the Supreme Court of Georgia, whether right or wrong, had determined that the proper remedy was a motion for a new trial, and not a motion to set aside the verdict.

Our present proceeding, an application for a writ of *habeas corpus*, is not circumscribed by any procedural objection of the character involved on the application for a writ of error. It is an independent and plenary proceeding in the Federal court, based on the proposition that, because the appellant was prevented from being present in court, at the time of the rendition of the verdict without his fault and because he was deprived of a trial before a competent tribunal, the judgment based on the verdict was a nullity, he having been deprived of due process of law, and in consequence the court had lost jurisdiction. That presents a proposition which is not affected by State practice. The case is in the precise situation that it would occupy if no timely proceeding had been attempted in the State courts of Georgia, either by motion for a new trial or to set aside the verdict. In that event, the bare question presented in this proceeding would have been, Did the court possess jurisdiction to pronounce sentence of death? That is the exact condition that now exists. That is the same question which must now be answered. The fact that unavailing attempts have been made to procure a determination of this question in the State court, does not preclude the appellant from now asserting the nullity of the judgment. If the trial court lost jurisdiction by the facts detailed in the petition, if the judgment of death was thereby rendered a nullity, the appellant's unavailing attempts in the State court for relief from the consequences of such action,

cannot make that a legal judgment which was before a nullity.

It is to meet just such situations, that the sacred writ of *habeas corpus* was devised, and it would be a sad day in our judicial history if a man, struggling for life as against a void judgment, should be informed that, because of an error in procedure, that which is in realty nothing, has become an effective instrument of death.

X.

In the present case, the Superior Court of Georgia had jurisdiction over the appellant after his indictment and down to the later stages of his trial. The verdict and all subsequent proceedings, being nullities, he is entitled to his discharge from the void judgment and to be relieved from the void sentence of death. He does not, however, contend that he cannot be held for further trial under the indictment.

There is abundance of authority in support of this proposition.

In *Ex parte Badgley, 7 Cowen 472*, it was adjudged that where there are two causes of imprisonment or detention, one good, and the other invalid, the Court may on *habeas corpus*, dis-

charge as to the invalid cause, and remand the prisoner as to the other.

In *Medley, Petitioner, 134 U. S. 160, 174,* one convicted in the State Court of murder, was sentenced to death, that being the punishment when the crime was committed and to the further punishment of imprisonment by solitary confinement until execution. This Court held that the sentence imposing both punishments was void, the law authorizing it being *ex post facto*. Dealing with the question as to what subsequent proceedings were proper, Mr. Justice Miller said:

"The language of the act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice, or judge (before whom the prisoner may be brought by writ of *habeas corpus*) shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

"What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of Section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offense, it repeals

the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the Attorney General of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court."

In *re Bonner, 151 U. S. 256-259, 261, 262,* the petitioner was sentenced on conviction to imprisonment in a penitentiary, which it was decided was an illegal punishment. Discussing the judgment which under the circumstances should be rendered in the *habeas corpus* proceedings instituted in this Court, Mr. Justice Field said:

A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges—perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of *habeas corpus* cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punish-

ment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of *habeas corpus* in such a case is a virtual suspension of it, and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source—equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals. * * *

"The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*. Section 761 of the Revised Statutes on this subject provides that: 'The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' It would seem that in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected. *Medley, Petitioner, 134 U. S. 160, 174.*

"In the case of *Coleman* v. *Tennessee, 97 U. S. 509*, a party, who had been convicted of a capital offense, and the judgment had been confirmed by the Supreme Court of that State, was discharged by judgment of this court because it was held that the State court had no jurisdiction to try a soldier of the army of the United States for a military offense committed by him whilst in the military service and subject to the articles of war. But as it appeared that the prisoner had been tried by a court-martial regularly convened in the army for the same offense and sentenced to be shot, and had afterwards escaped, this court, in reversing the judgment of the Supreme Court of Tennessee, stated that that court could turn the

prisoner over to the military authorities of the United States. He was so turned over, and the punishment was commuted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

"In some cases, it is true that no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on *habeas corpus* persons who have been duly convicted will be thus removed."

In *Ex parte Scott, 70 Miss. 247, 11 So. Rep. 657,* the general nature of which bears strong resemblance to the present case, Judge Woods said:

"'The petition of the relator avers that he is in the custody of the sheriff of Warren County, who holds him as the agent of the keeper of the State prison, and to whom the said sheriff is about to deliver him, to undergo imprisonment pursuant to the judgment of the circuit court of said county, and that such judgment is a nullity, because relator says it was founded upon a verdict rendered against him by eleven men. The return of the sheriff, among other matters showing his authority for relator's detention, states that the judgment of said circuit court (meaning the record of said court) shows that the relator was tried by eleven jurors; * * * Mere reversible error must not be examined into on *habeas corpus*, and the party must be driven to his direct appeal, the proper mode of rectification of irregularities. But for incurable, radical, fatal defects, plainly and indisputably manifest of record, relief should be granted even on *habeas corpus*. The error complained of is incurable by any supplementary oral proof. It is not an irregularity merely. It is an omission

of a fact from the record which no presumption may be invoked to supply. It is a fatal defect, affecting the jurisdiction of the court. The constitutional right to trial by twelve men must be secured to every defendant, and a verdict by six men, or by eleven men, is absolutely void, and judgment founded on such nullity must necessarily be itself a nullity. The court undoubtedly had jurisdiction of the relator and of the subject-matter, and ordinarily no other question will be considered on *habeas corpus. But, in the present instance, we see indisputably the intervention of an unauthorized agency, whereby the defendant's guilt of the crime laid to his charge was established and the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view, the relator stands just as if he had not been tried at all.* The verdict is a nullity, and the judgment upon it is a nullity. The judgment below will be reversed, but the prisoner will not be discharged. He has not yet been tried, and will therefore be remanded to the custody of the sheriff of Warren County, to be held to answer the charge of burglary and larceny originally preferred against him."

In *People ex rel. Devoe* v. *Kelly, 97 N. Y. 212,* it was held, that where a person convicted of the crime of assault in the third degree was sentenced to imprisonment at hard labor in State's prison, while the sentence was void, the conviction was valid; the prisoner was therefore not entitled to a discharge on *habeas corpus,* but should be remanded to the custody of the sheriff, that the trial court might deal with him according to law. Judge Danforth, said:

"But the conviction is still valid and the prisoner not entitled to his discharge. He should be

remanded to the sheriff of Otsego county in order that the Court of Sessions may deal with him according to law. (*People ex rel Bork* v. *Gilbert, 96 N. Y. 631; People v. Bork, id. 188.*) So far, therefore, as the order of the county judge directs the prisoner to be remanded to the custody of the sheriff, it is right, as is also the judgment of the General Term, so far as it affirms such direction, and to that extent they should be affirmed."

