercise their respective functions and rights before a judicial tribunal, and wrest the prisoner from their custody, and then murder him to punish him for the crime, do, in the constitutional sense, as well as in every other sense, deprive the prisoner of the enjoyment of due process at the hands of the state, and prevent the state from affording it? *No one can deny that,*

under the Constitution, it is the prisoner's right to enjoy the workings of such due process, and that it is the duty of the state, under the Fourteenth Amendment, to dispense such justice to him. These rights cannot be enjoyed, or the duty enjoined upon the state discharged, except from the undisturbed workings of the machinery of justice after its power has once been put in motion, until the period arrives in the particular case where it may rightly stop. Until it has done its perfect work, the administration of due process, which in a case like this cannot be enjoyed except by the regular and orderly working of judicial procedure, is not afforded by the state. It may be true the state was not at fault; but that does not obliterate the fact that it was prevented from causing to be done the physical and mental acts which alone constitute the discharge of the duty in this case, and that by means of lawless violence, directed at the state and the prisoner alike, the prisoner has been prevented from enjoying the right to have the state do or cause to be done the physical or mental tasks which alone can afford him due process of law.

It cannot be contended, with any foundation in reason, that the right, privilege, or immunity of the accused to have due process at the hands of the state is neither derived from nor secured by the Constitution of the United States. The phrase 'due process' has had a well-defined meaning for ages. It had been previously employed in the Fifth Amendment. Putting it in the Fourteenth Amendment not only granted, but directly defined, certain specific rights which inure to the benefit of every person, alien as well as citizen, and are 'derived from, dependent upon, or secured by the Constitution of the United States.' The right thus created and defined, in a case like this, involving life and liberty, is the right to enjoy the benefits of all proceedings which constitute a trial according to 'the law of the land.' But it cuts deeper than this. The law of the land,

applying to all persons impartially, might not afford some of the rights which this clause of the Constitution grants and secures to the citizen and compels the state to afford. If, for instance, the state should deprive a person of the benefit of counsel, it would not be due process of law. It it allowed a private person to pass judgment on him for crime, it would not be due process. Within certain limits the state may change its remedies at pleasure, but it must be 'with due regard to the landmarks established for the protection of the citizen.' It must not exercise 'arbitrary power, or depart from the principles of private right and distributive justice.' As declared by the Supreme Court, the Fourteenth Amendment, in its requisition concerning due process, 'is not too vague and indefinite to operate as a practical restraint.' *Hurtado* v. *California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232.* As there declared, 'due process must, in the language of Mr. Webster, be, according to his familiar definition, the general law, or law which hears before it condemns, and which proceeds upon inquiry and renders judgment.' * * *

Under the due process clause, the vital essence of the grant, of what it shall consist, flows from the Constitution of the United States itself. It is beyond the power of the state in any way to withhold anything thus granted. From the very nature of the right, whenever the administration of due process involves the administration of judicial procedure, the state must not only pass fair laws, but through its officers must do, or cause to be done, certain physical and mental operations in individual cases, which operate directly upon a particular individual, the benefits of which he cannot enjoy unless the officers of the state are permitted to perform them or cause them to be performed, according to the established course of judicial procedure, when he is present and asserting his rights. Undoubtedly, then, private persons may defeat enjoyment, in the constitutional sense, of the right, privilege, or immunity of the citizen

to have the state afford him due process of law in many cases."

Further Authorities on the Right To Be Heard.

As illustrations of the application of the principle to *quasi* judicial power, we cite *Central of Georgia Railway* v. *Wright, 207 U. S. 127* and *Londoner* v. *Denver, 210 U. S. 385.*

In the first of these cases it was held that due process of law requires that opportunity to be heard as to the validity of a tax and the amount of the assessment be given to a taxpayer, who, without fraudulent intent and in the honest belief that he is not taxable, withholds property from tax returns, and this requirement is not satisfied where the taxpayer is allowed to attack the assessment only for fraud and corruption. The assessment of a tax is action judicial in its nature requiring for the exertion of the power such opportunity to appear as the circumstances of the case require, and this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining whether the taxpayer has been afforded due process of law. Mr. Justice Day said:

"In view of this statute as thus construed the question made is, whether due process of law is afforded where a taxpayer, without fraudulent intent and upon reasonable grounds, withholds property from tax returns with an honest belief that it is not taxable, and the assessing officer proceeds to assess the omitted property without opportunity to the taxpayer to be heard upon the validity of the tax or the amount of the assessment, either in the tax proceedings or afterward

upon a suit to collect taxes, or by independent suit to enjoin their collection. * * *

"It would be impossible to reconcile the different holdings in the State courts upon this subject. One class holds that upon the assessment of omitted property the taxpayer has no right to be heard, having by his failure to return submitted himself to 'the doom of the assessor.' Another class holds that in such cases there must be an opportunity to be heard before the taxpayer can be assessed, and that to deny him such right as a penalty for failure to return is a denial of due process of law secured to the taxpayer by many State Constitutions as well as the Fourteenth Amendment of the Constitution of the United States."

"Of course, this court, as the ultimate arbiter of rights secured by the Federal Constitution, is charged with the duty of determining this question for itself."

"Former adjudications in this court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson* v. *New Orleans, 96 U. S. 97; Weyerhauser* v. *Minnesota, 176 U. S. 550; Hager* v. *Reclamation District, 111 U. S. 701.*

"In the late case of *Security Trust & Safety Vault Co.* v. *The City of Lexington, 203 U. S. 323,* decided at the last term of this court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the taxpayer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the pro-

cedure in the State court gave the taxpayer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

"Applying the principles thus settled to the statutory law of Georgia, as construed by its highest court, does the system provide due process of law for the taxpayer in contesting the validity of taxes assessed under its requirements?"

Londoner v. *Denver* (*supra*), also involved the validity of an assessment for a local improvement. Mr. Justice Moody, dealing with the sufficiency of the hearing accorded by the legislature, said:

"In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this Court has regarded substance and not form. But where the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing. * * * It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization. If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the

case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal. *Pittsburg, &c. Railway Co.* v. *Backus, 154 U. S. 421, 426; Fallbrook Irrigation District* v. *Bradley, 164 U. S. 112, 171.* It is apparent that such a hearing was denied to the plaintiffs in error. * * * The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it."

In *City and County of Denver* v. *State Investment Co., 49 Col. 244, 112 Pac. Rep. 789, 33 L. R. A., N. S., 395,* which follows *Londoner* v. *Denver, 210 U. S. 373,* the court said:

"Unless the law authorizing the assessment expressly or by implication, provides for notice to the owner of the property to be affected, and gives him an opportunity to be heard at a specified time and place, before board or tribunal competent and ready to administer proper relief, concerning the correctness of the charge, before it is made conclusive, the constitutional guaranty that no person's property shall be taken withiut due process of law has been infringed. *Brown* v. *Denver, 7 Colo. 305, 3 Pac. 455.* Notice or citation of the time and place for hearing, or possibly a waiver thereof by the property owner, was therefore essential to vest in the council the power to create a valid lien for the cost of the improvement, and it was likewise essential that the hearing be before a tribunal competent to act. The denial to a party in such a case of the right to appear and to be fully heard is, in legal effect, a recall of the citation to him. *Windsor* v. *McVeigh, 93 U. S. 274.*

* * * A judgment, finding or decree rendered under such circumstances is an arbitrary edict without the sanction of law. As stated by Brannon, in his work on the 14th Amendment, page 251: 'Though there be service of process, yet, if the defendant is not allowed to make his defense, it is a withdrawal of the summons, 'a 'denial of the benefit of a notice, and would in effect be to deny that he was entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether,' because judgment without hearing is void.' * * * It certainly cannot be said that a party has had a hearing when he has been called to appear, or appears, before a tribunal with power to act and grant relief, and which recognizes that such party is entitled to the relief for which he prays, yet disclaims in itself power and authority in the premises, and refuses to hear evidence and act upon the matter. The right to property and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial."

