an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? * * * None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the 'law of the land' there secured."

He then pointed out that it was not included in the Petition of Right or in the Bill of Rights, or in most of the Constitutions of the original States, and then proceeds (*p. 110*):

"The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here confronted with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. *We need*

notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. *Neff, 95 U. S. 714, 733; Scott* v. *McNeal, 154 U. S. 34; Old Wayne Life Association* v. *McDonough, 204 U. S. 8,* and *that there shall be notice and opportunity for hearing given the parties, Hovey* v. *Elliott, 167 U. S. 409; Roller* v. *Holly, 176 U. S. 398;* and see *Londoner* v. *Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries,* this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. * * *

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases *proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard,* then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa, 160 U. S. 393*: 'But it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, *provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be*

heard before the issues are decided;' and in *Louisville & Nashville Railroad Co.* v. *Schmidt, 177 U. S. 230, 236*: 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State courts or regulate practice therein. All its requirements are complied with, *provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;'* * * *

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property.''*

Hammond Co. vs. *Arkansas.*

In *Hammond Packing Co.* v. *Arkansas 212 U. S. 322,* the constitutionality of the provisions of the anti-trust statute of Arkansas and the validity of the proceedings in the State courts thereunder, were in question. The action was brought to recover statutory penalties for a violation of the law. The act required corporations to produce books and papers, and upon the refusal of the corporation to comply with that requirement, the answer, motion, demurrer, or other pleading filed by the corporation, was on motion of the Attorney General or Prosecuting Attorney to be stricken out and judgment rendered against the

corporation. Dealing with that provision, Mr. Justice White said:

"Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by §9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey* v. *Elliott, 167 U. S. 409,* and the previous cases in this court which were there cited and applied. The ruling in *Hovey* v. *Elliott* was that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the Fourteenth Amendment. There the power to strike out and punish was exerted, by the court, in virtue of what it assumed to be its inherent authority, and the occasion which caused the exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the ninth section of the statute furnishes no ground for taking this case out of the ruling in *Hovey* v. *Elliott,* if otherwise controlling. The fundamental guarantee of due process is absolute and not merely relative. The inherent want of power in a court to do what was done in *Hovey* v. *Elliott* was in that case deduced from no special infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the Government without transgressing the constitutional safeguard as to due process, at all time dominant and controlling where the Constitution is applicable. Indeed in *Hovey* v. *Elliott* the impotency of the legislative depart-

ment to endow the judicial with the capacity to disregard the Constitution was emphasized. But while this is true the question yet remains, Is the doctrine of *Hovey* v. *Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if from doing so *it results that the authority exerted flows from a reservoir of unquestioned power it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power and not a mere incidental result arising from its exertion is the criterion by which its validity is to be measured. Hovey* v. *Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default.* The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, *as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey* v. *Elliott, and the power exerted in this, is as follows: In the former the process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the*

other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception therefore the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.''

Jordan vs. *Massachusetts.*

In *Jordan* v. *Massachusetts, 225 U. S. 167,* the accused had been convicted by a jury and sentenced to death. After the verdict one of the jurors became insane, and the court, after an inquiry had in accordance with the established procedure of the State, found by a preponderance of evidence that the juror was of sufficient mental capacity during the trial to act as such, and therefore refused to set the verdict aside. Dealing with this subject Mr. Justice Lurton said:

''Subject to the requirement of due process of law, the States are under no restriction as to their method of procedure in the administration of public justice. *That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned.* 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law, this court has up to this time sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.' * * *

"Due process implies a tribunal both impartial and mentally competent to afford a hearing. But to say that due process is denied when a competent State court refuses to set aside the verdict of a jury because the sanity of one of its members was established by only a preponderance of evidence, would be to enforce an exaction unknown to the precedents of the past, and an interference with the discretion and power of the State not justified by the demands of justice, nor recognized by any definition of due process.

"In criminal cases due process of law is not denied by a State law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether. *Hurtado* v. *California, 110 U. S. 516; Maxwell* v. *Dow, 176 U. S. 581. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present,* the power of a State over its methods of procedure is substantially unrestricted by the due process clause of the Constitution."

Garland vs. *Washington.*

In *Garland v. Washington, 232 U. S. 642,* the plaintiff in error claimed that he had been deprived of due process of law, because he had been convicted and sentenced on an information on which he had never been arraigned and to which he had never pleaded, and relied on *Crain v. United States 162 U. S. 625.* This contention was overruled, but upon grounds which sustain rather than combat our present contention. Thus Mr. Justice Day said:

"It is apparent that the case was tried and convicted upon an information charging an offense against the law; that he had a jury trial, with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him, was fully subserved in this case, for the accused had taken objections to the second information and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the Supreme Court of Washington, following its former decisions, held that the failure to enter the plea and deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution.

"Due process of law, this court has held, does not require the State to adopt any particular form of procedure, *so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Roger v. Peck, 199 U. S. 425, 435,* and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment *deprived the accused of any substantial right or in any wise changed the course of trial to his disadvantage.* All requirements of due process of law in criminal trials in a State, as laid down in the repeated decisions of this court, were fully met by the proceedings had against the accused in the trial court."

The case of *Crain* v. *United States, 162 U. S. 625*, was then considered, and the opinion continues:

"If a legal trial cannot be had without a plea to the indictment duly entered of record before trial, it would follow that such omission in the present case requires a reversal of the judgment of conviction, because the prisoner has been deprived of due process of law."

Appellee's Cases Distinguished.

While, in *Hurtado* v. *California*, it was declared to be within the power of the State to abolish the grand jury, and in *Maxwell* v. *Dow*, that it was within its power to abolish the petit jury, it by no means follows that one accused of crime in a State which has preserved these ancient institutions, may, without an indictment be tried before a judge without a jury, and be said thereby to be accorded due process of law. Nor would he in such a State, if tried before a common law jury, in accordance with the mode of procedure prevailing therein, be condemned by due process of law, if he were not permitted to be present on the trial, or if his presence were permitted during a part of the trial only. In the latter instance, he would be deprived of the hearing, or opportunity to be heard, without which due process is inconceivable. In other words, whatever the tribunal may be which is to pass upon his guilt or innocence he is deprived of due process unless he is enabled to defend himself before that tribunal, and to avail himself of his right to be heard, in such manner as is adapted to the nature and character of that tribunal and its modes of proce-

dure consonant with the ordinary principles of liberty and justice.