In *Michaelson* v. *Beemer, 72 Neb. 761, 101 N. W. Rep. 1007*, it was held, that where a prisoner is held under a void commitment, but is properly informed against by information or indictment charging a crime, before a court of competent jurisdiction, on a *habeas corpus* proceeding he should be discharged from his confinement on the illegal commitment, and remanded to the custody of the court having jurisdiction of the information or indictment pending against him. Commissioner Oldham said:

"But when the defendant pleaded not guilty, and the cause was set for trial on such plea, the only tribunal provided by the Constitution and laws of this State that had authority to determine whether the defendant was guilty or innocent of the offense charged in the information was a jury summoned from the county in which the offense was alleged to have been committed. When the judge of the court, acting under a mistaken conception of the effect of the consent of the prisoner, undertook to determine the question of his guilt or innocence of the felony charged, his judgment and sentence based on such judgment was a mere nullity, and absolutely void. From this line of reasoning it follows that the commitment under which the respondent warden detains the petitioner in the penitentiary is a legal nullity. It therefore follows that so much of the judgment of the district court as remanded

the prisoner to the custody of the warden of the penitentiary is erroneous, and should be set aside.

"It does not follow, however, as contended by counsel for the prisoner, that because the commitment under which the warden detains the prisone is insufficient, that the prisoner should be discharged from further proceedings, for it is provided by *Section 2492, Cobbey's Ann St.,* which governs *habeas corpus* proceedings, among other things, that when the said judge shall have examined into the cause of the caption and detention of the prisoner so brought before him, and shall be satisfied that the person is unlawfully imprisoned or detained, he shall forthwith discharge such person from said confinement, and, in case the person or persons applying for such writ shall be confined or detained in a legal manner on a charge of having committed any crime or offense, the said judge shall at his discretion, commit, discharge, or let to bail such person or persons. Now, it clearly appears that an information properly charging the offense of grand larceny, to which the prisoner has pleaded not guilty, is pending against him for trial before a duly authorized tribunal in Garfield County, and the rule covering such case is that, if the commitment on which the prisoner is detained is insufficient, the court, on *habeas corpus,* will discharge the prisoner from that commitment, and will recommit him to the custody of the court having jurisdiction of the offense properly charged by indictment or information against him. *Ex parte Bennett, Fed. Cas. No. 1311, 2 Cranch, C. C. 612; In re Ring, 28 Cal. 248; Miller v. Snyder, 6 Ind. 1; In re Mason, 8 Mich. 70; Ex parte Badgely, 7 Cow. 472.*

"It is therefore recommended that the judgment of the district court be reversed, and the cause remanded, with directions to the trial court to discharge the prisoner from his confinement in the penitentiary on the warrant of commitment based on the void judgment and sentence of the

judge of the district court of Garfield County, and that the prisoner be required to enter into a recognizance for his appearance at the next term of the district court of Garfield County to answer the charge of grand larceny therein pending against him, and that these proceedings and the recognizance so directed be certified to the district Court of Garfield County, as provided by *Section 2492, Cobbey's Ann. St.*, and that in default of the recognizance so directed the prisoner be committed to the jail of Garfield County, there to remain until discharged by due process of law."

XI.

It is respectfully submitted that the judgment of the District Court of the United States for the Northern District of Georgia, should be reversed, and a writ of habeas corpus allowed, as prayed.

LOUIS MARSHALL,
HENRY C. PEEPLES,
HENRY A. ALEXANDER,
Appellant's Counsel.

APPENDIX.

(Referred to on pages 71 and 73.)

GEORGIA.

In Georgia, the presence of the accused at all stages has been held to be essential to the validity of the trial. The following stages of the trial have been specifically dealt with:

1. **At his arraignment:**
   Wells v. *Terrell, 121 Ga. 368.*

2. **At the declaration of a mistrial.**
   Bagwell v. *State, 129 Ga. 170.*

3. **At the argument of the Solicitor-general:**
   Tiller v. *State, 96 Ga. 430.*

4. **At the reading over by the court of the written testimony taken down by it to the jury:**
   Wade v. *State, 12 Ga. 25.*

5. **At the charge of the court:**
   Hopson v. *State, 116 Ga. 90.*

6. **At a recharge:**
   Martin v. *State, 51 Ga. 567.*
   Bonner v. *State, 67 Ga. 510.*
   Wilson v. *State, 87 Ga. 583.*

7. **At the rendition of the verdict:**
   Nolan v. *State, 53 Ga. 137.*
   Barton v. *State, 67 Ga. 653.*

Excerpts from the above decisions are given below in the order cited.

In *Wells* v. *Terrell, Governor, 121 Ga., 368*, the Court, speaking unanimously through Mr. Justice Lamar, said: in the 3rd headnote:

"It is universally held that a defendant in a felony case cannot be arraigned or plead in his absence."

In *Bagwell* v. *State, 129 Ga. 170*, the first headnote of a unanimous decision was:

"In a prosecution for a felony the accused has the right to be present at every stage of the trial; and where the court in such a case, without the consent of the accused and during his enforced absence—he being confined in jail—ordered a mistrial because of the inability of the jury to agree, on a subsequent trial of the same case it was error, requiring a reversal, to strike a plea setting up such unauthorized mistrial and the former jeopardy of the accused."

In *Tiller* v. *State, 96 Ga. 430*, a trial of an indictment for murder, the solicitor general was permitted through the inadvertence of the court to make his argument to the jury during the absence of the accused. Speaking for a unanimous court, Mr. Justice Samuel Lumpkin said:

"The rule that one on trial for a criminal offense is entitled to be personally present at every stage of the proceedings, is too well settled to require argument or the citation of authority. This rule, both in England and in this country, is so well recognized by the standard text-writers and by judicial decisions in an almost unbroken line of cases, that its existence cannot now be seriously called into question. It cannot be doubted

that the argument of counsel is a stage of the proceedings, for the trial is not concluded until after the verdict has been received and recorded. The importance of this particular stage as affecting the accused is obvious, it being a matter of vital concern to him to see and hear everything done and said both for and against him as the trial progresses. When the accused is on bail, and therefore in control of his own movements, he may, by voluntarily absenting himself from the court-room, be deemed to have waived his right to make any objection to the validity of the trial because of his absence. In the case of *Commonwealth* v. *McCarthy*, recently decided by the Supreme Court of Massachusetts, 40 N. E. Rep. 766, it was held that when a person on trial for felony, who was on bail, voluntarily absented himself without leave when the jury retired to consider the case, and remained absent, the verdict rendered in his absence was binding upon him. But Knowlton, J., who delivered the opinion of the court, distinctly stated the general rule we have above announced, and in support thereof cited numerous authorities, which, as already intimated, might be multiplied indefinitely. *The case is altogether different when the accused has not been admitted to bail, but is confined in jail, and therefore in the strictest sense a prisoner whose movements are absolutely controlled by the court.* In the case with which we are now dealing, the accused was such a prisoner. Assuming his right to be present while the solicitor-general was arguing the case to the jury, and the accused being then absent, though the presiding judge was not actually aware of the fact, the real question is: Did the failure of counsel for the accused to call the attention of the court to the fact that the accused was not present constitute a binding waiver by or for him of his undoubted right to be present?"