The appellee will doubtless cite many decisions of this Court, in which it was held that the various statutes and proceedings affecting criminal and *quasi* criminal procedure in State courts, which were the subject of consideration, did not constitute a denial of due process of law. Of these cases, we deem it important to consider the following:

Decisions Probably Relied on by the State.

Hurtado v. *California, 110 U. S. 516.*
Allen v. *Georgia, 166 U. S. 138.*
Brown v. *New Jersey, 175 U. S. 172.*
Maxwell v. *Dow, 176 U. S. 581.*
Simon v. *Craft, 182 U. S. 427.*
Twining v. *New Jersey, 211 U. S. 78.*
Hammond Packing Co. v. *Arkansas, 212 U. S. 322.*
Jordan v. *Massachusetts, 225 U. S. 167*
Garland v. *Washington, 232 U. S. 642.*

We believe all of these cases to be distinguishable from the present, and in order to point out the differences which exist between them and this, and the recognition in them of the fundamental principles on which we rely, we take the liberty of quoting at some length from the opinions rendered, declaring at the outset, that it is not our contention that the appellant's enforced absence from the court at the time of the reception of the verdict, was a mere interference with a privilege or immunity, but that it amounted to a deprivation of due process of law, within the meaning of the Fourteenth Amendment.

Hurtado vs. *California.*

In *Hurtado* v. *California, 110 U. S. 516*, it was held that the words "due process of law" in the Fourteenth Amendment, do not necessarily require an indictment by a grand jury in a prosecution by a State for murder. After discussing the various definitions of the phrase, among them the language of Mr. Justice Miller in *Davidson* v.

New Orleans, 96 U. S. 97-105. "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case," Mr. Justice Matthews said:

"We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. * * * According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth

Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. * * *

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and National, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communi-

ties to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law."

Allen vs. *Georgia.*

In *Allen* v. *Georgia, 166 U. S. 138,* the prisoner had been convicted in the State court of murder, and sued out a writ of error from the Supreme Court of the State. On the day assigned for its hearing it appeared that he had escaped from jail and was a fugitive from justice. The court thereupon ordered the writ of error dismissed, unless he should within sixty days surrender himself or be recaptured, and when that time passed without either happening, the writ was dismissed. He was afterwards recaptured, and resentenced to death, whereupon he sued out a writ of error to this Court, assigning as error that the dismissal of his writ by the Supreme Court of Georgia was a denial of due process of law. This contention was denied, and in the course of the opinion Mr. Justice Brown said:

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a

State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. *The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.*

"We cannot say that the dismissal of a writ of error is not justified by the abandonment of his case by the plaintiff in the writ. By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offense; and it seems but a slight punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction."

Brown vs. *New Jersey.*

In *Brown* v. *New Jersey, 175 U. S. 172,* the question was presented as to whether a trial by a struck jury constituted due process of law. Dealing with this subject Mr. Justice Brewer said:

"The State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. Ex parte Reggel, 114 U. S. 642; Iowa Central Railway* v. *Iowa, 160 U. S. 389; Chicago, B. & Q. Railroad* v. *Chicago, 166 U. S. 226.* * * *

"In providing for a trial by a struck jury, empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of se-

lection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to *select* jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert, 116 U. S. 642.* The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained.' *Hayes* v. *Missouri, 120 U. S. 68, 71.*"

Maxwell vs. *Dow.*

In *Maxwell* v. *Dow, 176 U. S. 581,* the Court, following *Hurtado* v. *California,* decided that the trial of a person accused as a criminal by a petit jury of only eight persons instead of twelve, and his subsequent imprisonment after conviction, do not deprive him of his liberty without due process of law. Whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether, in case of an infamous crime, a person shall be only liable to be tried after presentment or indictment by a grand jury, are questions properly to be determined by the citizens of each State for themselves. Following the *Slaughter House Cases,* it was further held that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight Amendments to the Constitution against the powers of the Federal Government. Mr. Justice Peckham said:

"The question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado case, supra.* The distinct question was

there presented whether it was due process of law to prosecute a person charged with murder by an information under the State Constitution and Law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a petit jury of the number fixed by the common law. If the State have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado case* was decided are to be found gathered in *Hodgson* v. *Vermont, 168 U. S. 262; Holden* v. *Hardy, 169 U. S. 366, 384; Brown* v. *New Jersey, 175 U. S. 172; Bolln* v. *Nebraska, 176 U. S. 83.*

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado case* is a trial by jury mentioned as a necessary part of such process. * * * As was stated by Mr. Justice Brewer, in delivering the opinion of the court in *Brown* v. *New Jersey, 175 U. S. 172,* the State has full control over the procedure in its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.* The legislation in question is not, in our opinion, open to either of these objections."

Simon vs. *Craft.*

In *Simon* v. *Craft, 182 U. S. 427,* it was held that a person charged with being of unsound mind is not denied due process of law by being refused an

opportunity to defend, when, in fact, actual notice was served on him of the proceedings, and when, if he had chosen to do so, he was at liberty to make such defense as he deemed advisable. The due process clause in the Fourteenth Amendment to the Constitution does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an oppirtunity afforded to defend against it. Mr. Justice White said:

"The contention now urged is that notice imports an opportunity to defend, and that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred that the State court interpreted the statute—that the purpose in the command of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial,' was to enforce the attendance of the alleged *non compos*, rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in a fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of this duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing

herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting. The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230.* We cannot, then, even on the assumption that Mrs. Simon was of sound mind and fit to attend the hearing, hold that she was denied due process of law by being refused an opportunity to defend, when, in fact, actual notice was served upon her of the proceedings, and when, as we construe the statute, if she had chosen to do so, she was at liberty to make such defense as she deemed advisable. The view we take of the statute was evidently the one adopted by the judge of the probate court, where the proceedings in lunacy were heard, since that court, upon the return of the sheriff, and the failure of the alleged lunatic to appear, either in person or by counsel, in order to protect her interests, entered an order appointing a guardian *ad litem* 'in the matter of the petition to inquire into her lunacy;' and an answer was filed by such guardian denying all the matters and things stated and contained in the petition, and requiring strict proof to be made thereof according to law.''

Twining vs. *New Jersey.*

In *Twining* v. *New Jersey, 211 U. S. 78,* the question presented was whether exemption from compulsory self-incrimination in the State courts was secured by the Federal Constituion. In a masterly opinion, Mr. Justice Moody dealt with this subject from two points of view, first, whether such exemption was a privilege and immunity, and second, whether its denial was a deprivation

of due process of law within the meaning of the Fourteenth Amendment.

Dealing with the first proposition, the Court, following the decision in the *Slaughter House Cases, 16 Wall. 36,* decided that privileges and immunities, although fundamental, which do not arise out of the nature and character of the National Government, or are not specifically protected by the Federal Constitution, are attributes of State, and not of National, citizenship; that the first eight Amendments are restrictive only of National action, and that while the Fourteenth Amendment restrained and limited State action, it did not take up and protect citizens of the States from action by the States as to all matters enumerated in the first Eight Amendments. On the other hand, privileges and immunities of citizens of the United States were declared to be only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. The exemption from compulsory self-incrimination was declared not to be one of these.

Dealing with the second question, as to whether self-incrimination was a denial of due process of law, Mr. Justice Moody pointed out that, viewed historically, such exemption did not form part of the law of the land prior to the separation of the colonies from the mother-country, that it was therefore not one of the fundamental rights, immunities and privileges of citizens of the United States, and that the fact that exemption from compulsory self-incrimination was specifically enumerated in the guarantee of the Fifth Amendment, tended to show that it was to be regarded as a

separate right and not as an element of due process of law. In the course of this discussion the Court said (*p. 100*):

"What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray v. Hoboken Land Co.,.18 How. 272, 280.*"

At *page 106* he said:

"But without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law."

At *page 107* he says:

"The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, State or National, for they are secured otherwise, but the rights fundamental in due process, and therefore