Allen v. *Georgia* related merely to a hearing on appeal after conviction. The right to appeal has never been regarded as a fundamental right. Moreover, Allen had lost the right to prosecute his appeal by his voluntary act. The distinction between a case like the present and *Allen* vs. *Georgia* was concisely stated by Mr. Justice White in *Hovey* vs. *Elliott, 167 U. S. 443,* as "between the inherent right of defence secured by the due process of law clause of the constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal."

Simon v. *Craft* was not a criminal case. It related to proceedings against one *non compos mentis,* who was given the right to a hearing but apparently did not avail herself of that right, and who was represented in the proceedings by a guardian *ad litem.*

Twining v. *New Jersey* related merely to immunity from self-crimination, which was shown by historical research not to be inherent in due process; and in that respect was distinguished from *Hovey* v. *Elliott, Scott* v. *McNeal* and *Londoner* v. *Denver,* which declared that the right to be heard constituted a fundamental prerequisite to due process of law.

Hammond Packing Co. v. *Arkansas* merely involved a rule of evidence which created a legal presumption, preservative rather than destructive of due process.

In *Jordan* v. *Massachusetts* and *Garland* v. *Washington,* there was not the slightest interfer-

ence with the right of the accused to be heard. In fact, in both cases, there was shown to have been a full and fair hearing.

Here, however, as the record unmistakably shows, the appellant was denied the right to be heard, not with his consent or approval, not because of his voluntary act, but by reason of the active and affirmative intervention of the court, which coerced his counsel, not only to consent without authority that the appellant should not be present at the rendition of the verdict, but also that the counsel should absent themselves at that time, by inspiring the fear that if the accused or his counsel were present in court at the reception of the verdict, and the jury should either acquit him or disagree, their lives would be imperiled by the hostile mob, which the presiding judge confessed himself to be unable to quell or to control, and which, in consequence, dominated the trial and paralyzed the orderly processes of law.

Ong Chang Wing v. *United States, 218 U. S. 280.*

The Right of the Accused to be Present at Every Stage of his Trial Essential to The Right to be Heard.

The constitutional right or opportunity to be heard, is not to be treated literally. It is not confined to the mere right of one accused of crime to appear in court and make a statement of his defense. It comprehends the right to defend, in person and by counsel, in the fullest sense of the term; to aid in the selection of the jurors; to hear

the allegations and proofs of the prosecution; to interrogate witnesses; to adduce testimony; to hear the rulings and instructions of the court; to see, and to be seen by, the jury, not while merely flitting in and out of the court-room, but during the entire proceedings. If he may be involuntarily kept out of or removed from the court-room at the last stage of the trial, it may be done at any other or at all othe rstages of the trial—during the selection of the jurors, the taking of testimony, the argument, or the charge. It is impossible to draw a line as to when his enforced absence would be either permissible or not allowable. The law has no way of determining at what moment of the trial his presence may be imperatively necessary for his protection, and has no way of knowing to what degree he has been injured, or what opportunities of defense he may have lost by his absence. Hence the only safe rule is to render his presence at every stage indispensable.

The law simply cannot permit any infraction whatever, be it of apparent consequence or not, of the defendant's right to be present at every moment of the trial. In a criminal case, where a prisoner is not required to become a witness, or in some jurisdictions, as in Georgia, where he cannot become a witness in his own behalf, but is merely permitted to make a statement "which shall not be under oath", (Penal Code, §§1036, 1037), he is nevertheless in evidence from the beginning to the end of the trial. His demeanor and conduct, his equanimity or excitement, his mere presence, constitute potent factors in the hearing, or opportunity to be heard, to which he is entitled under the Constitution. His personality speaks for him continuously. Who can say when

the decisive impression is made on the minds of those who sit in judgment? A jury may be, as it often has been, inclined in favor of the accused at the final moment of the trial, at the very instant when the verdict is to be pronounced, by his actions, which, to use a familiar and psychologically accurate phrase, often speak louder than words. It has been known that, even at that supreme period when the jury and the accused are brought face to face, a verdict of guilty agreed upon in the jury room, in the absence of the prisoner, has been withheld in his presence, and one of acquittal rendered. It is one thing to condemn a man *in absentia*. It is another, to look into his countenance and to declare his doom.

In *Nolan* v. *State, 55 Ga. 522,* Mr. Justice Bleckley refers to such a case:

"Many years ago, in the County of Fayette, I witnessed the polling of a jury on the return of a verdict of guilty, where the eleven jurors first called declared the verdict to be theirs, and only the twelfth man disowned it. The result was, that on considering the case, the whole twelve agreed to a verdict of not guilty, and the prisoner was acquitted."

This thought is also expressed with great felicity by Chief Justice Gibson in *Prine* v. *Commonwealth, 18 Pa. St. 103,* in language which was cited with approval by Mr. Justice Shiras in *Lewis* v. *United States, 146 U. S. 372*:

"It would be contrary to the dictates of humanity to let him (the accused) waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

In other words, the hearing or opportunity to be heard to which a defendant, especially in a capital case, is entitled, continues down to the very moment when the jury is actually discharged. This opportunity to be looked at by the jury is, in such a case, an opportunity to be heard, and may prove a most effective hearing. The human element continues to operate. The accused is a reality and not a mere abstraction. The eyes of the jury serve as the means of conveying to their minds an impression often more convincing than that which is borne through their ears. The accused is engaged in testifying to his guilt or innocence, to an intelligent observer, during every moment of his trial, even though he remain silent.

In *Rex* v. *Ladsingham, Sir T. Raym, 193*, it was quaintly said:

"'Tis intended that no privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there present at the same time."

Emphasis is also laid in various of the authorities on the fact that, "at the rendition of the verdict, the prisoner is entitled to have the jury polled, so that each one shall answer on his own responsibility, *face to face with the prisoner*, as to his guilt or innocence."

Dunn v. *Commonwealth, 6 Pa. St. 384.*
Temple v. *Commonwealth, 14 Bush, Ky., 769.*
Nolan v. *State, 55 Ga. 522.*

The importance of observing the demeanor of the accused by the jury, is exemplified in *Rhodes* v. *State, 128 Ind. 189, s. c. 27 N. E. Rep. 866,* where a new trial was granted to a convicted defendant upon proof that the eyesight of one of the jurors was so defective that he was unable to distinguish one from another of the faces of the witnesses.