"It does not appear from the record that the counsel knew of the prisoner's absence; but

granting that he had such knowledge, or is chargeable with it, could his mere silence be held sufficient to constitute such a waiver? We think not. In the case of *Bonner* v. *State, 67 Ga. 510,* this court held that in view of the right of the prisoner in a criminal case to be present in person throughout the trial, it was error for the judge to recharge the jury while the prisoner was absent and in confinement, although his counsel were present and kept silent. This case is, in principle, directly applicable to the case at bar, because the argument to the jury was a matter of great importance, and of almost, if not altogether, as much concern to the accused as the charge of the court. We therefore are of the opinion that it was a duty devolving upon the judge himself to see to it that the accused was brought from jail to the court-room before allowing the argument to proceed; and the omission to perform this duty is of sufficient gravity to require the granting of a new trial. We do not mean to say that the duty of seeing that his client was present did not also rest upon the counsel; but his failure in this respect should not relieve the judge of giving the proper attention to this matter, *he being primarily, and above all others, responsible for the regularity and lawfulness of the trial.*"

In the case of *Wade* v. *State, 12 Ga. 25,* Judge Warner said:

"Another ground taken for a new trial, is that the Court erred in calling the Jury from their room after they had retired to consider their verdict, into the Court room, and reading over to them the written testimony as taken down by the Court, without the *consent* of the prisoner's counsel, and while *the prisoner was absent.*'

"This was clearly error. The Court has no more authority under the law, to read over the testimony to the Jury, affecting the life or lib-

erty of the defendant in *his absence*, than it has to examine the witnesses in relation thereto, in his absence. The defendant has not only the right to be confronted with his witnesses, but he has also the right to be *present*, and see and hear, *all the proceedings* which are had against him on the trial before the Court. It is said the presumption must be, that the Court read over the testimony correctly, and read over all that was delivered against the defendant; therefore, he was not injured. The answer is, that it was the *legal right* and *privilege of the defendant, to* have been *present in Court* when this proceeding was had before the Jury in relation to the testimony delivered against him; and he is to be considered as standing upon *all his legal rights,* waiving none of them."

In *Hopson* v. *State, 116 Ga. 90,* the Court, speaking through Mr. Justice Samuel Lumpkin, said:

"We are, however, constrained to order a new trial upon another ground of the motion, which complains that, after the court had charged the jury and they had considered the case for some hours, the judge, in the absence of the accused and his counsel, and without any effort to bring them into court, gave to the jury a second charge which was substantially the same as that which had been given before they retired in the first instance. This practice can not be upheld. See *Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567, Bonner* v. *State, 67 Ga. 510; Wilson* v. *State, 87 Ga. 583; Tiller* v. *State, 96 Ga. 430.* There was no waiver of the right of the accused and his counsel to be present when the second charge was given. It does not appear that both were ignorant of its being given until after the trial had ended; but this makes no difference. It is an inevitable conclusion from the cases cited above that the accused may complain of such an

irregularity after verdict, notwithstanding knowledge thereof by him or his counsel while the trial was in progress. Nor does the fact that the 'recharge' was, in substance, the same as the original charge dispense with the necessity for ordering a new trial. *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 in the case. To say that no injury results when it appears that what occurred in their absence was regular and legal would, in effect, practically do away with this great and important right, one element of which is to see to it that what does take place is in accord with law and good practice.*"

In *Martin* v. *State, 51 Ga. 567,* the Court, speaking through Judge Trippe, said:

"It is true the court required the prisoner's counsel to strike from his motion for a new trial the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to-wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was "the polling of the jury and the reception of the verdict in his absence." There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during one of the most important portions of his trial, the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply

grafted in our practice has this great right become that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them, without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial."

In *Bonner* v. *State, 67 Ga. 510*, the court, speaking through Chief Justice Jackson, said:

"Without scanning this entire record, we are of the opinion that a new trial must be granted, on the ground that the court erred in recalling the jury and recharging them at their request, in the absence of the defendant, who was at the time in custody and confinement, though his counsel were present, but silent.

"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. *Whar-ton's Crim. Plead. and Prac. 540a, 545, 546, 549, 550.*"

In the case of *Wilson* v. *State, 87 Ga. 583*, Chief Justice Bleckley said:

"The sixth ground of the motion for a new trial complains that the court recharged the jury without notifying defendant and in his absence, although his counsel was present. It appears from the record that the judge did not know whether the accused was present in the court-room or not when the recharge was delivered, and that the fact was that he was in an adjoining room in the custody of an officer, not knowing that the jury

was being recharged, and knowledge did not come to him until after the recharge was concluded. Whether his absence from the room was voluntary or by compulsion, we think the court should not have recharged the jury in his absence. He was in the custody of an officer, and whether the officer took him to the adjoining room with or without his consent, it seems to us, made no difference. There is nothing to indicate that it was his intention to be absent when any material step was to be taken in the trial; and before taking such a material step as recharging the jury, we are of opinion that the court should have seen and known that he was present, verifying the fact, if necessary, by ocular demonstration. 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; Wade* v. *State, 12 Ga. 25; Martin* v. *State, 51 Ga. 567.*

"There was error in not granting a new trial on this ground of the motion."

In *Barton* v. *State, 57 Ga. 653*, the Court, speaking through 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; 55 Ib. 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 the court by its order."

In *Nolan* v. *State, 53 Ga. 137*, the Court, speaking through Chief Justice Warner, said:

"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."

ALABAMA.

State v. Hughes, 2 Ala. 102.
Eliza v. State, 39 Ala. 693.
Waller v. State, 40 Ala. 332.
Slocovitch v. State, 46 Ala. 227.
Cook v. State, 60 Ala. 39, 41, 31 Am. Rep. 31.
Wells v. State, 147 Ala. 140, 41 S. W. 630.

In *State* v. *Hughes, 2 Ala. 102,* the trial of an indictment for murder, the court said in the 1 and 2 headnotes:

"The 10 sec. of the 1 Art. of the Constitution guarantees to one indicted for a crime, the right to be present in Court, that he may discuss questions of law and fact, which may arise either preparatory to, or pending the trial, and that he may point out objections to the action of the jury, or other proceedings in the cause.

"One tried for a crime, has the right to be present when the jury returns their verdict against him, that he may examine them by the poll, to ascertain if they assent to his conviction."

In *Eliza (a freedwoman)* v. *State, 39 Ala. 693,* an indictment for grand larceny, the court said:

"(2) In looking into the record of this case, we find a fatal error, which must reverse the judg-

ment below. In the judgment-entry, it does not sufficiently appear that the prisoner was personally present in court when she was tried and sentenced. The entry recites, that 'this day came S. A. M. Wood, solicitor, and the defendant,' &c.; and it also recites, that she 'be taken *hencé* to the jail of Tuskaloosa county,' &c. These recitals are not sufficient to make it affirmatively appear that the prisoner was present *in person,* both during the trial, and at the time of the sentence. The rule is well settled, in England, and in this State, and is *inflexible, that a prisoner, accused of felony, must be arraigned in person, and must plead in person; and in all the subsequent proceedings, it is required that he shall appear in person.*''

In *Waller (a freedman)* v. *The State, 40 Ala. 325,* the court said on page 332:

"It was erroneous for the court to allow the jury to return their verdict to the clerk, under the facts of this case. The counsel had no authority to assent thereto, or to waive the right of a prisoner, charged with a felony, *to be present when the jury delivered their verdict to the court. The State* v. *Hughes, 2 Ala. 102; 2 Hawk. ch. 47; 2 Lead. Crim. Cases, 452; Nomague* v. *The People, 1 Breese, 109; 1 Chitty's Crim. Law, 626; 1 Term. R. 434; Prine* v. *Commonwealth, 6 Har. (Pa.) 103; 1 Bish. Cr. Pro. § 688; State* v. *Buckner, 25 Mis. 168; Eliza* v. *The State, 39 Ala. 693.*"

In *Slocovitch* v. *The State, 46 Ala. 227,* the court said in the headnote:

"1. Trial for indictable offense, cannot be had without personal presence of prisoner. No person indicted for a criminal offense, whether it be for a felony or a misdemeanor, can be tried *without being personally present in court,* and a judgment rendered upon a conviction obtained in his absence, if for a fine only, is erroneous, and will be reversed on appeal."