2 Moore on Facts, §§991-995.

Section 5732 of the Code of Georgia of 1910 recognizes the importance in the determination by a jury of an issue submitted to it, that it shall consider among other things "all the facts and circumstances of the case, *the witnesses' manner of testifying,* their intelligence" etc.

It is also conceivable, that before the verdict was rendered the accused might have asked the Court, and have been granted an opportunity to address the jury, or to make a forgotten or newly conceived suggestion bearing upon his defense, which might have exerted a controlling influence upon the minds of the jurors, or of some one of them; or he might have moved for a mistrial or made other appropriate motions.

The Right of the Accused to be Present at the Reception of the Verdict.

In the light of these elementary considerations, it becomes important to ponder the authorities which, with remarkable unanimity, have laid down the rule, that the reception of a verdict against one accused of a felony, in his absence and without his consent, he being at the time confined in

jail, is a nullity. In the Appendix printed at the end of the argument, is to be found a collation of all the decisions bearing on this subject, which we have been enabled to discover after a careful search. The decisions of this Court will be presently discussed. Where the name of any State does not appear in the list, it is because no decision is found in its reports dealing with the question. The States included are Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin. There is also a decision by the United States Court of Claims, and excerpts from various text writers and common law authorities follow.

From this array of authority, there is but one conclusion to be drawn, namely, that one accused of a capital offense may not be tried in his absence, and that a verdict received while he is incarcerated in jail, and all proceedings based thereon, are *coram non judice* and absolute nullities.

In *Cooley's Constitutional Limitations, Second Edition, §452,* that distinguished author says:

"In cases of felony, where the prisoner's life or liberty is imperiled, he has the right to be present and must be present, during the whole of the trial and until the final judgment. If he be absent, either in prison or by escape, *there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.*"

In *McGehee on Due Process, pp. 164, 165, 168,* the author says:

"In criminal trials certain matters pertaining to procedure have been declared to involve fundamental rights, of which the person accused of crime may not be deprived without the denial of due process of law, while others are matters of form only. Generally, whatever matters are jurisdictional are essential and protected by the Constitution; matters which do not affect the competency of the court are not jurisdictional and are not protected. * * * So, also, under the same provision, (Fifth Amendment), the right of a person accused of felony, to be present during the whole of the trial, in the trial court, is a substantive right of which he cannot be deprived without due process of law, even with his consent."

Attention is also directed to the discussion of this subject in *1 Bishop's New Criminal Procedure, Edition 1913, §§265-274.*

The Georgia Decisions.

The decisions of Georgia bearing upon this point are clear and outspoken, and with one accord recognize the applicability of this principle to circumstances precisely like those detailed in the present record. In fact the Supreme Court of Georgia, in the opinion rendered on the denial of the appellant's motion to set aside the verdict rendered against him, in so many words announced that "it is the right of a defendant on trial for crime in this State to be present at every stage of his trial, and to be tried according to established procedure."

Although all of the Georgia decisions are to be found in the Appendix, we deem it desirable at this time to call attention to a number of the more important ones.

In *Nolan* vs. *State, 53 Ga. 137,* the defendant had been indicted for murder, and the jury returned a verdict finding him guilty of voluntary manslaughter, the verdict being rendered in his absence. A motion in arrest of judgment was made on that ground, and was held not to be the proper method for raising the question sought to be presented, and the judgment was affirmed. The Court, however, pointed out that the proper remedy was by motion to set aside the verdict, because the defendant's absence when the verdict was rendered was a fact extrinsic of the record. Chief Justice Warner concisely declared:

> "That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court."

After this affirmance of the conviction of Nolan by the Supreme Court, a motion was made in the court of first instance, to set aside the verdict on the ground that it had been rendered and published in his absence, and the motion was granted. The effect of granting this motion was subsequently considered in *Nolan* vs. *State, 55 Ga. 522.* In the course of his opinion, Mr. Justice Bleckley said:

> "The error of receiving a formal verdict in the prisoner's absence would be nothing if the

jury had been retained in the box and required to render a valid one in his presence. The mischief was done by discharging the jury without any legal necessity, and without obtaining from it something that the law could recognize as a verdict. The prisoner was once fully in the power of that jury, and he had a right to such a verdict, *as each several juror could avow before his face.*"

In *Bonner* vs. *State, 67 Ga. 510,* Chief Justice Jackson said:

"The presence of the prisoner is necessary to his legal trial from the beginning to the end of that trial before the jury. *12 Ga. 25.* And such was the rule and practice at common law. *Wharton's Crim. Plead & Prac. 540a, 545, 546, 549, 550.*"

In *Barton* v. *State, 67 Ga. 653,* Chief Justice Jackson said:

"It is the right of the defendant in cases of felony, and this is one, to be present at all stages of the trial—*especially at the rendition of the verdict,* and if he be in such custody and confinement by the court as not to be present unless sent for and relieved by the court, the reception of the verdict during such compulsory absence is so illegal as to necessitate the setting it aside on a motion therefor. *Nolan* v. *State, 53 Ga. 137; Ib. 55, 521.* The principle thus ruled is good sense and sound law; because he cannot exercise the right to be present at the rendition of the verdict when in jail, unless the officer of the court brings him into court by its order."

This language was quoted with approval in *Diaz v. United States, 223 U. S. 456.*

In *Bagwell* v. *State, 129 Ga. 170, s. c. 58 S. E. Rep. 650,* which was also a conviction of murder,

it appeared that, after the case had been submitted to the jury, the court, without the defendant's *consent* and in his absence, he being at the time confined in jail, and in the absence of his counsel, discharged the jury without a verdict on the ground of *their inability* to agree. The validity of this act as applicable to a subsequent trial, was presented on a review of a judgment of conviction. In the course of its opinion the court said:

"It has been frequently held by this court that it is the right of the accused charged with a felony to be present at every stage of his trial, including his arraignment or waiver thereof (*Wells* v. *Terrell, 121 Ga. 368, s. c. 49 S. E. 319*), reading to the jury notes of the evidence taken by the court (*Wade* v. *State, 12 Ga. 25*), the argument of counsel for the State (*Tiller v. State, 96 Ga. 430, 23 S. E. 825*), during the charge of the court (*Hopson* v. *State, 115 Ga. 90, 42 S. E. 412*), and at the *rendition of the verdict* (*Nolan* v. *State, 53 Ga. 137, 55 Ga. 521, 21 Am. Rep. 281; Barton* v. *State, 67 Ga. 653, 44 Am. Rep. 743*)."