In *Cook* v. *The State 60 Ala. 40*, the court said on page 41:

"It was *not within the authority of prisoner's counsel* to waive for him his right to be present when the verdict was delivered.—*Waller* v. *The State, 40 Ala. 333; Young* v. *The State, 39 Ala. 358; Sperry* v. *Commonwealth, supra; Eliza* v. *The State, 39 Ala. 694.*"

In *Wells* v. *The State, 147 Ala. 140*, the court said in 1, 3 and 5 headnotes:

"1. Criminal Law; Verdict; Rendition; Presence of Accused.—It is essential to the validity of a verdict in all criminal cases that it be rendered in open court, and *in the presence of the accused.*"

"3. Same; Reception of Verdict; Recess.—It is error to permit the clerk of the court to receive the verdict of the jury during the recess of the court, in a felony case, in the absence of accused *even with the consent of his counsel.*"

"5. Same; Waiver; Misdemeanors.—The right to be present when the verdict is rendered, in a misdemeanor case, may be waived by the accused."

ARKANSAS.

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102.
Cole v. State, 10 Ark. 318.
Sweeden v. State, 19 Ark. 205.
Warren v. State, 19 Ark. 214, 68 Am. Dec. 214.
Brown v. State, 24 Ark. 620.
Osborn v. State, 24 Ark. 629.
Gore v. State, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

In *Sneed* v. *The State, 5 Ark. 431*, an indictment for larceny, the headnotes were as follows:

"Larceny is, by the common law, a felony; and an indictment for a felony cannot be tried unless the prisoner be *personally present* at the trial. The law is thus careful for the safety of the citizen through the whole trial, from his arraignment to the final disposition of the cause, lest in so important a matter he should be prejudiced."

"The prisoner must also be present when the verdict of the jury is returned."

"Where the prisoner is out on bail the rule is the same; the law not regarding the cause of his absence, as whether he be absent voluntarily or against his will."

"*A verdict taken in the absence of the prisoner is void.*"

In *Cole* v. *The State, 10 Ark. 318*, an indictment for assault with intent to murder, the court said on page 325:

"And the authorities are equally numerous, pointed, and respectable, that, in all cases of treason and felony, the verdict, whatever may be its effect *must be delivered in the presence of the defendant in open Court,* and cannot be either privily given, or promulgated, while he is absent, and if he does not appear the jury must be discharged without rendering it. (*1 Ch. Cr. Law 636, 1 Breese 109. Overton's Tenn. Rep. 435. The People* v. *Perkins, 1 Wend. 91.*) And the defendant's being out on bail does not alter the case. *State* v. *Hulbert, 1 Root 91. Sneed* v. *The State, 5 Ark. 432.*"

In *Sweeden* v. *The State, 19 Ark. 205*, an indictment for assault with intent to murder, the court said in the second headnote:

"On indictments for slight misdemeanors, the accused may be tried without being personally present; but *upon charges amounting to felony,* he must be *personally present in Court during the trial.*"

In *Warren* v. *The State, 19 Ark. 214,* the court said in the first headnote:

"In a criminal prosecution for a slight misdemeanor—as for gaming—a verdict may be rendered and a judgment pronounced, without the defendant being personally present in Court at the time."

In *Brown* v. *The State, 24 Ark. 620,* at 627 the court said:

"The remaining ground relied on for a reversal, is well taken. Upon examination, we find that *the record does not show that the accused was personally present in court,* at the time the *venire facias* for the trial of this case was ordered; and it has been repeatedly decided by this court that, *in prosecutions for felony, the defendant must be personally present at each and every time when any step is taken by the court in his cause,* and that the record must affirmatively show the fact."

In *Osborn* v. *The State, 24 Ark. 629,* at page 635, the court said:

"Referring to the transcript, we find that the defendant was not present when the time for the service of a copy of the indictment was waived, nor was he present when the order for a venire was granted on the motion of the attorney for the state; and therefore he was not legally put upon his arraignment, and that it was error in the court to proceed with the trial, until he was so legally arraigned."

In *Gore* v. *The State, 52 Ark. 285*, the court said:

"Criminal Procedure: Trial for felony: Presence of defendant. 'Section 2213 Mansfield's Digest which provides that if a defendant on trial for a felony, escapes from custody after his trial has commenced, 'or if on bail, shall absent himself during the trial, the trial * * * may progress to a verdict,' is not unconstitutional. The guaranty of the Constitution (Art. 2, Sec. 10) that the defendant shall have the right to be confronted with the witnesses against him, does not include the right to abscond and then complain of his own absence."

"It has been uniformly held by this court that a defendant, charged with felony, has a right to be present at every stage of his trial. Sections 8 and 10 of Article 2 of the Constitution have been construed to guarantee him that right. *And it has been often held that a defendant cannot waive his constitutional rights by agreement.* It is now to be determined whether the constitutional guaranty that the defendant shall be confronted with the witnesses against him remain, where he, pending a trial, absconds and refuses to be confronted. Neither direct authority nor analogy are lacking in the construction of this guaranty."

CALIFORNIA.

People v. Kohler, 5 Cal. 72.
People v. Ebner, 23 Cal. 159.
People v. Beauchamp, 49 Cal. 41.
People v. Higgins, 59 Cal. 357.

In *The People* v. *Kohler, 5 Cal. 72*, indictment for murder, the court said:

"The bill of exceptions shows that after the jury retired, they returned and asked to hear read two depositions of witnesses of the defendant.

The depositions were read to them, and this was done *during the absence of the prisoner.* The rule is familiar that the prisoner, in a case of felony, must be present during the whole of his trial; and reading evidence taken by deposition, although it was done after the jury had retired, is a part of the trial as much as any other. *In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed.*''

In *People* v *Beauchamp, 49 Cal. 41,* the court said in the 2 headnote:

''Receiving verdict in case of Felony.—In a case of felony, the prisoner must be personally present in Court when the verdict is rendered. *If the verdict is received in his absence, it is not valid.*''

In *People* v. *Higgins, 59 Cal. 357,* the court said:

''The defendant, being charged with a felony, was required to be present during the whole of the trial, including the rendition of the verdict. *Without his presence,* no valid verdict or judgment could be given against him.''

COLORADO.

Green v. People, 3 Colo. 68.

Smith v. People, 8 Colo. 457.

In *Green* v. *The People, 3 Colo. 68,* the court said in the headnotes:

''1. Under the statute of Colorado an assault with intent to murder is felony.''

''2. It is error to render a verdict in a charge of felony, the defendant being absent and under confinement in jail; *his right to be present cannot be waived by counsel.*''

In *Smith* v. *People, 8 Colo. 457*, the 1st and 2nd headnotes are as follows:

"1. It is a general rule that the prisoner in a case of felony must be present at every step of the proceedings, or the proceedings will be invalid; except in cases of misdemeanor *the privilege cannot be waived by counsel.*"

"2. If the prisoner is deprived of the privilege of being present when the verdict is returned, the verdict must be set aside and a new trial granted, or the judgment will be reversed."

CONNECTICUT.

State v. Hurlbut, 1 Root 90.