In *Cawthon* v. *State, 119 Ga. 395, s. c. 46 S. E. Rep. 897*, Mr. Justice Cobb said:

"Where the accused is in custody, and does not consent that the verdict shall be received in his absence, the reception of the verdict while he is thus involuntarily absent will render the same illegal. *Nolan* v. *State, 53 Ga. 137, s. c. 55 Ga. 521; Rose* v. *State, 20 Ohio, 31; People* v. *Perkins, 1 Wend. 91; State* v. *Ford, 31 La. Ann. 311.*"

In *Lyons* v. *State, 7 Ga. App. 50, s. c. 66 S. E. Rep. 149*, the defendant had been convicted of a felony, the verdict being rendered while he was absent in jail. An order denying his application to set aside the verdict was entered, but on ap-

peal was reversed. Chief Judge Hill, after citing with approval the opinions in *Nolan* v. *State* and *Barton* v. *State, supra,* said:

"It cannot be questioned that the defendant had a right to be present during the whole of the trial and until the rendition of the verdict. This is a right so clearly and generally established that we deem it unnecessary to cite any authority. In some jurisdictions it is held that this right is limited to cases of felony, but the Penal Code of this State makes no distinction in this respect between felonies and misdemeanors. The accused has the right in all criminal cases to be present during the entire trial, not only in person, but also by his counsel. *Const. Ga. art 1, §1, par. 4.* 'The presence of the counsel was no substitute for that of the man on trial. Both should have been present.' *Bonner* v. *State, 67 Ga. 510; Martin* v. *State, 51 Ga. 567; Wilson* v. *State, 87 Ga. 584, 13 S. E. 566.* 'The great point is that the accused and his counsel have the right to be present at every stage of the proceedings and personally see and know what is being done with the case.' *Bagwell* v. *State, 129 Ga. 172, 58 S. E. 650.*"

There is thus an unbroken line of authority in Georgia, which announces, in unqualified terms, the rule making the presence of a defendant charged with felony, at the time of the rendition of a verdict against him, where he is in the custody of the court at the time of the trial, a prerequisite to a legal trial.

The Decisions of this Court.

This doctrine is clearly recognized by the decisions of this Court, and has been applied under conditions identical in character with those existing here.

Thus, in *Hopt* vs. *Utah, 110 U. S. 574,* it was held that the trial of challenges to proposed jurors in felony cases, by triers appointed by the court, must be had in the presence of the accused as well as of the court; and that the presence of the accused cannot be dispensed with. Mr. Justice Harlan said:

"The prisoner is entitled to an impartial jury composed of persons not disqualified by statute and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins."

And we may add that, necessarily, that right to be present only ends when the verdict of the jury has been rendered.

That part of the opinion which deals with this proposition, concludes as follows:

"Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for a felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

In *Ball* v. *United States, 140 U. S. 118*, Chief Justice Fuller said:

"At common law no judgment for corporal punishment could be pronounced against a man in his absence, and in all capital felonies it was essential that it should appear of record that the defendant was asked before sentence if he had anything to say why it should not be pronounced."

In *Schwab* vs. *Berggren, 143 U. S. 442, 448,* the defendants were convicted of murder in the State Court of Illinois. An appeal was taken to the Supreme Court, where there was an affirmance. The defendants were not present upon the affirmance of the judgment, and it was claimed that this fact brought the case within the principle requiring the presence of a prisoner at every stage of the trial. A writ of habeas corpus was sued in the United States Circuit Court to procure the defendant's discharge because of their absence from the appellate tribunal at the time of the announcement of its decision. A demurrer to the petition was sustained, and the case was then brought here. Although this Court held that the rule relating to the presence in court of one accused did not require his presence at the time of the affirmance of his conviction on appeal, the principle for which we here contend was nevertheless emphatically recognized by Mr. Justice Harlan, who said (p. 448):

"The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

In *Lewis* vs. *United States, 146 U. S., 370,* it was held to be error to permit challenges to be made to jurors whose names appeared on the jury lists, in the absence of the defendant. Mr. Justice Shiras, speaking for the Court, said:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The point made was that the accused had been required to challenge the jury from a list, and without an opportunity of first seeing the jurors face to face.

Dealing with this proposition the opinion continues:

"Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

In *Dowdell* vs. *United States, 221 U. S. 331,* Mr. Justice Day said:

"In *Hopt* v. *Utah, 110 U. S. 574,* this court held that due process of law required the accused to be present at every stage of the trial."

In *Diaz* vs. *United States, 223 U. S. 442, 455,* speaking of the necessity for the presence at every stage of the trial of a defendant on trial for felony, who is not at large on bail, Mr. Justice Van Devanter said:

> "In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury *and the reception of the verdict,* and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one, because his presence or absence is not within his own control, and the other because, in addition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction."

The opinion then quotes at length from that of the Supreme Court of Georgia in *Barton* vs. *State, supra,* the passage which we have above quoted.

In this connection, we refer to *Hibben* vs. *Smith, 191 U. S. 310,* where it was held that the due process clause of the Fourteenth Amendment places the same inhibition on the States as does the Fifth Amendment upon the Federal Government. This makes the decisions of this Court, above quoted, especially important in the present case.

See also *French* vs. *Barber Asphalt Paving Co., 181 U. S. 324.*

In *Maurer* vs. *The People, 43 N. Y. 1,* a conviction was reversed where, on a trial for murder,

after the jury had retired to deliberate on its verdict, it returned into court and asked certain questions as to what had been the evidence on particular points, to which the court gave the information requested in the presence of the prisoner's counsel, the prisoner being absent. It was held that this was a proceeding upon the trial, and the prisoner not being present, the action of the Court was illegal. Judge Grover said:

"The clause, 'during such trial,' as used in the statute [a mere codification of the common law]. includes all proceedings had in empaneling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, receiving and recording the verdict. In all these proceedings, the legislature has deemed the presence of the accused essential to the attainment of justice and the protection of the innocent. The charge of the court to the jury includes all instructions of the court to the jury upon points of law, and all comments upon the evidence. Those familiar with trials for crime must be aware that the presence of the accused is quite as necessary and important to him during the latter as the former."

II.

Not only was the appellant deprived of due process of law, because he was by the action of the court, kept out of the court-room when the verdict was rendered, but the entire proceedings became coram non judice, because of mob domination, to which the presiding judge succumbed and which in effect wrought a dissolution of the Court.

In his petition the appellant avers (*Rec. p. 8*):

> "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 to the Constitution of the United States, the protection of which I expressly invoke."