In *State* v. *Hurlbut, 1 Root, 90,* (1784), the report of the case was as follows:

"Information for counterfeiting money; trial to the jury, and the defendant was out upon bail: The jury returned into court with their verdict, and the defendant being called did not appear: The question was, whether the court would receive the verdict. *By the Court*: The defendant must appear, or there will be no propriety in receiving the verdict."

FLORIDA.

Holton v. State, 2 Fla. 500.

Gladden v. State, 12 Fla. 562.

Summeralls v. State, 37 Fla. 162, 53 Am. St. Rep. 247.

In *Holton* v. *the State, 2 Fla. 476,* indictment for murder, the court said on page 500:

"But there was another very important, settled and well established principle of criminal law violated, we think, by this proceeding; which

is, that during the trial of a capital case, (the whole trial,) the prisoner has the right to be, and must be, present—no step can be taken by the court in the trial of the cause in his absence. This results from the humanity of the law, and the tender regard it has for human life; which forbids that any proceedings shall take place in the trial of such a cause, unless the prisoner charged is present in court, to make his objections to any and every step that may be taken in it, which he may deem illegal, and to do whatever else he may or can legally and properly do in his own defence."

In *Gladden* v. *The State, 12 Fla. 562,* the court sand in the 14th headnote:

"14. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions, both of law and of fact, and no step can be taken in his absence."

In *Summeralls* v. *The State, 37 Fla. 162,* the court said on page 164:

"It is well settled by repeated decisions here, as well as in other states, that in cases of felony the accused must be personally present in court during every stage of his trial from its beginning to and including the final passing of sentence. *If it is shown that he was absent during the taking of any essential step in the trial, he can not be said to have had a trial in due course of law.* He has a right to be present in person at the rendition of the verdict in order to exercise the right of polling the jury, and the verdict, in such cases, can not legally be rendered or received during his absence; and it makes no difference whether his absence be voluntary or involuntary."

ILLINOIS.

Holliday v. People, 4 Gilm. (9 Ill.) 111.
Harris v. People, 130 Ill. 457, 22 N. E. 826.

In *Holliday* v. *The People, 4 Gilm. (9 Ill.) 111,* the court said in the last headnote:

"According to the principles of the Common Law, in all capital cases, the verdict must be received in open Court, and in the presence of the prisoner. The rule, however, did not apply to cases of inferior misdemeanor."

In *Harris* v. *The People, 130 Ill. 457,* the court said on page 459:

"It has been a well established rule of the common law from an early period, that a prisoner accused of a felony must be arraigned in person and must plead in person, and his personal appearance is required throughout the trial, and at the time sentence is pronounced. As said *Mr. Chitty*: "Although a defendant accused of a misdemeanor may be found guilty in his absence, this can never be done in capital felonies, but it is necessary that he should personally attend, and it should so appear on the record." 1 Chit. Crim. Law, 414. A leading authority on this question is Rex *v.* Harris, 1 Ld. Raym. 267, Comb. 447, Holt, 399, Skin. 684, in which it was held by Lord Holt, that a judgment can not be given against any man in his absence for a corporal punishment."

KANSAS.

State v. Myrick, 38 Kan. 238.

In *State* v. *Myrick, 38 Kan. 238*, indictment for assault with intent to murder; the court said on page 240:

"His presence is not less necessary or important when the jury are instructed than during the impanelling of the jury, the introduction of evidence, the argument of counsel, or the reception of the verdict. In the present case the defendant was on trial for a felony, and the instructions requested and given were exceedingly important. As the statute forbids the trial of a person for felony, unless such individual be personally present during the trial, the presence of the defendant's counsel and *their consent* to proceeding with the trial in his absence and imprisonment will not cure the illegality. *It has frequently been decided that the right of a defendant in a prosecution for felony to be present is one that cannot be waived by counsel*, and that a reviewing court will not in such cases stop to inquire in regard to the correctness of the instructions given, or steps taken during the absence of the defendant."

KENTUCKY.

Temple v. Commonwealth, (77 Ky.) 14 Bush 769, 29 Am. Rep. 442.

In *Temple* v. *Commonwealth, 14 Bush 769, (77 Ky.) 29 Am. Rep. 442*, which is one of the leading cases on the subject, the court said, in a case of an indictment for murder:

"The bill of rights declares 'That in all criminal prosecutions the accused hath a right to be heard by himself and counsel.' The right exists to be heard by himself and counsel and to have a reasonable opportunity to have his counsel present also at every step in the progress of the trial,

and to deprive him of this right is a violation of that provision of the fundamental law just quoted."

"The presence of the accused is not a mere form. It is of the very essence of a criminal trial not only that the accused shall be brought face to face with the witnesses against him, but also with his triers. He has a right to be present not only that he may see that nothing is done or omitted which tends to his prejudice, but to have the benefit of whatever influence his presence may exert in his favor. And at no time in the whole course of the trial is this right more valuable than at the final step when the jury are to pronounce that decision which is to restore him to the liberty of a citizen, or to consign him to the scaffold or to a felon's cell in the state prison. He has a right not only to see and know that the whole jury is present assenting to the verdict, but by polling to demand face to face of each juror whether the verdict is his verdict, and to object to it unless each member of the jury shall answer for himself that the verdict is his."

"The right to poll the jury in criminal causes has in this state always been deemed an essential part of the right of trial by jury. It is guaranteed by both the constitution and the statute, and ought to be maintained and preserved by the courts as essential to the protection of the rights of the citizen."

LOUISIANA.

State v. Ford, 30 La. Ann. 311.

State v. Bradley, 30 La. Ann. 326.

State v. Christian, 30 La. Ann. 367.

State v. Thomas, 128 La. Ann. 813, 55 So. 415.

In *State* v. *Ford, 30 La. 311,* the court said in the 2nd headnote:

"The *presence of the accused,* at the time the verdict against him for a felonious offense is received, *is essential to the validity of the verdict.*"

In State *v.* Christian, 30 La. 367, the court said in the 2nd headnote:

"Where the record in a criminal case fails to show that the accused was present in court, at any time from the moment of his arraignment to his sentence, the judgment and verdict against him will be annulled, and set aside."

In *State* v. *Thomas, 128 La 813,* indictment for murder, the court said in the 1 headnote:

"Not only must the defendant be present at every stage of his trial for a felony, but the record must show his presence or disclose facts that will authorize the presumption that he was present; and a conviction in such case is vitiated when it appears, affirmatively, that the defendant was absent from the court whilst a person, called as juror, was being examined on his *voir dire,* and when he was challenged peremptorily by his (defendant's) counsel." Nor does it affect the question that defendant failed, at the time, to object and except, since "That which the law makes essential, in the deprivation of life and 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."

MASSACHUSETTS.

Commonwealth v. Tobin, 125 Mass. 203.
Commonwealth v. McCarthy, 163 Mass. 458.