The petition shows throughout, that the crowds which gathered, both within and without the court room, were boisterous, were inimical to the appellant and his counsel, and gave evidence of intense partisanship in favor of the prosecution, to such a degree that the presiding judge became thoroughly alarmed, and, in the presence of the jury, conferred with the Chief of Police of Atlanta and the Colonel of the Fifth Regiment stationed there, who were well known to the jury.

The public press of Atlanta as well, apprehending danger on the Saturday preceding the submission of the case to the jury, if the trial continued on that day, united in a request to the court that the proceedings should not continue on Saturday evening. Although this request was heeded and the trial was adjourned until the following Monday, public excitement did not subside, but continued as intense as it had previously been.

Instead of quelling the outbursts of the mob, or seeking to control its demonstrations, or asserting the judicial power and enabling justice to pursue its uninterrupted sway, the Court surrendered and abdicated its functions, and temporized with those whose lawlessness defied the duly constituted authorities, at the decisive moments of the trial, and permitted itself to be coerced, by ominous threats of prejudice and by the terrors of violence, into denying one of the most substantial and elementary rights of the man whose steadfast insistence on his innocence had inflamed the hostile passions of his enemies. What the court did at this important moment, which meant life or death to the accused, was a judicial admission that the administration of justice had broken down, that its proceedings were controlled by the mob, that it was powerless to protect the man on trial in his legal rights, and that fear of its action hovered like an evil spell over the tribunal which was to hear and decide his guilt or innocence without the intervention of unauthorized participants.

Thus influenced by considerations irreconcilable and inconsistent with due process of law, with the avowed purpose of avoiding an outburst from the dominating mob which might result in

the murder of the prisoner at the bar and of his counsel, in the very sanctuary of the law, entitled though they there were to its protection, the Court drove them forth from the forum where they were struggling for the appellants' life and left it in the unrestrained possession of the prosecution, and of those who came to desecrate the temple of justice, to exercise upon the jury the same constraint that they had successfully brought to bear upon the court.

The trial to which the appellant was entitled, as part of that due process which was guaranteed to him by the Constitution, was a fair trial. As was well said by Judge Vann in *People* v. *Wolf, 183 N. Y. 472*:

> "An unfair trial, especially in a criminal case, is a reproach to the administration of justice and casts grave responsibility not only upon the prosecuting officer but also upon the trial judge. * * * A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law."

Here, the trial was permitted to degenerate into a judicial lynching, when the mob triumphantly intervened and was permitted to control and dominate the instrumentalities of juridical procedure, to terrify the Court itself, and neutralize the judicial function. There was no longer a court or a jury. They were as though they had never been. There ceased to be a trial or a hearing, or an opportunity to be heard. For all practical purposes, the court might as well have handed the appellant over to the tender mercies of the boisterous bystanders who were clamoring for his blood, as to proceed with the formality of a

trial which ceased to be an inquiry into the appellant's guilt, and became a mere plaything of unrestrained lawlessness.

It is true that neither the court nor the jury was physically attacked, but it is impossible to believe, from the facts which stand uncontradicted on the record, that the jury was not made to feel that its only function was to register the will of the mob. When the jurors returned into the court room, and found the prisoner absent, and his counsel absent, with none to look into their faces but the excited multitude, and when, after the first juror had been polled, the tumult of applause and the cheers that were bellowed were so resounding as to prevent the responses of the jurors as they were polled, from being heard ten feet away, is it possible to believe that these jurors acted as free moral agents, or that they were not subjected to a species of duress that swept from their minds every thought save that of personal jeopardy?

A trial amid such concomitants, is a mere travesty. *It is not a legal proceeding. It is not conducted in a tribunal in which justice is administered in a secure and orderly manner, free from external coercive influences, calmly, soberly, without fear or favor, without passion or prejudice. It is rather a tribunal where law has been dethroned, where terror reigns, and where fear sits trembling on the judgment seat.*

A fair trial is universally recognized as one of the conditions without which due process of law cannot exist.

5 Cyc. of U. S. Sup. Ct. Rep., 618, and cases cited.

The effect of demonstrations by a mob and the fear engendered thereby in the mind of a court, and their influence on a jury, in criminal cases, is discussed with great force, and remarkable relevancy to the present case, in the following authorities, which show that a trial which is not fair and impartial, which is dominated by a mob, is not a legal proceeding, but a mere mockery:

In *Massey* v. *State, 31 Tex. Cr. Rep. 371, s. c. 20 S. W. Rep. 758,* a negro was tried on an indictment for rape upon a white woman. It was claimed that he had been deprived of a fair and impartial trial by the presence of a mob in the court room. One of the defendant's counsel, appointed by the court, applied for a change of venue. The court refused the application, for the reason "that it would at once precipitate an attack upon the jail, which he desired to avoid." There was a conviction, which was set aside, the court declaring that to decide that a trial under such circumstances was fair, impartial and legal, would be a travesty on decency, law, common sense and justice, notwithstanding that good men may have tried the prisoner. In the course of the opinion the court made use of the following language, the application of which to the present case is unmistakable:

"Appellant was not present when the verdict was reached and returned into court. But the state replies that he waived this right. He did; but under what circumstances was this so-called waiver made? 'While the jury were out, considering of their verdict, the honorable district judge who tried the case advised defendant's counsel to have defendant to waive his right to be present at the reading of the verdict, as under the circum-

stances it was best to have him safely in jail. The county attorney then wrote out a waiver, which defendant's attorney brought to the jail, and defendant signed it. Neither the honorable judge nor the county attorney denies these things, nor is there any explanation of this matter. Why was it best to have defendant safely in jail? What were the circumstances which rendered it best to have him safely in jail? The answer to these questions is evident. The spirit, if not the presence, of that same howling, threatening, tumultuous, blood-thirsty mob, had overawed justice, dominated the court, and thus deprived the appellant of the right to be present in court when the issue of his life or death was being settled. Did the appellant waive his right to be present when the jury returned their verdict? He did not. This so-called waiver was forced upon him. He was compelled to make it, or take the risk of being hung by the mob in the event the jury failed to hang him. It would be an insult to law, justice and common sense to submit an argument or cite authorities to prove that the act of appellant, called a 'waiver,' was not such as would be binding upon him. Appellant had a right to a fair and impartial trial, which was denied him by a mob. He had a right to be present in court. It was his court, the court of every citizen of this state. Its portals must be kept open, and no mob has a right to close them against a citizen who is being tried for his life, liberty, or property. He was deprived of this right by a mob, and not by the court; for the writer is impressed by this record with the belief that the ruling of the court in regard to the change of venue and motion for a new trial was made to save defendant from the vengeance of the mob. But it is contended that the mob, when the verdict was returned had dispersed; that in fact there was no danger to appellant. *The honorable judge did not so view the situation, or he would not have requested the waiver.*"

In *State v. Welden, 91 S. C. 29, s. c. 39 L. R. A., N. S. 667,* it was held that a conviction of murder would be set aside where the court room was filled with a hostile crowd, who threatened to lynch the prisoner, so that the counsel called upon to defend him did not dare to ask for the customary time for preparation, and the space about the judge, counsel and witnesses was so filled with people that counsel for the accused could not see the witnesses, and failed to see the jury until he arose to address them. In the course of the opinion Mr. Justice Woods said:

"An immense number of people assembled at the trial intensely hostile to the accused, and crowded the courthouse. The defendants being without counsel, the presiding judge sent for Mr. W. F. Clayton and requested him to undertake their defense. On his way to the court through the dense crowd, Mr. Clayton 'heard expression in regard to lynching' which convinced him that, if he should ask for the three days of preparation allowed by law, the prisoners would be lynched, and under the compulsion of this fear he gave up that most vital right, and went immediately into the trial without preparation. That the danger of mob violence was present and imminent is made further manifest by the statements of Mr. Lucien W. McLemore and the stenographer of the court, Mr. F. F. Covington, both witnesses of high character. Not a particle of evidence was offered by the state to controvert this showing. The presiding judge, it is true, says that the crowd was quiet, and that it manifested no mob spirit to his eye nor in his hearing; but this statement does not impair the force of the testimony of those who mingled with people, and thus had better opportunity to observe. Thus it appears, beyond all doubt, that the circumstances of the trial were such that counsel of experience and courage *gave up, under the most urgent compulsion, the right*

to three days' preparation guaranteed to the accused by the law; and that, too, when he had been called into the case by the court without previous notice. Compulsion is sufficient to annul a will or a contract for the sale of property. How, then, can it be held that a trial involving life or death was fair and impartial, according to the law of the land, when the accused, under the compulsion of a reasonable apprehension of lawless violence, surrenders a right vital to his defense?

"In an opinion delivered by the distinguished Judge Elliott, the Supreme Court of Indiana, under circumstances very similar to those appearing here, set aside for compulsion a plea of guilty, which defendant's counsel showed to the court had been entered, by their advice, on the reasonable apprehension that if their client should be acquitted he would be lynched. *Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29.*"

In *Sanders v. State, 85 Ind. 319,* a judgment entered on a plea of guilty, interposed by one accused of murder on the advice of his counsel, who believed at the time that it was the only way in which his life might be saved from the imminent danger of mob violence, was vacated, Mr. Justice Elliott most pertinently saying:

"There were strong reasons in support of the appellant's prayer. All men are by our laws entitled to a fair trial, in absolute freedom from restraint and entire liberty from fear of threats and violence. It is almost mockery to call that a trial, or a judicial hearing, which condemns an accused upon a plea of guilty forced from his reluctant counsel by threats of an angry and excited mob, and interposed because they believed that to proceed with a trial upon a plea of not guilty would result in the hanging of their client by lawless men. A man who makes a promisory note because of fear is

entitled to relief. A man who executes a deed under duress is entitled to judicial assistance. A will executed under the influence of fear falls before the law. These are small things when compared with life and liberty, and yet in the eyes of the law they are null. If such things are null when procured by fear, or extorted by violence, should not a plea be so, when to have refused it would have been to put in jeopardy the life of the man arraigned upon a charge of felony? In many respects the facts of this case go far beyond that of ordinary cases of duress, for here the officers of the law, judge, sheriffs and jailers were inspired with fear of violence; counsel of age and experience, influenced by the appearances of danger that surrounded their client, secured from him a reluctant acquiescence to the plea of guilty."

See also

People v. *Fleming, 136 Pac. Rep. 291.*
Myers v. *State, 97 Ga. 76.*
Collier v. *State, 115 Ga. 803, 42 S. E. Rep. 226.*

The remarks of Mr. Justice Holmes, in the opinion rendered by him on the denial of the appellant's application for a writ of error to the Supreme Court of Georgia (*Rec., p. 13*), are the natural expression of protest against the proceedings by means of which the appellant is sought to be deprived of his life:

"I understand that I am to assume that the allegations of fact in the motion to set aside are true. On those facts I very seriously doubt if the petitioner has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, though by the

presiding judge to be ready for violence unless a verdict of guilty was rendered."

The language of Judge Jones in *Ex parte Riggins, 134 Fed. Rep. 404,* which is quoted at length under Point I (*pp. 36 to 40, supra*), is applicable here, in its full vigor. These words, however, are worthy of repetition in this connection:

"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."

The abdication by a court of its powers, whether voluntarily or involuntarily, operates as a dissolution of the court.

In *Ellerbee v. State, 75 Miss. 522, s. c. 41 L. R. A. 569,* it was held that the temporary relinquishment by a judge of his functions, on a trial for felony, by departing from the court room, leaving a member of the bar presiding in his absence, which lasted about twenty minutes, during which the trial proceeded, amounted to a dissolution of the court, which rendered the trial a nullity.

To the same effect are the decisions in

Blend v. People, 41 N. Y. 604.
People v. Shaw, 3 Hun, 272; aff'd. 63 N. Y. 36.
Hinman v. People, 13 Hun, 266.
Hayes v. Georgia, 58 Ga. 35.
O'Brien v. People, 17 Col. 561.
McClure v. State, 77 Ind. 287.

A court is no more deprived of jurisdiction, by the fact that the presiding judge absents himself physically, than by the fact that he surrenders his control over the judicial proceedings pending before him, to a mob, although he be physically present.

As said in *Pennoyer* v. *Neff, 95 U. S. 714,* to give legal proceedings any validity, "*there must be a competent tribunal* to pass upon their subject-matter." How can it be said that there is "a competent tribunal," where the established instrumentality of justice has lost control over its proceedings? If the mob had driven Judge Roon from the bench, its domination of the proceedings would have been no more complete, than it in fact was when fear of it overthrew the judicial faculty.