In *Commonwealth* v. *Tobin 125 Mass. 203*, indictment for felony, the court said on page 207:

"The law requires the double safeguard against mistake: 1st, the delivery of the verdict by the foreman as the organ of the jury, by word of mouth, in open court, *under the sense of responsibility attending such an utterance in the face of the court and of the public, and, in a case of felony, of the accused;* and 2d, the proclamation by the clerk of that verdict, as understood and recorded by the court. The fact that in this Commonwealth the defendant is not entitled or permitted, as he is in England and in many states, to have the jury polled, makes it peculiarly important for the security of his rights to adhere to the established forms, remembering the words of Chief Justice Shaw, *"In this respect it is true that forms are substance."* *Commonwealth* v. *Roby, 12 Pick. 496, 514, 515.*

In *Commonwealth v. McCarthy, 163 Mass. 458,* the defendant, after being indicted for larceny, was admitted to bail. He was present during all of the trial until after the jury had retired to consider the case, but he voluntarily went away and remained absent until after the jury had returned a verdict against him, which was received and recorded. While it was held that, under these circumstances, the prisoner not being incarcerated and having voluntarily absconded after the submission of the case to the jury, the verdict would not be interfered with, Mr. Justice Knowlton nevertheless recognized the principle for which we contend in the present case. He said:

"It is a general rule, both in England and in this country, that a trial for a felony cannot be had without the personal presence of the accused.

1 Co. Inst. 227 b. 3 Co. Inst. 110. 1 Chit. Crim. Law, (2d ed.) 635, 636. Rex v. Ladsingham, T. Raym. 193; S. C. 2 Keb. 687, and Ventris, 97. 2 Hale P. C. 298-300. 4 Bl. Com. 375. State v. Hurlbut, 1 Root, 90. People v. Perkins, 1 Wend. 91. Sargent v. State, 11 Ohio, 472. Jones v. State, 26 Ohio St. 208. Prine v. Commonwealth, 18 Penn. St. 103. State v. France, 1 Overton, (Tenn.) 434, 436. Harriman v. State, 2 Greene, (Iowa) 270. Cole v. State, 5 English, (Ark.) 318. State v. Hughes, 2 Ala. 102. State v. Battle, 7 Ala. 259. Kelly v. State, 3 Sm. & Marsh, 518. State v. Cross, 27 Mo. 332. People v. Kohler, 5 Cal. 72. The trial is not concluded until the verdict is received and recorded. *Maurer v. People, 43 N. Y. 1,* and cases above cited. In this Commonwealth we have a statute which embodies the same general rule. *Pub. Sts. c. 214, Par. 10.* See *Commonwealth v. Costello, 121 Mass. 371.* Under this statute, as well as at the common law, it may well be held that when a defendant is in custody under an indictment for a felony the verdict cannot properly be taken in his case without his personal presence, even if he has been in attendance in all previous stages of the trial, and that whether he is in custody or on bail the trial cannot properly be begun in his absence. But whether a defendant who is on bail, and who has been present during his trial until the case has been given to the jury, can nullify the whole proceedings by absenting himself until it becomes necessary to discharge the jury, is a very different question. We have seen no well considered case that decides this question in the affirmative. In most of the reported cases the defendant was in custody, and the failure of the authorities to have him present when the verdict was taken deprived him of a right. In others, when the defendant was on bail there was an attempt to convict him without his being present at all; and in two or three others the general rule was applied without discussion to the case of a defendant on bail who had been

present during a part of the trial and was absent when the verdict was rendered. But it has been repeatedly held, upon careful consideration, that while it is a right of the defendant indicted for a felony to be present when the verdict is rendered as well as during the earlier parts of the trial, and while it is irregular and improper to begin the trial in such a case without the presence of the accused, yet if he is on bail and is present at the commencement of the trial, and afterwards voluntarily departs without leave and is absent when the verdict is returned, he may be defaulted and a verdict which will be binding upon him may be taken in his absence. *Fight v. State, 7 Ohio 180. Wilson v. State, 2 Ohio St. 319. Price v. State, 36 Miss. 531. Hill v. State, 17 Wis. 675. State v. Wamire, 16 Ind. 357.* See also *Lynch v. Commonwealth, 88 Penn. St. 189.* Such a case is treated as an exception to the general rule, and as a waiver by the defendant of his right to be present.

The principal object of the general rule above referred to is that the defendant may have an opportunity to exercise his right of challenge, and may avail himself of other rights which cannot be so well exercised, if exercised at all, by his counsel in his absence. Another object is that he may be present at the end of the trial to receive the sentence of the court if found guilty; but under a system like ours, where the prisoner is allowed to give bail and to go at large during the hours that the court is not in session until the end of the trial, and afterwards if there are exceptions, or if there is a motion for a new trial, until these matters are disposed of, it would be unreasonable to hold that he can attend until the case is given to the jury, and, when he sees indications that the verdict is to be against him, can make it impossible to complete the trial, and thus nullify all that has been done by absconding".

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MINNESOTA.

State v. Recards, 21 Minn. 47.

In *State* v. *Reckards, 21 Minn. 47*, the court said on page 50:

"Sec. 3, ch. 114, Gen. Stat., provides that even an indictment for misdemeanor may be tried in the absence of the defendant, if he appear by counsel, his personal presence being required only upon his trial for felony."

MISSISSIPPI.

Scaggs v. State, 8 Smed. & M. 722.
Price v. State, 36 Miss. 531, 72 Am. Dec. 195.
Stubbs v. State 49 Miss. 716.
Finch v. State, 53 Miss. 363.
Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. N. S. 509.
Warfield v. State, 96 Miss. 170, 50 So. 561.
Stanley v. State, 97 Miss. 860, 53 So. 497.
Corbin v. State, 99 Miss. 486, 55 So. 43.

In *Scaggs* v. *The State of Mississippi, 8 Smed. & M. 722*, the court said in a headnote:

"In a case of murder, the record must show affirmatively that the accused was present during the trial."

In *Price* v. *The State of Mississippi, 36 Miss. 531* the court said on page 542:

"The general rule is, that the verdict, in cases of felony, must be delivered in open court, and in the presence of the defendant. *1 Chitty Cr. L. 636.* This rule is founded on two reasons: first, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors;

and secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court."

In *Stubbs v. The State 49 Miss. 716*, the court said on page 724:

"The rule that the accused, in cases of felony, must be present in person pending the trial, and that this must be affirmatively shown by the record, as we have seen, is not an open question in this State."

In *Finch* v. *State, 53 Miss. 363*, indictment for grand larceny, the court said on page 365:

"The accused had the right to be present when the verdict was announced, that he might witness the proceeding, and poll the jury. It was erroneous to receive the verdict in his absence. The court had no right to discharge the jury under the circumstances."

In *Sherrod* v. *State, 93 Miss. 774*, the 1st, 2nd and 4th headnotes were as follows:

"1. A defendant on trial for a crime other than a capital felony, who is on bond, may waive the right to be present when a verdict is received; but *in capital cases the accused cannot waive the right,* whether he be in jail or on bond, nor in felony cases not capital where he is in jail."

"2. The right to waive the presence of the accused when the verdict is received is personal, and *cannot be exercised by attorney.*"

"4. That one indicted for murder and on bond was convicted only of manslaughter does not cure error in receiving the verdict in his voluntary absence."

In *Barfield* v. *State, 96 Miss. 170*, the court said:

"The absence of the defendant, on trial for murder, during a part of the time the jury was being impanelled, is fatal error."

In *Stanley* v. *State, 97 Miss. 860, 53 So. 497*, the first headnote was:

"One on trial for murder has a constitutional right to be present during the entire trial, which he cannot waive; and the inadvertent examination of a witness for him in his absence, while confined in jail, requires the entry of a mistrial, and a trial de novo, notwithstanding his silence on the court being advised of the fact."