The absence of the appellant at the time of the rendition of the verdict, was symptomatic of the conditions which prevailed during the entire trial, and which culminated in the conclusion by the court, that his life and the lives of his counsel were in extreme jeopardy from mob violence. It was this condition which induced the trial judge to insist upon a waiver on behalf of the prisoner of his right to be present, and which led him to induce appellant's counsel to avoid the conse-

quences of a hostile demonstration from a dangerous crowd, "ready for violence unless a verdict of guilty was rendered."

In *United States* v. *Shipp, 203 U. S. 563,* Johnson, a negro, had been convicted of rape in the State court of Tennessee, and sentenced to death. He presented to the United States Circuit Court his petition for a writ of habeas corpus, which was denied. He then appealed to this Court, and an order staying proceedings was issued. Before the appeal was argued, a mob broke into the jail at Chattanooga and hung him. Proceedings to punish the sheriff and others for contempt then followed. It was urged that this Court had no jurisdiction of the appeal, because the cause did not involve a violation of any rights secured to the prisoner under the Constitution of the United States. The petition for the writ of habeas corpus alleged, that negroes were excluded illegally from the grand and petit juries, that the prisoner's counsel was deterred from pleading this fact or of challenging the array, or asking for a change of venue, or a continuance, or moving for a new trial, or for an appeal, from fear of mob violence. Mr. Justice Holmes, speaking for this Court, said:

"We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. . . . We shall say no more than that it does not appear to us clear that the subject-matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied."

III.

The right of the prisoner to be present during the entire trial, including the time of the rendition of the verdict, the polling of the jury, and its discharge, is one which neither he nor his counsel could waive or abjure.

The record shows beyond a doubt, that Frank did not know that his counsel were requested by the Court to waive his presence at the time of the rendition of the verdict, or that they had in fact agreed that he should not be present, and that he did not in fact learn of this arrangement until after the verdict had been rendered, the jury discharged and the sentence of death pronounced upon him. It is also shown that he had never authorized his attorneys or any other person to waive his appearance at the time of the rendition of the verdict, or to waive their own presence at that time, and that he did not know until after he had been sentenced to death that the verdict convicting him of murder had been received in the absence of his counsel, and that they were not present when the jury was polled by the Court. It is not even intimated in the record that it was agreed on his behalf that the jury should be polled. The statement to that effect in the opinion of Supreme Court of Georgia (*Rec. p.*) is unwarranted.

The facts discussed under Point II stand admitted, and demonstrate that when appellant's counsel complied with the request of the Court,

that neither they nor their client should be present when the verdict should be received, they were under duress.

The question therefore arises, whether the attempted waiver of his presence by his counsel is for any purpose effective, when he was not voluntarily absent, when he was not at large on bail, but was in the actual custody of the court, and when it is shown that he did not personally waive the right to be present, and did not authorize his counsel to make such waiver. We contend not only that, under the circumstances of this case, there was no waiver, but also that there could be none, both for the reason discussed under the foregoing Point, but for the additional ones, now to be considered.

Georgia Decisions.

Here, again, the decisions of Georgia speak in the most conclusive terms.

In *Barton* vs. *State, 67 Ga. 653,* a distinction was made between the case of a prisoner in custody and one who was out on bail and absent when the verdict was rendered. After laying down the rule contained in the passage from this opinion above quoted, and adopted by this Court in *Diaz* vs. *United States,* Chief Justice Jackson continued:

"But the case is quite different, when after being present during the progress of the trial and up to the dismissal of the jury to their room, he voluntarily absents himself from the court room where he and his bail obligated themselves that he should be. This difference is plainly indicated by the ruling in the Nolan case in the fifty-fifth Geor-

gia, and the opinion of the court delivered in that case by Judge Bleckley. And the absolute necessity of the distinction, for the abolition of the continuance of the bail when the trial begins, is seen, when it is considered that otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered. * * * It ought not to be, because it would put it in the power of defendants on bail to block their conviction for felonies forever; it cannot be because the very object of all criminal law is punishment for crime, and without verdicts there can be no punishment for crime."

In *Robson* vs. *State, 83 Ga. 171*, Chief Justice Bleckley said:

"When the verdict was brought into court the accused was at large on bond, and was voluntarily absent. His counsel being present consented to the reception and publication of the verdict. We see not why the voluntary absence alone would not be good cause for proceding with this necessary step in the trial. Barton *vs.* State, 67 Ga. 653. It was the privilege of the accused to be present, but its exercise rested upon his will alone. *He was under no restraint or constraint by the action of the court.*"

In *Cawthon* vs. *State, supra,* the assignment of error contained in the bill of exceptions was worded in the following language:

"After the evidence, statement of prisoner, the argument of counsel, and the charge of the court had been concluded, and while the jury were out considering their verdict in the case, the presiding Judge, with the consent of the defendant's counsel, and in the interest of the safety of the prisoner and the preservation of order, sent the defendant back to jail, and the verdict finding him guilty of murder was received in the absence of the

prisoner, who was in jail under this charge, and could not control his own movements; and such reception of the verdict in the absence of the defendant, being also with the consent of defendant's counsel, who stated that they would take no exception thereto, and in the interest of the prisoner's safety and of the preservation of order. The defendant excepts to the receiving of the verdict finding him guilty of murder in his absence, as being illegal and in violation of his constitutional and statutory right to be present in the court room when the verdict was received, and says that his counsel, though acting in the most perfect good faith and in the interest of his personal safety, had no legal authority to waive his right to be present, and he says that for this reason the verdict in this case and the sentence based on said verdict should be held to be illegal and set aside."

Mr. Justice Cobb, after conceding the general principle to be, as shown by the excerpt from his opinion already quoted, added, that it had been settled in Georgia that the voluntary absence of the accused at the time of the reception of the verdict would not vitiate the verdict, and expressed it to be his individual view that the accused may himself waive his right to be present. The opinion proceeds:

"The open question in this State is whether his counsel can make the waiver for him. There is an intimation in Robson *vs.* State, 83 Ga. 167, 9 S. E. 610, that counsel might make an express waiver; but the point was not directly involved. * * * The weight of authority in other jurisdictions seems, however, to be that counsel cannot waive the right of the accused to be present. See *Rex* vs. *Streak, 2 Car. & P. 413; Fight* vs. *State, 28 Am. Dec. 630 (notes); State* vs. *Kelly, 97 N. C. 407, 2 S. E. 185,* and cases cited. * * * These decisions seem to draw no distinction between a

waiver made by counsel in the presence of his client and one made in his absence. While counsel may have no implied authority, growing out of the relation of attorney and client, to make a waiver of this character for his client in his absence, we can see no good reason why the accused would not be bound by an express waiver made in his presence. * * *

Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in the counsel, whether the accused be present or not at the time of the waiver; his authority arising from the mere relation of attorney and client. * * * But under the facts of this case it is not necessary for a direct ruling to be made upon this point, as, in our opinion, a waiver by counsel in the presence of the accused, unrepudiated by him at the time of the waiver, is so binding as to make valid any action of the court based thereon."