In *Corbin* v. *State, 99 Miss. 860, 55 So. 43*, the court said in the 3rd headnote:

"One physically unable to attend his trial for a misdemeanor does not voluntarily absent himself and waive the right to be present, guaranteed by Const. §26; and where he is tried in his absence he is deprived of his constitutional right."

MISSOURI.

State v. Buckner, 25 Mo. 172.

State v. Cross, 27 Mo. 332.

State v. Braunschweig, 36 Mo. 397.

State v. Davis, 66 Mo. 684, 27 Am. Rep. 387.

State v. Smith, 90 Mo. 37, 59, Am. Rep. 4.

In *State* v. *Buckner, 25 Mo. 167*, the court said in the 5th headnote:

"5. In the case of an indictment for murder it is error to receive a verdict of the jury in the absence of the defendant. He must be personally present, not only during the trial, but at the time of the rendition of the verdict."

In *State* v. *Cross, 27 Mo. 332*, the court said in the 1st headnote:

"1. In a capital case, the defendant must be present at the time of the rendition of the verdict; and the record must affirmatively show his presence."

In *State* v. *Braunschweig, 36 Mo. 397*, the court said in the 1st headnote:

"1. In cases of felony, the accused must be personally present at the trial, and no verdict can be entered against him except in his presence."

In *State* v. *Davis, 66 Mo. 684*, the headnote was as follows:

"A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, quaere?"

In the body of the opinion, the court said on page 686:

"The very term waiver imports a voluntary act, and an act cannot be thus denominated when per-

formed under conditions of practical compulsion. If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopards his right to an impartial trial by jury, guaranteed to him by the constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice."

"We do not by the above remarks, intend to be understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one; but we do mean to assert that such waiver must be one in deed and in truth; in reality, not alone in name and appearance; not made as the result of what is in effect, an intimidatory suggestion of the prosecuting attorney."

In *State* v. *Smith, 90 Mo. 37*, the court said in the 3rd headnote:

"3. Impanelling and examining the jury is a material and substantive step during the trial, within the meaning of the statute, and the defendant cannot waive the requirement to be present when it is taken."

NEBRASKA.

Burley v. State, 1 Neb. 385.

The 3rd and 4th headnotes of the case of *Burley* v. *The State, 1 Neb. 385*, the court said:

"3. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict."

"4. *Nor can the prisoner waive his right thus to be present when on trial for a capital felony.*"

NEW JERSEY.

State v. Peacock, 50 N. J. L. 34, 11 Atl. 270.

In *State* v. *Peacock, 50 N. J. L. 34,* it was said in the body of the opinion; the case being an indictment for a felony:

"In felonies, in England, no verdict could be rendered in the absence of the defendant, but in the case of *State* v. *Jackson, 20 Vroom 252,* it was held that by a long course of procedure the practice has become settled in this state to receive the verdict of the jury in all criminal cases, *except capital cases,* without the presence of the accused."

NEW YORK.

People v. Perkins, 1 Wend. 91.

Maurer v. People, 43 N. Y. 1.

One of the leading and earliest cases in this country is *People* v. *Perkins, 1 Wend. 91.* The decision is reported as follows:

"By the Court, Savage, Ch. J. We are of opinion that the verdict was irregular. The prisoner was indicted, and tried, for an offence, formerly called capital. And though many of the ancient forms on trials are now dispensed with, the prisoner should have been present on receiving the verdict, so that he might have availed himself of the right of polling the jury. We advise that the verdict be set aside, and that there be a new trial."

In *Maurer v. People, 43 N. Y. 1,* the headnotes were as follows:

"All instructions or information given by the court to the jury, having a tendency to influence the verdict, are a part of the trial, within the pro-

vision of the statute that no person indicted for felony can be tried, unless he be personally present during such trial."

"Accordingly, where the plaintiff in error having been indicted, and being on his trial for murder, after the jury had retired to deliberate upon their verdict, they returned into court and asked certain questions of the court as to what has been the evidence on particular points, to which the court replied, giving the information requested, *Held*, that this was a proceeding upon the trial within the statute, and the prisoner not having been present, it was error, for which his conviction must be reversed."

"*Held*, further, that neither the *presence of the prisoner's counsel*, nor his ommission to object, *could waive the illegality*."

NORTH CAROLINA.

State v. Blackwelder, Phil. L. 38.

State v. Bray, 67 N. C. 283.

State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643.

State v. Paylor, 89 N. C. 539.

State v. Kelly, 97 N. C. 404, 2 Am. St. Rep. 643.

State v. Cherry, 154 N. C. 624, 70 S. E. 294.

In the course of the opinion, in the case of *State* v. *Blackwelder, 61 N. C. 38*, the court said:

"The question thus presented is one of very great importance in the trial of capital crime. It is whether the prisoner has a right to be present at the bar at all times during the progress of his trial. We believe that the general impression among the profession in this State is, and always has been, that he has such right; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of *State* v. *Craton, 6 Ire. 104*, the implication in favor of the existence

of the right is so strong that we must regard it as equivalent to a positive decision."

The first headnote in *State* v. *Bray, 67 N. C. 283,* was:

"When a verdict, in a case subjecting a party to punishment in the penitentiary, is rendered out of Court, to a Judge at his chambers, in the absence of the prisoner and his counsel, and is entered on the record on the next day, in the absence of the jury and the prisoner; *Held,* that such verdict cannot be sustained."

State v. *Jenkins, 84 N. C. 812,* is one of the leading cases on this subject. The opinion was rendered by Judge Ruffin. The 2nd headnote was as follows:

"In the prosecution of all felonies, the prisoner has the right to be present throughout the trial; and this right cannot be waived in capital felonies; the prisoner must be *actually* present. Whether the prisoner can waive it, in those not capital—quaere; his counsel cannot."

In the opinion in *State* v. *Paylor, 89 N. C. 539,* it was said:

"In the trial of capital felonies, the rule of practice seems to be uniform in all the states that the prisoner should be present during the whole of the trial; *and in favor of life, this rule is never relaxed.*"

State v. *Kelly, 97 N. C. 404,* involved the trial of an indictment for larceny. We call the court's attention to the fact that the obiter statement in the 3rd headnote is contradicted by the opinion. The headnote referred to was as follows:

"*It seems* that a prisoner in a capital felony can waive his right to be present at all stages of the trial, but his counsel cannot waive it for him."

Speaking of capital felonies, the court said in the opinion itself:

"The rule that he must be so present in capital felonies is in favorem vitae."

In *State* v. *Cherry, 154 N. C. 624,* the court said in the 2nd headnote:

In felonies less than capital and in misdemeanors the defendant has the right to be present at the trial; but this right may be voluntarily waived by him, the limitation being made that in the case of felonies this waiver may not be made by his counsel unless he expressly authorizes them so to do."

OHIO.

Fight vs. State, 7 Ohio 180; s. c. 28 Am. Dec. 626.

Sargent v. State, 11 Ohio 472.

Rose v. State, 20 Ohio 31.

In *Fight v. State, supra,* the prisoner was admitted to bail. After the testimony had been partly heard the court adjourned. The following morning the prisoner did not appear, and a verdict was received in his absence. It was held that, under the circumstances, it was permissible. Mr. Justice Woods differentiated the case from one affecting an incarcerated prisoner. He said:

"A prisoner, in close custody, may be so easily oppressed and deprived of his rights, and it would be so extremely difficult for him to make known

his injuries, and obtain redress, that to prevent unnecessary restraint, and to afford the accused an opportunity of being fully and fairly heard, the rule in reference to him may be reasonable and salutary; * * *. If on bail, I apprehend, neither the courts in Great Britain nor in the United States would proceed to impanel a jury, in a trial for felony, unless the accused were present, to look to his challenges. If the trial, however, is once commenced, and the prisoner in his own wrong leaves the court, abandons his case to the management of counsel, and runs away, I can find no adjudged case to sustain the position, that in England the proceedings would be stayed. Such a case must form an exception to the general rule, and the verdict may be legally received in the absence of the accused. The prisoner cannot be deprived of his right to be present, at all the stages of his trial; but that he must be, under all circumstances, or the proceedings will be erroneous, cannot, we think, be sustained."

In *Sargent* v. *Ohio, 11 Ohio Reports 472,* the 2nd headnote was as follows:

"In criminal cases, the verdict should be received in presence of the prisoner, that he may have the jury polled."

In *Rose* v. *Ohio, 20 Ohio Reports 31,* the court said on page 33;

"Again, an accused person, when a verdict of guilty is returned against him, has a right to have the jury polled. This privilege is never in this State, denied, in a criminal case, although it is a matter of discretion with the court whether it shall or shall not be allowed in a civil case. Of this privilege the accused person is deprived unless present when the verdict is returned. We conceive it to be the right of an accused person to be

present during the trial of his case, and at the return of the verdict, and we think that when deprived of these privileges by being imprisoned in jail, or in any other improper manner, the verdict returned against him should not be followed by judgment or sentence of the court, but a new trial should be ordered if requested."

OKLAHOMA.

Day v. Territory, 2 Okla. 409, 37 Pac. 806.
Leroy v. Territory, 3 Okla. 596, 41 Pac. 612.
Humphrey v. State, 3 Okla. Cr. 504, 106 Pac. 978, 139 Am. St. Rep. 972.

In *Day v. Territory of Oklahoma, 2 Okla. 409*, the court said on page 412:

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

"From the record, it does not appear affirmatively that the defendant has been afforded his constitutional right of presence during the trial. It may be, and more than likely is true, that the defendant was, in fact, present at all times and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be the truth and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, *thereby saying to the world that the trial of a defendant may take place in this territory, in his absence, in vio-*

lation of a sacred and humane, constitutional, as well as a statutory, immunity.''

In *LeRoy* v. *Territory of Oklahoma, 3 Okla. 596,* the court said in the headnote:

"In a criminal prosecution for a felony the defendant must be actually present at every step in the trial, and in cases where it is necessary the record must show affirmatively the fact of his presence. A case-made cannot be so amended by the trial judge as to contradict the records of the court."

In *Humphrey* v. *State, 3 Okla. Crim. Rep. 504,* the court said in the 2nd headnote:

"2. In a criminal prosecution for a felony, the defendant must be present, in person, during the trial, and the record must affirmatively show this fact."

The court said in the opinion on page 507:

"It may appear technical to reverse the case for the failure of the record to show the presence of the defendant, when in all probability the defendant was present at each step taken during the trial. *Courts of last resort must establish precedents under which innocent men are to be tried.* The law presumes every man innocent, and this presumption clings to him until overcome by competent evidence in a fair trial conducted according to law. Even though the evidence in this case is sufficient to warrant the verdict of guilty, yet we must not declare a rule in this case that would deprive an innocent man of any substantial right. It is not the fault of appellate courts when such a precedent must be declared in a case where the proof shows the defendant guilty. The fault, if any there be, is

with the trial court, the clerk, and the prosecuting attorney in their failure to have the record speak the truth."

PENNSYLVANIA.

Dunn v. Com., 6 Pa. St. 384.

Prine v. Com., 18 Pa. St. 103.

Dougherty v. Com., 69 Pa. St. 286.

The 2nd headnote of *Dunn* v. *Commonwealth, 6 Pa. St. 384*, one of the leading cases, was:

"*In capital felonies, the record must show that the prisoner was present at the trial, verdict, and passing of the sentence.*"

The following are extracts from the opinion by Judge Coulter:

"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."

"This has been deemed one of the material hedges and safeguards which the common-law forms throw around a person tried for life, and therefore it ought to appear distinctly from the record that he was afforded an opportunity to avail himself of it." * * *

"How easy would it have been for the clerk to enter that "the prisoner being brought into court, and asked, &c., the court proceeded to sentence him to death as follows, &c.;" and how easy is it, in such cases, for the court to see, that, in a matter of life and death, it is so entered."

"We may safely presume, as individuals, in tranquil times, and in an enlightened city, the conduct of the trial was all right; but, as a court,

we can look only to the record, for this record and judgment will be recorded as a precedent for other times; and, if we let in presumptions to supply omissions and defects in records, it will by and by be deemed scarcely necessary to show by the record any of the important safeguards of the trial by jury; and the common-law forms stoutly asserted as a shield of liberty, by the Hampdens, Russels, and Sidneys of other days, will lose their value. *But forms are not merely a shield against the despotism of kings, for there is occasionally a depotism in all countries—a despotism whose terrible voice is heard in tumults and excitements—in the rage of unrestrained and impetuous will, it is then that the stern and inflexible rules of the common-law trial by jury will best prove their importance and value. In the last ten or twenty years there have been mock trials and bloody executions, without the forms of law, in these states a thing which would have been deemed impossible in the primitive days of the republic.*"

"The judgment of this court is, that it does not sufficiently appear by the record that the prisoner was present at the trial, particularly at the rendition of the verdict, nor when sentence of death was passed. Every record of this kind ought to show clearly that the prisoner was tried and sentenced, and is to suffer according to the substantial forms of the law. We cannot say that of this record, and the judgment and sentence is therefore reversed, and the prisoner is discharged."

The case of *Prine v. Commonwealth, 18 Pa. St. 103*, a trial of an indictment for burglary, is a leading case which has probably been more often quoted than any other. The opinion by Chief Justice Gibson is given in full:

"It is undoubtedly error to try a person for felony in his absence, even with his consent. It

would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence. Never has there heretofore been a prisoner tried for a felony in his absence. No precedent can be found in which his presence is not a postulate of every part of the record. He is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him. These things are matter of substance, and not peculiar to trials for murder; they belong to every trial for felony at the common law, because the mitigation of the punishment does not change the character of the crime. How could the Court record them as facts, if the truth were not so? Our looseness in recording forms of procedure, especially in criminal cases—if we have any forms left—has grown till the knowledge of the principles of which they were the exponents, has been lost to the bench and the bar. More method sometimes appears in the record of a justice's judgment for a few dollars, than appears in the record of a conviction of murder. These irregularities strike our professional neighbors with special wonder. They have overborne resistance by force of numbers; but we have not yielded to them in the one case capital by our law. In conviction of murder, we have required the substantive parts of a proper record to be set out so clearly as to be separable from the dross with which it is usually blended. This was in favorem vitae. In other felonies, it is allowable to presume that everything was rightly done till the contrary appear; but when it is stated on the record positively that the prisoner was not present, we cannot shut our eyes to the fact. What authority had the prisoner's counsel in this instance, on the pretext of convenience, to waive their presence? In a criminal case, there is no warrant of attorney, actual or potential; for when