In *Lyons* vs. *State, supra,* Chief Judge Hill, said:

"In some jurisdictions it has been held that this right of the defendant to be present during the trial and until the rendition of the verdict could not be waived at all, either by himself or by his counsel. But in this State the defendant can waive any right guaranteed to him by the law or the Constitution, and it has also been held that a defendant who is out on bond can constructively waive his right to be present at any stage of the trial. It is admitted in this case that the defendant was in jail, that he was not present when the verdict was rendered, and that he personally did not waive his right to be present. It is, however, contended that his counsel waived this right for him. Whether his counsel had the right to make any waiver of the defendant's presence is to the writer a very serious question. There is weighty authority for the statement that a waiver of this right must be the act of the accused himself, and

not that of his counsel. *People* vs. *Perkins, 1 Wend. 91; Rex.* vs. *Streak, 2 Car. & P. 413; Rose* vs. *State, 20 Ohio, 31; Young* vs. *State, 39 Ala. 357; Prine* vs. *Com. 18 Pa. 103.* In this last case the learned Chief Justice uses the following strong language: 'What authority had the prisoner's counsel in this case to waive the defendant's presence on the pretext of convenience? In a criminal case there is no warrant of attorney, actual or potential. It is unnecessary, however, to speak of delegated authority, for the right of a prisoner to be present at his trial is inherent and inalienable.'

"If it be said that counsel for the prisoner in this case had the right to waive his own presence at the rendition of the verdict, and also the right to waive the polling of the jury, can it be claimed that he had the right to do this much in the absence of his client, and without the express authority of his client to make such waiver? The prisoner had the right to have his attorney present at the rendition of the verdict. This it seems to me is a right which not the attorney, but the client alone, can waive. Of course, it is generally, the practice, where both counsel and client are present in court on the trial of criminal cases, for many important rights of the client to be waived by counsel. But we do not think that in the trial of a criminal case the waiver of an attorney of his right to be present at the rendition of the verdict is binding upon his client. The man on trial has not only the right to be present in person, but to have his counsel present."

Decisions of This Court.

This question has been most effectively considered by this Court.

Thus, in *Hopt* vs. *Utah, 110 U. S. 579,* Mr. Justice Harlan said:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense

with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, not by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. *The public has an interest in his life and liberty.* Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiration or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substituted rights may be affected by the proceedings against him. *If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.*"

This passage was cited with approval in *Schwab* vs. *Berggren, 143 U. S. 449;* and also in *Lewis* vs. *United States 146 U. S. 373,* where Mr. Justice Shiras, in support of the contention that the right

to be personally present during the trial cannot be waived in cases of felony, further said:

"'It would be contrary to the dictates of humanity to let him waive the advantage which a view of his said plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence.' *Prime* vs. *Commonwealth, 18 Pa. St. 103, 104,* per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus, in a Virginia case, *Hooker* vs. *Commonwealth, 13 Gratt. 763, 766,* the court observed that the record showed that, on two occasions during the trial, the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court either day, and added, 'This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses,' and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.' Thereupon the judgment was reversed. And in the case of *Dunn* vs. *Commonwealth, 6 Pa. St. 384,* it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. *Ball* vs. *United States, 140 U. S. 118* is to the same effect."

In *Thompson* vs. *Utah, 170 U. S. 343,* a similar question arose *i. e.,* as to whether it was in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon his guilt, in-

stead of a constitutional jury of twelve. Dealing with this proposition, Mr. Justice Harlan said:

"It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of *Hopt* vs. *Utah*, above cited, the question arose whether the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence."

The opinion then quotes at length the passage from *Hopt vs. Utah* which we have cited above.

In *Kepner* v. *United States, 195 U. S. 100, 135,* Mr. Justice Holmes, in a dissenting opinion in which Justices White and McKenna concurred, said:

"*In a capital case, like Hopt* v. *People, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights.. Thompson* v. *Utah, 170 U. S. 343, 353, 354.* Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

To the same effect are *Cancemi* vs. *People, 18 N. Y. 128*, and *Ball* vs. *United States, 140 U. S. 118.*

In the first of these cases, which is a leading authority in this country, it was decided that a prisoner on trial for a capital offense could not consent to be tried by a jury of eleven. The reasoning of Judge Strong, which has been frequently quoted, is very much in point here:

"The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const. art. 1, sec 6), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: 'The king has an interest in the preservation of all his subjects.' And again (vol. 1, 133), that the 'natural life, being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' These considerations make it apparent that the right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case, should be much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to vari-

ous matters, regard and act upon it as valid. Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. In such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and the whole which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any member short of a full panel of twelve jurors, and we think it ought not to be tolerated."

To the same effect is, *Dickinson* vs. *United States, 159 Fed. Rep. 801.*

Two facts are to be emphasized in this aspect of the case:

1. The appellant was not at large on bail. He could not come and go as he pleased. The circumstances were not such as existed in *Diaz* vs. *U. S.* (*supra*), or in *Barton* vs. *State*, (*supra*). He was lodged in jail and was not a free moral agent. He could not act upon his own initiative, with respect to his attendance upon his trial. He could not even enter the court-room except with the permission and at the instance of the Court. Without the exercise of its volition that he should be present, his entire trial would have proceeded *in absentia*. His absence at the reception of the verdict, the polling of the jury, and its discharge was therefore the direct result of judicial action. In fact it was because of the positive request of the Court that his counsel, without authority, waived his presence to the extent desired. They might as well, on like request, have waived his presence during the entire trial. The legal situation and effect would have been precisely the same.

2. Not only was the appellant's absence involtary, so far as any act or consent of his was concerned, but the consent of his counsel was coerced by the action of the presiding judge, who yielded to the terror inspired by the mob, which dominated the trial, and who confessed his inability to withstand its anticipated violence. Their consent was, therefore, not only without authority express or implied, but was wrested from them by duress equivalent to the application of the thumb-screw and the rack. The authorities cited under Point II, as well as every principle of justice and humanity, condemn such an act as a nullity.